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SESSION I: CHALLENGING NON-PRICE RESTRAINTS

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Antitrust and Inequality: What Antitrust Can and Should Do to Protect Workers

Apr 25 2017
Diana Moss
Commentaries
DOJ, Entrepreneurship, FTC, IP and Innovation, Mergers and Joint Ventures

For almost three decades, light-handed enforcement of the U.S. antitrust laws tilted the scales toward allowing consolidation and strategic conduct that was thought to enhance “efficiency.” Justifications for this approach ranged from forcing down costs, to promoting quality control and spurring investment in R&D by large deep-pocketed firms. Over-enforcement was the bogeyman of conservative ideology. Too-vigorous application of the laws threatened to stifle the efficiencies that were expected to flow from mergers and restraints on competition.

This approach is now known to have been misguided. While over-enforcement was assiduously avoided, the sin of under-enforcement was committed on a grand scale. Mounting evidence points to declining competition, increasing market concentration, growing income and wealth inequality, and slowing rates of market entry by start ups. As this story unfolds, the progressive agenda has ascended and conservative economic and business scholars have gone silent, or even signaled interest in being part of the debate over policy responses to declining competition.

The 30-year battle waged on competition by conservative ideology has produced many casualties. One of them is labor. At the most general level, market power is exercised by cutting back on output, which reduces demand for workers. An obsessive focus on squeezing out cost efficiencies through consolidation means streamlining the workforce and laying off workers. Large firms now wield significant market power in buying labor, reducing the bargaining power of workers – even those in collective bargaining units. “Non-compete” agreements among firms in hiring skilled professionals also harms labor. All of this, and more, has worked to widen the inequality gap between labor and capital.

Of course, lax antitrust enforcement is hardly the sole cause of America's labor and inequality problems. Advances in manufacturing and information technology, further shifts from a manufacturing to a service economy, expanding globalization of trade, and rising levels of education and income in other countries contribute as well. Moreover, there are a host of other statutory and regulatory constraints that affect labor through restrictions on worker mobility and occupational licensing requirements.

It comes as no surprise that inequality is now an economic and political issue. A disenfranchised and disgruntled part of the American labor force embraced Mr. Trump's brand of conservative populism during the presidential campaign. This group suffers from wage depression, loss of employment benefits, offshoring of jobs to countries with cheaper wage rates, and weakened collective bargaining power. Promises of "America first" and economic nationalism resonated deeply with this group, who continue to wait for Mr. Trump to deliver on his promises to revitalize the U.S. labor force.

Antitrust is an important policy tool for addressing labor and inequality problems. And enforcers have begun to respond. Antitrust investigations have focused on the effects of mergers and abusive conduct on labor markets. For example, the U.S. Department of Justice (DOJ) challenged the recent merger of Tyson Foods and Hillshire Brands, which would have created a powerful purchaser of sows. The DOJ’s condition on the deal was designed to reduce the merged firm’s enhanced ability to push down prices paid to farmers. But for the remedy, the likely abuse of buyer power could have driven farmers from the market.

The government and plaintiffs in civil suits also prevailed in a case involving illegal agreements by hi-tech firms not to recruit each other’s employees. In the merger of health insurers Anthem and Cigna, the DOJ's case revolved around how the larger insurer could drive down reimbursement rates paid to hospitals and physician practices, making it more difficult to attract labor to the medical professions and early retirement of physicians.

Antitrust has the tools to address labor and inequality problems. But it can and should do more. Enforcers should challenge deals that create powerful buyers that can depress wage rates and force down prices paid to suppliers. Public and private enforcers can pursue alleged bid rigging in auction markets, such as those for cattle, which drives down prices paid for cattle. They can scrutinize conduct that raises entry barriers for smaller innovators in markets like medical devices and online retailing. Enforcers can also block mergers that eliminate important head-to head competition between R&D pipelines that employ scientists and researchers. Finally, enforcers can look even more skeptically at claims that mergers will lower costs (by among other things, reducing employment). By protecting the competitive process, enforcement also promotes market conditions that are conducive to retaining and attracting labor.

How much of the burden for solving the labor and inequality problem should antitrust shoulder? Some propose wholesale changes to the standard underlying the laws in order to make antitrust go further and faster. They would swap out the existing "consumer welfare" standard for a new "public interest" one. A public interest standard would expand the scope of antitrust to directly consider the effects of anticompetitive activities on employment. Scrapping the existing standard in the name of combatting inequality would be shortsighted, for a couple of reasons.

First, a consumer welfare standard already accounts for the distribution of wealth between consumers and firms - a big part of the inequality problem. Antitrust’s focus on price, quality, choice and innovation means that the laws are mindful of taking away from consumers and giving to firms. While consumer welfare was once interpreted as focusing on efficiency (which cares much less about equity), that is no longer the case. The vigorous, consumer-minded enforcement that was the hallmark of the late Obama administration broadly benefitted the public and workers. We need more of that.

Second, proposals to overhaul antitrust raise nontrivial details. How do we define the "public interest?" That standard could include everything that is affected by a merger or abusive conduct: employment, health and safety, and even environmental concerns. A new standard would require significant guidance by the enforcement agencies. It would also take years to develop the case law necessary to establish a reliable precedent for judicial review. Moreover, it raises questions about how an antitrust public interest standard would apply in industries such as telecommunications and energy where regulatory agencies also apply a public interest standard. The uncertainty that a revision in antitrust standard would create could lead to the under-enforcement of antitrust laws that helped create the current crisis of declining competition.

Changing the antitrust standard would therefore be a poor policy choice. There are other policy tools that can and should be harnessed - in concert with antitrust - to tackle labor and inequality problems. This includes tax policy, job retraining programs, economic incentives for small business, and subsidies for higher education. Moreover, statutory changes to the antitrust laws are unlikely under a Trump administration.

So, why all the fuss? These proposals are taking important time away from improving the existing antitrust enterprise and more effectively protecting labor markets. By maintaining competitive markets, antitrust law broadly benefits workers and the public. And enforcement resources can be focused in ways that will particularly help serve the goal of reducing inequality. What we need is creative and proactive enforcement, not to throw the baby out with the bathwater. The Administration's nominee for chief of the DOJ's Antitrust Division is a smart, experienced, and thoughtful antitruster - we hope he takes up where the most recent enforcers left off.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE ANIMATION WORKERS ANTITRUST LITIGATION	Master Docket No. 14-CV-4062-LHK
	NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH THE WALT DISNEY COMPANY, PIXAR, LUCASFILM LTD., LLC, AND TWO PIC MC LLC
THIS DOCUMENT RELATES TO: ALL ACTIONS	Date: March 9, 2017 Time: 1:30 p.m. Courtroom: 8, 4th Floor Judge: The Honorable Lucy H. Koh

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 9, 2017 at 1:30 pm or as soon thereafter as the matter may be heard by the Honorable Lucy H. Koh of the United States District Court of the Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, CA 95113, plaintiffs will and hereby do move the Court pursuant to Federal Rules of Civil Procedure 23 for an order:

1) Preliminarily approving a proposed class action settlement with The Walt Disney Company, Pixar, Lucasfilm Ltd., LLC, and Two Pic MC LLC;

2) Approving the manner and form of Notice and proposed Plan of Allocation to class members.

This motion is based on this Notice of Motion and Motion for Preliminary Approval of Settlement with The Walt Disney Company, Pixar, Lucasfilm Ltd., LLC, and Two Pic MC LLC, the following memorandum of points and authorities, the Settlement Agreement filed herewith, the pleadings and papers on file in this action, and such other matters as the Court may consider.

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23, plaintiffs Robert Nitsch, David Wentworth, and Georgia Cano respectfully seek preliminary approval of a Settlement Agreement with the remaining defendants in the case: The Walt Disney Company, Pixar, Lucasfilm Ltd., LLC, and Two Pic MC LLC (collectively, "Disney Defendants"). The Court should preliminarily approve the proposed settlement as fair, reasonable, and adequate because it provides for the class a cash payment of $100,000,000. That amount is approximately 33.5 percent of plaintiffs' expert's calculation of the damages attributable to Disney Defendant employees in the certified class based on plaintiffs' November 16, 2016 merits expert report on damages.

The settlement was reached after arm's length negotiations—including with an experienced mediator—drawing on the expertise of informed, experienced counsel who have been deeply involved in this litigation since its inception, and it reflects the risks associated with both parties continuing to litigate this case. In particular, counsel have been informed and guided by the rulings and settlement valuations deemed fair and reasonable in both this action and the *High-Tech* litigation.

At this stage in the litigation, plaintiffs are quite familiar with the strengths of this case, as well as the challenges plaintiffs face as this case proceeds to trial. Counsel for plaintiffs have analyzed and catalogued approximately 350,000 documents produced from defendants' custodians, deposed nearly thirty witnesses, including two third-party witnesses and defendants' expert, defended the deposition of each of the named plaintiffs, defended two depositions of plaintiffs' expert Dr. Orley Ashenfelter, one of the world's leading labor economists, filed a successful class certification motion and reply supported by Dr. Ashenfelter's expert reports, defeated multiple attempts by defendants to obtain absent class member discovery, and have served two merits expert reports: one from Dr. Ashenfelter and one from Dr. Barry Gerhart, a preeminent scholar in the fields of compensation design and human resources management.[1] The settlement reached with the Disney Defendants is fair and appropriate based on the risks and rewards of litigating this case.

[1] *See* Declaration of John E. Schiltz in Support of Motion for Preliminary Approval of Settlement with Disney Defendants ("Schiltz Decl."), ¶ 3, filed concurrently herewith.

Further, plaintiffs propose a comprehensive notice program designed to effectively provide direct and actual notice of the settlement to all class members. The manner and form of notice is modeled after the manner and form of notice this Court finally approved with respect to the Blue Sky and Sony Pictures settlements. As with those settlements, to promote efficiency and save the Class money, plaintiffs propose providing one comprehensive notice for both the DreamWorks Settlement[2] and the Disney Defendant Settlement.[3]

Plaintiffs respectfully request an order providing: (1) preliminary approval of the proposed Settlement Agreement with the Disney Defendants; and (2) approval of the manner and form of notice and proposed Plan of Allocation[4] to class members.

II. PROCEDURAL HISTORY

Named plaintiffs are former animation and visual effects employees of defendants. Each named plaintiff worked for at least one of the defendants during the period when plaintiffs allege defendants were engaged in an illegal agreement to suppress compensation paid to class members.

Plaintiffs allege that defendants' conspiracy worked to restrain competition in several respects. Defendants entered into a "gentlemen's agreement" not to actively solicit each other's employees.[5] Among the manner and means of the alleged anti-solicitation conspiracy were (a) defendants would not "cold–call" each other's employees; (b) they would notify the other company when making an offer to an employee of the other company, if that employee had applied for a job; and (c) the company making such an offer would not increase the compensation offered to the prospective employee in its offer if the company currently employing the employee made a counteroffer.[6] In addition, plaintiffs allege that defendants' employees who were responsible for monitoring and enforcing the recruiting restraints engaged in direct collusive discussions to

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[2] *See* ECF No. 353.

[3] *See* Schiltz Decl., Ex. A, Attachment 1.

[4] *See* Schiltz Decl., Ex. A, Attachment 2.

[5] *See* Second Consolidated Amended Class Action Complaint (SAC) ¶ 43, ECF No. 117.

[6] *See id.*, ¶ 2.

coordinate compensation across defendant firms.[7]

On December 2, 2014, plaintiffs filed their Consolidated Amended Class Action Complaint (CAC) against DreamWorks Animation, ImageMovers Digital, Lucasfilm, Pixar, Sony Pictures Animation, Sony Pictures Imageworks, The Walt Disney Company, and Blue Sky.[8] On January 9, 2015, defendants filed a motion to dismiss.[9] This Court granted defendants' motion without prejudice on April 17, 2015.[10] The Court held that plaintiffs had not sufficiently alleged acts of fraudulent concealment by defendants such that the four-year statute of limitations should be tolled. On May 15, 2015, plaintiffs filed the SAC, alleging additional and more detailed acts of fraudulent concealment by defendants.[11] The Court denied defendants' second motion to dismiss on August 20, 2015.[12]

Following the denial of defendants' second motion to dismiss, plaintiffs engaged in extensive discovery: drafting and responding to requests for production and deposition notices, reviewing thousands of plaintiffs' documents for responsiveness and privilege, reviewing defendants' voluminous document productions, responding to defendants' written discovery, engaging in discovery motion practice, preparing for and taking depositions, obtaining relevant employment data and working with plaintiffs' expert to evaluate that data and calculate damages on a class-wide basis – all in anticipation of their motion for class certification and trial.

Plaintiffs filed their motion for class certification on February 1, 2016. Plaintiffs' motion was supported by 139 exhibits and a 70-page expert report from Dr. Ashenfelter. Defendants' opposition included 67 exhibits and a 161-page expert report from Dr. Michael C. Keeley. Plaintiffs responded with a 93-page reply report from Dr. Ashenfelter. On May 25, 2016, the Court granted in part and denied in part plaintiffs' motion for class certification, and certified the following class:

All animation and visual effects employees employed by one or more of the Defendants in

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[7] *See id.*, ¶¶ 13-15.

[8] ECF No. 63.

[9] Motion to Dismiss the CAC, ECF No. 75.

[10] Order Granting Motion to Dismiss, ECF No. 105.

[11] ECF No. 121.

[12] Order Denying Motion to Dismiss, ECF No. 147.

> the United States who held any of the jobs listed in Ashenfelter Reply Report Amended Appendix C during the following time periods: Pixar (2004 - 2010), Lucasfilm Ltd., LLC (2004 - 2010), DreamWorks Animation SKG, Inc. (from 2004 - 2010), The Walt Disney Company (2004 - 2010), Sony Pictures Animation Inc. and Sony Pictures Imageworks Inc. (2004 - 2010), Blue Sky Studios, Inc. (2005 - 2010) and Two Pic MC LLC f/k/a ImageMovers Digital LLC (2007 - 2010). Excluded from the Class are senior executives, members of the board of directors, and persons employed to perform office operations or administrative tasks.[13]

As relevant here, the Court denied the motion without prejudice as to class members who worked at Pixar and Lucasfilm from 2001-2003 and at DreamWorks in 2003, holding that the SAC did not sufficiently allege acts of fraudulent concealment during the 2001-03 period. Defendants petitioned for interlocutory appeal of that order under Federal Rule of Civil Procedure 23(f), plaintiffs responded, and on August 29, 2016, the Court of Appeals for the Ninth Circuit denied defendants' Rule 23(f) petition.

Plaintiffs filed Motions for Preliminary Approval of Settlements with Blue Sky Studios on March 31, 2016, and with Sony Pictures Imageworks Inc. and Sony Pictures Animation Inc. (collectively, "Sony Pictures") on May 3, 2016.[14] Following instructions from the Court, on May 11, 2016 plaintiffs filed an amended motion with respect to the Blue Sky settlement to reflect the fact that plaintiffs had proposed sending one notice for both settlements.[15] The Settlement Agreement with Blue Sky provides for a $5.95 million settlement fund, which was over 25 percent of plaintiffs' expert's calculation of the damages attributable to Blue Sky employees. The Settlement Agreement with Sony Pictures provides for a $13 million settlement fund, which was approximately 16.7 percent of plaintiffs' expert's calculations of the damages attributable to Sony Pictures employees. The Court preliminarily approved the Settlements with Blue Sky Studios and Sony Pictures on July 6, 2016.[16] The Court finally approved those Settlements on November 11, 2016, entering final judgment against Blue Sky and Sony and dismissing them from the case.[17]

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[13] ECF No. 289, at 79.

[14] ECF Nos. 249, 273.

[15] ECF No. 282.

[16] *See* ECF No. 305.

[17] *See* ECF Nos. 346, 348.

Plaintiffs filed a Motion for Preliminary Approval of Settlement with DreamWorks on October 17, 2016.[18] The Settlement Agreement with DreamWorks provides for a $50 million settlement fund, which was approximately 39.3 percent of plaintiffs' expert's calculations of the damages attributable to DreamWorks employees. Plaintiffs filed a stipulation and order on January 13, 2017 in which all remaining parties stipulated that the preliminary-approval hearing for the DreamWorks settlement be rescheduled for February 2, 2017, so that the Court could hear both motions for preliminary approval concurrently. The Court denied that stipulation on January 16, 2017, [19] and held a preliminary approval hearing for the DreamWorks settlement on January 19, 2017, as originally scheduled. Preliminarily finding the settlement "fair, reasonable, and adequate," the Court preliminarily approved the DreamWorks settlement the same day.[20]

III. SUMMARY OF SETTLEMENT TERMS

A. The Settlement Consideration

1. Monetary Settlement Fund

The Disney Defendants have agreed to a lump-sum payment of $100,000,000 to the Settlement Fund. This payment is the full amount owed under the Settlement Agreement, and is inclusive of any attorneys' fees, expenses, and service awards that might be ordered by this Court.[21]

B. Release of Claims

Once the Settlement Agreement is final and effective, the named plaintiffs and the class shall release, as to the Disney Defendants and any of their related entities as defined by the Settlement Agreement, any and all state and federal claims, either known or unknown, arising from or relating to the factual allegations in plaintiffs' SAC, or any purported restriction on competition for employment or compensation of named plaintiffs or Class Members, up to the date of the Settlement.

The Disney Defendants have agreed not to solicit or encourage any class members to exclude themselves from the Settlement Agreement.[22]

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[18] ECF No. 338.

[19] *See* ECF No. 351.

[20] *See* ECF No. 353.

[21] *See* Schiltz Decl., Ex. A § III(A), ¶ 1.

C. Notice and Implementation of the Settlement

The Settlement Agreement provides for actual notice to Class Members, as described below. In connection with the other settlement agreements reached to date, defendants have already provided to the notice administrator contact information in defendants' human resources and payroll databases for all potential Class Members. The Disney Defendants have again agreed as part of the Settlement Agreement to provide such contact information as they have available in their human resources and payroll databases for all potential Class Members.[23] Plaintiffs have submitted with this Motion a notice of settlements with the Disney Defendants and with DreamWorks that will be sent within 7 days of preliminary approval of the Disney Settlement Agreement. This notice is intended to supersede and replace the Amended Notice of the DreamWorks Settlement approved by the Court on January 19, 2017.[24] Submitting a combined notice of both Settlements, as was done with the Blue Sky and Sony settlements, will be more efficient and will save the class administrative expenses that would otherwise be incurred by submitting separate notices of each settlement.

D. Plan of Distribution

Within ten days of preliminary approval, the Disney Defendants will wire (or cause to be wired) $100,000 to the Class escrow agent, and within twenty days of final approval of the Settlement Agreement, the Disney Defendants will wire (or cause to be wired) $99,900,000 to the Disney escrow agent.[25] Within one business day after the Effective Date, the Disney escrow agent will transfer the $99,900,000 plus accrued interest into an interest-bearing escrow account at the Class escrow agent. This escrow account will be construed to be a "Qualified Settlement Fund" pursuant to applicable IRS regulations.[26] The Claims Administrator will be responsible for determining the monetary award that shall be awarded to class members from the Settlement Fund

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[22] *Id.*, § V(A), ¶ 3.

[23] *Id.*, § II(B), ¶¶ 4, 5.

[24] *See* ECF No. 353. The Court's redlines to that notice have been incorporated into the comprehensive notice submitted herewith.

[25] *Id.*, § III(A), ¶1(a). If the Court preliminarily approves the Settlement Agreement, the Disney Defendants will already have provided $100,000 to the settlement fund within 10 days of the Court's order.

[26] *Id.*, § III(A), ¶1(c).

based on their pro-rata share, which is calculated based on their total compensation compared to the total compensation of all class members throughout the class period, as described in the Plan of Allocation. The Claims Administrator's decision shall be final and unreviewable.[27] Class Counsels' attorneys' fees and cost payments and the Named Plaintiffs' service awards are subject to court approval.[28]

IV. ARGUMENT

A. The Settlement Agreement Satisfies Rule 23(e)

Federal Rule of Civil Procedure 23(e) provides that a proposed settlement in a class action case must be approved by the Court. The Court is to determine whether the proposed settlement is "fair, reasonable, and adequate."[29] As a first step, plaintiffs must seek preliminary approval of the proposed settlement, which is an "initial evaluation" of the fairness of a proposed settlement.[30] In determining whether the proposed settlement is "fundamentally fair, adequate, and reasonable" the court makes a preliminary determination of whether to give notice of the proposed settlement to the class members and an opportunity to voice approval or disapproval of the settlement.[31] Preliminary approval is not a dispositive assessment of the fairness of the proposed settlement, but rather determines whether it falls within the "range of reasonableness."[32] Preliminary approval establishes an "initial presumption" of fairness,[33] such that notice may be given to the class and the class may have a "full and fair opportunity to consider the proposed [settlement] and develop a response."[34]

Preliminary approval of a settlement and notice to the proposed class is appropriate: "[i]f [1] the proposed settlement appears to be the product of serious, informed, non-collusive

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[27] *Id.*, § IV(B), ¶¶ 3, 4.

[28] *See id.*, § VI(A), ¶ 1.

[29] Fed. R. Civ. P. 23(e)(2).

[30] Manual for Complex Litigation (Fourth) § 21.632 (2015).

[31] *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)); *see* Manual for Complex Litigation (Fourth) § 21.631 (2015).

[32] *In re High-Tech Emp. Litig.*, No. 11-cv-2509, 2013 WL 6328811, at *1 (N.D. Cal. Oct. 30, 2013) ("*High-Tech I*") (citation omitted); *see also Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-302 (E.D. Cal. 2011).

[33] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

[34] *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of possible approval."[35] It is within the "sound discretion of the trial judge" to approve or reject the settlement.[36] In instances where a settlement results from arm's length negotiations with involvement of experienced counsel and relevant discovery has been provided, there is a "presumption that the agreement is fair."[37]

1. The Settlement Is the Product of Informed, Arm's Length Negotiations

The Settlement was reached after informed, arm's length negotiations between the parties.[38] The parties reached this settlement after the Court certified the class, after the Ninth Circuit denied defendants' Rule 23(f) motion, and after Plaintiffs served their merits expert reports. In the months leading up to the class certification decision, plaintiffs served and reviewed detailed written discovery, reviewed hundreds of thousands of documents, took and defended more than twenty fact and expert depositions, and briefed and argued their motion for class certification. Plaintiffs then conducted additional, informative discovery after the Court certified the class, including by deposing key current and former Disney Defendant employees, including Walt Disney Studios President Alan Bergman, Pixar President Ed Catmull, former Lucasfilm CEO George Lucas, and ImageMovers Digital co-founder Steve Starkey, in addition to a variety of other executives and human resources professionals from the Disney Defendant companies.[39] The settlement was only reached after months of negotiations between the parties, and following a mediation with the Honorable Judge Layn Phillips (ret.).[40]

The settlement also reflects non-collusive negotiations. Courts weigh three factors when considering collusion: (1) a disproportionate distribution of the settlement fund to counsel; (2) a negotiation of a "clear sailing provision," which allows for the payment of attorneys' fees

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[35] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

[36] *Zepeda v. Paypal, Inc.*, No. C 10-2500, 2015 WL 6746913, at *4 (N.D. Cal. Nov. 5, 2015).

[37] *Linney v. Cellular Alaska P'ship*, No. C-96-3008, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997).

[38] *See* Schiltz Decl., Ex. A, § III(B), ¶ 1.

[39] *See id.* ¶ 3

[40] *See id.* ¶ 4.

independent of payments to the class; and (3) an arrangement for funds not awarded to revert to defendants rather than to be added to the settlement fund.[41] None of those factors is present here.

First, the settlement requires payment of attorneys' fees solely out of the Settlement Fund. Payment to the named plaintiffs and class members is distributed based on the distribution plan specified in the Settlement Agreement, and class counsels' fees and payments to Named Plaintiffs must be approved by this Court.[42] *Second*, there is no clear sailing provision. To the contrary, the settlement stipulates that the parties have no agreement on any applications for Attorney's Fees and Expenses by Class Counsel.[43] *Third*, the settlement allows a pro rata reduction of the Settlement Fund if three percent or more of Class Members opt out, and termination if more than an agreed percentage of Class Members opt out, but other than that provision, the Settlement Agreement does not allow any reversion of settlement funds to the defendants.[44] This provision is common, a similar provision was included in the finally-approved settlements with Blue Sky and Sony Pictures (as well as in the preliminarily-approved DreamWorks Settlement), and it is no way reflective of any collusion; its threshold is unlikely to be met. After the distribution, to the extent that any monies remain in the settlement fund, plaintiffs will move the Court to order distribution of such funds either for additional distribution to eligible claimants and/or *cy pres* distribution as approved by the Court.[45]

2. The Proposed Settlement Has No Obvious Deficiencies

The Proposed Settlement Agreement was the product of a thorough assessment of the strengths and weaknesses of plaintiffs' case. It reflects more than two years of discovery, uncovering the intricacies of a multi-faceted conspiracy. This settlement follows the Court's certification of the class and the Ninth Circuit's denial of defendants' Rule 23(f) petition, and allows the Disney

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[41] *See In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (citation omitted).

[42] *See* Schiltz Decl., Ex. A, § VI(A).

[43] *See id.*, § III(B), ¶ 1.

[44] *See id.*, § VII(S).

[45] *See id.*, § IV(B), ¶ 6.

Defendants to settle and obtain a release of all claims against them before the Disney Defendants would be required to engage in expert discovery and any briefing of dispositive motions.

The Settlement also provides meaningful and certain monetary recovery. In making this assessment, plaintiffs are guided by this Court's decisions in *High-Tech* and in approving the Blue Sky and Sony Pictures settlements.

Initially, *High-Tech* plaintiffs sought approval of a $20 million settlement with Intuit, Lucasfilm, and Pixar—$9 million of which was paid by Lucasfilm and Pixar. The Court approved this amount, based on (1) an "initial presumption of fairness" that adheres to arm's length negotiations involving experienced counsel; (2) the amount of consideration – $20 million – was "substantial," based on the number of injured plaintiffs and total compensation paid by defendants; (3) the non-settling defendants remained jointly and severally liable for all damages caused by the conspiracy, including the damage caused by the defendants who settled; and (4) the defendants' agreement to cooperate with authenticating documents and locating witnesses.[46]

Similarly, in preliminarily approving the $18.95 million combined settlements with defendants Blue Sky and Sony Pictures, the Court held that the following factors weighed in favor of that preliminary approval: (1) the settlement was the result of "arm's length negotiations among experienced counsel following extensive discovery on both sides"; (2) the combined consideration of $18.95 million was "fair and reasonable based on the circumstances, risks involved, and significant recovery from two of the companies whose share of employee-years comprise 20.3% of the class"; (3) the remaining defendants remained jointly and severally liable for all damages caused by the conspiracy; and (4) and the settling defendants had independently agreed to cooperate with plaintiffs in authenticating documents and to not assist the remaining defendants with the litigation.[47]

As detailed above, the proposed settlement here was the result of arm's length negotiations with experienced counsel, following extensive discovery on both sides. And although the Disney Defendants are "last out"—rendering further cooperation and joint-and-several liability irrelevant—

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[46] *See High-Tech I*, 2013 WL 6328811, at *1.

[47] ECF No. 305 at 3-4.

assuming all settlements to date are given final approval, the common settlement fund will be $168.95 million, or nearly one-third of Plaintiffs' total single damages estimate of $553,425,117.

The remaining issue, then, is the fairness of the consideration paid by the Disney Defendants at this stage of the litigation. Here again, this Court's reasoning in rejecting a proposed *High-Tech* settlement of $324.5 million with Adobe, Apple, Google, and Intel,[48] and in preliminarily approving the $18.95 million combined Blue Sky and Sony Pictures settlements is instructive.[49]

In *High-Tech*, the Court noted that the total proposed settlement of $344.5 million was 11.29 percent of the expert's calculation,[50] but the "procedural posture of the case swung dramatically in Plaintiffs' favor after the initial settlements were reached," and the parties were a month from trial.[51] The Court ultimately approved a settlement at that late posture in the case representing 14.26 percent of the total single damages calculated by plaintiffs' expert.

Here, the proposed Disney Defendant settlement provides for a one hundred million dollar payment to the settlement fund, which represents approximately 33.5 percent of the total single damages attributable to Disney Defendant employees as calculated by plaintiffs' expert. This compares favorably to the Blue Sky, Sony Pictures, DreamWorks, and *High-Tech* settlements, which this Court deemed "fair and reasonable."

The Settlement also reflects the risks plaintiffs must consider in reaching a successful outcome for class members through expert discovery, dispositive motions, trial, and appeal. For example, although plaintiffs believe the class members have meritorious claims, juries can be difficult to predict. And defendants would almost certainly appeal any adverse finding from the jury. In particular, as this Court is aware, the statute of limitations has been a hotly-contested issue in this case; the Court initially dismissed plaintiffs' first Complaint based on insufficient allegations of fraudulent concealment. Although the Court ruled that plaintiffs have now sufficiently pled

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[48] *See In re High-Tech Emp. Litig.*, No.11-cv-02509, 2014 WL 3917126, at *5 (N.D. Cal. Aug. 8, 2014) ("*High-Tech II*").

[49] *See* ECF No. 305.

[50] *See High-Tech II*, 2014 WL 3917126 at *5. The total settlement figure included the previously approved $20 million settlement with Intuit, Lucasfilm, and Pixar.

[51] *Id.*

fraudulent concealment, and plaintiffs have continued to obtain evidence to support their fraudulent concealment allegations, that issue undoubtedly injects uncertainty into the ultimate outcome in this case. Indeed, defendants have pursued discovery on this issue vigorously with the named Plaintiffs and third parties, including through document requests and deposition testimony, and by requesting leave to serve absent class member discovery on 500 absent class members (which the Court denied). Moreover, although defendants' Rule 23(f) petition was unsuccessful, defendants have shown a willingness to hire prominent appellate counsel to challenge the trial court outcomes in this case; an approach which they have made clear will continue post-trial on a number of issues, including class certification and fraudulent concealment. Overall, the risks plaintiffs face here remain significant.

Plaintiffs also face defendants' claim that their conduct should not be treated as a *per se* antitrust violation, but instead should be judged under the rule of reason framework – an issue plaintiffs faced in *High-Tech I*. Defendants have also challenged plaintiffs' impact and damages theories, as well as their expert's damages calculations. These issues also raise uncertainty for plaintiffs in obtaining a favorable verdict in this case. Accordingly, this settlement reflects the careful balance struck between each parties' position at this stage in the litigation.

3. The Settlement Does Not Improperly Grant Preferential Treatment to Class Representatives or Segments of the Class

The third factor the court must consider in granting preliminary approval is whether the settlement improperly grants preferential treatment to class representatives or segments of the class.[52] The proposed Settlement Agreement does not. It provides a reasonable and fair manner to compensate named plaintiffs and class members based on their salary and injury. Pursuant to the Proposed Settlement Agreement, Plaintiffs' counsel would seek (and the Disney Defendants would take no position on) a service award for the Named Plaintiffs, each of whom has been deposed, has reviewed and produced thousands of pages of documents, has had their personnel work files produced, has continued to provide valuable assistance to counsel as they pursue the class's claims, and whom could very well face workplace retaliation and be labeled a "troublemaker" within the animation and visual effects industry.

[52] *Zepeda*, 2015 WL 6746913, at *4.

Plaintiffs previously sought $10,000 in service awards for the Named Plaintiffs in connection with the Blue Sky settlement, which the Court approved, and an additional $10,000 in service awards for the Named Plaintiffs in connection with the DreamWorks settlement. Though the amount is not specified in the Settlement Agreement, Plaintiffs anticipate seeking an additional $80,000 in service awards, for a total of $100,000 for each Named Plaintiff. This total would be on par with the named plaintiffs in *High-Tech*, most of whom received $100,000 in total service awards, even though the results obtained here are proportionally better than the results obtained in *High-Tech*.

4. The Settlement Falls Well Within the Range of Possible Approval

The court must also determine whether a settlement "falls within the range of possible approval." To make a determination, the Court must focus on "substantive fairness and adequacy."[53]

This settlement certainly falls within the range of possible approval. As detailed above, the $100 million settlement represents about 33.5 percent of the damages that Dr. Ashenfelter estimated the Disney Defendants caused their employees in the certified class based on his November 16, 2016 merits expert report. This is in excess of both the 25 percent and the 16.7 percent approved by the Court in the Blue Sky and Sony Pictures settlements, respectively, and in excess of the 14.26 percent approved by the Court in *High-Tech II*.

B. The Proposed Notice and Plan of Dissemination Meets the Strictures of Rule 23

Rule 23(c)(2)(B) provides that class members must receive the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts." Moreover, Rule 23(e)(1) requires a court to "direct notice in a reasonable manner to all class members who would be bound by the propos[ed] [settlement]." Plaintiffs propose the same notice here that this Court already approved for the prior settlements.

A class action settlement notice "is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'"[54] Rule 23(c)(2)(B) contains specific requirements for the notice, namely,

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[53] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080.

[54] *Rodriguez v. W. Pub. Corp.*, 563 F.3d 948, 962 (9th Cir.2009) (*quoting Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

that the notice state in clear, concise, plain, and easily understood language:

> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; [and] (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

"Notice by mail is sufficient to provide due process to known affected parties, so long as the notice is 'reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[55] Notice by email is routinely accepted as well.[56] As in *High-Tech*,[57] and with the Blue Sky and Sony Pictures settlements, to discourage potentially frivolous objections, an objector must not only sign his or her objection under penalty of perjury, but must also list any other objections by the Objector, or the Objector's attorney, to any class action settlements submitted to any court in the United States in the previous five years.

The Proposed Notice[58] here meets those requirements, and is modelled on the notices approved by the Court for the Blue Sky and Sony Pictures settlements and in *High-Tech*. The parties' intent is to have the Claims Administrator provide actual notice to each Class Member by email and/or mail to the extent practicable. Pursuant to the agreement between the parties, the Disney Defendants are obligated to provide plaintiffs with the full name, social security number, all known email addresses, last known physical address, dates and location of employment, and all known compensation information by date, job title, and type of compensation at Pixar, Lucasfilm, Disney, and Two Pic during the defined class period (to the extent that information exists in the Disney Defendants' human resources databases). If the Disney Defendants are unable to determine an employee's job title during the class period, they are obligated to provide in an electronic database format all known dates of employment at any Disney Defendant and all known associated

[55] *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 452 (E.D. Cal. 2013) (*quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

[56] *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015) ("The notice provided in this settlement, in both mail and email form, was sufficient under the Constitution and Rule 23(e)").

[57] *See High-Tech I*, 2013 WL 6328811, at *6.

[58] *See* Schiltz Decl., Ex. A, Attachment 1.

compensation by date and type of compensation. Defendants, including the Disney Defendants, have already provided such information to the notice administrator pursuant to the Court's order that they do so in connection with the Blue Sky and Sony Pictures settlements.

The Claims Administrator, Kurtzman Carson Consultants ("KCC"),[59] will be responsible for providing notice to potential class members consistent with Rule 23(c)(2)(B). The Court previously appointed KCC the Notice and Claims Administrator in its order preliminarily approving the Blue Sky, Sony Pictures, and DreamWorks Settlements.[60] The Claims Administrator will email notice to settlement class members where possible, and send mailed notice if email notification is not possible. Finally, the detailed notice will be available on the website www.animationlawsuit.com, along with relevant case documents such as the complaint and settlement agreement itself. With this motion, plaintiffs provide proposed forms for email notice, mailed notice, and a proposed plan of distribution.

C. Proposed Schedule for Final Approval and Dissemination of Notice

Below is a proposed schedule for providing notice, filing objections, and holding a fairness hearing:

Event	Due Date
Notice mailed and posted on internet	7 days from Order preliminarily approving Settlement.
Deadline for motion for attorneys' fees, costs, and service awards	31 days after Notice mailed.
Objections deadline	45 days after Notice mailed.
Exclusions deadline/end of opt-out period	45 days after Notice mailed.
Administrator files Affidavit of Compliance with Court regarding notice requirements	14 days after opt-out deadline.

[59] KCC acquired Gilardi LLC in August 2015. Gilardi previously served as Claims Administrator in the *High-Tech* litigation.

[60] *See* ECF No. 305 at ¶ 19; ECF No. 353 at ¶ 7.

Event	Due Date
Motion for final approval deadline	14 days after opt-out deadline.
Final Fairness Hearing	May 18, 2017

V. CONCLUSION

Based on the foregoing, plaintiffs respectfully request that the Court preliminarily approve the proposed Settlement Agreement, and approve the notice plan.

DATED: January 31, 2017

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E-FILING ATTESTATION

I, John E. Schiltz, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

s/ John E. Schiltz
JOHN E. SCHILTZ

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION	Master Docket No. 11-CV-02509-LHK
THIS DOCUMENT RELATES TO: **ALL ACTIONS**	**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT MOTION TO DISMISS; DENYING LUCASFILM LTD.'S MOTION TO DISMISS**

Before the Court are Defendants' Joint Motion to Dismiss the Consolidated Amended Complaint ("Joint Mot."), ECF No. 79, and Defendant Lucasfilm Ltd.'s Motion to Dismiss ("Lucasfilm Mot."), ECF No. 83. The Court held a hearing on the motions on January 26, 2012. Having considered the parties' submissions, arguments, and the relevant law, the Court GRANTS IN PART and DENIES IN PART Defendants' joint motion to dismiss, and DENIES Lucasfilm's motion to dismiss.

I. BACKGROUND

This is a consolidated class action brought by employees alleging antitrust claims against their employers, all of whom are high-tech companies with a principal place of business in the San Francisco-Silicon Valley area of California. Plaintiffs challenge an alleged conspiracy among Defendants to fix and suppress employee compensation and to restrict employee mobility.

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The Court recites the factual allegations as pled in the Consolidated Amended Complaint ("CAC"), ECF No. 65, and as indicated in judicially noticed documents. The Court then recounts the procedural background.

A. Factual Background

Unless otherwise noted, the following allegations are taken from the CAC and presumed to be true for purposes of ruling on Defendants' motions to dismiss. *See Marder v. Lopez*, 450 F.3d 445, 447 n.1 (9th Cir. 2006). The Court also takes judicial notice of documents from a related Department of Justice ("DOJ") investigation and civil lawsuit that are referenced in the CAC or attached as exhibits to the Declaration of Christina J. Brown ("Brown Decl."), ECF No. 79-1, and the Declaration of Dean M. Harvey (Harvey Decl."), ECF No. 93. A court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). A court may also take judicial notice of the existence of matters of public record, such as a prior order or decision, but not the truth of the facts cited therein. *See Lee v. City of L.A.*, 250 F.3d 668, 689-90 (9th Cir. 2001). The Court may consider documents referenced in, but not attached to a complaint without converting a motion to dismiss into one seeking summary judgment. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

1. The Parties

Defendants include the following high-tech companies with principal places of business located in the following cities in California: Adobe Systems Inc. ("Adobe"), San Jose; Apple Inc. ("Apple"), Cupertino; Google Inc. ("Google"), Mountain View; Intel Corp. ("Intel"), Santa Clara; Intuit Inc. ("Intuit"), Santa Clara; Lucasfilm Ltd. ("Lucasfilm"), San Francisco; and Pixar, Emeryville. CAC ¶¶ 16-20.

Plaintiffs Michael Devine, Mark Fichtner, Siddharth Hariharan, Brandon Marshall, and Daniel Stover (collectively "Named Plaintiffs"), all worked as software engineers for some of the Defendants. *Id.* ¶¶ 21-27. Mr. Devine worked for Adobe in the State of Washington from October

2006, through July 7, 2008. *Id.* ¶ 16. Mr. Fichtner worked for Intel in Arizona from May 2008 through May 2011. *Id.* ¶ 17. Mr. Hariharan worked for Lucasfilm in California from January 8, 2007, through August 15, 2008. *Id.* ¶ 18. Mr. Marshall worked for Adobe in California from July 2006 through December 2006. *Id.* ¶ 19. Finally, Mr. Stover worked for Intuit in California from July 2006 through December 2010. *Id.* ¶ 20.

Named Plaintiffs purport to represent the following nationwide class of similarly situated individuals:

> All natural persons employed by Defendants in the United States on a salaried basis during the period from January 1, 2005 through January 1, 2010 (the "Class Period"). Excluded from the Class are: retail employees; corporate officers, members of the boards of directors, and senior executives of Defendants who entered into the illicit agreements alleged herein; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.

Id. ¶ 30.

2. DOJ Investigation

Many of the factual allegations in the CAC come directly from two civil complaints filed by the DOJ in the United States District Court for the District of Columbia (the "D.C. District Court"). *See* Joint Mot. 5-6. Plaintiffs reference these documents in the CAC, and both Defendants and Plaintiffs have attached documents from the DOJ lawsuit to their briefing. *See* Harvey Decl. Exs. A-B; Brown Decl. Exs. A-F.

From 2009 through 2010, the Antitrust Division of the DOJ conducted an investigation into Defendants' employment and recruitment practices. CAC ¶¶ 3, 111. After receiving documents produced by Defendants and interviewing witnesses, the DOJ concluded that Defendants reached "facially anticompetitive" agreements that "eliminated a significant form of competition . . . to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities." DOJ Complaint against Adobe, et al. ("DOJ Adobe Compl."), Harvey Decl. Ex. A, at ¶¶ 2, 14; DOJ Complaint against Lucasfilm ("DOJ Lucasfilm Compl."), Harvey Decl. Ex. D, at ¶¶ 2, 15, 22; CAC ¶ 112. The DOJ also determined that the agreements "were not ancillary to any legitimate collaboration," "were much broader than reasonably necessary for the formation or implementation of any collaborative effort," and "disrupted the normal price-setting mechanisms that apply in the labor setting." DOJ Adobe Compl. ¶ 16; DOJ Lucasfilm Compl. ¶ 17; CAC ¶ 112. The DOJ concluded that Defendants entered into agreements that were naked restraints of trade that were *per se* unlawful under the antitrust laws. DOJ Adobe Compl. ¶ 35; DOJ Lucasfilm Compl. ¶ 3; CAC ¶ 112.

On September 24, 2010, the DOJ filed a complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar regarding Defendants' agreements. DOJ Final J. against Adobe, et al. ("DOJ Adobe J."), Brown Decl. Ex. A, at 2; CAC ¶ 114. On December 14, 2010, the DOJ filed another complaint against Lucasfilm and Pixar regarding Defendants' agreements. DOJ Final J. against Lucasfilm ("DOJ Lucasfilm J.") Order at 1, *United States v. Lucasfilm, Inc*., No. 10-02220-RBW (D.D.C. June 3, 2011), 2011 WL 2636850 at *1;[1] CAC ¶ 114. In both cases, the DOJ filed stipulated proposed final judgments in which Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar agreed that the DOJ's complaints "state[] a claim upon which relief may be granted" under federal antitrust law. DOJ Proposed Final J. against Lucasfilm ("DOJ Proposed Lucasfilm J."), Brown Decl. Ex. B, at 2; CAC ¶ 114.[2] Although Defendants did not admit any wrongdoing or violation of law, Defendants agreed to be "enjoined from attempting to enter into, maintaining or enforcing any agreement with any other person or in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person." DOJ Adobe J. at 5;

[1] The D.C. District Court Order suggests that the DOJ's complaint against Lucasfilm was filed on December 21, 2010, whereas the CAC states that it was filed on December 14, 2010. The difference is immaterial here, but the Court takes the date as pled in the CAC to be true for purposes of these motions.

[2] Plaintiffs ask this Court to apply the doctrine of judicial estoppel to prevent Defendants from taking a position on this motion that is inconsistent with the position they took before the D.C. District Court that the same allegations "stated a claim upon which relief may be granted." Opp'n to Joint Mot. 6 n.2 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). The Court declines to apply the judicial estoppel doctrine here. Defendants' apparent concession that the DOJ stated a claim under Section 1 of the Sherman Act is not clearly inconsistent with Defendants' position here that Plaintiffs fail to state a claim under Section 4 of the Clayton Act. Section 1 of the Sherman Act governs a claim to relief by the government. Section 4 of the Clayton Act governs a claim to relief by an individual and has the additional requirement of antitrust injury, which is inapplicable to the government's Section 1 claim.

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DOJ Proposed Lucasfilm J. at 4; CAC ¶ 115. The D.C. District Court entered the stipulated proposed final judgments on March 17, 2011, and June 2, 2011, respectively. DOJ Adobe J. at 12, DOJ Lucasfilm J. at 1; CAC ¶ 115.[3]

3. Alleged Conspiracy[4]

Plaintiffs allege that Defendants engaged in a conspiracy to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of Defendants' employees. CAC ¶ 55.

According to Plaintiffs, the conspiracy consisted of an interconnected web of express bilateral agreements, each with the active involvement and participation of a company under the control of the late Steven P. Jobs ("Mr. Jobs") and/or a company whose board shared at least one member of Apple's board of directors. *Id.* Defendants' senior executives actively participated in negotiating, executing, monitoring compliance with, and policing violations of the bilateral agreements. *Id.* ¶¶ 56, 65, 74, 79, 84, 85, 91, 98, 102, 104, 107. Defendants' senior executives also actively concealed each bilateral agreement, and Defendants' employees were not informed of, nor did they agree to, the terms of any of the agreements. *Id.* ¶¶ 64, 77, 82, 89, 100, 105.

From 2005 to 2007, each pair of Defendants in a bilateral agreement entered into nearly identical "Do Not Cold Call" agreements, whereby each company placed the names of the other company's employees on a "Do Not Cold Call" list and instructed recruiters not to cold call the employees of the other company. *See id.* ¶¶ 67, 78, 83, 90, 101.[5] In a properly functioning and lawfully competitive labor market, each Defendant would compete for employees by "cold

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[3] As with the discrepancy in the date of the filing of the DOJ's complaint against Lucasfilm, as described in footnote 1, the D.C. District Court Order suggests that the final judgment against Lucasfilm was filed on June 3, 2011, whereas the CAC states that it was filed on June 2, 2011. The difference is immaterial here, but the Court takes the date as pled in the CAC to be true for purposes of this motion.

[4] Plaintiffs included additional factual allegations supporting a conspiracy, allegedly uncovered in discovery, in their section of the Joint Case Management Statement. ECF No. 109. Although the Court does not opine on the eventual admissibility of this evidence, the Court presently gives no weight to these additional factual allegations as they are not properly before the Court on these motions.

[5] As discussed below, Pixar and Lucasfilm entered into other agreements in addition to entering into a "Do Not Cold Call" agreement.

calling," that is, soliciting current employees of one or more other Defendants. *Id.* ¶ 41. Cold calling includes communicating directly in any manner (including orally, in writing, telephonically, or electronically) with another company's employee who has not otherwise applied for a job opening. *Id.* The use of cold calling among competitors commonly increases total compensation and mobility of all Defendants' employees. *Id.* ¶ 50.

Each bilateral agreement in this case applied to all employees of a given pair of Defendants; was not limited by geography, job function, product group, or time period; and was not related to a collaboration between that pair of Defendants. *Id.* ¶¶ 63, 76, 81, 88, 100, 105. The bilateral relationships between pairs of Defendants are described in more detail below.

Pixar and Lucasfilm. In January 2005, while Mr. Jobs was CEO of Pixar, senior executives of Pixar and Lucasfilm entered into express, written agreements to eliminate competition between them for skilled labor. *Id.* ¶¶ 58, 62. Pixar drafted the terms of the agreements in Emeryville, California and sent those terms to Lucasfilm. *Id.* ¶ 62. Pixar and Lucasfilm entered into agreements: (1) not to cold call each other's employees; (2) to notify the other company when making an offer to an employee of the other company, even if that employee had applied for the prospective position on his own initiative in the absence of cold calling; and (3) not to engage in "bidding wars," i.e., counteroffer above the initial offer, if either company made an offer to the employee of the other company. *Id.* ¶¶ 59-61.

In 2007, Pixar twice contacted Lucasfilm regarding suspected violations of the agreement, and Lucasfilm responded by changing its conduct to conform to the agreement. *Id.* ¶ 65.

Apple and Adobe. In May 2005, while Mr. Jobs was CEO of Apple (concurrently serving as CEO of Pixar), Apple, and Adobe entered into an express "Do Not Cold Call" agreement, similar to the first agreement between Pixar and Lucasfilm. *Id.* ¶¶ 72, 73. Apple and Adobe reached the agreement through direct and explicit communications between their senior executives, who actively managed and enforced the agreement through further direct communications. *Id.* ¶ 74.

Apple and Google. In 2006, while Arthur D. Levinson ("Mr. Levinson") sat on the boards of both Apple and Google, these two companies entered into an express "Do Not Cold Call" agreement identical to the "Do Not Cold Call" agreement between Apple and Adobe. *Id.* ¶ 79.

In February and March 2007, Apple contacted Google to complain about suspected violations of the agreement. In response, Google conducted an internal investigation and reported its findings back to Apple. *Id.* ¶ 84.

Apple and Pixar. In April 2007, Apple entered into an agreement with Pixar that was identical to Apple's earlier "Do Not Cold Call" agreements with Adobe and Google. *Id.* ¶ 85. At this time, Mr. Jobs, as the single largest shareholder of the Walt Disney Company ("Disney"), continued to exert substantial control over Pixar. *Id.* ¶ 87. Disney had acquired Pixar in 2006, and Mr. Jobs thereafter sat on Disney's board of directors and continued to oversee Pixar's animation business. *Id.* ¶ 15.

Google and Intuit. In June 2007, Google entered into an express "Do Not Cold Call" agreement with Intuit that was identical to Google's earlier agreement with Apple, and identical to the earlier agreements between Apple and Adobe, and between Apple and Pixar. *Id.* ¶ 103. At this time, Google CEO Eric Schmidt ("Mr. Schmidt") sat on Apple's board of directors, along with Mr. Levinson, who continued to sit on the boards of both Apple and Google. *Id.*

Google and Intel. In September 2007, Google entered into an express "Do Not Cold Call" agreement with Intel that was identical to Google's earlier agreements with Apple and Intuit, and identical to Apple's earlier agreements with Adobe and Pixar. *Id.* ¶ 98. At this time, Google CEO Mr. Schmidt continued to sit on Apple's board of directors, along with Mr. Levinson, who continued to sit on the boards of both Apple and Google. *Id.* ¶ 97.

Plaintiffs allege that each member of the Class was harmed by each and every agreement described above, which together made up "an overarching conspiracy" to decrease competition for skilled labor, reduce employee mobility, and suppress compensation. *Id.* ¶¶ 108-110. Each Defendant is alleged to have entered into this conspiracy with knowledge of the other Defendants' participation in the conspiracy, and with the intent of suppressing Plaintiffs' compensation and

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mobility through eliminating competition for skilled labor. *Id.* ¶¶ 55, 108. The elimination of competition and suppression of compensation and mobility had a cumulative effect on all Class members. *Id.* ¶ 110.

Plaintiffs allege that in August 2007, Mr. Jobs contacted the CEO of Palm Inc. ("Palm"), Edward T. Colligan ("Mr. Colligan"), to propose that Apple and Palm also agree to refrain from cold calling and hiring each other's employees. *Id.* ¶¶ 92, 94. Mr. Jobs said to Mr. Colligan, "We must do whatever we can" to stop cold calling each other's employees and other competitive recruiting efforts between the companies. *Id.* ¶ 94. Mr. Jobs also threatened litigation to intimidate Palm into entering into a "Do Not Cold Call" agreement. *Id.* Mr. Colligan declined Mr. Jobs's proposal, telling him, "Your proposal that we agree that neither company will hire the other's employees, regardless of the individual's desires, is not only wrong, it is likely illegal." *Id.* ¶ 95.

4. Claims

Plaintiffs' CAC contains four claims for relief under the following statutes: (1) Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16720, *et seq.*; (3) Cal. Bus. & Prof. Code § 16600[6]; and (4) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.* *Id.* ¶¶ 119-152. Plaintiffs seek damages, restitution, costs, attorneys' fees, and prejudgment and post-judgment interest. *Id.* ¶¶ 153-164.[7]

B. Procedural Background

The original complaints in the five actions underlying this consolidated action were filed in California state court. *Hariharan v. Adobe Sys. Inc.*, Case No. 11574066 (Alameda Super. Ct. filed May 4, 2011); *Marshall v. Adobe Sys. Inc.*, Case No. 11-CV-204052 (Santa Clara Super. Ct. filed June 28, 2011); *Devine v. Adobe Sys. Inc.*, Case No. 11-CV-204053 (Santa Clara Super. Ct. filed June 28, 2011); *Fichtner v. Adobe Sys. Inc.*, Case No. 11-CV-204187 (Santa Clara Super. Ct. filed

[6] After the hearing, Plaintiffs withdrew their claim under Cal. Bus. & Prof. Code § 16600. ECF No. 111. Accordingly, Defendants' joint motion to dismiss as to this claim is DENIED as MOOT.
[7] The CAC originally contained a prayer for injunctive relief, *see* CAC ¶¶ 126, 135, 143, and declaratory relief, *see id.* ¶¶ 143, 152, 154, 155, 157, 158. However, Plaintiffs have since withdrawn their prayer for injunctive relief, *see* ECF No. 89, and declaratory relief, *see* ECF No. 111.

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June 30, 2011); *Stover v. Adobe Sys. Inc.*, Case No. 11-CV-25090 (Santa Clara Super. Ct. filed July 14, 2011).[8] Defendants subsequently removed the five state court actions to the United States District Court for the Northern District of California. *Hariharan v. Adobe Sys. Inc.*, Case No. 11-CV-2509-JCS (removed May 23, 2011); *Marshall v. Adobe Sys. Inc.*, Case No. 11-CV-3538-HRL (removed July 19, 2011); *Devine v. Adobe Sys. Inc.*, Case No. 11-3539-HRL (removed July 19, 2011); *Fichtner v. Adobe Sys. Inc.*, Case No. 11-CV-3540-PSG (removed July 19, 2011); *Stover v. Adobe Sys. Inc.*, Case No. 11-CV-3541-PSG (removed July 19, 2011).

On June 1, 2011, the lead case, *Hariharan v. Adobe Systems Inc.*, was reassigned from Magistrate Judge Spero to Judge Armstrong. ECF No. 24. On July 19, 2011, Intuit filed a motion to relate the five underlying actions, ECF No. 41, which Judge Armstrong granted on July 27, 2011, ECF No. 52. On August 2, 2011, Plaintiff Siddharth Hariharan moved to transfer the five underlying actions to the San Jose Division, ECF No. 56, which Judge Armstrong granted on August 4, 2011, ECF No. 58.

On August 5, 2011, the underlying actions were reassigned to the undersigned judge. The Court consolidated the five underlying actions on September 12, 2011, ECF No. 64, and Plaintiffs filed the CAC on September 13, 2011. ECF No. 65.

On October 26, 2011, the Court held a Case Management Conference, where the Court granted in part and denied in part Defendants' joint motion to stay discovery, ECF No. 80. *See* ECF No. 88. The Court ordered that Defendants respond to Plaintiffs' Document Request Nos. 1-7 and produce responsive, non-privileged documents already produced to the DOJ. *See id.* Pursuant to the Court's instructions at the Case Management Conference, Plaintiffs withdrew their prayer for injunctive relief, ECF No. 89, and voluntarily dismissed a related case, *Lieff, Cabraser, Heimann & Bernstein, LLP v. U.S. Dep't of Justice, Antitrust Div.*, Case No. 11-CV-5105-HRL (N.D. Cal. Oct. 18, 2011), ECF No. 90.

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[8] While the name of each Superior Court case listed only Adobe Systems Inc. as the defendant, the Superior Court complaints also named as defendants Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and Does 1-200.

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Defendants filed the instant joint motion to dismiss on October 13, 2011, ECF No. 79, and, with leave of the Court, Lucasfilm filed its separate motion to dismiss on October 17, 2011, ECF No. 83. Plaintiffs opposed both of these motions on November 4, 2011. ECF Nos. 91, 92. Defendants filed their joint reply on December 2, 2011, ECF No. 97, and Lucasfilm filed its reply that same day, ECF No. 96.

II. Legal Standard

A motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal under Rule 12(b)(6) may be based on either (1) the "lack of a cognizable legal theory," or (2) "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While "'detailed factual allegations'" are not required, a complaint must include sufficient facts to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 544.

For purposes of ruling on a Rule 12(b)(6) motion to dismiss, the Court accepts all allegations of material fact as true and construes the pleadings in the light most favorable to the plaintiffs. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The Court need not, however, accept as true pleadings that are no more than legal conclusions or the "'formulaic recitation of the elements' of a cause of action." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *accord Iqbal*, 129 S. Ct. at 1949-50. However, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1940-41.

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III. ANALYSIS

The Court addresses Defendants' joint motion to dismiss before turning to Lucasfilm's motion to dismiss.

A. Defendants' Joint Motion to Dismiss

Defendants jointly move to dismiss the CAC on the grounds that it fails to state an antitrust claim under federal and California law because: (1) the CAC fails to allege evidentiary facts to support the claim of an "overarching conspiracy" among all Defendants to suppress their employees' wages; (2) such a conspiracy is implausible on its face; and (3) the CAC fails to plead antitrust injury. Defendants also argue that Plaintiffs' claims under the UCL fail for the same reasons as Plaintiffs' antitrust claims. Finally, Defendants argue that Plaintiffs lack standing to assert claims for injunctive or declaratory relief because Plaintiffs are former employees with no stated intention of working for any Defendant, and the alleged conduct has already been enjoined by the DOJ. The Court need not reach this last argument, however, because it was rendered moot by Plaintiffs' withdrawal of their prayer for declaratory and injunctive relief. ECF Nos. 89, 111.

1. Antitrust Claims Under the Sherman Act and California's Cartwright Act

The parties appear to agree that Plaintiffs' federal and state antitrust claims rise and fall together. "Indeed, the analysis under California's antitrust law mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act." *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001); *see also Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1091 (9th Cir. 2000). Thus, if Plaintiffs plead a valid Sherman Act claim, they likewise plead a valid Cartwright Act claim.

a. Legal Standard

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade." To state a claim under Section 1, a plaintiff must allege that "(1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis;[9]

[9] Defendants' briefing does not contest that the individual bilateral agreements are horizontal agreements between competitors in restraint of trade, which are either *per se* unlawful, *Am. Ad Mgmt.*, 92 F.3d at 786, or at least, as alleged here, prima facie anticompetitive under the rule of

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and (3) the restraint affected interstate commerce."[10] *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996); *see also Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001). The Supreme Court has stated that a plaintiff must plead "'enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement . . . . [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.'" *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 556-57).

Section 4 of the Clayton Act creates a private right of action under the Sherman Act for a plaintiff who has been "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). Thus, an antitrust plaintiff must have suffered 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." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999).

b. Failure to State a Claim

Defendants argue that Plaintiffs fail to allege sufficient facts to establish an "overarching conspiracy." Specifically, Defendants argue that: (1) Plaintiffs fail to plead the "who, what, where, and when" describing the alleged conspiracy, and (2) Plaintiffs have not alleged the requisite knowledge and intent to show a conspiracy. Joint Mot. 2 (citing *Kendall*, 518 F.3d 1042). Defendants also contend that an "overarching conspiracy" consisting of six bilateral agreements is implausible on its face, primarily because each Defendant remained free to cold call most of the other Defendants' employees. *Id.* at 3. Finally, Defendants argue that Plaintiffs have failed to plead antitrust injury. The Court addresses these arguments in turn.

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reason analysis. *See Brantley v. NBC Universal, Inc.*, --- F.3d ----, 2012 WL 1071257, at *3 (9th Cir. Mar. 30, 2012). As an initial matter, the parties agree that the Court need not decide, at this stage, whether the rule of reason or *per se* analysis applies to this case. Reply 9; Tr. 29:15-17. Thus, whether Defendants had a procompetitive justification for their bilateral agreements, a consideration that is relevant only under a rule of reason analysis, is properly decided in later stages of litigation. *See Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 343 (1982).

[10] The third factor, whether the alleged restraint affected interstate commerce, is not in dispute.

i. Who, What, to Whom, Where, and When

Defendants argue that Plaintiffs fail to plead the "who, what, where, and when" of the alleged overarching conspiracy. Defendants urge the Court to ignore Plaintiffs' "labels and conclusions" and mere "formulaic recitation[s] of the elements of a cause of action." Joint Mot. 9 (citing *Iqbal*, 129 S. Ct. at 1949). While it is true, as Defendants note, that Plaintiffs refer to the "overarching conspiracy," CAC ¶¶ 55, 108, as an "interconnected web of agreements," *id*. ¶¶ 1, 55, 108, these labels are not the only facts that Plaintiffs have alleged here.

Defendants rely primarily on *Kendall* to support their argument that Plaintiffs have failed to allege sufficient facts supporting an overarching conspiracy. *Kendall*, however, is distinguishable. Even after conducting depositions, the plaintiffs in *Kendall* did "not allege *any* facts to support their theory that the [defendants] conspired or agreed with each other . . . to restrain trade." *Kendall*, 518 F.3d at 1048 (emphasis added). The Ninth Circuit held that the plaintiffs' allegations of mere parallel conduct, without more, were insufficient to plead a Section 1 violation. *Id*. at 1049. The Ninth Circuit also held that, to survive a motion to dismiss, a Section 1 claim should "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id*. at 1048.

Plaintiffs here have alleged much more than mere parallel conduct, despite not having any discovery before filing the CAC. Unlike the plaintiffs' complaint in *Kendall*, Plaintiffs' CAC details the actors, effect, victims, location, and timing of the six bilateral agreements between Defendants.

Who. Plaintiffs allege that the agreements were negotiated, executed, and, in most cases, enforced by Defendants' "senior executives." CAC ¶¶ 62, 64, 65, 74, 77, 79, 84, 85, 91, 98, 102, 107. The Ninth Circuit has expressed concern that "[a] bare allegation of a conspiracy is almost impossible to defend against, particularly where the defendants are large institutions with hundreds of employees entering into contracts and agreements." *Kendall*, 518 F.3d at 1047. This concern, however, is inapplicable here, where Plaintiffs allege that, at all relevant times, at least one of three individuals had significant influence over at least one party to each of the six bilateral agreements: Apple CEO and Pixar CEO Mr. Jobs; Apple and Google board member Mr. Levinson; and Google

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CEO and Apple board member Mr. Schmidt. CAC ¶¶ 55, 57, 58, 72, 79, 87, 97, 103, 108. Specifically, Mr. Jobs exerted significant influence over companies involved in four of the bilateral "Do Not Cold Call" agreements: Pixar-Lucasfilm; Apple-Pixar; Apple-Google; and Apple-Adobe. *Id.* ¶¶ 58, 72, 79, 85, 87. Mr. Schmidt, CEO of Google, sat on Apple's board of directors when Google entered into agreements with Intel and Inuit. *Id.* ¶ 97. Mr. Levinson sat on the boards of both Apple and Google when the two companies entered into their bilateral agreement; when Google entered into agreements with Intel and with Intuit; and when Apple entered into an agreement with Pixar. *Id.* ¶¶ 79, 97, 103.

Moreover, the identical nature of the six bilateral agreements may support the inference that these individuals played a role in shaping these agreements. For example, it strains credulity that Apple and Adobe reached an agreement in May 2005 that was identical to the "Do Not Cold Call" agreement Pixar entered into with Lucasfilm in January 2005, *id.* ¶¶ 58, 72, without some communication or coordination between these two sets of Defendants. The only apparent link between the Apple-Adobe agreement and the Pixar-Lucasfilm agreement is Mr. Jobs, who controlled Apple, *id.*, and who oversaw Pixar. *Id.* ¶ 87. Plaintiffs allege that all of the bilateral agreements were reached in secrecy. *Id.* ¶¶ 56-91. Thus, the identical nature of the six secret bilateral agreements further supports the plausible inference that the agreements were negotiated, reached, and policed at the highest levels of the Defendant companies.

Furthermore, Plaintiffs provide an example of Mr. Jobs personally negotiating a potential "Do Not Cold Call" agreement directly with the CEO of Palm, Mr. Colligan. *Id.* ¶¶ 92-96. Plaintiffs quote Mr. Jobs as allegedly telling Mr. Colligan, "'We must do whatever we can' to stop cold calling each other's employees and other competitive recruiting efforts between the companies." *Id.* ¶ 94. Based on Mr. Jobs's attempt to negotiate a "Do Not Cold Call" agreement directly with Palm's CEO, it is reasonable to infer that such agreements were negotiated directly CEO to CEO.

Finally, because the bilateral agreements were not limited by geography, job function, product group, or time period, and were not related to a collaboration between defendants. *Id.* ¶¶

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63, 76, 81, 88, 100, 105, it is reasonable to infer that such significant wide-ranging, company-wide, and worldwide policies would have been approved at the highest levels.

The Court finds that at the pleading stage, Plaintiffs have sufficiently pled who negotiated and entered into the bilateral "Do Not Cold Call" agreements.

What, to Whom, Where, and When. Plaintiffs also allege that the agreements removed cold calling as an upward pressure on Plaintiffs' salaries, resulting in artificially lower salaries. CAC ¶¶ 70, 72, 79, 85, 98. As discussed in greater detail in Section III.A.1.b.ii, *infra*, Plaintiffs describe a plausible scenario as to how, in light of basic economic principles, these agreements formed an overarching conspiracy that resulted in artificially lower salaries. Plaintiffs also set forth how the nearly identical agreements, of identical scope, were entered into in various cities and counties in California, *id.* ¶¶ 62, 75, 80, 86, 99, between 2005 and 2007. *Id.* ¶¶ 58, 73, 79, 85, 98, 103. Plaintiffs allege how these agreements were the subject of a DOJ investigation in which the DOJ found the agreements to be "*per se* unlawful" and in which Defendants agreed that the DOJ stated a federal antitrust claim. *Id.* ¶¶ 112, 114. Indeed, Defendants note that "virtually all of the facts alleged in the Complaint relate to six bilateral agreements among Defendants," apparently conceding that Plaintiffs have pled sufficient facts to establish the existence of these bilateral agreements. Joint Mot. 9.

Unlike the plaintiffs in *Kendall*, Plaintiffs here have "answer[ed] the basic questions: who, did what, to whom (or with whom), where, and when?" *Kendall*, 518 F.3d at 1047. Moreover, Plaintiffs have alleged facts beyond mere parallel conduct that "tend[] to exclude the possibility of independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (holding that "evidence that tends to exclude the possibility of independent action . . . create[s] a jury issue"); *see also Harkins Amusement Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 484 (9th Cir. 1988) ("concerted action may be inferred from circumstantial evidence of the defendant's conduct and course of dealings") (internal citation omitted); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627-29 (7th Cir. 2010) *cert. denied*, 131 S. Ct. 2165 (2011) (holding that where a "complaint allege[d] a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion," this "constitute[d] supporting evidence of collusion," and

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"provide[d] a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery").

Accordingly, failure to plead the "who, what, to whom, where, and when" is not a basis to dismiss Plaintiffs' Section 1 claims here. *Cf. In re Cathode Ray Tube (CRT) Antitrust Litig*., 738 F. Supp. 2d 1011, 1018 (N.D. Cal. 2010) (Conti, J.) (distinguishing *Kendall* on the ground that the CRT "complaints allege[d] a governmental investigation, hundreds of meetings between 1995 and 2007, and detailed allegations concerning the structure and typical pattern of those meetings").

ii. Knowledge and Intent

Defendants argue that Plaintiffs have failed to show "some meeting of the minds." Specifically, Defendants argue that the mere fact of overlapping board members is not evidence of a conspiracy and that multiple bilateral agreements do not make up an overarching conspiracy. Joint Mot. 11-12. The Court is not persuaded.

In order to plausibly state a Section 1 claim, Plaintiffs must allege something more than parallel conduct and a conclusory allegation of agreement at some unidentified point. "[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 127 S. Ct. at 1966. To establish a conspiracy, the conspirators must have a unity of purpose or a common design and understanding. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). A co-conspirator need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy. *Beltz Travel Serv. Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1366-67 (9th Cir. 1980) ("Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result."); *cf. Blumenthal v. United States*, 332 U.S. 539, 557 (1947) (stating the same proposition in the criminal context). In antitrust conspiracy cases, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each . . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole . . . ." *Continental Ore Corp. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

Plaintiffs allege that Defendants had the means, the motive, and the opportunity to implement a conspiracy to restrain competition for employees. Plaintiffs allege that Defendants' senior executives negotiated, executed, monitored, and policed a series of identical "Do Not Cold Call" agreements in an effort to eliminate competition for skilled labor. CAC ¶¶ 1, 56, 74, 79, 85, 98, 104. Furthermore, Plaintiffs allege that, at all relevant times, at least one of three individuals had significant influence over at least one party to each of the six bilateral agreements: Apple and Pixar CEO Mr. Jobs, Apple and Google board member Mr. Levinson, and Google CEO and Apple board member Mr. Schmidt. *Id.* ¶¶ 55, 57, 58, 72, 79, 87, 97, 103, 108.

Defendants cite *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1561 (10th Cir. 1984), for the proposition that service on multiple boards is "not evidence of a conspiracy." Joint Mot. 12. However, *Jicarilla* does not stand for this proposition. To the contrary, the *Jicarilla* Court acknowledged that overlapping board membership "may indicate an opportunity to conspire . . . ." *Jicarilla*, 728 F.2d at 1561. This is precisely the reason for which Plaintiffs allege overlapping board membership here: to indicate an opportunity to conspire.

Specifically, Mr. Levinson sat on the boards of both Apple and Google when the two companies entered into their bilateral agreement; when Google entered into an agreement with Intel and Intuit; and when Apple entered into an agreement with Pixar. *Id.* ¶¶ 79, 97, 103. Mr. Schmidt, CEO of Google, sat on Apple's board of directors when Google entered into agreements with Intel and Inuit, *id.* ¶ 97. Mr. Levinson's and Mr. Schmidt's positions on the boards of companies entering into virtually identical, yet secret, bilateral "Do Not Cold Call" agreements provided an opportunity for Defendants to share knowledge and to conspire. Thus, their overlapping board membership lends plausibility to Plaintiffs' allegations that each Defendant entered into this conspiracy "with knowledge of the other Defendants' participation in the conspiracy, and with the intent of . . . reduc[ing] employee compensation and mobility through eliminating competition for skilled labor." *Id.* ¶ 55; *see also id.* ¶ 108. These bilateral "Do Not Cold Call" agreements were negotiated by senior executives and represented the "policies" of several hi-tech companies. *Id.* ¶ 116. Thus, it is reasonable to infer that such significant policies would have to be approved at the highest levels. The Court agrees with Plaintiffs, Opp'n to Joint Mot. 10, that it is plausible to infer that the overlapping board membership here provided an opportunity to conspire and an opportunity for transfer of the requisite knowledge and intent regarding the bilateral agreements.

The plausibility of these inferences increases when the Court considers that Mr. Jobs also exerted significant influence over companies involved in four of the bilateral "Do Not Cold Call" agreements: Pixar-Lucasfilm; Apple-Pixar; Apple-Google; and Apple-Adobe. Plaintiffs provide an example of Mr. Jobs personally negotiating the same kind of "Do Not Cold Call" agreement directly with the CEO of Palm. *Id.* ¶¶ 92-96. Notwithstanding the fact that this example involved a non-Defendant, Mr. Jobs's alleged personal involvement lends further plausibility to Plaintiffs' allegations that the agreements at issue here were executed, policed, and enforced by senior executives. Furthermore, Plaintiffs quote Mr. Jobs as allegedly telling Palm's CEO, Mr. Colligan, "'We must do whatever we can' to stop cold calling each other's employees and other competitive recruiting efforts between the companies." *Id.* ¶ 94. From this quote it is reasonable to infer that Mr. Jobs had the intent to reduce competition for skilled labor and was aware that "Do Not Cold Call" agreements were effective means of doing so. Given that Mr. Jobs, as CEO of Apple, had contact with Messrs. Levinson and Schmidt, who were members of Apple's Board, it is also reasonable to infer that the overlapping board membership provided an opportunity for Mr. Jobs to expand the conspiracy. Thus, Plaintiffs have alleged sufficient facts plausibly suggesting "a unity of purpose[,] a common design and understanding, or a meeting of minds in an unlawful arrangement." *Monsanto*, 465 U.S. at 764 (internal citation omitted).

Defendants also argue that six bilateral "Do Not Cold Call" agreements do not add up to an overarching conspiracy. Defendants rely principally on *In re Iowa Ready-Mix Concrete Antitrust Litigation*, 768 F. Supp. 2d 961 (N.D. Iowa 2011), to support this argument. In addition to not being binding on this Court, *Iowa Ready-Mix Concrete* is distinguishable. There, the plaintiffs sought to rely on bilateral agreements -- which were the basis for three of the defendants' guilty pleas to criminal antitrust violations -- to show one conspiracy among all defendants. *Id.* at 972.

The plaintiffs' complaint alleged that the defendants "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-Mix Concrete," an allegation that, without more, was not only "conclusory," but also "tautolog[ical]." *Id.* at 974-75. In dismissing the complaint, the court noted that the plaintiffs failed to allege: (1) "parallel conduct," *id.* at 974; (2) a "larger picture from which inferences of a wider conspiracy can be drawn from guilty pleas to separate bilateral conspiracies," *id.* at 975; (3) "any facts that could tie together the specific, discrete incidents of admitted misconduct and the overarching all-defendant four-plus year conspiracy . . . ," *id.* at 972; and (4) "that the defendants ever systematically interacted with each other, much less that they had some mechanism to operate the alleged conspiracy, allocate its profits, and police its participants," *id.* The plaintiffs' complaint had the additional defect of failing to allege when, where, and from whom plaintiffs purchased the allegedly price-fixed product. *Id.* at 964.

As discussed above, Plaintiffs here have alleged a "larger picture" of senior executives from closely connected high-tech companies in Northern California contemporaneously negotiating and enforcing six bilateral "Do Not Cold Call" agreements. The fact that all six identical bilateral agreements were reached in secrecy among seven Defendants in a span of two years suggests that these agreements resulted from collusion, and not from coincidence. Unlike the plaintiffs in *Iowa Ready-Mix Concrete*, therefore, Plaintiffs here have alleged facts plausibly suggesting "a unity of purpose[,] a common design and understanding, or a meeting of minds in an unlawful arrangement." *Monsanto*, 465 U.S. at 764 (internal citation omitted). Whether Plaintiffs can adduce sufficient evidence in discovery to *prove* an overarching conspiracy is a question that is not before the Court today. At the pleading stage, Plaintiffs have alleged sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Accordingly, failure to plead sufficient evidentiary facts supporting an overarching conspiracy is not a ground for dismissal of Plaintiffs' antitrust claims.

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iii. Plausibility of the Conspiracy Theory

Defendants also argue that Plaintiffs' theory of an overarching conspiracy is implausible. Joint Mot. 14 (citing *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009 ("*Gilley*")). While it is true that the facts alleged must be "'plausible' in light of basic economic principles," *Gilley*, 588 F.3d at 662, Plaintiffs' allegations meet this plausibility standard here.

As Defendants note, the bilateral "Do Not Cold Call" agreements alleged in Plaintiffs' CAC do not cover all possible pairings between Defendants—that is, while Adobe cannot cold call Apple employees or vice versa, nothing in the CAC indicates that Adobe could not cold-call Adobe, Intuit, Google, Lucasfilm, and Pixar. Joint Mot. 15. In fact, of the 21 possible pairings between the 7 Defendants, only 6 pairings have a bilateral "Do Not Cold Call" agreement, leaving competition open among the remaining 15 pairings. *Id*. Defendants argue that the economics of this situation evidence the lack of an overarching conspiracy, as a rational conspiracy would seek to eliminate these additional price pressures in order to make the existing bilateral constraints effective. *Id*. Relatedly, Defendants argue that Plaintiffs' alleged conspiracy is implausible because Plaintiffs have failed to allege that Defendants have market power over a relevant market. *Id*. at 16. For the reasons below, neither of these arguments prevails.

First, the Court does not agree with Defendants that Plaintiffs' allegations of an overarching conspiracy are implausible on their face. While Defendants accurately point out that only 6 bilateral "Do Not Cold Call" agreements have been alleged, Plaintiffs nonetheless adequately allege that the "compensation effects of cold calling are not limited to the particular individuals who receive cold calls, or to the particular individuals who would have received cold calls but for the anticompetitive agreements alleged herein. Instead, the effects of . . . eliminating cold calling . . . commonly impact all salaried employees of the participating companies." *Id.* ¶ 50. Plaintiffs allege that "Plaintiffs and each member of the Class were harmed by each and every agreement herein alleged. The elimination of competition and suppression of compensation and mobility had cumulative effect on all Class members." *Id.* ¶ 110. For example, "an individual who was an employee of Lucasfilm received lower compensation and faced unlawful obstacles to mobility as a

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result of not only the illicit agreements with Pixar, but also as a result of Pixar's agreement with Apple." *Id.*

Defendants do not attack Plaintiffs' allegations of the cumulative harm of the bilateral agreements beyond calling the allegations "conclusory." Joint Mot. 17. The Court disagrees with Defendants' characterization. Far from asserting mere conclusions of law, Plaintiffs' CAC details how cold calling normally works in the labor market for skilled employees in the high-tech industry and how eliminating cold calling would reduce such employees' compensation and mobility. CAC ¶¶ 41-54. Plaintiffs provide specific examples of various ways in which cold calling significantly impacts employee compensation. First, Plaintiffs allege that when an employee of Company A receives a cold call from rival Company B, the current employee may either move to Company B, or use Company B's offer as leverage to negotiate increased compensation from Company A. *Id.* ¶ 46. Second, when a current employee of Company A receives a cold call from rival Company B, that information is likely to spread through informal employee communication channels, empowering other Company A employees to use that information in their own compensation negotiations. *Id.* ¶ 47. Third, when rival Company B cold calls a Company A employee, Company B is likely to glean information about Company A's compensation practices. As a result, in a normal, competitive labor market, Company B is likely to match or exceed the compensation package offered by its rivals. This iterative process tends to lead to increased compensation levels across the industry, as companies vie for rivals' employees. *Id.* ¶ 48. Finally, when Company A knows that its employees may be cold called by rival Company B, Company A is more likely to forfend prospective poaching of its employees by preemptively increasing the compensation of its current employees. *Id.* ¶ 49.

While these allegations concerning the labor market effects of cold calling remain to be proven, the Court presumes these factual allegations to be true for purposes of ruling on a motion to dismiss. In light of Plaintiffs' specific allegations concerning the industry-wide procompetitive effects of cold calling recruiting practices, it is plausible to infer that even a single bilateral agreement would have the ripple effect of depressing the mobility and compensation of employees of companies that are not direct parties to the agreement. Plaintiffs' allegations of six parallel

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bilateral agreements render the inference of an anticompetitive ripple effect that much more plausible. Accordingly, the Court finds that Plaintiffs have sufficiently pled facts alleging the economic plausibility of the conspiracy.

Defendants' second argument, which challenges the plausibility of Plaintiffs' conspiracy theory based on Plaintiffs' failure to allege a relevant market and that Defendants have power within that market, also fails. "There is no requirement that [the market definition] elements of the antitrust claim be pled with specificity." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). "An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Id.* The existence of a "relevant market" is typically a factual inquiry for the jury. *Id.* A complaint may be dismissed on this ground only if the market definition is "facially unsustainable." *Id.*

Here, Plaintiffs allege that Defendants are high-tech companies in the market for skilled labor, where cold calling plays an important role in determining salaries and labor mobility. CAC ¶¶ 41-54. Plaintiffs further allege that the labor market for skilled high-tech labor is national. *Id.* ¶¶ 30, 39. Finally, Plaintiffs allege that "Defendants succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market." *Id.* ¶ 108. Thus, the Court accepts as true, as the Court must on a motion to dismiss, Plaintiffs' allegation that Defendants succeeded in distorting the market through their agreements. Accordingly, it is reasonable to infer that Defendants had the market power to do so. *Cf. Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1001 (9th Cir. 2008) ("Evidence of restricted output and supracompetitive prices is direct evidence of market power." (quoting *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997)).

Moreover, the Court need not engage in a market analysis until the Court decides whether to apply a *per se* or rule of reason analysis. *See F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 462 (1986); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). Defendants' argument relies on the false assumption that the Court should apply a rule of reason analysis, but as the parties agree, Joint Mot. 9; Tr. 29:15-17, the Court need not decide now whether *per se* or rule of reason analysis applies. Indeed, that decision is more appropriate on a motion for summary judgment. *See Pecover v. Elecs. Arts Inc.*, 633 F. Supp. 2d 976, 983 (N.D. Cal. 2009) (deferring market analysis under rule of reason, under Cartwright Act, until after deciding motion to dismiss); *In re Beer Distrib. Antitrust Litig.*, 188 F.R.D. 557, 564 (N.D. Cal. 1999) (Williams, J.). Plaintiffs have successfully pled a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion, *see* CAC ¶¶ 2, 32(b), 125, 134, 155; Opp'n to Joint Mot. 1, and therefore no market analysis is required at this time. *See United States v. Socony-Vacuum Oil*, 310 U.S. 150, 224 n.59 (1940) (noting that a *per se* Section 1 violation does not require evidence of market power or the ability to affect prices); *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1425 (9th Cir. 1995) ("The foundational principle of *per se* antitrust liability is that some acts are considered so inherently anticompetitive that no examination of their impact on the market as a whole is required."); *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, No. MDL 09–2074-PSG, 2011 WL 3555610, at *14 (C.D. Cal. Aug. 11, 2011).

For all these reasons, Plaintiffs' antitrust claims cannot be dismissed on the basis of implausibility.

iv. Antitrust Injury[11]

Defendants argue that Plaintiffs have not alleged antitrust injury. Joint Mot. 16. The Court disagrees.

In general, "[a]ntitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained." *Am. Ad Mgmt.*, 190 F.3d at 1057. However, "it is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff." *Id*. at 1058. The Ninth Circuit has held that, where, as here, an employee is the direct and intended object of an

[11] Defendants focus their arguments on antitrust injury, but appear cursorily to attack Plaintiffs' Article III standing. Joint Mot. 9. Plaintiffs meet the requirements for Article III standing: (1) injury in fact; (2) causal connection; (3) redressability. *Takhar v. Kessler*, 76 F.3d 995, 999-1000 (9th Cir. 1996) (internal quotations omitted). Plaintiffs allege that their salaries were artificially reduced as a result of Defendants' alleged anticompetitive conduct and that their injury can be redressed through the payment of damages should Plaintiffs establish liability. As Plaintiffs were directly affected by the alleged agreement to eliminate competition, they have antitrust standing as well. *AGC v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983).

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employer's anticompetitive conduct, that employee has standing to sue for antitrust injury. *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 742-43 (9th Cir. 1984); *accord Eichorn v. AT & T Corp.*, 248 F.3d 131, 140-41 (3d Cir. 2001); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542 (10th Cir. 1995).

Plaintiffs have asserted that their salary and mobility were suppressed by Defendants' agreements not to cold call, and that the alleged agreements were entered into to suppress competition for skilled labor. CAC ¶¶ 108-10. Plaintiffs have specifically alleged that they were injured by Defendants' alleged anticompetitive conduct, *id.* ¶¶ 16-20, 70, 108, 110; have explained the means by which Defendants allegedly caused this injury, *id.* ¶¶ 41-55, 108; and have suggested how this injury should be quantified, *id.* ¶ 32(h). In alleging that Defendants conspired to fix salaries at artificially low levels, Plaintiffs have alleged "an example of the type of injury the antitrust laws are meant to protect against." *Doe v. Ariz. Hosp. & Healthcare Ass'n*, No. CV07-1292-PHX-SRB, 2009 WL 1423378, at *4 (D. Ariz. Mar. 19, 2009) (citing *Am. Ad Mgmt.*, 190 F.3d at 1054). Plaintiffs have further alleged that Defendants' attempts to suppress competition had the intended "effect of fixing the compensation of [Plaintiffs] at artificially low levels." CAC ¶ 108. Plaintiffs have thus also alleged that their injury is a direct result of Defendants' conduct. *Ariz. Hosp.*, 2009 WL 1423378, at *4.

Thus, Plaintiffs have adequately pled antitrust injury.[12] Accordingly, Defendants' motion to dismiss Plaintiffs' Sherman Act claim and Cartwright Act claim is DENIED.

2. Cal. Bus. & Prof. Code § 16600

Plaintiffs have voluntarily dismissed their claim under Cal. Bus. & Prof. Code § 16600. *See* ECF No. 111. Defendants' Joint Motion to Dismiss this claim is therefore DENIED as MOOT.

3. UCL

Plaintiffs also allege that Defendants' actions violate California's UCL, which does not prohibit specific activities but instead broadly proscribes "any unfair competition, which means

[12] Defendants repeat their argument that Plaintiffs have failed to allege a relevant market and control of that market, *see* Section III.A.1.b.iii, *supra*, to argue that Plaintiffs have also failed to allege antitrust injury. *See* Joint Mot. 18-19. As discussed above, the Court declines to require a market analysis at the motion to dismiss stage.

'any unlawful, unfair or fraudulent business act or practice.'" *In re Pomona Valley Med. Group, Inc.*, 476 F.3d 665, 674 (9th Cir. 2007) (quoting Cal. Bus. & Prof. Code §§ 17200, *et seq.*); *see also Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 251-52 (2011).

The UCL provides for restitutionary, injunctive, and declaratory relief. *See* Cal. Bus. & Prof. Code § 17203 (authorizing injunctive and restitutionary relief); *AICCO, Inc. v. Ins. Co. of N. Am.*, 90 Cal. App. 4th 579, 590 (2001) (authorizing declaratory relief). Damages and disgorgement are unavailable under the UCL. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003). As discussed above, Plaintiffs withdrew their prayers for injunctive and declaratory relief. Thus, the only relief Plaintiffs seek under the UCL is restitution. However, because, as explained below, Plaintiffs are not entitled to restitution, Plaintiffs' UCL claim is DISMISSED.

Plaintiffs' alleged injury is in the form of elimination of competition and suppression of compensation and mobility. CAC ¶ 110. In their claim under the UCL, Plaintiffs pray that Defendants be required to "disgorge their illegal gains for the purpose of making full restitution to all injured class members." *Id.* ¶ 150.

Under the UCL, "'the concept of restoration or restitution . . . is not limited only to the return of money or property that was once in the possession of that person. Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest.'" *Lozano v. AT&T Wireless Servs. Inc.*, 504 F.3d 718, 733-34 (9th Cir. 2007) (quoting *Juarez v. Arcadia Fin., Ltd.*, 152 Cal. App. 4th 889 (2007)). For example, a plaintiff has a vested interest in unpaid wages and therefore may state a restitution claim under the UCL to recover such lost money or property. *See Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 177-78 (2000). The California Supreme Court has made clear, however, that a mere "expectation interest" is not a "vested interest" for purposes of stating a claim for restitution under the UCL. *See Pineda v. Bank of Am.*, 50 Cal. 4th 1389, 1401-02 (2010).

The Court finds that the speculative higher compensation Plaintiffs may have gotten in the absence of the alleged conspiracy, unlike unpaid wages, is not a vested interest. In *Cortez,* the California Supreme Court held that "earned wages that are due and payable pursuant to section 200 *et seq.* of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice." 23 Cal. 4th at 178. "[R]estitutionary awards encompass quantifiable sums one person owes to another." *Id.* The Court agrees with Defendants that the salaries Plaintiffs may have been able to negotiate in the absence of the alleged conspiracy is an "attenuated expectancy" -- akin to "lost business opportunity" or lost revenue -- which cannot serve as the basis for restitution. *Korea Supply*, 29 Cal. 4th at 1150-51. Plaintiffs are notably silent in response to Defendants' arguments that Plaintiffs are not entitled to restitutionary relief. Plaintiffs request for disgorgement is also foreclosed, because this remedy is available "only to the extent that it constitutes restitution." *Id.* at 1145. Any profits Defendants made through the alleged conspiracy at the expense of Plaintiffs' wages are likewise attenuated expectancies. Accordingly, Plaintiffs are entitled neither to restitution nor to disgorgement.

Thus, because "the only relief the UCL provides is unavailable here, [Plaintiffs'] UCL claim fails." *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773, at *15 (C.D. Cal. Dec. 18, 2009). Accordingly, Defendants' joint motion to dismiss Plaintiffs' UCL claim is GRANTED.[13]

B. Lucasfilm's Motion to Dismiss

In addition to joining the other Defendants' joint motion to dismiss, Lucasfilm brings its own motion to dismiss premised on the federal enclave doctrine.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Lucasfilm seeks to dismiss Plaintiffs' Cartwright Act claim. Lucasfilm argues that Plaintiffs' Cartwright Act claim fails as a matter of law because, under the federal enclave doctrine, the Act does not apply to conduct on the Presidio, where Lucasfilm has been located since July 2005. Lucasfilm Mot. 3. All other Defendants join Lucasfilm's motion on the ground that some of the events of the alleged overarching conspiracy occurred on the Presidio. Joint Mot. 1 n.1. The Court disagrees with Defendants.

[13] The Court notes that even if Plaintiffs' UCL claim were to survive a motion to dismiss, the UCL claim would likely face an insurmountable hurdle at the class certification stage given that the Ninth Circuit has foreclosed the certification of nationwide classes under the UCL. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 585 (9th Cir. 2012).

The parties appear to agree that since July 2005, Lucasfilm has been located on the Presidio of San Francisco -- a federal enclave that was ceded to the United States government by the state of California in 1897. Lucasfilm Mot. 1. The parties also agree that any state law enacted after a property becomes a federal enclave cannot be enforced on the enclave unless Congress specifically authorizes its enforcement on the federal enclave. Plaintiffs' only remaining state law claim is under the Cartwright Act. The parties apparently agree that, because the Cartwright Act was enacted after 1897, and Congress has not authorized its enforcement on the Presidio, the Cartwright Act does not apply to the Presidio. The parties disagree, however, on the nexus required between the Cartwright Act claim and the Presidio for the federal enclave doctrine to bar Plaintiffs' Cartwright Act claim here.

Defendants argue that the federal enclave doctrine applies as long as some of the alleged events occurred on the federal enclave. Plaintiffs, on the other hand, argue that the federal enclave doctrine only applies when the locus in which the claim arose is the federal enclave itself. The Court agrees with Plaintiffs. The Ninth Circuit has held that in federal enclave cases, "the jurisdiction of the federal court depends upon . . . the locus in which the claim arose." *Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975).[14] That Lucasfilm is now located on the Presidio, therefore, does not automatically bar *all* state law claims brought against it. Rather, the federal enclave doctrine bars only those claims which arose "on a federal enclave." *Totah v. Bies*, No. 10-CV-05956-CW, 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011). Thus, the Court looks to whether the locus in which Plaintiffs' Cartwright Act claim arose is the Presidio.

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[14] To the extent *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010), conflicts by suggesting that the federal enclave doctrine applies as long as "some of the events alleged . . . occurred on a federal enclave," the Court instead follows the Ninth Circuit, which has held to the contrary. While it is true, as Lucasfilm notes, Lucasfilm Reply 2, that Judge Wilken applied the federal enclave doctrine to bar plaintiff's defamation claim in *Totah* even though the defamatory statement was uttered and republished outside of the Presidio, *Totah* is not an example of a sister court adopting *Corley*'s "some of the events" standard. Judge Wilken stated that "the substance and consummation of the tort [of libel] occurs when and where the third person receives, reads, and comprehends the libelous matter," and held that federal enclave jurisdiction applied because the allegedly libelous statements at issue in that case had been received on a federal enclave. *Totah*, 2011 WL 1324471, at *2.

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To state a claim under the Cartwright Act, Plaintiffs must allege, "(1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts." *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709, 718 (1982). Plaintiffs allege that Lucasfilm and Pixar formed a conspiracy by entering into a bilateral agreement "no later than January 2005." CAC ¶ 128. Though Plaintiffs allege that this conspiracy would later expand to include numerous other players, Plaintiffs have successfully alleged that the conspiracy had already formed and was operating by January 2005, six months before Lucasfilm moved to the Presidio. Plaintiffs also allege that the negotiation, execution, and enforcement of this bilateral agreement -- the first of the six such agreements in the overarching conspiracy -- took place in Emeryville, CA. *Id.* ¶¶ 62, 65-70. Thus, the locus of the first two Cartwright Act elements was not the Presidio.

The Court recognizes that the federal enclave doctrine may extinguish the Cartwright Act claims of a putative subclass of Plaintiffs, and may not extinguish the Cartwright Act claims of another putative subclass of Plaintiffs. For example, the named Plaintiff who suffered the earliest injury, Mr. Marshall, began work at Adobe in July 2006, over a year after Adobe had entered into its bilateral "Do Not Cold Call" agreement with Apple. *Id.* ¶¶ 73. Although Mr. Marshall's injury did not arise until a year after Lucasfilm had moved to a federal enclave, Adobe is not located on the Presidio, and nothing in the CAC suggests that Mr. Marshall was injured on the Presidio. Thus, regardless of the fact that Lucasfilm had already moved to the Presidio by the time of Mr. Marshall's alleged injury in 2006, all three elements of Mr. Marshall's Cartwright Act claim arose outside the Presidio. Accordingly, the locus in which Mr. Marshall's Cartwright Act claim arose was not the Presidio, and the federal enclave doctrine does not extinguish Mr. Marshall's Cartwright Act claim.

Defendants' federal enclave defense is more appropriately addressed when the Court considers class certification, and is not ground to dismiss Plaintiffs' CAC. Accordingly, Lucasfilm's motion to dismiss is DENIED.

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IV. CONCLUSION

For the reasons set forth above, the Court rules as follows on Defendants' joint motion to dismiss and Lucasfilm's motion to dismiss:

1. Defendants' joint motion to dismiss is DENIED as to Plaintiffs' Section 1 Sherman Act claim.
2. Defendants' joint motion to dismiss is DENIED as to Plaintiffs' Cartwright Act claim.
3. Defendants' joint motion to dismiss is DENIED, as moot, as to Plaintiffs' Cal. Bus. & Prof. Code § 16600 claim.
4. Defendants' joint motion to dismiss is GRANTED as to Plaintiffs' UCL claim.
5. Defendants' joint motion to dismiss is DENIED, as moot, as to Plaintiffs' prayer for injunctive and declaratory relief.
6. Lucasfilm's motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: April 18, 2012

Lucy H. Koh

LUCY H. KOH
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION This Document Relates To: ALL CASES	**MDL Docket No. 2656** **Misc. No. 15-1404 (CKK)**

MEMORANDUM OPINION

(October 28, 2016)

Presently before the Court is Defendants' [106] Motion to Dismiss Plaintiffs' Consolidated Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Defendants allege that the Consolidated Amended Complaint should be dismissed because Plaintiffs failed to plead facts sufficient to demonstrate that Plaintiffs suffered injury-in-fact and because Plaintiffs failed to plead factual allegations of a plausible price-fixing conspiracy in violation of federal antitrust laws. Upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a whole, the Court DENIES Defendants' [106] Motion to Dismiss Plaintiffs' Consolidated Amended Complaint for the reasons described herein.

[1] Consol. Am. Class Action Compl. ("Compl."), ECF No. [91]; Def.'s Mot. to Dismiss Pls.' Consol. Am. Compl. ("Defs.' Mot."), ECF No. [106]; Def. Southwest Airlines Co.'s Supp. Br. in Supp. of Defs.' Mot. to Dismiss Pls.' Consol. Am. Compl. ("Def. Southwest's Supp. Br."), ECF No. [110]; Pls.' Omnibus Mem. in Opp'n to Defs.' Mot. to Dismiss the Consol. Am. Compl. & Southwest Airline Co.'s Supp. Brief ("Pls.'s Opp'n"), ECF No. [116]; Defs.' Reply Mem. of P&A in Supp. of Mot. to Dismiss Pls.' Consol. Am. Compl. ("Defs.' Reply"), ECF No. [120]; and Def. Southwest Airline Co.'s Supp. Reply Mem. of P&A in Supp. of Defs.' Mot. to Dismiss Pls.' Consol. Am. Compl. ("Def. Southwest's Supp. Reply"), ECF No. [121]. The motion is fully briefed and ripe for adjudication. In an exercise of its discretion, the Court finds that holding oral argument would not be of assistance in rendering its decision. *See* LCvR 7(f).

I. BACKGROUND

A. Procedural Background

The United States Judicial Panel on Multidistrict Litigation ("the Panel") consolidated 23 actions pending in seven districts involving claims that four major airlines fixed prices for domestic airline tickets by keeping capacity artificially low. The Panel transferred these consolidated actions to this Court on October 13, 2015. The Panel subsequently transferred additional related actions to be consolidated into the instant litigation. There are presently a total of 105 cases consolidated in this action.

On October 30, 2015, the Court entered an Initial Practice and Procedure Order Upon Transfer Pursuant to 28 U.S.C. § 1407, in which the Court set out a general outline of how it intends to proceed in this matter. Initial Practice & Procedure Order Upon Transfer Pursuant to 28 U.S.C. § 1407, ECF No. [4]. On February 4, 2016, the Court entered an Order Appointing Plaintiffs' Interim Class Counsel and, on February 26, 2016, set a schedule for Plaintiffs to file their Consolidated Amended Complaint and for Defendants to file any responsive pleadings or motions. Order Appointing Pls.' Interim Class Counsel (Feb. 4, 2016), ECF No. [76]; Order (Feb. 26, 2016), ECF No. [83]. On March 24, 2016, at the parties' joint request, the Court held a telephonic conference call on the record to discuss Plaintiffs' request to lift the discovery stay for the limited purpose of obtaining the material that Defendants provided to the Government in response to the Government's subpoenas. On March 30, 2016, the Court entered a Memorandum Opinion and Order denying Plaintiffs' request to lift the discovery stay. Mem. Op. & Order (Mar. 30, 2016), ECF No. [96]. On March 25, 2016, Plaintiffs filed their Consolidated Amended Class Action Complaint ("Complaint"). On May 11, 2016, Defendants filed their Motion to Dismiss

Plaintiffs' Consolidated Amended Complaint, which is now fully briefed.

B. Factual Background

For the purposes of the motion before the Court, the Court accepts as true the allegations in the Complaint. *See generally* Compl., ECF No. [91]. The Court does "not accept as true, however, the plaintiff's legal conclusions or inferences that are unsupported by the facts alleged." *Ralls Corp. v. Comm. on Foreign Inv. in United States.*, 758 F.3d 296, 315 (D.C. Cir. 2014). The Court recites the principal facts pertaining to the issues raised in the pending motion relying on the Complaint and undisputed and/or uncontroverted facts.

Defendants, American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), Southwest Airlines Co. ("Southwest"), and United Airlines, Inc. ("United"), are the four largest commercial air passenger carriers in the United States. Compl. ¶¶ 1, 23-26. In addition to the four named Defendants, Plaintiffs allege that U.S. Airways prior to its merger with American, Air Canada, and the International Air Transport Association ("IATA") willingly conspired with Defendants to unlawfully restrain trade. *Id.* ¶ 27.

Plaintiffs are purchasers of air passenger transportation for domestic travel directly from Defendants or their predecessors and/or through websites including Travelocity.com, Orbitz.com, Priceline.com, Expedia.com, and Flyfar.ca. *Id.* ¶¶ 11-22. Plaintiffs named in the Complaint include individuals who are residents of various states and the District of Columbia, a non-profit corporation, and a corporation. Plaintiffs seek classwide recovery, defining the putative class, with certain exceptions, as: "All persons and entities that purchased air passenger transportation services for flights within the United States and its territories and the District of Columbia from Defendants or any predecessor, subsidiary or affiliate thereof, at any time between July 1, 2011 and the present." *Id.* ¶ 142. Plaintiffs assert that they do not know the exact number of members in the putative class because such information is in control of Defendants but Plaintiffs believe that the number of Class members is in the millions and that Class members "are sufficiently numerous and geographically dispersed throughout the United States so that joinder of all Class members is impracticable." *Id.* ¶ 143.

Plaintiffs allege that Defendants colluded to limit capacity on their respective airlines in a conspiracy to fix, raise, maintain, and/or stabilize prices for air passenger transportation services within the United States, its territories, and the District of Columbia in violation of Sections 1 and 3 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 3), and that Plaintiffs suffered pecuniary injury by paying artificially inflated ticket prices as a result of this purported antitrust violation. *Id.* ¶¶ 1, 11-22. Plaintiffs allege that the conspiracy commenced in the first quarter of 2009 and continues until the present, and seek to recover treble damages for the period of July 1, 2011, to the present ("Class Period"). *Id.* ¶ 1. Defendants now move the Court to dismiss all of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1)

To survive a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its claim. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007). In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted). "At the motion to dismiss stage, counseled complaints, as well as pro se complaints, are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005). "Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (citations omitted).

B. Federal Rule of Civil Procedure 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint on the grounds that it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The Federal Rules of Civil Procedure require that a complaint contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *accord Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). Rather, a complaint must contain sufficient factual allegations that, if accepted as true, "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must construe the complaint in the light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers of Am. Empl. Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994). Further, in deciding a Rule 12(b)(6) motion, a court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint," or "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011) (citations omitted).

III. DISCUSSION

A. Plaintiffs Established Standing Under Article III of the U.S. Constitution

Pursuant to Article III of the Constitution, Defendants move to dismiss this action on the basis that this Court has no jurisdiction because Plaintiffs lack standing. "Article III of the Constitution limits the jurisdiction of federal courts to 'actual cases or controversies between proper litigants.'" *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 661 (D.C. Cir. 1996)). Because standing is a "threshold jurisdictional requirement," a court may not assume that Plaintiff has standing in order to proceed to evaluate a case on the merits. *Bauer v. Marmara*, 774 F.3d 1026, 1031 (D.C. Cir. 2014). A plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). "To establish constitutional standing, plaintiffs 'must have suffered or be imminently threatened with a concrete and particularized injury in fact that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.'" *Mendoza*, 754 F.3d at 1010 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, -- U.S. --, 134 S. Ct. 1377, 1386 (2014); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

"The 'irreducible constitutional minimum of standing contains three elements': injury in fact, causation, and redressability." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (quoting *Lujan*, 504 U.S.at 560-61). "Injury in fact is the 'invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* (quoting *Lujan*, 504 U.S. at 560) (alterations in original). "The 'causal connection between the injury and the conduct complained of' must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Id.* (quoting *Lujan*, 504 U.S. at 561). Finally, "it must be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* (quoting *Lujan*, 504 U.S. at 561).

Here, Plaintiffs allege that they purchased air passenger transportation for domestic travel directly from Defendants or their predecessors and/or through websites during the alleged conspiracy, that the fares were affected by the alleged conspiracy, and, as a result, that they paid artificially inflated ticket prices. Defendants argue that Plaintiffs have not established standing because they have failed to establish injury in fact. Specifically, Defendants argue that Plaintiffs must identify specific routes that were affected by the alleged conspiracy and plead that they purchased tickets on those specific routes, rather than simply pleading that they purchased tickets from Defendants during the alleged conspiracy. For the reasons described herein, the Court concludes that Plaintiffs sufficiently established their standing to bring this action.

Defendants assert that Plaintiffs acknowledge in their Complaint that: (1) the capacity of some routes increased during the class period; and (2) fares for some routes decreased during the class period. Def.'s Mot. at 42-43. In support of this assertion, Defendants cite to the following information in the Complaint: (1) Defendant Southwest's announcement in May 2015, that it increased available seat miles ("ASM")[2] by 7 to 8 percent in 2015, the majority of which was related to the acquisition of two gates at Dallas Love Field and plans to expand service at Houston Hobby airport, Compl. ¶ 116; (2) fares on certain routes where Defendants faced competition from discount carriers declined after the Department of Justice commenced an investigation into a number of airlines on June 30, 2015, *id.* ¶¶ 133-34; and (3) charts included with the caption "Average Airfares and The Lack of Competitive Pricing on *Various Routes*" that Plaintiffs claim demonstrate a divergence in fares starting in 2009 on routes where one of the Defendants was the largest carrier as opposed to routes where a non-Defendant airline was the largest carrier, *id.* ¶¶ 64-65. Defendants assert that these facts demonstrate an acknowledgement by Plaintiffs that only some routes were allegedly affected by the conspiracy.[3]

The Court rejects this narrow reading of the Complaint. Indeed, Plaintiffs point to two actions undertaken by Defendants in 2015, and generally present evidence that fares on routes starting in 2009 grew at different rates when a Defendant rather than a non-Defendant airline was the major carrier on the route. It is clear that Defendants misstate the gravamen of the Complaint by focusing on its inclusion of a subsection looking at "various" routes, while ignoring the

[2] "The term ASM is a common measurement of airline output that refers to one aircraft seat flown one mile, whether occupied or not." Compl. ¶ 76 n.38.

[3] Defendants also rely on facts not cited in the Complaint but contained in documents filed alongside their pleadings that they assert support the contention that Plaintiffs have alleged a conspiracy only as related to certain routes. The Court shall not consider the facts cited outside the Complaint by Defendants for the reasons described in greater detail *infra*.

Complaint's broader allegation of a national conspiracy. Plaintiffs' discussion of fares on some routes does not preclude its argument that the conspiracy affected the fares more generally within the market. While Defendants read the Complaint to indicate that these specific routes or fares were unaffected by the conspiracy, that is a mischaracterization of Plaintiffs' claim.

Here, Plaintiffs allege that Defendants violated § 1 of the Sherman Act by participating in a conspiracy affecting air passenger transportation services within the United States. Specifically, Plaintiffs' allegation is that Defendants conspired "to fix, raise, maintain, and/or stabilize prices for air passenger transportation services within the United States, its territories and the District of Columbia . . . by, *inter alia*, colluding to limit capacity on their respective airlines." *Id.* ¶ 1. The crux of Plaintiffs' claim is that Defendants colluded to restrict capacity growth and, as a result, airfares were artificially inflated. This claim is not limited to certain routes or city-pairs, as Defendants contend, nor as discussed further below are Plaintiffs required to plead specific routes or city-pairs allegedly affected by the conspiracy. Plaintiffs' allegation is that they suffered a pecuniary injury by paying artificially inflated ticket prices as a result of the conspiracy. This is sufficient to establish injury in fact for purposes of standing.[4] *See Osborn v. Visa, Inc.*, 797 F.3d

[4] For the purposes of establishing standing, Plaintiffs also are required to demonstrate an antitrust injury, or "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" O*xbow Carbon & Minerals LLC v. Union Pac. R.R.* ("*Oxbow II*"), 81 F. Supp. 3d 1, 6-7 (D.D.C. 2015) (quoting *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 862 (D.C. Cir. 2008)). While the parties' briefing focuses on whether Plaintiffs established injury in fact, the Court finds that Plaintiffs also meet the standing requirement of pleading an antitrust injury: (1) their purported injury, paying artificially inflated fares, is the type of injury that the Sherman Act was intended to prevent; and (2) the injury flows from Defendants' purported collusion to restrict capacity growth. *See Adrx Pharma., Inc. v. Biovail Corp. Intern.*, 256 F.3d 799, 806 (D.C. Cir. 2001) (noting that the antitrust standing inquiry incorporates a traditional injury-in-fact or threatened injury-in-fact analysis).

1057 (D.C. Cir. 2015), *cert. granted* – U.S. --, 136 S. Ct. 2543 (2016) (quoting *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005)) ("Economic harm, such as that alleged here, 'is a classic form of injury-in-fact.'"); *Oxbow II*, 81 F. Supp. 3d at 7 ("[P]laintiffs need only allege, as they have in the amended complaint, that they suffered damages as a result of the conspiracy in which defendants participated.").

The Court notes that in order to establish causation, Plaintiffs' conspiracy allegations rely on certain economic principles which Defendants seek to undercut in their motion. However, as the United States Court of Appeals for the District of Columbia Circuit recently explained, "A Rule 12(b)(1) motion . . . is not the occasion for evaluating the empirical accuracy of an economic theory." *Osborn*, 797 F.3d at 1065-66. Where, as here, "the economic facts alleged by the Plaintiffs are specific, plausible, and susceptible to proof at trial, they pass muster for standing purposes at the pleadings stage." *Id.* at 1066.

B. Plaintiffs Sufficiently Pled a Plausible Claim Pursuant to § 1 of the Sherman Act

The parties dispute whether Plaintiffs pled a plausible claim pursuant to § 1 of the Sherman Act. The Sherman Act prohibits any "contract, combination, . . . or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. "Section 1 [of the Sherman Act] applies only to concerted action that restrains trade." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010). As such, "[t]o make out a Section 1 claim, 'plaintiffs must allege: (1) that the defendants entered into some agreement, contract, combination, conspiracy, or other concerted activity; (2) that at least one defendant committed an overt act in furtherance of the conspiracy; and (3) that the agreement constituted an unreasonable restraint of trade in the relevant market in a manner that had an impact on interstate commerce.'" *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*

("*Oxbow I*"), 926 F. Supp. 2d 36, 42 (D.D.C. 2013) (quoting *Jung v. Ass'n Am. Med. Colls.*, 300 F. Supp. 2d 119, 157-58 (D.D.C. 2004)).

The Supreme Court of the United States in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 554 (2007), set forth the pleading requirements for a Section 1 claim under Federal Rule of Civil Procedure 8(a)(2). The Court explained, "Because § 1 of the Sherman Act 'does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy,' '[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express . . . .'" *Twombly*, 550 U.S. at 553 (internal citation omitted). Accordingly, "a claim [pursuant to § 1] requires a complaint with enough factual matter (taken as true) to suggest that [such] an agreement was made." *Id.* at 556.

An antitrust plaintiff may plead the existence of a conspiracy through direct and/or circumstantial evidence that reasonably tends to prove that the defendants "'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). "[D]irect evidence of concerted action . . . [includes] 'a document or conversation explicitly manifesting the existence of the agreement in question . . . .'" *Havens v. Mobex Network Servs., LLC*, 820 F.3d 80, 91 (3d Cir. 2016). "[D]irect evidence in . . . [the antitrust] context is 'explicit and requires no inferences to establish the proposition or conclusion being asserted.'" *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226 (4th Cir. 2004) (quoting *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003)). As such, "[d]irect evidence is extremely rare in antitrust cases and is usually referred to as the 'smoking gun.'" *Id.*

Circumstantial evidence in the antitrust context is evidence that "tends to exclude the possibility of independent action." *Monsanto Co.*, 465 U.S. at 768. In *Twombly*, the Court recognized that parallel business behavior is admissible circumstantial evidence from which a factfinder may infer an agreement. 550 U.S. at 553-54. However, evidence of parallel conduct without more is insufficient at the pleading stage to demonstrate an agreement as required under the Sherman Act. *Id.* at 554 ("The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."). Rather, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557. "To show conspiracy, therefore, plaintiffs must plead 'plus factors' that suggest collusion, in addition to merely alleging parallel conduct." *Oxbow I*, 926 F. Supp. 2d at 46-47. "The term 'plus factors' refers to circumstances demonstrating that the wrongful conduct 'was conscious and not the result of independent business decisions of the competitors.'" *Havens*, 820 F.3d at 91 (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999)). "Plus factors" must be evaluated holistically. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 424 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015), *cert. denied*, -- U.S. --, 136 S. Ct. 2485 (2016).

Here, Defendants contend that Plaintiffs failed to plead sufficient facts to demonstrate that there was parallel conduct among Defendants and, if there was parallel conduct, that this conduct was the result of an agreement between them. As discussed further *infra*, Defendants in their briefing seek to parse out each "plus factor" and consider individually whether each is sufficient to demonstrate collusion on Defendants' part. The Court declines to analyze Plaintiffs' allegations in this way as the Court must take the factual allegations in the complaint as a whole and accept them as true for the purposes of its analysis at this phase in the proceeding. *See, e.g.*, *SD3, LLC*, 801 F.3d at 425; *Haley Paint Co. v. E.I. Dupont De Nemours & Co.*, 804 F. Supp. 2d 419, 426 (D. Md. 2011); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 32-33 (D.D.C. 2008). Indeed, "[a]ctions that might seem otherwise neutral in isolation can take on a different shape when considered in conjunction with other surrounding circumstances." *SD3, LLC*, 801 F.3d at 425. As such, the Court first shall discuss the allegations in Plaintiffs' Complaint and shall analyze the sufficiency of these factual allegations in light of the relevant legal standard. Next, the Court shall address Defendants' arguments that Plaintiffs failed to demonstrate a plausible antitrust claim pursuant to § 1 of the Sherman Act. Finally, the Court shall address specific arguments raised by Defendant Southwest related to the sufficiency of Plaintiffs' claims only as applied to Southwest.

1. <u>Factual Allegations Set Forth in Complaint</u>

In their Complaint, Plaintiffs plead the nature of the alleged conspiracy as follows. Plaintiffs allege that Defendants conspired "to fix, raise, maintain, and/or stabilize prices for air passenger transportation services within the United States, its territories and the District of Columbia . . . by, *inter alia*, colluding to limit capacity on their respective airlines." Compl. ¶ 1. Plaintiffs further allege that during the conspiracy that spans from the first quarter of 2009 to the present time, "Defendants' airfares rose substantially compared to those of other domestic air carriers, despite stagnant or decreasing demand and declines in the cost of jet fuel." *Id.* Generally, Plaintiffs assert:

> The alleged conspiracy was carried out, *inter alia*, by repeated assurances by the executives of Defendants to each other that: (a) each of their companies is engaging in 'capacity discipline' (*i.e.*, reduction or relative stabilization of airline capacity); (b) this is a practice that has to be utilized by the industry as a whole; (c) it is good for the industry as a whole; and (d) it reflects the collective commitment of the Defendants' airline managers.

Id. ¶ 3. Plaintiffs cite to statements made during earning calls with analysts, at airline industry conferences as well as other conferences, and at meetings of the International Air Transport Association ("IATA")[5] that Plaintiffs claim were made in furtherance of the conspiracy. *Id.* Plaintiffs further allege that Defendants limited consumers' ability to compare fares and deterred potential competitive entry of foreign air passenger carriers in order to advance the conspiracy. *Id.* Plaintiffs assert that as a result of the conspiracy, airline capacity deviated from historical patterns, remaining largely stagnant or decreasing on an annual basis, and passengers were injured by paying higher airfares and facing a reduction in flight choices. *Id.* ¶ 4. The Court shall further expound below on the factual allegations in the Complaint that support these contentions.

As an initial matter, the parties dispute whether Plaintiffs alleged any direct evidence to support their claim that Defendants engaged in an antitrust conspiracy in violation of § 1 of the Sherman Act. The Court agrees with Defendants that the facts alleged in the Complaint are not direct evidence of a conspiracy as they do not explicitly demonstrate an express agreement between Defendants. However, as previously discussed, Plaintiffs are not required to plead direct evidence of a conspiracy. Rather, Plaintiffs may allege parallel conduct on the part of Defendants coupled with circumstantial evidence sufficient to demonstrate a plausible antitrust conspiracy claim. For

[5] IATA is an industry trade association to which Defendants American, Delta, and United belong. Compl. ¶ 113.

the reasons described herein, the Court finds that Plaintiffs sufficiently set forth circumstantial evidence to demonstrate a plausible claim. Moreover, Plaintiffs' Complaint sufficiently sets forth the specific time, place, and persons involved in the alleged conspiracy such that Defendants have fair notice of the claims against them. *See Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) (noting that pleading requirements include notifying defendants as to the allegations of who conspired, at what time, to do what).

Generally, Plaintiffs allege that as early as September 2003, the former Executive Director of IATA discussed the importance of focusing on capacity within the industry. Compl. ¶ 86 (citing statements made by Giovanni Bisignani from 2003, 2006, and 2010). The crux of Plaintiffs' claim is that in 2009, after the economy improved and jet fuel prices declined, Defendants made a conscious, joint decision not to return to the previous industry practice of adding airline capacity and decreasing fares. *Id.* ¶ 87. Rather, Plaintiffs posit that Defendants colluded to exercise "capacity discipline," the reduction or relative stabilization of airline capacity, as a mechanism for increasing profits. *Id.* ¶¶ 87, 3. This effort, Plaintiffs contend, was exercised collectively by industry members, supported by statements made by Defendants' executives, and resulted in a 10% reduction in capacity by United States airlines in 2009. *Id.* ¶ 88.

Plaintiffs advance several factual allegations that tend to exclude the possibility of independent action. Specifically, Plaintiffs' factual allegations can be divided into four main categories: (1) general allegations regarding the nature of the industry; (2) statements made by Defendants' executives and Defendants' participation in IATA; (3) economic evidence regarding capacity, airfares, and profits; and (4) allegations regarding Southwest's 2015 announcement. The Court shall address each in turn.

a. *General Allegations Regarding the Nature of the Industry*

Plaintiffs discuss certain aspects of the structure of the domestic airline passenger industry that they assert render the industry conducive to collusion. Plaintiffs allege that the domestic airline industry is an oligopoly with high barriers to entry due to government regulations of airports and gates, capital requirements for technology and equipment, and the nature of ticketing and reservation systems. Compl. ¶¶ 35, 47. Moreover, Plaintiffs point to the concentrated nature of the industry and the shareholders. Specifically, the Delta-Northwest, United-Continental, Southwest-AirTran, and American-U.S. Airways mergers altered the nature of the industry by reducing the number of major domestic air passenger carriers from ten to four within a decade. *Id.* ¶¶ 37-38. As a result of this consolidation, the four Defendant airlines control approximately 80% of the domestic air passenger seats. *Id.* ¶ 34. Furthermore, the industry is characterized by a concentration of common stockowners. Indeed, Defendant airlines' four largest stockholders are BlackRock, Inc., State Street Corporation, J.P. Morgan Chase & Co., Primecap, and Capital Group Companies. *Id.* ¶ 42.

Plaintiffs also note mechanisms within the industry that they contend facilitate the alleged conspiracy by allowing Defendants to coordinate their airfares, monitor the actions of their co-conspirators, and punish any co-conspirator that steps out of line. The Airline Tariff Publishing Company ("ATPCO") is owned by airlines including Defendants Delta, United, and American. The ATPCO provides all airlines with complete, accurate, and real-time access to every airline's published fare structure on every route. *Id.* ¶ 48. Airlines provide their pricing data to ATPCO, including fare base code, dollar amount, fare rules or restrictions, and first and last ticket date information. *Id.* ¶ 49. Any fare changes received by ATPCO are processed and disseminated to other airlines, including the Defendants, and ATPCO subscribers can generate detailed reports to monitor fare changes that are not yet available for sale to the public. *Id.* ¶ 50.

Plaintiffs also note that in the past, airlines have used cross-market initiatives ("CMIs") in situations when airlines compete on multiple routes to deter competitors from aggressively discounting fares. *Id.* ¶ 57. In this scenario, when an airline offers a discounted fare in one market, an affected competitor responds with a CMI or a discount in another market. *Id.* The purpose of the CMI is to cause the original discounting airline to withdraw its fare discount. *Id.* Plaintiffs also note the history of antitrust actions brought against the airlines. *Id.* ¶¶ 58-62.

While Plaintiffs' general allegations regarding the nature of the airline industry do not serve as conclusive proof of an antitrust conspiracy, the consolidation within the market, the concentration of common stockowners, Defendants' ability to monitor other airlines' fare structure and pricing, and past industry practice of using CMIs are all factors that the Court considers at this stage of the proceeding in reaching its determination as to whether Plaintiffs sufficiently pled a plausible antitrust conspiracy. *See, e.g.*, *Haley Paint Co.*, 804 F. Supp. 2d at 426 (relying in part on details of the titanium dioxide industry that facilitate collusion and market conditions favoring collusion); *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 631 (E.D. Pa. 2010) (considering the nature of the blood reagents market before the commencement of the alleged conspiracy); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1144-45 (N.D. Cal. 2009) (noting that high market concentration coupled with multiple and on-going business relationships, cross-licensing and joint-venture agreements, high barriers to entry, and homogeneity in products can be relied on as factors supporting an inference of collusion). As the Court noted earlier, none of these allegations are direct evidence of a conspiracy. However, as *Twombly* notes, this Court should consider the context in which the alleged conspiracy arises, and this information is pertinent to that inquiry. 550 U.S. at 557 (discussing the importance of considering allegations of parallel conduct in context).

b. *Statements by Defendants' Executives and Defendants' Participation in IATA*

Plaintiffs point to a series of statements made by Defendants' executives regarding "capacity discipline" from 2009 through 2015 in support of their conspiracy claim. Notably, Plaintiffs allege that the statements demonstrate that Defendants not only participated in capacity discipline but also advocated that such participation should be exercised collectively by industry members starting in 2009, a departure from past practice.

For instance, Plaintiffs cite to statements made in 2009 by Defendants' executive, including statements of: John Tague, President of Delta, during a third quarter earnings call; Kathryn Mikells, United's Senior Vice President and Chief Financial Officer ("CFO"), at a March 2009 industry summit hosted by Thomson Reuters; Mikells of United, Ed Bastian, President of Delta, and Grace C. Kelly, CEO of Southwest, at a March 10, 2009, industry conference hosted by J.P. Morgan; Tom Horton, CFO and Executive Vice-President of Finance & Planning for American, during an earnings call in July 2009; Bastian of Delta during December 2009; and Hank Halter, CFO of Delta, during a Morgan Stanley conference in December 2009. *Id.* Plaintiffs also cite to a host of other statements made by Defendants' executives during earnings calls, industry summits, industry conferences, and investment conferences from 2010 through 2015 regarding their individual commitment to capacity discipline as well as its role within the industry. *See generally id.* ¶¶ 91-106, 108-112.

In addition to statements made by Defendants' executives, Plaintiffs also note that three of four Defendants participate in the trade association IATA.[6] In 2015, IATA issued a report which discussed the consolidation of U.S. airlines and noted that airlines "have been very disciplined about capacity." *Id.* ¶ 113.

Plaintiffs emphasize that this focus on capacity discipline was a departure from prior practice within the industry. *Id.* ¶ 89. In support of this assertion, Plaintiffs provide an excerpt from an article discussing statements made by Defendants' executives at the Bank of America Merrill Lynch Investment Conference in June 2010, in light of the newly announced United/Continental Airlines merger. The cited article includes statements from Scott Kirby, U.S. Airways President prior to the U.S. Airways-American merger, Gerard Arpey, American Airlines' CEO, and Bastian of Delta, discussing the change in the industry. Specifically, Arpey stated, "[t]here are . . . hopeful signs that the industry has learned its lesson about keeping capacity growth in line with demand—and will continue to apply that lesson even as the economy comes back." *Id.* Kirby stated, "The industry, by and large, has CEOs with different views than the CEOs of yesteryear . . . . They are much more focused on returns and financial performance than they are on empire building, 'how big is my airline, what is my market share, how many cities do I fly to,'

[6] Plaintiffs also note the participation of three of Defendants' executives on the board of the trade group Airlines for America and the chief executives' participation in "Conquistadores del Cielo," a "secret club" of top aviation executives that meets, according to Plaintiffs, twice a year on an "off the record" basis. Compl. ¶ 114. While Plaintiffs point to no specifics about this conduct, they aver that "[t]hese venues provide abundant opportunities for the Defendants' executives to meet face to face and conspire on capacity reduction and pricing." *Id.* However, as Defendants note, "'[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations.'" *Osborn*, 797 F.3d at 1067 (*quoting Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981)).

etc. things can change in a hurry, but I don't think rapid capacity growth is going to become a problem in this industry, at least for the foreseeable future." *Id.* Bastian noted that consolidation within the industry would "allow[] us to manage the overall capacity levels in a better way." *Id.*

Indeed, these statements upon which Plaintiffs rely demonstrate two points that support the plausibility of their claim and, more specifically, the inference that Defendants' conduct was the result of an agreement. First, Defendants made public statements about their own commitment to capacity discipline as well as the importance of maintaining the capacity discipline within the industry. Defendants' discussion of the need for capacity discipline within the industry as a whole is notable because it involves more than a mere announcement of Defendant's own planned course of conduct. *See In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1362 (N.D. Ga. 2010) (discussing at the motion to dismiss stage that plaintiffs alleged more than mere price announcements because the executives' statements related to the allegation that "each Defendant signaled its willingness to cut capacity and increase prices if the other Defendant acted in concert"). Second, Defendants' statements concerning the focus on exercising capacity discipline commenced in 2009 and were a deviation from past business practices. *See id.* at 1360 ("Courts have . . . found that unlawful conspiracies may be inferred when collusive communications among competitors precede changed/responsive business practices, such as new pricing practices.").

c. *Economic Evidence Regarding Capacity, Airfares, and Profits*

Plaintiffs also provide information regarding capacity, airfares, and profits that they contend support their assertion that Defendants colluded to restrict capacity which resulted in higher airfares and increased profits. Moreover, Plaintiffs argue that these economic trends are not otherwise explained by market forces absent an agreement among Defendants.

Turning first to capacity, Plaintiffs provide information regarding load factors, a measurement of revenue passenger miles[7] divided by available seat miles, typically used by airlines to track capacity utilization. Compl. ¶ 76. Plaintiffs indicate that from 2005 through 2008, when there was substantially increasing demand, Defendants' annual load factors averaged approximately 80%. *Id.* In contrast, from 2009 through 2014, times of decreasing and steady demand and lower costs, Defendants' annual load factors averaged approximately 84%. *Id.* On September 22, 2015, the American Antitrust Institute ("AAI") sent a letter to the Department of Justice raising concerns of "coordinated conduct" within the airline industry and citing that domestic load factors for Defendant airlines increased from 76% to 86% between 2004 and 2014. *Id.* ¶ 77.

Plaintiffs also present economic evidence that they contend supports the conclusion that Defendants priced airfares differently from other airlines in the industry during the relevant time period, resulting in large profits. *Id.* ¶ 63. In support of this assertion, Plaintiffs present a chart reflecting the average fare per route and distinguishing between routes that a Defendant was the largest carrier and routes that a non-Defendant airline was the largest carrier from January 2003 through July 2015. *Id.* ¶ 64. The chart demonstrates what Plaintiffs contend is the result of the conspiracy that commenced during the first quarter of 2009. Specifically, prior to January 2009, the average fare per route when Defendant was the largest carrier was comparable to the average fare per route when another airline was the largest carrier on a particular route. *Id.* However, after

[7] "Revenue passenger miles" is "a term denoting how many of an airline's available seats are actually sold." Compl. ¶ 76 n.38.

January 2009, the chart displays a deviation between fares on routes that a Defendant was the largest carrier and routes when another airline was the largest carrier. *Id.* On routes where Defendant was the largest carrier, the chart shows increasingly greater than average fares as compared to city-pair routes where a non-Defendant airline was the largest carrier. *Id.*

Plaintiffs also provide a chart comparing the average quarterly growth rate in fares charged by the largest carrier on each route from the first quarter of 2003 through the fourth quarter of 2008, and between the first quarter of 2009 through the third quarter of 2015, when the Complaint was filed. *Id.* ¶ 65. The chart demonstrates that in the period prior to the commencement of the alleged conspiracy, airfare for both Defendants and non-Defendant airlines grew at approximately the same pace on routes where each was respectively the largest carrier. *Id.* Beginning in January 2009, the chart shows a departure from the previous trend, with airfares on routes which Defendant was the largest carrier growing at a much higher rate than airfares on routes which a non-Defendant airline was the largest carrier. *Id.*

More generally, Plaintiffs provide a chart based on data from the United States Producer Price Index that demonstrates an increase in prices of airfares from 2009 through January 2016. *Id.* ¶ 67. Plaintiffs assert that this general trend in increased prices cannot be explained by related increases in demand or an increase in jet fuel prices. Plaintiffs argue that "[a]s a matter of economics, all other things equal, falling demand would lead to falling prices and steady demand would lead to prices that do not change." *Id.* ¶ 73. However, Plaintiffs provide a chart demonstrating that the average number of daily passengers per route increased substantially from 2003 to 2008, fell from 2008 to 2009, remained steady from 2011 to 2013, and increased from 2013 to 2015. *Id.* Plaintiffs also allege that the increase in prices cannot be explained by jet fuel prices. *Id.* ¶ 74. As a chart provided by Plaintiffs demonstrates, jet fuel prices peaked in September 2008 at $3.91 per gallon and then plummeted to $1.19 per gallon in March 2009. *Id.* Since that time, the price of jet fuel has not reached its 2008 peak but rather rose from the March 2009 price and then decreased again, reaching 91 cents per gallon in January 2016. *Id.* Plaintiffs assert that this reduction in the cost of jet fuel should have caused airfares to decrease but instead, the prices increased during this period.

Plaintiffs also note that in addition to the increase in fares from 2009 to 2015, Defendants "unbundled" charges for certain services such as imposing fees for checked bags, cancellations of tickets, seat selections, blankets and pillows, carry-on bags, reservations made over the phone or in person, and in-flight food and beverage. *Id.* ¶ 78. The revenue from baggage and cancellation fees grew from $1.4 billion in 2007 to more than $6.5 billion in 2014. *Id.* These new ancillary fees were previously included in the price of airfare, which continued to rise even when these charges were unbundled. *Id.*

Plaintiffs argue that the result of these actions taken by Defendants is record profits in recent years. *Id.* ¶ 80. Indeed, Defendants earned a record $22 billion in net income in 2015, with American earning $7.6 billion, Delta earning $4.6 billion, Southwest earning $2.2 billion, and United earning $7.3 billion. *Id.* ¶ 81. Plaintiffs assert that these record profits can be attributed in part to the decrease in the cost of jet fuel. *Id.* ¶ 82. However, Plaintiffs argue that absent collusion, this trend would not otherwise occur. *Id.*

Here, Plaintiffs base their claims in part on some economic assumptions that they assert support the inference that the behavior within the industry is contrary to Defendants' self interest in the absence of collusion. *See Osborn*, 797 F.3d at 1065 (in discussing standing, noting that plaintiffs rely on certain economic assumptions about supply and demand that are provable at trial). As such, the Court shall consider these economic trends within the industry to the extent that the Court finds they provide some support for an inference of a conspiracy. *See, e.g., In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010) (considering "anomalous behavior" of defendants increasing prices in the face of steeply falling costs); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004) ("Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market."). In simplistic terms, Plaintiffs contend that absent collusion to restrict capacity, fares would decrease with decreased demand and decreased costs. Here, Plaintiffs allege that fares increased despite a decline in fuel costs, that there was a decreased and/or steady demand, and an increase in ancillary fees, and that Defendants received record profits as a result. While this behavior may be explained by other factors as Defendants note in their briefing, it is at least some evidence that supports Plaintiffs' claim that this trend was the result of Defendants' collusion to limit capacity growth.

d. *Allegations Regarding Southwest's 2015 Announcement*

Plaintiffs claim that while Defendants colluded to restrict capacity, Defendant Southwest's May 19, 2015, announcement of its 2015 capacity plans during the Wolfe Research Transport Conference, caused concern among its alleged co-conspirators and Defendant co-conspirators responded by emphasizing the importance of capacity discipline. Compl. ¶ 116. At the conference, Southwest CEO and Executive Vice President Tammy Romo stated that Southwest anticipated a 7 percent to 8 percent increase in capacity in 2015 with the majority of capacity related to the airline's expansion into Dallas Love Field. In response, John Rainey, United's former CEO, noted

United's commitment to capacity discipline and later indicated, "[A]t United we are very focused on capacity discipline, but we're not going to do it at the expense of United and to the benefit of others. The whole industry needs to have that level of discipline." *Id.* Plaintiffs point to other statements regarding capacity discipline made by Rainey during a presentation on June 4, 2015, at the Deutsche Bank Global Industrials & Basic Materials Conference, and statements made at the IATA Annual General Meeting from June 7 to 9, 2015. *Id.* ¶¶ 119-20. At the IATA meeting, Bastian of Delta indicated that Delta is "continuing with the discipline that the marketplace is expecting," and Parker of American noted that he thought everyone within in the industry had "learned their lessons" from past price wars. *Id.* ¶ 120. On June 11, 2015, Kelly of Southwest was quoted in a *New York Times* article stating, "We have taken steps this week to begin pulling down our second half to manage our 2015 capacity growth." *Id.* ¶ 122. Plaintiffs contend this action was taken after Defendant Southwest was criticized by its alleged co-conspirators following the announcement of its growth estimate for 2015. While this information is not conclusive to establish the existence of the conspiracy, Plaintiffs demonstrate that Southwest's announcement of its plans to grow capacity was linked, at least temporally, to other Defendants' executives continuing to discuss capacity discipline.[8]

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[8] Following this announcement by Southwest, Plaintiffs point to statements made by a United States Senator and the existence of a DOJ investigation to support their claim. Plaintiffs claim their position is supported by a letter written by United States Senator Richard Blumenthal to the Department of Justice in response to the IATA annual meeting urging an investigation into "apparent anti-competitive conduct potentially reflecting a misuse of market power, and excessive consolidation in the airline industry." Compl. ¶ 124. Plaintiffs also cite to the DOJ's civil investigation of Defendants' anticompetitive conduct that involved DOJ issuing civil investigative demands to Defendants on June 30, 2015, and the Attorney General of the State of Connecticut announcing a similar investigation into collusive activity within the airline industry. *Id.* ¶¶ 126, 129. The Court briefly mentions these assertions in the interests of completeness. However, the

e. *Plaintiffs Sufficiently Pled Their Claim*

In light of the factual allegations in the Complaint which this Court must accept as true for the purposes of the pending motion, Plaintiffs plead a plausible claim pursuant to § 1 of the Sherman Act. As discussed more fully below, Plaintiffs pled parallel conduct on the part of Defendants coupled with sufficient circumstantial evidence to raise a suggestion of a preceding agreement. Here, Plaintiffs allege that starting in the first quarter of 2009, Defendants colluded to limit capacity on their respective airlines and, as a result, the airfares rose during that period. Plaintiffs provide economic data that demonstrates this trend and at least tends to support their claim that Defendants' capacity decisions and the increase in airfares are not otherwise explained by other factors absent collusion. Moreover, Plaintiffs further demonstrate that this trend in limiting capacity was a departure from prior practice within the industry. Plaintiffs also point to specific statements made by specific executives of each of the companies that they assert were made as a result of and in furtherance of this agreement among Defendants. Plaintiffs also point to specific characteristics of the industry that render it conducive to collusion. The Court finds that the facts as alleged are sufficient to meet Plaintiffs' pleading requirement.

2. <u>Defendants' Arguments Regarding the Sufficiency of the Complaint</u>

Defendants raise three issues in their briefing that the Court shall address. First, Defendants allege that Plaintiffs failed to sufficiently plead their claim because Plaintiffs did not provide direct allegations of an agreement. Second, Defendants contend that Plaintiffs failed to allege Defendants engaged in parallel conduct and argue that the other factual allegations do not

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Court does not rely on them in reaching its ultimate determination of the sufficiency of the Complaint because it is the Court's view that they are not necessary to establish a plausible claim.

support the inference of an agreement. Finally, Defendants assert that the Court should consider other information provided in 39 documents attached as exhibits to their briefing in rendering its decision on the motion to dismiss. For the reasons described herein, the Court finds that these arguments are without merit.

a. *Plaintiffs' Direct Allegations of An Agreement*

Defendants first argue that Plaintiffs did not include direct allegations of an agreement including the formation, objective, or terms of the purported agreement.[9] Specifically, Defendants assert that Plaintiffs failed to specify the time, place, and persons involved in the alleged conspiracy as required under *Twombly*. *See* 550 U.S. at 565 n.10. Moreover, Defendants assert that Plaintiffs failed to define the object of the horizontal agreement and pled only general, vague claims about an agreement to "limit capacity" and fix prices for "air passenger transportation services within the United States." Defendants argue that Plaintiffs must plead with more specificity the precise behavior engaged in by Defendants to limit capacity and the specific routes that were affected by the alleged conspiracy.

As set forth in the discussion above, Plaintiffs provided sufficient details regarding the alleged agreement underlying the conspiracy. Plaintiffs define "capacity discipline" as the "reduction or relative stabilization of airline capacity." While it is true that Plaintiffs do not in their Complaint point to one specific meeting where the purported agreement was finalized, they are not required to make such an assertion. Indeed, as the United States District Court for the

[9] To the extent that Defendants assert that Plaintiffs must present direct evidence of the agreement, the Court rejects this argument because, as described above, Plaintiffs may satisfy their pleading requirement through circumstantial evidence including factual allegations of parallel conduct coupled with "plus factors."

Northern District of Georgia explained in *In re Delta/AirTran Baggage Fee Antitrust Litigation*:

> Plaintiffs need not allege the existence of collusive communications in "smoke-filled rooms" in order to state a § 1 Sherman Act claim. Rather, such collusive communications can be based upon circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways.

733 F. Supp. 2d at 1360; *see also Costco Wholesale Corp. v. Johnson & Johnson Vision Care, Inc.*, No. 3:15-cv-734-J-20JRK, 2015 WL 9987969, at *14 (M.D. Fla. Nov. 4, 2015) (same). For the reasons described above, Plaintiffs pled the formation, objective, or terms of the purported agreement with enough specificity to survive a motion to dismiss.

To the extent Defendants assert that Plaintiffs must provide a more specific or "industry-accepted definition" of capacity discipline, the Court notes that Plaintiffs provided several examples of Defendants' own executives using the term "capacity discipline" and a discussion of the term as used in the complaint filed by the Department of Justice in *United States v. U.S. Airways Group, Inc.*, No. 1:13-cv-01236 (D.D.C.). *See* Compl. ¶ 88 (quoting Tague of United, Mikells of United, Bastian of Delta, Horton of American, and Halter of Delta as discussing "capacity discipline" in 2009); *see also id.* ¶¶ 38-39 (quoting the complaint in *U.S. Airways Group, Inc.*, as alleging "capacity discipline"). Defendants' executives themselves noted that this emphasis on capacity discipline was a shift from prior practice within the industry.

Defendants also contend that Plaintiffs are required to plead specific routes or city-pairs that were affected by the conspiracy. Plaintiffs instead assert that the conspiracy had an industry-wide effect on prices and plead that the conspiracy affected air passenger transportation services within the United States. Defendants point to the decision of the United States District Court for the Northern District of California in *Malaney v. UAL Corporation* in support of its argument that the Court should reject a nationwide industry definition. *See* No. C 10-02858 RS, 2011 WL 6845773, at *1 (N.D. Cal. Dec. 29, 2011), *aff'd*, 552 F. App'x 698 (9th Cir. 2014). While the court in *Malaney* granted a motion to dismiss on the grounds that plaintiffs failed to provide a proper market definition for a Clayton Antitrust Act claim, the facts there are distinguishable from this action. First, *Malaney* involved an antitrust claim brought under the Clayton Act challenging the United and Continental airlines merger. As part of the claim pursuant to the Clayton Act, the plaintiffs were required to plead a viable relevant market in which the defendants had market power. *Id.* at *4. Second, as the *Malaney* court stressed, the plaintiffs had previously moved the court for a preliminary injunction and, as result, the parties in that case had already "conducted substantial fact and expert discovery, including depositions and document production, culminating in a two day evidentiary hearing." *Id.* at *1. One of the key issues addressed through the briefing and the hearing on the motion for a preliminary injunction was the issue of the market definition. *Id.* The court denied the request for a preliminary injunction finding that the plaintiffs had not established a viable market. *Id.* At the motion to dismiss phase, the plaintiffs continued to argue that a national market for air transportation was a legally adequate market definition. *Id.* at *4. The court disagreed, noting that the plaintiffs "already enjoyed ample opportunity to develop a substantial record on this question." *Id.*

In this case, Plaintiffs cite the United States District Court for the Northern District of Georgia's decision in *In re Domestic Air Transportation Antitrust Litigation* in support of their assertion that they have sufficiently pled a conspiracy affecting the air passenger transportation services within the United States. 137 F.R.D. 677, 687-88 (N.D. Ga. 1991). At the class certification stage of that case, the court expressly rejected the defendants' city-pair argument. *Id.*

at 686-88. Rather, relying on expert testimony regarding the nature of the industry, the court found "air passenger service [is] a standardized product consisting of the transport of a passenger from an origin to a destination aboard an aircraft." *Id.* at 687-88. As such, the court granted class certification for all persons who purchased domestic airline passenger tickets from one or more defendant airlines for air transportation on a single defendant airline to and/or from a defendant's hub during the relevant time period. *Id.* at 697. In light of the conflicting case law on this point, the Court agrees that Plaintiffs are not required to plead specific city-pairs, particularly at this juncture when discovery has not yet commenced.

In sum, as previously discussed, to the extent that Defendants argue that Plaintiffs must plead specific city-pairs that are affected by the conspiracy, the Court rejects this argument for the same reasons discussed in its analysis of Plaintiffs' standing. Specifically, Plaintiffs allege a system-wide conspiracy to limit capacity in order to drive up fares within the nationwide air passenger transportation market. As such, Plaintiffs are not required to demonstrate specific city-pairs that were alleged to have been affected by the exercise of "capacity discipline." Accordingly, the Court finds that Plaintiffs sufficiently pled the formation, objective, or terms of the purported agreement.

b. *Defendants' Parallel Conduct and Other Circumstantial Evidence*

Generally, Defendants in their motion parse out each of Plaintiffs' allegations and argue that each allegation in isolation is not sufficient to support an antitrust conspiracy claim. Defendants essentially ask the Court to engage in an analysis that is not proper at this point. Rather, this Court is tasked with reviewing the Complaint as a whole when determining whether the allegations are sufficient to survive a motion to dismiss. *See, e.g., In re Blood Reagents Antitrust*

Litig., 756 F. Supp. 2d at 629; *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008) ("[A] district court must consider a complaint in its entirety without isolating each allegation for individualized review."); *In re Flat Glass Antitrust Litig.*, 385 F.3d at 369 ("A court must look to the evidence as a whole and consider any single piece of evidence in the context of other evidence.").

Here, Plaintiffs sufficiently pled parallel conduct. Plaintiffs alleged that various executives from Defendant airlines made statements close in time regarding the exercise of capacity discipline and, in concert, with these statements a new trend of limited capacity growth occurred within the industry. As Plaintiffs acknowledge, Defendants did not reduce or limit capacity in identical amounts. However, Plaintiffs do not need to demonstrate that Defendants cut or limited capacity in exactly the same way in order to adequately allege parallel conduct. *See SD3, LLC*, 801 F.3d at 428-29 (rejecting the argument that parallel conduct needs to be exactly simultaneous or identical, or that defendants need to move in relative lockstep to achieve their anticompetitive ends); *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d at 630 ("Plaintiffs are not required to plead simultaneous price increases—or that the price increases were identical— in order to demonstrate parallel conduct."); *In re Baby Food Antitrust Litig.*, 166 F.3d at 132 (recognizing that parallel pricing permits pricing within an agreed-upon range, but does not require uniform pricing). Rather, Plaintiffs demonstrate that Defendants' executives made statements not only about their own exercise of capacity discipline but also about the importance of the practice within the industry starting in 2009. Starting in 2009, the industry experienced limited capacity growth. Notably, as Defendants' executives acknowledged, this restriction on growing capacity was a marked change within the industry. The Court is satisfied that at this stage, Plaintiffs sufficiently pled parallel conduct.

Plaintiffs also provided a host of other factual allegations that tend to exclude the possibility of independent action on the part of Defendants. Indeed, as discussed more fully above, Plaintiffs' factual allegations can be divided into four main categories: (1) general allegations regarding the nature of the industry; (2) statements made by Defendants' executives and Defendants' participation in IATA; (3) economic evidence regarding capacity, airfares, and profits; and (4) allegations regarding Southwest's 2015 announcement. While Defendants provide alternative explanations for these undertakings, the Court finds at this stage of the litigation that it can reasonably infer the existence of a conspiracy, and, as such, the Court shall not weigh Plaintiffs' reasonable interpretation of these factual allegations against Defendants' alternative interpretation. *See Twombly*, 550 U.S. at 556 ("[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'"); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 782 (2d Cir. 2016) ("[A]t the motion-to-dismiss stage, appellants must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, *even if* the facts are susceptible to an equally likely interpretation.") (emphasis in original); *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33, 45 (1st Cir. 2013) ("[W]e may at this early stage only accept as true all factual allegations contained in a complaint, make all reasonable inferences in favor of the plaintiff, and properly refrain from any conjecture as to whether conspiracy allegations may prove deficient at the summary judgment or later stages.").

c. *Defendants' Exhibits to Their Briefing*

Defendants also seek to undercut the Plaintiffs' factual allegations by providing as exhibits to their Motion to Dismiss, documents cited by Plaintiffs in their Complaint and other documents not cited by Plaintiffs. Defendants argue that the Court should consider the full text of these exhibits in ruling on the motion to dismiss. Specifically, Defendants attached 39 exhibits to the briefing on their pending motion that they assert the Court should consider. The exhibits include: 34 documents that are cited by Plaintiffs in their Complaint, but not attached thereto; and five additional documents not cited by Plaintiffs in their Complaint.

In deciding a Rule 12(b)(6) motion, the Court is limited to considering facts alleged in the complaint, any documents attached to or incorporated in the complaint, matters about which the court may take judicial notice, and matters of public record. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997); *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 n.6 (D.C. Cir. 1993). Defendants argue that the Court should consider facts outside of those cited in the Complaint in some instances by virtue of the incorporation-by-reference doctrine, and in other instances because these are facts about which the Court should take judicial notice. Pursuant to Federal Rule of Civil Procedure 10(c), plaintiffs may attach exhibits to a complaint and the exhibit is considered "a part of the pleading for all purpose." Fed. R. Civ. P. 10(c). "Incorporation by reference can also amplify pleadings where the document is not attached by the plaintiff, but is 'referred to in the complaint and [] integral to [the plaintiff's] claim.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015) (quoting *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004)). However, the United States Court of Appeals for the District of Columbia Circuit has recognized the limits of the incorporation-by-reference doctrine. Indeed, "Rule 10(c) 'does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply because the documents were attached to the complaint to support an alleged fact.'" *Id.* (quoting *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 455 (7th Cir. 1998)). "When considering incorporation, it is necessary to consider 'why a plaintiff attached the documents, who authored the documents, and the reliability of the documents.'" *Id.* at 1133-34 (quoting *N. Ind. Gun & Outdoor Shows, Inc.*, 163 F.3d at 455). Moreover, "[i]f a document itself comes before the court *only as an attachment to the defendant's motion to dismiss*, it may not be appropriate for the court to treat the entire document as incorporated into the complaint." *Id.* at 1133 (emphasis added).

With respect to judicial notice, a court may consider matters about which the court may take judicial notice including, in appropriate circumstances, records in related cases, without converting the motion to dismiss into a motion for summary judgment. *See Dupree v. Jefferson*, 666 F.2d 606, 608 n.1 (D.C. Cir. 1981). However, the rule still holds that judicial notice is restricted to, in relevant part, "fact[s] that [are] not subject to reasonable dispute because [they] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Defendants first provide articles, industry reports, transcripts from earning calls, pleadings filed in other matters, and filings made with the Securities and Exchange Commission that they assert should be incorporated by reference because they were cited by Plaintiffs in their Complaint. Def.'s Mot., Exs. A-D, G-M; Def. Southwest's Supp. Br., Exs. 1-18, 21-24, Def.'s Reply, Exs. N-O. Defendants assert the Court should consider other information in these documents not cited in the Complaint because "plaintiffs' conclusory allegations of parallel 'capacity reductions' are contradicted by other allegations in the complaint . . . ." Def.'s Mot. at 18; *see also id.* at 11 n.4. Moreover, Defendants argue that "Plaintiffs' Complaint is constructed in large part out of selective quotations drawn from third-party articles; take those away and there would be almost nothing left in the pleading." Def.'s Reply at 3. The incorporation-by-reference of a document is inapplicable in this instance. The cited documents do not "'form . . . the basis for a claim or part of a claim,'" such as an authentic copy of a contract underlying a complaint asserting a breach of that contract. *See Banneker,* 798 F.3d at 1133 (quoting *Carroll v. Yates,* 362 F.3d 984, 986 (7th Cir. 2004)). As such, the Court finds that the documents are not "integral" to Plaintiffs' claims in that they were merely cited as the source of certain factual allegations within the Complaint. *See Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir. 1985) ("[L]imited quotation does not constitute incorporation by reference."). Indeed, Rule 10(c) does not require a plaintiff to adopt every word in a cited document as true for pleading purposes. Here, the Court declines to consider the other facts in the documents attached to Defendants' pleadings under the incorporation-by-reference doctrine.

Defendants also appear to request that the Court take judicial notice of the 34 documents cited in the Complaint as well as five other documents attached as exhibits to their pleadings but not cited in the Complaint. These documents include three articles, a Competitive Impact Statement filed by the government in another case, and a press release issued by the Department of Justice. Def.'s Mot., Exs. E, F; Def. Southwest's Supp. Br., Exs. 19, 20, 23.[10] In *Twombly*,

[10] From a review of the Complaint, it appears Defendants' Exhibits E and F were not cited by Plaintiffs, although Defendants do not expressly note this in their briefing. Moreover, while Defendant Southwest only expressly requests that the Court take judicial notice of its Exhibits 19 and 20, Exhibit 23 also does not appear to be cited in the Complaint. As such, for the purposes of its analysis, the Court only considers whether it should take judicial notice of these documents because the incorporation-by-reference doctrine is inapplicable. Southwest appears to argue the Court should consider Exhibit 23 under the incorporation-by-reference doctrine because the article includes the same quotation from Southwest's Kelly that was cited by Plaintiffs in their Complaint although attributed to a different source. Def. Southwest's Supp. Br. at 9 n.24. The Court rejects this argument as Southwest has not provided any support for its assertion that the Court can

the Supreme Court suggested that a district court may take notice of "the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn." *Twombly*, 550 U.S. at 569 n.13. Here, however, the Court declines to adopt this approach given the purpose for which Defendants seek to introduce the documents. *Cf. In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 740 n.31 (E.D. Pa. 2011) (noting the suggestion in *Twombly* "appears in that case in relation to a narrow factual context where a *Chicago Tribune* article reported on a defendant-speaker's thoughts on a matter that were only selectively excerpted in the complaint."). Indeed, in this case, Defendants provide the documents in order to present new factual allegations to counter the factual allegations underlying Plaintiffs' claim as set forth in the Complaint. *See Sandza v. Barclays Bank PLC*, 151 F. Supp. 3d 94, 113 (D.D.C. 2015), *appeal dismissed* (Mar. 7, 2016) (taking judicial notice of the *existence* of news articles but not accepting these articles for the truth of their assertions). In essence, Defendants ask the Court to consider all the facts in the Complaint and the underlying documents provided as exhibits to their briefing and make factual determinations after weighing and considering the facts relied upon by each party. This is a proper inquiry to conduct when addressing a motion for summary judgment, rather than a motion to dismiss when the Court is tasked with accepting all factual allegations in the Complaint as true. Moreover, other than asserting that the Court should take notice of these facts, Defendants do not set forth how each document at issue satisfies the requirements of Federal Rule of Evidence

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consider a document *not cited* in the Complaint under the incorporation-by-reference doctrine, particularly in light of the fact that Plaintiffs did credit a different article as the source of the quotation at issue. Moreover, the Court does not find that the one cited quotation within the Complaint is integral to the Plaintiffs' claim such that the entirety of the uncited article should be considered by the Court under the incorporation-by-reference doctrine.

201. Fed. Evid. R. 201(b) (permitting judicial notice as to "fact[s] that [are] not subject to reasonable dispute because [they] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). As such, the Court shall not consider other information within those documents when reaching its decision on the Motion to Dismiss.[11]

3. Southwest's Supplemental Arguments Regarding the Sufficiency of the Complaint

Defendant Southwest filed a supplemental brief arguing that Plaintiffs failed to satisfy their pleading requirements specifically as applied to Southwest. Indeed, Plaintiffs bear the burden of "alleging that each defendant participated in or agreed to join the conspiracy and played some role in it." *Jung*, 300 F. Supp. 2d at 163. Southwest seeks to distinguish itself from the other Defendants by noting that it operates under a different business model, including that it: operates under a point-to-point network; employs an all-inclusive pricing model, a single class of service, few ancillary fees, and no checked bag fees for up to two bags; exclusively sells tickets through its website and its own telephone reservation agents; and utilizes only one type of aircraft with a seat capacity ranging from 122 to 175 seats. Defendant Southwest also argues that the documents cited by Plaintiffs from the Department of Justice recognize Southwest as a disruptive competitor within the industry. Defendant Southwest further takes issue with Plaintiffs' reliance on its 2015 statements regarding its plans to increase capacity, arguing that its CEO announced on May 28, 2015, that Southwest intended to increase capacity around 7 percent in 2015, and reiterated the plan to grow 7 to 8 percent after the alleged backlash from the executives of the other Defendant

[11] To the extent that the Court declines to take judicial notice of certain documents provided by Defendant Southwest in its supplemental brief, the Court shall still consider Southwest's arguments underlying its request for judicial notice of those documents.

airlines.

Here, Plaintiffs alleged sufficient facts specific to Defendant Southwest to establish a plausible claim that Southwest had a conscious commitment to the alleged common scheme designed to achieve an unlawful objective. Specifically, Plaintiffs allege that in 2001, Southwest stopped utilizing ATPCO, the system that allows airlines to monitor and analyze the fares of its competitors, but once again began filing its fares with ATPCO in August 2008. Compl. ¶ 55 n.27. At the commencement of the alleged conspiracy in 2009, Southwest's Kelly stated, "[w]e are reducing our capacity . . . our schedule reductions were in effect as of January." *Id.* ¶ 88. In 2010, Laura Wright, Southwest's CFO and Senior Vice-President of Finance stated, "[n]o question, if there's a lot of capacity discipline in the market, that will -- that should help yields as well." *Id.* ¶ 91. In 2010, Wright also noted that Southwest had nearly an 8% reduction in capacity. *Id.* ¶ 112 n.112. In 2011, Wright indicated that Southwest's capacity would remain flat or slightly down in 2012. *Id.* ¶ 96. In 2012, Wright also noted, Southwest's "2012 combined available seat capacity will be relatively flat with our 2011 combined capacity." *Id.* ¶ 112 n.112. In 2012, Southwest also was purported to have launched two of the three fare increases during one quarter that year. *Id.* ¶ 71. In 2014, Southwest's Romo stated, "[T]he industry as a whole has enjoyed capacity discipline, which I think is good all the way around, including for Southwest." *Id.* ¶ 106. In 2014, Romo also noted that Southwest "continue[d] to have a disciplined growth strategy with flat year-over-year ASM [available seat mile] capacity in 2014." *Id.* ¶ 112 n.112. In 2015, Southwest had a net income of $2.2 billion. *Id.* ¶ 81.

Turning to the 2015 Southwest capacity announcement, Romo announced on May 19, 2015, at the Wolf Research Transport Conference: "[W]ith the additional two gates that we have acquired at Dallas Love Field, and our plans to expand service at Houston Hobby, our full year 2015 available seat miles falls in the 7% to 8% range, year-over-year. And so, again, the majority of that capacity is related to our rapid and very successful expansion out of Dallas Love Field." *Id.* ¶ 116. In response to a statement made by an industry analyst at the same conference, Romo stated, "[W]e're very focused on capacity, doing what's right of course, for the Southwest shareholders. What we want to do is, enable lot of flexibility in our fleet plans. I think the story for 2015 is really straightforward, and it is largely a Love Field story." *Id.* On June 11, 2015, the *New York Times* published an article quoting Kelly as indicating, "'We have taken steps this week to begin pulling down our second half 2015 to manage our 2015 capacity growth . . ." *Id.* ¶ 122. The Complaint also alleges that from 2013 to 2015, the seven shareholders who controlled 60 percent of United also controlled 22.3 percent of Southwest as well as 27.5 percent of Delta.[12]

The Court considers these facts in addition to the facts alleged in the Complaint that apply equally to all Defendants, including the general trend of higher airfares, increased profits, and decreasing jet fuel costs. Upon review of these facts, the Court concludes that the Complaint sets forth a plausible claim that Southwest was a participant in the alleged conspiracy. Indeed, as Plaintiffs point out, "It is not necessary to plead that each defendant had a role in 'every detail in the execution of the conspiracy . . . to establish liability, for each conspirator may be performing different tasks to bring about the desired result.'" *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980). Here, Southwest's executives made statements regarding

[12] The Court notes that Defendant Southwest properly asserts that Southwest is not a member of IATA. The Complaint does allege that Southwest's Kelly is a member of the Conquistadores del Cielo. *Id.* ¶ 114; *see also supra* n.4.

the importance of capacity discipline both with respect to Southwest itself and within the industry starting in 2009, and the information regarding capacity follows the industry trend with the exception of the 2015 announcement. Southwest again began utilizing ATPCO shortly before the alleged start of the conspiracy. Moreover, Southwest also had some common shareholders with other Defendants. While it is true that Southwest is distinguishable in some ways from the other Defendants, Southwest's arguments regarding its all-inclusive pricing model, exclusive sale of tickets through its website and reservation agents, and its seating capacity on its aircrafts does not exclude the possibility that Southwest was a participant in the alleged conspiracy. Indeed, Plaintiffs' assertions about the increased use of ancillary fees and ticket sales through third-party vendors was information provided to support its assertion that Defendants' actions were not the result of independent business behavior. However, these allegations did not serve as a separate basis for a conspiracy claim. Plaintiffs' conspiracy claim centers around the reduction or limiting of capacity on flights resulting in increased fares. The fact that Southwest has a limited ability to reduce the number of seats on its aircrafts similarly does not preclude its ability to participate in the scheme. Indeed, Plaintiffs pointed to specific statements made by Southwest's executive indicating that the airline was reducing capacity despite this fact.

In sum, the Court concludes that Plaintiffs adequately established standing to bring this claim and pled a plausible claim pursuant to § 1 of the Sherman Act with respect to each Defendant. Accordingly, the Court shall deny Defendants' request that the Court dismiss the Complaint. The Court notes that it does not reach this holding lightly, particularly in light of the high cost of discovery in antitrust cases. *See Twombly*, 550 U.S. at 557-60. However, Plaintiffs met their burden at the motion to dismiss phase and are entitled to proceed. The Court shall require

Defendants to file an Answer to the Complaint by November 28, 2016. By separate order, the Court shall set this matter for an Initial Scheduling and Case Management Conference.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' [106] Motion to Dismiss Plaintiffs' Consolidated Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: LIQUID ALUMINUM SULFATE ANTITRUST LITIGATION	Civil Action No. 16-md-2687 (JLL) (JAD) **CONSOLIDATED AMENDED <u>COMPLAINT</u>**

Plaintiffs Central Arkansas Water, City of Charlotte, North Carolina, City and County of Denver, Colorado, acting by and through its board of Water Commissioners, Denver, Colorado, Flambeau River Papers, LLC, City of Greensboro, North Carolina, Mobile Area Water and Sewer System, City of Rochester, Minnesota, City of Sacramento, California, SUEZ Water Environmental Services Inc., SUEZ Water New Jersey Inc., SUEZ Water Princeton Meadows Inc., SUEZ Water New York Inc., SUEZ Water Pennsylvania Inc., and City of Texarkana, Arkansas and City of Texarkana, Texas, d/b/a Texarkana Water Utilities, by way of Consolidated Amended Complaint against Defendants, say:

I. NATURE OF ACTION

1. This is an antitrust class action arising from a conspiracy among Defendants, as identified below, to allocate territories and/or not to compete for each other's historical business by rigging bids for, allocating customers and fixing, stabilizing, and maintaining the price of liquid aluminum sulfate ("Alum") sold in the United States. This Consolidated Amended Complaint is filed pursuant to the Court's Orders dated April 8, 2016 (Docket Entry 139), April 26, 2016 (Docket Entry 153) and July 13, 2016 (Docket Entry 216).

2. Alum is a coagulant used to remove impurities and other substances from water. It hydrolyzes to form insoluble precipitates, which aid in the removal of tiny particles that cannot

be easily filtered or are too small to settle. Essentially, it aggregates small particles of impurities into larger particles that fall to the bottom of a vessel for removal or are filtered out of the water.

3. This lawsuit is brought as a class action on behalf of all entities and persons that purchased Alum directly from one or more of the Defendants from January 1, 1997 through at least February 2011 ("Class Period"). The named Plaintiffs and Class here include public bodies and private water companies, which use Alum in their water and wastewater treatment processes, and paper and pulp manufacturers, which uses Alum to remove impurities from the water used to make paper.

4. During the Class Period, Defendants implemented their Alum conspiracy through a number of mechanisms. Defendants agreed to "stay away" from each other's "historical" customers and territories. The documentary evidence (which includes specific and detailed communications between and among Defendants' executives and employees) shows that Defendants operated on the shared understanding that it would be, in their own words, "***better business for everyone to work together instead of competing and ruining the market price***."

5. Defendants regularly met and spoke throughout the Class Period, creating an industry culture where there was no inhibition about discussing customer allocation and prices for Alum. Phone records and emails between top executives at the Defendant companies and their co-conspirators demonstrate that they furthered the conspiracy by (a) meeting or otherwise communicating to discuss their respective Alum businesses, including the prices quoted or bid to their customers, (b) agreeing to submit intentionally high "throw-away" bids to a particular customer to ensure that their "competitor," the existing seller to that customer, would continue to "win" that customer's business (or to help that "competitor" raise the prices paid by that customer), and (c) in instances where they inadvertently submitted a winning bid or price quote

against a nominal "competitor," withdrawing the inadvertently winning bid or price quote, returning the customer to the original supplier the following year, or allowing that "competitor" to win business from another customer.

6. As a result of these efforts, Defendants were able to raise or maintain the price of Alum at supra-competitive levels. Data on bids produced to Plaintiffs in discovery confirms that bidding throughout the Class Period was infected by Defendants' collusion.

7. The DOJ is likewise investigating Defendants' conspiracy "not to compete for each other's historical business by rigging bids, allocating customers and fixing the price for liquid aluminum sulfate." On June 21, 2016, Defendant GEO pled guilty in connection with the conspiracy to rig bids and allocate customers for, and to fix the price of, Alum supplied to municipalities and pulp and paper manufacturers in the United States. As a condition of its guilty plea, GEO agreed to pay a fine of $5,000,000. Pursuant to 15 U.S.C. § 16(a), GEO's guilty plea is prima facie evidence of its liability in this civil action. Defendant Chemtrade, the current parent of GenChem, publicly disclosed that it "is cooperating with the investigation and has the benefit of the conditional amnesty and a leniency 'marker' from the U.S. Department of Justice" Critically, the DOJ only affords such amnesty where the leniency applicant admits there is evidence suggesting that a criminal violation of the antitrust laws occurred. Additionally, on October 27, 2015, Defendant Frank A. Reichl, a former executive of GenChem, pled guilty for his role in the conspiracy. Defendant Reichl admitted that he "did knowingly and intentionally conspire and agree with others not to compete for each other's historical business by rigging bids, allocating customers and fixing the price for liquid aluminum sulfate." Defendant Reichl also admitted that he and others he supervised and co-conspirators did submit "intentionally losing bids … in order for the intended winner to be awarded the contract," and that "that

agreement came about as a result of meetings and conversations…that [he] had with [his] co-conspirators in which [he] discussed each other's liquid aluminum sulfate business." In addition, Defendants Vincent J. Opalewski (a former GenChem executive) and Brian C. Steppig (a former GEO executive) have been indicted.

II. PARTIES

A. Plaintiffs

8. Plaintiff Central Arkansas Water is a consolidated water system created and existing under the Consolidated Waterworks Authorization Act, Act 982 of the 83rd General Assembly of the State of Arkansas, with its principal place of business at 211 East Capital Avenue, Little Rock, Arkansas.

9. Plaintiff City of Charlotte, North Carolina ("Charlotte") is a municipal corporation chartered by the State of North Carolina. Its principal place of business is the Charlotte-Mecklenburg Government Center, 600 East Fourth Street, Charlotte, North Carolina.

10. Plaintiff City and County of Denver, Colorado, acting by and through its Board of Water Commissioners, ("Denver Water") is a municipal corporation of the State of Colorado with its principal place of business at 1600 West 12th Avenue, Denver, Colorado.

11. Plaintiff Flambeau River Papers, LLC ("Flambeau") is a Wisconsin limited liability company with its principal place of business at 200 1st Avenue North, Park Falls, Wisconsin.

12. Plaintiff City of Greensboro, North Carolina ("Greensboro") is a municipal corporation chartered by the State of North Carolina with its principal place of business at 300 West Washington Street, Greensboro, North Carolina.

13. Plaintiff Mobile Area Water and Sewer System ("Mobile") is a municipal authority created under the laws of the State of Alabama with its principal place of business at 4725 Moffett Road, Mobile, Alabama.

14. Plaintiff City of Rochester, Minnesota ("Rochester") is a municipal corporation of the State of Minnesota, with its principal place of business at 201 4th Street SE, Rochester, Minnesota.

15. Plaintiff SUEZ Water Environmental Services Inc. is a Delaware corporation with its principal place of business in Paramus, New Jersey. Plaintiff SUEZ Water New Jersey Inc. is a New Jersey corporation with its principal place of business in Paramus, New Jersey. Plaintiff SUEZ Water Princeton Meadows Inc. is a New Jersey corporation with its principal place of business in Plainsboro, New Jersey. Plaintiff SUEZ Water New York Inc. is a New York corporation with its principal place of business in West Nyack, New York. Plaintiff SUEZ Water Pennsylvania Inc. is a Pennsylvania corporation with its principal place of business in Harrisburg, Pennsylvania. These entities are collectively referred to as "SUEZ" herein.

16. Plaintiff City of Sacramento, California ("Sacramento") is a municipal corporation under the laws of the State of California with its principal place of business at 915 I Street, Sacramento, California.

17. Plaintiffs the City of Texarkana, Arkansas and the City of Texarkana, Texas, d/b/a Texarkana Water Utilities ("Texarkana"), are, respectively, municipal corporations chartered by the State of Arkansas and Texas. The two cities jointly own and operate Texarkana Water Utilities, which is an unincorporated entity that manages and operates the cities' integrated water and sewer systems.

18. Plaintiffs each directly purchased Alum from one or more of the Defendants during the Class Period. As a direct and proximate result of the unlawful conduct and price-fixing conspiracy of Defendants alleged herein, Plaintiffs and other members of the Class have paid more during the Class Period for Alum than they otherwise would have paid in a competitive market and have therefore been injured in their respective business and property. Plaintiffs seek damages for the inflated Alum prices they paid as a result of Defendants' illegal conduct.

B. Corporate Defendants

1. General Chemical

19. During the Class Period, Defendants General Chemical Corporation, General Chemical LLC, and, General Chemical Performance Products LLC (collectively, GenChem) manufactured and sold Alum and other water treatment chemicals for use by municipalities and pulp and paper plants.

20. Defendant General Chemical LLC was a limited liability company existing under the laws of Delaware, with its principal place of business at 90 Halsey Street, Parsippany, New Jersey.

21. Defendant General Chemical Corporation was a Delaware corporation with its principal place of business at 90 Halsey Street Parsippany, New Jersey.

22. Defendant General Chemical Performance Products, LLC was a limited liability company existing under the laws of Delaware, with its principal place of business at 90 Halsey Street Parsippany, New Jersey.

23. Until January 2014, the GenChem entities were part of a holding company, GenTek, Inc. On or about October 11, 2002, GenTek filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the District of Delaware, including bankruptcy filings on

behalf of its subsidiaries, including GenChem. Effective October 7, 2003, GenTek and GenChem emerged from bankruptcy under a plan of reorganization. After emerging from bankruptcy, GenChem reaffirmed its participation in the conspiracy through specific post-bankruptcy actions taken by GenChem in furtherance of the conspiracy, as alleged below. GenChem also reaffirmed its participation in the conspiracy in part by continuing to engage in the conduct described herein with respect to Alum.

24. GenChem participated in the conspiracy alleged herein throughout the Class Period through the actions of GenChem's senior executives.

25. In approximately January 2014, Defendants Chemtrade Chemicals Corporation, Chemtrade Chemicals US LLC, and Chemtrade Solutions, LLC (collectively, "Chemtrade") absorbed GenChem, and assumed all rights and obligations of GenChem in a transaction valued at approximately $860 million. As the legal successor in interest to GenChem, Chemtrade assumed the liability for damages caused by GenChem's participation in the conspiracy to fix prices and rig bids for Alum.

26. Chemtrade has publicly disclosed that it "is cooperating with the [DOJ] investigation and has the benefit of the conditional amnesty and a leniency 'marker' from the U.S. Department of Justice" Prior to Chemtrade's acquisition of GenChem, GenChem received conditional amnesty from the Department of Justice in connection with the investigation. The DOJ grants conditional amnesty only where the leniency applicant admits there is evidence suggesting that a criminal violation of the antitrust laws occurred.

27. Defendant Chemtrade Chemicals Corporation is a Delaware corporation, with its principal place of business at 90 E. Halsey Road, Parsippany, New Jersey, and is a wholly

owned and controlled subsidiary of Defendant Chemtrade Holding Partnership. It is a successor-in-interest to GenChem.

28. Defendant Chemtrade Chemicals US LLC is a limited liability company organized under Delaware law, with its principal place of business at 90 E. Halsey Road, Parsippany, New Jersey. It is a wholly owned and controlled subsidiary of Defendant Chemtrade Chemicals Corporation and a successor-in-interest to GenChem.

29. Defendant Chemtrade Solutions, LLC is a limited liability company organized under Delaware law, with its principal place of business at 90 E. Halsey Road, Parsippany, New Jersey. It is a wholly owned and controlled subsidiary of Defendant Chemtrade Chemicals Corporation and a successor-in-interest to GenChem.

2. GEO

30. Defendant Geo Specialty Chemicals Inc. ("GEO") is a private corporation with its principal place of business at 340 Mathers Road, Ambler, Pennsylvania. GEO was founded in 1993 and manufactures and sells water treatment chemicals, including Alum. On June 21, 2016, GEO pled guilty for its role in the conspiracy and agreed to pay a $5 million fine.

31. On or about March 18, 2004, GEO filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the District of New Jersey. Effective December 20, 2004, GEO emerged from bankruptcy under a plan of reorganization. GEO participated in the conspiracy alleged herein throughout the Class Period through the actions of GEO's senior executives. After emerging from bankruptcy, GEO reaffirmed its participation in the conspiracy through specific post-discharge actions taken by GEO in furtherance of the conspiracy, as alleged below. GEO also reaffirmed its participation in the conspiracy in part by continuing to engage in the conduct described herein with respect to Alum.

3. Southern Ionics

32. Defendant Southern Ionics, Inc. ("Southern Ionics") is a Mississippi corporation with its principal place of business located at 1250 Neosho Ave., Baton Rouge, Louisiana. Southern Ionics manufactures and sells water treatment chemicals, including Alum.

4. C&S

33. C&S Chemicals, Inc. ("C&S") is a Pennsylvania corporation with its principal place of business at 4180 Providence Road, Marietta, Georgia. C&S manufactures and sells water treatment chemicals, including Alum.

5. USALCO

34. USALCO, LLC ("USALCO") is a Maryland limited liability company with its principal place of business at 2601 Cannery Avenue, Baltimore Maryland. USALCO is also the successor-in-interest to Delta Chemical Corporation ("Delta") as the result of the purchase of Delta's assets on or about November 17, 2013. USALCO manufactures and sells, and Delta formerly manufactured and sold, water treatment chemicals, including Alum.

C. Individual Defendants

35. Defendant Frank A. Reichl resides in Flanders, New Jersey. From 1993 through 2010, Reichl held high-level executive positions at GenChem, including serving as General Manager of Water Treatment from 1993 to 2005 and Vice President of Sales and Marketing from 2006 until he was terminated in 2010. In these positions, Reichl oversaw the sale and marketing of water treatment chemicals, including Alum, and was responsible for pricing and strategy, analyzing proposals, determining prices, approving bid and price proposals, and supervising other sales and marketing employees of GenChem. During the Class Period, Reichl conspired with other Defendants and co-conspirators in their unlawful price-fixing and bid-rigging conspiracy. On October 27, 2015, Reichl pled guilty for his role in the conspiracy.

36. Defendant Vincent J. Opalewski resides in Rockaway, New Jersey. From 2000 through 2011, Opalewski held high-level executive positions at GenChem, including serving as General Manager of the Sulfur Products business group from 1999 to 2005, Vice President of Sales and Marketing from 2005 to 2006, Vice President and General Manager from 2006 to 2009, and President from 2009 to 2011. In these positions, Opalewski's responsibilities included directing the sale and marketing of Alum. During the Class Period, Opalewski conspired with other Defendants and co-conspirators in their unlawful price-fixing and bid-rigging conspiracy. On February 17, 2016, Opalewski was indicted by the United States for his role in this price-fixing and bid-rigging conspiracy.

37. Defendant Alex Avraamides resides in Maywood, New Jersey. From 1994 through 2011, Avraamides held high-level executive positions at GenChem and Defendant GEO, including serving as the Director of Sales and Marketing at GenChem from 1994 to 2005, the Senior Vice President and General Manager of GEO from 2005 to 2010, and Vice President of Sales and Marketing at GenChem from 2010 to 2011. In these positions, Avraamides's responsibilities included directing the sale and marketing of Alum. During the Class Period, Avraamides conspired with Defendants and co-conspirators in their unlawful price-fixing and bid-rigging conspiracy.

38. Defendant Brian C. Steppig resides in the Little Rock, Arkansas area. From 1998 through at least 2011, Steppig held high-level executive positions at GEO, including serving as National Sales Manager from 1997 through August 2006 and as Director of Sales and Marketing from August 2006 through at least 2011. In these positions, Steppig's responsibilities included directing the sale and marketing of Alum. During the Class Period, Steppig conspired with Defendants and co-conspirators in their unlawful price-fixing and bid-rigging conspiracy. On

February 17, 2016, Steppig was indicted by the United States for his role in this price-fixing and bid-rigging conspiracy.

39. Defendant Amita Gupta is a resident of the United States. From April 2008 until September 2012 she was the Director of Sales and Marking for Water Treatment Chemicals for GenChem. In this position, Gupta's responsibilities included directing the sale and marketing of Alum. During the Class Period, Gupta conspired with Defendants and co-conspirators in this unlawful price-fixing and bid-rigging conspiracy.

40. Defendants' acts, as alleged herein, were authorized, ordered and condoned by their respective parent companies and authorized, ordered and performed by their officers, directors, agents, employees, representatives or subsidiaries while engaged in the management, direction, control or transaction of their business affairs.

C. Co-Conspirators

41. Various persons or entities not named as a Defendant have participated as co-conspirators in the violations alleged herein and have performed acts and made statements in furtherance thereof. The Defendants are jointly and severally liable for the acts of their co-conspirators whether named or not named as a Defendant in this Complaint.

III. JURISDICTION AND VENUE

42. This Court has jurisdiction over the subject matter of this action as it arises under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Further, this Court has jurisdiction under 28 U.S.C. §§ 1331 & 1337(a).

43. Venue is proper in this District pursuant to 15 U.S.C. §§ 15 and 22 and 28 U.S.C. § 1391(b) and (c) because, during the Class Period, the Defendants resided in, transacted substantial business in, were found in, and/or had agents within this District. Venue is also

proper in this district because much of the conduct giving rise to Plaintiff's claims occurred in New Jersey.

44. This Court has personal jurisdiction over each Defendant because, *inter alia*, each Defendant: (a) transacted business throughout the U.S., including in this District; (b) participated in the manufacturing and distribution of Alum throughout the U.S., including in this District; (c) had substantial contacts with the U.S., including in this District; and/or (d) was engaged in an illegal scheme and competition-elimination conspiracy that was directed at and had the intended effect of causing injury to persons residing in, located in, or doing business throughout the U.S., including in this District.

IV. CLASS ACTION ALLEGATIONS

45. Pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3), Plaintiffs bring this action on behalf of the following Class:

> All persons and entities in the United States who purchased liquid aluminum sulfate directly from Defendants, from 1997 through at least February 2011. Excluded from the Class are Defendants and their officers, directors, management, employees, parents, subsidiaries, or affiliates, and all federal governmental entities.

46. Members of the Class are so numerous that joinder is impracticable. Plaintiffs believe that there are hundreds, if not thousands of Class members. Further, the Class is readily identifiable from information and records maintained by Defendants.

47. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs and all members of the Class were damaged by the same wrongful conduct of Defendants.

48. Plaintiffs will fairly and adequately protect and represent the interests of the Class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of the Class. In addition, Plaintiffs are represented by counsel who are experienced and competent in

the prosecution of class action litigation, and who have particular experience with class action litigation involving alleged violations of antitrust law.

49. Questions of law and fact common to the members of the Class predominate over questions that may affect only individual Class members. Questions of law and fact common to the Class include:

a) whether Defendants and their co-conspirators conspired to fix prices, rig bids, and allocate customers of Alum sold in the U.S.;

b) the duration and extent of the alleged conspiracy;

c) the identity of the conspirators;

d) the effect of the conspiracy on the prices of Alum sold in the U.S. during the Class Period;

e) whether Defendants engaged in fraudulent concealment;

f) whether the alleged conspiracy violated the Sherman Act, § 1; and

g) the nature and extent of damages to which Plaintiffs and the Class are entitled.

50. Class action treatment is superior to any alternative method for the fair and efficient adjudication of the controversy. Such treatment will permit a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured persons or entities a method for obtaining redress on claims that could not practicably be pursued individually, substantially outweighs any hypothetical difficulties in management of this class action.

51. Class action treatment also is superior to any alternative method to compensate the victims of Defendants' conspiracy—Plaintiffs and the proposed Class—for the injuries they have suffered as a direct result of Defendants' conduct.

52. Plaintiffs know of no special difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

V. FACTUAL ALLEGATIONS

A. Background Regarding the Alum Industry

53. Alum is a water treatment chemical that removes impurities and other substances from water. Alum is the salt of sulfuric acid and aluminum hydroxide known by its chemical name $Al_2(SO_4)_3$.

54. Alum is used in the early stages of the water filtration process and functions as a coagulant. Coagulants are positively charged molecules which attract suspended particles in water and facilitate their removal through sedimentation or filtration.

55. Alum is one of the most established chemicals utilized in water and wastewater treatment today. Stringent water purity regulations have driven utilization of Alum.

56. Municipalities and private water companies routinely purchase Alum to treat potable water and wastewater. Municipalities typically acquire Alum through a publicly advertised bidding process, and municipal contracts for Alum are typically one year in duration with options to renew for a certain period of time.

57. Alum is also used in paper mills for drainage enhancement and to set rosins (a sizing agent used in the manufacturing process). The amount of Alum used in paper manufacturing is related to the pH level of the production processes—with higher pH levels requiring higher quantities of Alum. For instance, alum is heavily used in the production of fine

paper, which involve pH neutral or alkaline production processes. Alum is used less heavily in the production of newsprint and containerboard, which have more acidic production processes.

58. Pulp and paper manufacturers typically acquire Alum by issuing requests for price to manufacturers, including Defendants, and then purchasing Alum pursuant to supply contracts.

59. During the relevant time period, approximately 43% of Alum was consumed by pulp and paper manufacturers while approximately 41% was consumed by municipal water and wastewater authorities.

B. Structural Characteristics of the Alum Market in the United States Make It Susceptible to Collusion

60. Publicly available data on the Alum industry demonstrates that it is susceptible to cartelization by the Defendants and their co-conspirators. Factors that made the Alum market susceptible to collusion during the Class Period include: (1) industry concentration and consolidation; (2) a standardized product for which competition was principally on the basis of price; (3) the lack of available economic substitutes; and (4) stable demand.

1. The Alum Industry Is Highly Concentrated and Has Experienced Heavy Consolidation

61. When the market for a product is concentrated and dominated by a small number of firms, economic theory holds that it is easier to form and maintain an effective cartel. The Alum industry is highly concentrated, dominated by a small number of producers.

62. The Alum industry experienced significant consolidation in the period leading up to and including 1997. In February 1993, GEO acquired the aluminum chemicals division from Rhone Poulenc. In July 1994, GEO acquired the aluminum chemicals business of Courtney Industries. In December 1996, GEO acquired the aluminum chemicals division of Cytec Industries.

63. The consolidation of the industry continued throughout the Class Period. In June 1997, for example, GenChem purchased Augusta Georgia-based Peridot, a producer of sulfuric acid, Alum, and oleum. In September 2006, GenChem acquired GAC MidAmerica, Inc., a producer of Alum and bleach. In February 2007, GenChem acquired Chalum, Inc., which produced Alum for the greater Phoenix area. In December 2007, GenChem acquired Bay Chemical and Supply Company, a producer and distributor of Alum and other water treatment chemicals in south Texas. In early 2011, GenChem acquired certain Alum-related assets of Alchem, including Alchem's customer list.

64. The concentration of the Alum industry is also enhanced by agreements among Defendants to distribute one another's products. Such swaps, trades, and selling and distribution agreements among competitors in a consolidated market such as Alum in the United States also facilitates the formation of collusion among ostensible competitors.

2. Alum Is A Commodity Product With A High Degree Of Interchangeability

65. Typically, when a product is characterized as a commodity, market participants compete principally on the basis of price rather than other attributes such as product quality. When competition occurs principally on the basis of price it is easier to implement and monitor a cartel because price is more often objectively measurable and observable than non-price factors.

66. Further, the bidding process by which suppliers compete to provide alum to a municipality demonstrates that alum is interchangeable across suppliers and that competition is primarily based on price.

3. Lack of Substitutes for Alum

67. The lack of available substitutes for a product facilitates collusion among producers, because customers are not able to avoid supra-competitive prices for Alum by switching to another type of inorganic coagulant.

68. In the water treatment market, switching from Alum to another inorganic coagulant may require the reconfiguration of water treatment plants, which requires a significant expenditure of time and capital. In the paper manufacturing market, there is no viable substitute for Alum.

4. The Alum Market Experienced Stable Demand During the Class Period

69. Static demand makes the formation of a collusive arrangement more likely. In a competitive market, when faced with stable demand conditions, firms often will attempt to increase sales decreasing prices in order to take market share from competitors. For this reason, firms faced with static demand have a greater incentive to collude to avoid market share or price competition with competitors.

70. During the relevant time period, the Alum market was mature and stable. Demand for Alum grew at approximately 1% to 3% percent per year. In the water treatment industry, demand for Alum is tied to population growth.

71. The lack of significant demand growth was further exacerbated by the presence of excess capacity. None of any of Defendants' water treatment chemical plants were working at or near capacity for production of Alum during the Class Period. Thus, there was no capacity-related reason for any Defendant not to compete for Alum business during the Class Period. Absent an antitrust conspiracy, the presence of excess capacity, particularly for a commodity

product, means that firms are incentivized to increase their sales by maintaining or even lowering prices, not increasing them.

C. Defendants' Market Allocation and Related Bid-Rigging Activities

72. Prior to Defendants' conspiracy, the market for the sale of Alum in the United States was marked by competition. In the mid-1990s, for example, there was a "price war" between GenChem and GEO in which each company bid aggressively for the accounts of the other company.

73. As reflected in the GEO guilty plea and criminal indictments discussed in greater detail below, this era of competition and price wars ended in 1997 when Defendants agreed to "stay away" from each other's "historical" customers by not pursuing the business of those customers, and to engage in related bid-rigging. It appears that the conspiracy was hatched at that time when GEO's Avraamides, GenChem's Reichl, and GenChem's CEO Denny Grandle met and came to an agreement that they would no longer fight for each other's customers. Thereafter, others joined the conspiracy and abided by that agreement. For example, as reflected by communications between executives at GEO and Southern Ionics during the Class Period, the purpose of Defendants' conspiracy was to keep "peace in the valley" in order to "not bring down market price" because Defendants agreed that it would be "better business for everyone to work together instead of competing and ruining the market price."

74. Numerous other documents confirm Defendants' understanding of their overarching agreement. For example, based on the information currently available to Plaintiffs:

a. A March 31, 2003 GenChem internal marketing strategy memorandum outlined GenChem's strategy for its nominal competitor, USALCO: "Continue to work in conjunction at Akron, OH and Western Michigan accounts."

b. A March 2006 GEO internal business review concluded that both GenChem and Southern Ionics were "[r]emaining non-aggressive, consistently favoring price increases over share gain strategy."

c. In September, 2008, Housel of GenChem arranged for a meeting with himself and Gupta from GenChem and Steppig and Scot Lange of GEO, a "get to know you meeting" designed to introduce Gupta to senior staff of their friendly "competitor" GEO, and to discuss market and supply agreements.

75. Throughout the Class Period, Defendants took a number of actions in support of this overarching conspiracy to allocate customers among themselves. Those actions included regular communications with each other in private, including discussions of specific bids and accounts.

1. Regular Inter-Defendant Meetings and Communications

76. Defendants' executives and employees routinely communicated with each other over the telephone, email and during face-to-face meetings. As admitted by the criminal pleas, Defendants discussed their overarching market allocation agreement, as well as specific customer accounts that were off-limits to the other companies and how to handle the bidding process as it related to those accounts.

77. For example, in April 2008, Gupta, the then-recently hired Director of Marketing for Alum at GenChem, began the role of coordinating and enforcing the agreement between the Defendants. On May 28, 2008, Gupta exchanged contact information via email with Steppig, the Director of Sales and Marketing at GEO who is currently under indictment for his role in this conspiracy. Gupta promised to get "back to [him] with the other info we discussed," and later called Steppig on his mobile phone.

78. In addition, on January 14, 2010, Opalewski, Vice President and General Manager of Sales and Marketing for GenChem, emailed Milton Sundbeck, President of Southern Ionics to discuss arrangements for a dinner meeting. Opalewski wrote, "With regard to dinner,

happy to include the entire team or keep it to you and me. If we do get everyone together, would still like to slip away at some point to discuss the larger issue we touched on."

79. Trade associations also provided opportunities for Defendants to meet frequently and exchange information to facilitate collusion. Defendants are members of a number of trade associations in the United States, including the American Water Works Association, American Water Technologists, and the Association of Water Technologies. Defendants attended meetings and events sponsored by those associations. Their overlapping membership in various trade associations also provided an incentive for cartel members to stay within the illegally agreed upon price framework, as they could monitor one another's activities in the Alum market and punish non-compliance. Defendants' participation in trade associations helped facilitate their collusion.

80. For example, on July 16, 2009, GenChem's Housel contacted Gupta and Reichl regarding a conversation that he had had with Southern Ionics' founder Sundbeck. Housel stated, "Just spoke to Milton [Sundbeck]. He will be attending the SWFC [Southwestern Fertilizer Conference] in San Antonio. He's going to send me his schedule next week . . . they have a suite. Amita - anything you would like me to discuss with him?"

2. Specific Instances of Bid Coordination

81. Based on the information currently available to Plaintiffs, the following are specific instances where Defendants coordinated their bids for Alum contracts. While illustrative of how Defendants implemented their scheme, they are not an exclusive list of Defendants' activities in furtherance of their conspiracy.

a. Potlatch-McGehee, Arkansas (2005)

82. In 2005, GenChem and GEO furthered the conspiracy by coordinating bids for the paper mill of Potlatch-McGehee, Arkansas.

83. In December 2005, GEO's Avraamides asked GenChem's Rich Fedison what price GEO should bid for the Potlatch-McGehee account. Following that conversation, Avraamides instructed his colleague Steppig to bid $198.73 so that GEO would not take the account from GenChem.

b. Columbiana, Alabama (2006)

84. In 2006, GenChem and GEO furthered the conspiracy by coordinating bids for the municipality of Columbiana, Alabama.

85. In January 2006, GEO's Avraamides spoke with an employee of GenChem. Avraamides instructed GenChem to bid above $260 per ton for Columbiana's Alum business, so that GEO would win the business.

c. Mahrt Paper Mill and Fayetteville, North Carolina (2006)

86. In 2006, GenChem and GEO furthered the conspiracy by using coordinated bids to swap their historical accounts at MeadWestvaco paper mill in Mahrt, Alabama and the municipality of Fayetteville, North Carolina.

87. GenChem had been the historical supplier of Alum to the Mahrt paper mill until 2006, when the owners of the mill sought a new supplier. Opalewski or Reichl at GenChem told GEO's Avraamedes about the situation. An April 11, 2006 email from Fedison of GEO to Avraamides identified Fayetteville as a location where GenChem would be more freight logical than GEO and could "take a dent out of our swap imbalance."

88. In an email exchange dated May 22, 2006 between Steppig and Avraamides, they agreed that they needed to work out "The Swap" with GenChem "before we take Marht." Absent this coordination, GEO would not have bid aggressively for what was a historical GenChem account.

89. In exchange for this and after GEO won the Mahrt paper mill account, a GenChem employee called GEO and asked for the Fayetteville, North Carolina Alum account. GenChem subsequently won the Fayetteville contract, which had historically been a GEO account. For the September 2005 through September 2006 contract year, GEO, bidding through distributor Southern States, had been the winning bidder for Fayetteville's Alum business. For the September 2006 through September 2007 contract year, GenChem's bid was over $50 per ton lower than GEO's bid, $191.90 per ton for GenChem vs. $248.55 for GEO.

d. DeKalb County, Georgia (2009)

90. In 2009, GenChem and C&S furthered the conspiracy by coordinating bids for DeKalb County, Georgia.

91. In February 2009, GenChem's Larry McShane expressed interest in the DeKalb County account, which had previously been awarded to RGM of Georgia. After learning that RGM of Georgia was a distributor selling for C&S, McShane emailed Gupta "so I assume we don't want to take it." Gupta responded "Don't take. Thx."

e. Charlotte and High Point, North Carolina (2009)

92. In 2009, GenChem and Alchem[1] furthered the conspiracy by coordinating bids for the municipalities of Charlotte and High Point in North Carolina. High Point and Charlotte are approximately 80 miles apart on Interstate 85.

93. High Point was historically Alchem's account, but GenChem placed a low, winning bid in 2009. Alchem's Robert Wolcott called GenChem's Gupta to complain, and they later agreed that Alchem would not bid competitively for the Charlotte account if GenChem withdrew its High Point bid. Gupta did withdraw the bid. She provided Mark Paul of GenChem

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[1] Alchem is a manufacturer of Alum which is not presently named as a Defendant.

with contact information for the buyer at High Point and noted that there was a typo in their bid, that they meant to bid $324 per ton rather than $224 per ton.

94. In June 2009, consistent with the agreement, GenChem submitted a high bid for the Charlotte account. Alchem did not uphold its end of the bargain, underbidding GenChem by $5 per ton to win the account. After GenChem's Gupta called Alchem's Wolcott to complain, Alchem withdrew its winning bid and GenChem was awarded the Charlotte contract.

95. In 2010, GEO wanted to take the High Point account. In late 2010, GenChem acquired Alchem's list of Alum customers, effective January 31, 2011. GenChem's Avraamides advised GEO and C&S of this development and explained that it would treat the former Alchem customers, including High Point, as GenChem's own "historic" customers. On the next High Point bid, GEO bid high and C&S did not bid at all, despite previously expressing interest in the contract. Alchem had been supplying High Point at $255 per ton. GEO bid at $400 per ton, and GenChem won the account at more than $300 per ton.

f. Maryville, Tennessee (2009 – 2010)

96. In 2009 and 2010, GenChem and GEO furthered the conspiracy by coordinating bids for the municipality of Maryville, Tennessee.

97. Maryville had historically been supplied by Dycho, a distributor supplied by GEO. In 2009, GenChem submitted a low bid for Maryville, and GEO's Steppig called GenChem's Gupta to complain. Following the conversation, GenChem withdrew its original bid and/or resubmitted a losing bid at a higher price.

98. In 2010, consistent with Steppig and Gupta's conversation the previous year, GenChem submitted a high bid for the Maryville account, which GEO won.

g. Domtar Paper Company (2010-11)

99. In 2010, GenChem and GEO furthered the conspiracy by coordinating bids for the Domtar paper company.

100. In December 2010, GenChem's Gupta and GEO's Steppig discussed upcoming Alum price increases for Domtar across the United States so that the companies' price increases would be in line with each other. Following the conversation with Steppig, GenChem submitted bids to Domtar that were higher than the previous year's and higher than it had intended to before speaking with GEO, and it was awarded Domtar business at a $29 per ton increase.

101. In early 2011, Domtar's purchasing agent was unhappy with GenChem's pricing and called GEO's Steppig to encourage GEO to be competitive at Domtar's Ashdown, Arkansas mill. Steppig then called GenChem's Gupta to ask how GEO should bid in order to look competitive without taking business from GenChem. GEO bid higher than GenChem, which continued to supply the Ashdown mill.

h. Georgia Pacific Paper Company (2011)

102. In 2011, GenChem and GEO furthered the conspiracy by coordinating bids for the Georgia Pacific paper company.

103. In January 2011, GenChem's Avraamides and Gupta and GEO's Scott Lang, Opalewski, and Steppig spoke with each other about upcoming Alum price increases for Georgia Pacific across the United States so that the companies' price increases would be in line with each other. After GenChem learned that GEO would increase prices by $35 per ton, GenChem raised its increase to $32 per ton, instead of the $23 per ton increase originally planned before coordinating with GEO.

i. Sidney, Ohio (2010)

104. In 2010, GenChem and USALCO furthered the conspiracy by coordinating bids for the municipality of Sidney, Ohio. As of the end of 2010, Sidney, Ohio was a USALCO customer. When the bid for this customer was coming up in December 2010, GenChem's Lisa Brownlee emailed Gupta asking her if "you want to take this one too?" and noting that "US Alco supplies at $418.42. GCC bid $494.00. No history of Delta or Thatcher bidding here. Volume is only 65 tons. To take, I would bid $374 ($308 net for US Alco). To stay away, up $32.00." Gupta responded, "No. up 32," confirming GenChem decided to "stay away" from USALCO's historic customer.

3. Widespread Anomalous Bidding Behavior

105. Defendants enjoyed supra-competitive profit margins during this time period, not counting freight charges. Thus, sellers of Alum had the ability to submit bids at considerably lower prices than they did and still make a profit. Indeed, among the reasons for Defendants to agree to allocate customers was to protect their supra-competitive profit margins.

106. A significant part of the price for Alum is the cost of shipping. It is standard practice in the industry for suppliers of Alum to include in the quoted price the cost of shipping. Because shipping costs are a significant part of the price of Alum, a supplier that is "freight logical", *i.e.*, the supplier that is closest to the customer, has a built-in economic advantage over other suppliers which are materially farther away from the customer, since the freight logical supplier's shipping costs should be less than those of its competitors. The freight logical supplier can offer a lower price at the same profit margin as other suppliers and/or a non-freight logical supplier must cut its profit margin in order to sell at a competitive price.

107. During the Class Period, based on Plaintiffs' analysis for bidding data produced in discovery, it was common that non-freight-logical suppliers consistently submitted winning bids

to the same customer. Throughout the Class Period, there exists a pattern of bidding among the Defendants for which there is no reasonable economic explanation other than a conspiracy. There was a common pattern among incumbent Defendants of consistently winning bids over other Defendants which submitted what appear to be throw-away bids. In many instances, incumbent non-freight logical Defendants would continue to win bids over Defendants with plants materially closer to the customer, but who nonetheless repeatedly submitted bids that were higher than their non-freight logical co-conspirators.

108. For example, GEO has a water treatment chemical plant in Baltimore, Maryland, but rarely bid for Alum business in the Mid-Atlantic region. Southern Ionics has a water treatment chemical plant in Williamsport, Maryland, which would be freight logical to many locations in southern Pennsylvania, and from which it could also competitively bid in the Mid-Atlantic region, but it did not bid for Alum business in that region.

109. Additional examples include the following:

a. Gadsden, Alabama: GenChem (205 miles away) won this bid throughout the period from 2007 through 2011 despite being significantly further away than GEO (90 miles away), C&S (97 miles away) and Southern Ionics (131 miles away), some or all of whom also bid throughout this period.

b. Mount Clemens, Michigan: USALCO (246 miles away) maintained this customer from 2006 through 2012 despite the fact that a GAC plant (which was acquired by GenChem in 2006) was only 84 miles away. GenChem consistently bid much higher on this account from 2007-2012 and lost.

c. El Dorado, Arkansas: GenChem (90 miles away) held this customer from 2004 through 2011 despite the fact that GEO (72 miles away) was closer. GEO's bids were consistently significantly higher than GenChem's.

4. Policing and Enforcement Efforts

110. Defendants also undertook specific efforts to monitor and enforce the conspiracy. If, either intentionally or accidentally, a "competitor" submitted a lower bid to its competitor's

historic customer, that would often prompt a complaint that resulted in the withdrawal of the lower bid. For example, in 2009, GenChem submitted a low bid for the Maryville account held by distributor Dycho, which was supplied by GEO. GEO's Steppig called GCC's Gupta to complain that she was in breach of the agreement, and GenChem withdrew the bid via telephone call. GenChem then resubmitted a much higher bid so that GEO would win the account.

111. In addition, where a Defendant gained business at the apparent expense of its "competitor," that Defendant would often allow that "competitor" to win business from another customer to keep their respective levels of business and the conspiracy intact. For example, in 2006, GenChem bid for and won an account in Carthage, Texas for 200 tons of Alum, an account which historically belonged to GEO. Following discussions between Avraamides and Housel, GEO and GenChem agreed that GEO would take an account of the same size from GenChem in order to "mak[e] the playing field even again."

D. Defendants' Actions Increased Prices Across The Industry

112. During the Class Period, Defendants were able to maintain or increase the price of Alum at supra-competitive levels.

113. Throughout the Class Period, Defendants told customers that the price increases for Alum flowed entirely from increases in manufacturing costs, such as the costs of raw materials. For example, in December 2004, Fedison of GenChem told one customer that the industry was facing an "emerging alumina crisis and its impact on raw material costs. In a nutshell, alumina is short globally and producers are accelerating price increases at unprecedented levels."

114. In reality, however, Defendants' supra-competitive prices stemmed from their conduct described herein, including their direct and indirect discussions about prices. In 2010,

for example, GenChem acknowledged internally that it was publicly announcing price increases which were above any raw material cost increases.

115. As a result of Defendants' efforts described herein, including their coordination of price increases, the price of Alum increased across the United States during the Class Period. For example, according to the Chemical Market Reporter, the prices of Alum increased approximately 33.8% to 38% between 1998 and 2004. In addition, according to a survey of U.S. drinking water utilities conducted by the Water Environment Research Foundation (WERF), during the period from January 2008 and January 2009, of the U.S. drinking water utilities that responded, those that used Alum experienced an average 53% price increase, with maximum increases as high as 168%.

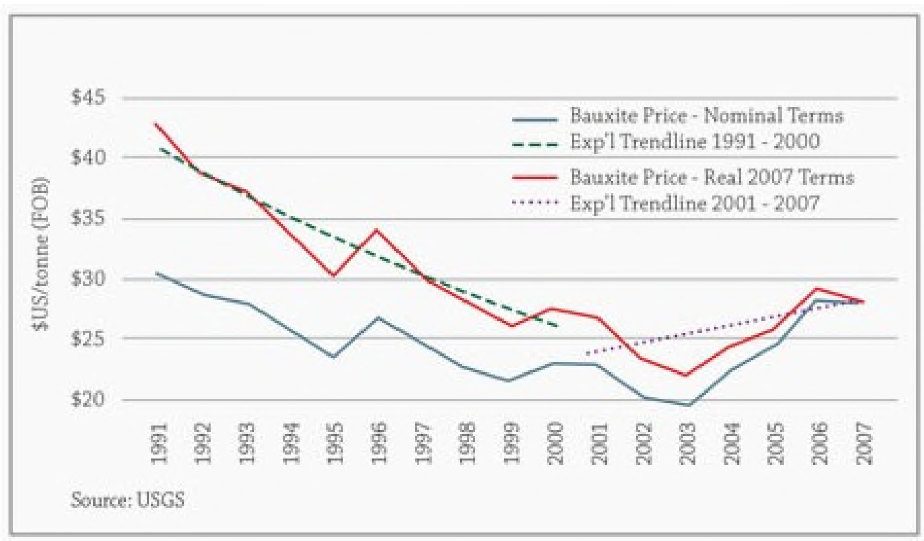
116. These price increases contributed to Defendants' bottom-lines. For example, between 2007 and 2008, Defendant GenChem's sales to the water treatment market rose 34% due to, *inter alia*, higher prices for its water treatment chemicals. The following year, price increases on Alum contributed significantly to GenChem's profits as reported in GenTek's 2009 Form 10-K.

E. Changes in Defendants' Input Costs – Which Were Stable or Declining For Much of the Class Period – Cannot Fully Explain Defendants' Pricing

117. Rising input costs for Alum cannot fully explain the significant price increases Defendants charged their customers between 1997 and 2010.

118. Alum is manufactured by combining sulfuric acid with aluminum trihydrate (also known as alumina or ATH). Aluminum trihydrate is purified from bauxite by dissolving the bauxite ore in strong caustic soda to form sodium aluminate, which is then precipitated by neutralization to form aluminum trihydrate.

119. As shown by the graph below, bauxite (the raw material for alumina) prices fell markedly during the period from 1991 to 2003, declining from approximately $43/ton in 1991 to approximately $20/ton in 2003. From 2003 to 2007, bauxite prices rose but did not reach the high prices seen in the early 1990s. In the period that followed, bauxite prices were stable. In 2008, bauxite prices dipped slightly to about $26/ton. Prices in 2009 increased slightly to approximately $28/ton.



120. Sulfuric acid costs were also relatively stable from 1997 to 2007. A brief spike in sulfuric acid prices in 2008 was followed by a crash in prices by early 2009 and historically low prices for the remainder of 2009 and 2010. However, GenChem maintained higher prices in 2009 despite decreasing commodity prices.

121. The pricing of the primary input costs of Alum – bauxite and sulfuric acid – cannot fully explain the rise in Alum prices during the Class Period. Instead, Defendants' illegal conspiracy to fix the price of Alum resulted in Plaintiffs and Class members paying artificially inflated prices.

VI. DEFENDANTS FRAUDULENTLY CONCEALED THEIR CONSPIRACY

122. Defendants fraudulently concealed their conspiracy by making false representations to Plaintiffs and members of the Class that they were not engaged in collusion. These false representations took many forms, including "non-collusion affidavits" and representations made in connection with Defendants' bid submissions. In addition, the structure of the conspiracy was self-concealing, in that the collusive bids that were submitted through the operation of the conspiracy gave the appearance of competition, when, in fact, none existed. As a result, Plaintiffs had neither actual nor constructive knowledge of the facts constituting their claims for relief.

123. Plaintiffs and members of the Class did not discover, and could not have discovered through the exercise of reasonable diligence, the existence of the conspiracy alleged herein until at until at least November 2015 when Reichl's plea agreement was filed and made public.

124. Defendants engaged in a secret conspiracy that did not reveal facts that would put Plaintiffs or the Class on inquiry notice that there was a conspiracy to fix prices for Alum. As discussed above, Defendants routinely met and had private conversations where they discussed their plans.

125. Defendants fraudulently concealed their misconduct by affirmatively (but falsely) represented to Class members that their Alum bids were free from collusion or illegal coordination. For example, Defendants signed "non-conclusion affidavits" in connection with bids made that falsely represented that the bids Defendants submitted were genuine and not collusive.

126. In other instances, rather than submit a non-collusion affidavit, municipalities required the bidders to represent, and the Defendants did falsely represent, that each bid was not

subject to or involved in any understanding or agreement with any other person or company. These false representations were meant to, and did, prevent Plaintiffs and members of the Class from discovering Defendants' conspiracy.

127. In announcing price increases forAlum, Defendants often asserted that the cause of such increases was attributable entirely to higher raw material and energy costs, even though the increased pricing more than covered any increases in raw material costs and, critically, without disclosing their conspiracy to fix and maintain Alum prices. Further, even when raw material prices dropped, Defendants often failed to make corresponding adjustments to their prices.

128. Defendants also fraudulently concealed their conspiracy by ensuring that there were few written communications regarding their conspiracy and agreement. For example, emails among the defendants' officers in furtherance of the conspiracy were often sent to and from personal email addresses, asking one another to speak via telephone, and telephone calls among the various conspirators were made from personal mobile phones rather than from office phones. In at least one instance, GEO's Steppig explicitly acknowledged that "the number [GenChem's Gupta] called was [his] mobile number."

129. Defendants' secrecy ensured that Plaintiffs could not have had either actual or constructive knowledge of the conspiracy until the public disclosure of the DOJ's criminal investigation.

130. Because Defendants' agreement, understanding, and conspiracy was kept secret, Plaintiffs and members of the Class were unaware of Defendants' unlawful conduct alleged herein, did not know that they were paying artificially high prices for alum during the Class

Period and could not have discovered Defendants' conspiracy and agreement by the exercise of due diligence.

131. Plaintiffs and members of the Class exercised due diligence in many ways, including, *inter alia*, asking the basis for price increases and/or requiring Defendants to submit declarations that their bids were not the product of collusion.

COUNT ONE
(Violation Of Section 1 Of The Sherman Act, 15 U.S.C. § 1)

132. Plaintiffs incorporate and re-allege, as though fully set forth herein, each of the paragraphs set forth above.

133. Through the conduct alleged in this complaint, Defendants and their co-conspirators violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to increase prices and otherwise restrain competition in the market for Alum sold to Plaintiffs and Class members during the Class Period.

134. Defendants are *per se* liable under Section 1 of the Sherman Act for the injuries and damages caused by their conspiracy in restraint of trade as alleged herein.

135. Defendants and their co-conspirators furthered and effectuated their conspiracy in the following ways, among others:

a) Participating in secret communications, discussions, and meetings in the U.S. and elsewhere to exchange confidential and competitively sensitive information regarding each other's Alum business;

b) Agreeing, during those conversations and meetings, to "stay away" from each other's "historical" customers by not pursuing the business of those customers;

c) Tracking bid and pricing histories to determine which accounts were the "historical" customers of each co-conspirator or other supplier of Alum, so as to determine whether to pursue a particular contract or to submit an intentionally losing or “throw away” bid or price quotation;

d) Submitting intentionally losing or “throw away” bids or price quotations to each other’s “historic” Alum customers;

e) From time to time, discussing and agreeing during those conversations and meetings, to set a price floor to be quoted to a customer by the intended winner to determine the amount of the intended loser’s intentionally losing or “throw away” bid or price quotation;

f) Where a co-conspirator could not withdraw its inadvertently winning bid, bidding to lose on one of its own customers to compensate for the loss of that “historical” customer;

g) Instructing new employees how to determine whether and how to bid on or quote a price for the business of Alum customers so as to comport with the agreement not to compete between Defendants and co-conspirators; and

h) Selling Alum to customers at collusive and non-competitive prices in the U.S.

136. Defendants and their co-conspirators fixed, raised, stabilized and maintained at artificially high and supra-competitive levels the prices for Alum charged to Plaintiffs and Class members in the U.S.

137. Defendants and their co-conspirators caused Plaintiffs and Class Members to pay more for Alum than they would have paid in the absence of a price-fixing conspiracy.

138. As a direct and proximate result of the unlawful combination, contract or conspiracy, Plaintiffs and Class members sustained damages to their business and property. The conspiracy had its intended effect, as prices for Alum sold in the United States during the Class

Period were higher than they would have been but for the wrongful conduct of Defendants and their co-conspirators as alleged in this complaint.

139. As a result of Defendants' unlawful conduct, Plaintiffs and Class members have been injured in their business and property in that they have paid more for Alum than they otherwise would have paid in the absence of Defendants' unlawful conduct. The full amount of such damages is presently unknown but will be determined after discovery and upon proof at trial.

140. Defendants' unlawful conduct as alleged herein poses a significant, continuing threat of antitrust injury for which injunctive relief is appropriate under Section 16 of the Clayton Act.

WHEREFORE, Plaintiffs demand judgment as follows:

A. Certifying this action as a Class Action pursuant to Federal Rule of Civil Procedure 23, and appoint Plaintiffs as class representatives and their counsel of record as Class Counsel;

B. Adjudging and decreeing that acts alleged herein are unlawful restraints of trade in violation of the Sherman Act, 15 U.S.C. § 1;

C. For the damages sustained by Plaintiffs and the Class defined herein, and for any additional damages, penalties and other monetary relief provided by applicable law, including treble damages;

D. Awarding Plaintiffs and Class members pre-judgment and post-judgment interest as provided by law, including that such interest be awarded at the highest legal rate from and after the date of service of the complaint in this action;

E. Awarding Plaintiffs and Class members the costs of this suit, including reasonable attorney fees; and

F. Awarding such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby request a jury trial, pursuant to Federal Rule of Civil Procedure 38, on any and all issues so triable.

Dated: August 22, 2016

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: QUALCOMM ANTITRUST LITIGATION This Document Relates To: ALL ACTIONS	Case No. 17-md-2773-LHK **PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL**

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Plaintiffs Sarah Key, Andrew Westley, Terese Russell and Carra Abernathy ("Plaintiffs"), on behalf of themselves and all others similarly situated (the "Class," as defined below), on personal knowledge with respect to facts pertaining to them and upon information and belief as to other matters, bring this Consolidated Class Action Complaint ("Complaint") against Defendant Qualcomm Incorporated ("Qualcomm") for damages, injunctive relief, and other relief pursuant to federal antitrust law and California antitrust, unfair competition, and consumer protection laws. Plaintiffs demand a trial by jury and allege as follows:

I. NATURE OF ACTION

1. This lawsuit is brought against Defendant Qualcomm for its anticompetitive practices, including its acquisition and maintenance of a monopoly in the market for modem chips, refusal to license on non-discriminatory terms its standard essential patents, and coercive *de facto* exclusive dealing agreements. This conduct has enabled Qualcomm to maintain its dominant market position, inhibit competitors, and artificially inflate the all-in costs to original equipment manufacturers ("OEM"), which are passed on to consumers who buy cellular devices.

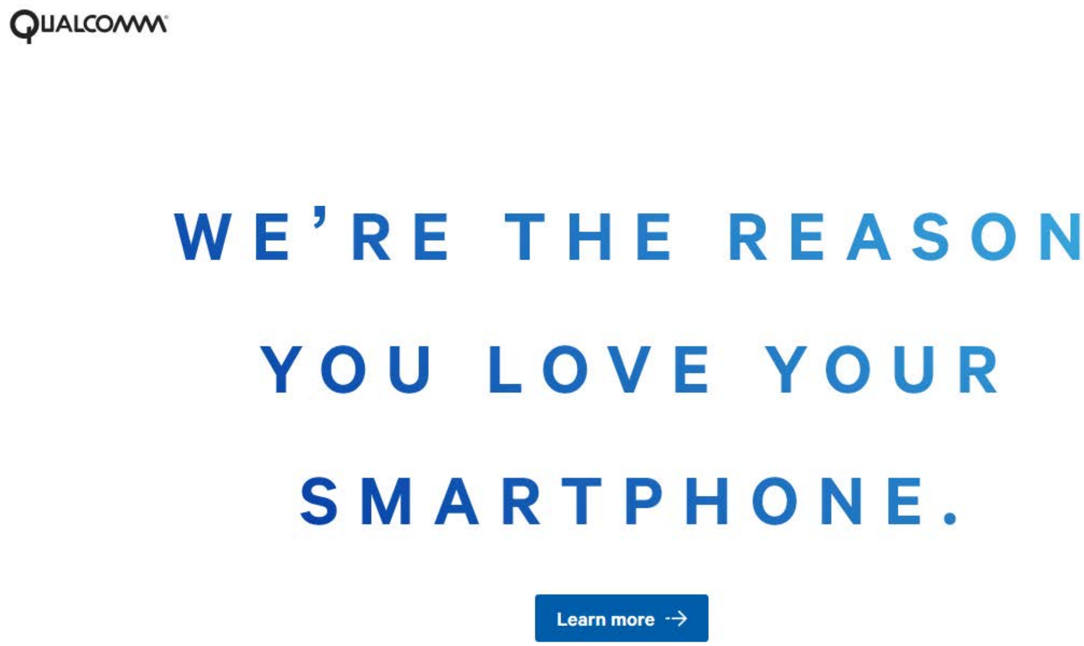
2. The modem chips at issue in this case are used in cellular devices like smartphones and tablets. Modem chips have no independent free-standing use. They must be made part of a cellular device to serve any purpose. And the purpose served by modem chips is directly tied to enabling wireless connectivity in cellular devices. As such, modem chips and the cellular devices that incorporate them are stages of a single market supply chain. Increases in the price of modem chips lead directly to price increases at the OEM and retail levels for cellular devices, and the demand for modem chips is driven by end-purchasers of cellular devices like smartphones and tablets. Thus, the market for modem chips and the market for the cellular devices incorporating those chips are inextricably intertwined.

3. The market for cellular devices incorporating modem chips, particularly smartphones and tablets, has grown tremendously. In 2007, Apple introduced the iPhone. A short time later, smartphones using the Android operating system developed by Google were introduced. Since then, sales of smartphones have exploded in the United States. In 2007, smartphone sales in the US were $8.65 billion. In 2016, smartphone sales in the United States

were $55 billion.

4. The financial performance of Qualcomm has been directly tied to the end market for cellular devices. The enormous increase in the sales of smartphones has resulted in a corresponding increase in Qualcomm's revenues, as recognized by Qualcomm. During the Qualcomm Analyst Day held on November 15, 2012, Qualcomm highlighted the smartphone as Qualcomm's "most important device":

5. Qualcomm states that "its technologies powered the smartphone revolution and connected billions of people." In a recent filing, Qualcomm described itself "as one of the world's leading technology companies and a pioneer in the mobile phone industry." Qualcomm tells cellular device consumers on its website:



6. Just last week, Qualcomm's executive vice president and general counsel, Don Rosenberg, reiterated this connection when he said that "Qualcomm's inventions are at the heart of every iPhone."

7. Qualcomm is the leading supplier of modem chips in the world and, in particular, in the supply of modem chips that (1) comply with the CDMA standards and (2) are used in premium-tier devices that comply with LTE standards.

8. But Qualcomm uses its dominant position in the supply of CDMA and premium LTE modem chips to engage in clear anticompetitive conduct, including the following:

a. <u>Refusal to License Competitors:</u> Qualcomm refuses to license its cellular standard essential patents ("SEPs") to competing modem chip manufacturers, instead only licensing its SEPs to cellular device OEMs, even though Qualcomm is required to license the SEPs on fair, reasonable and non-discriminatory ("FRAND") terms. Qualcomm violated a duty to deal by this conduct.

b. <u>"No-License-No-Chips" Policy:</u> Qualcomm conditions OEMs' access to its modem chips on the OEMs' acceptance of a non-FRAND license to Qualcomm's cellular SEPs. Unless OEMs agree to a separate SEP license with Qualcomm—one that covers all devices the OEM sells regardless of the chip supplier—on Qualcomm's preferred terms, Qualcomm refuses to supply such OEMs with Qualcomm modem chips. As a result of its threats to disrupt the supply of modem chips to OEMs, Qualcomm has extracted illegal, non-FRAND royalty rates, which inflate the royalties on the wholesale price of cellular devices. Among other things, these royalties: fail to apportion for (1) other SEPs held by other patent holders and pledged to the same cellular standard, (2) unpatented features of the cellular devices, and (3) the fact that the patents had already been exhausted by the sale of the Qualcomm chips. This above-FRAND incremental royalty is a surcharge that raises an OEM's all-in cost of purchasing any modem chips, which includes (1) the price of the modem chip itself and (2) any patent royalties that the OEM must pay to use the modem chip in a cellular device. This practice reduces competitors' margins, limits competitors' ability to invest in innovation, and restricts competitors' ability to compete with the all-in price that Qualcomm charges for its modem chips.

c. <u>Exclusive Deals that Foreclosed Competition:</u> In addition to its refusal to license to competing modem chip suppliers and its "no-license-no-chips" policy, Qualcomm also coerces OEMs into anticompetitive agreements. Qualcomm coerced Apple to enter into *de facto* exclusive dealing contracts that foreclosed Qualcomm's competitors from gaining chip business at Apple, one of the world's leading smartphone companies. This exclusive dealing arrangement caused substantial foreclosure in the markets for premium LTE chips and premium LTE cellular devices, as Apple products accounted for more than 40% of the premium

LTE cellular phone sales in the United States during the relevant period. Consumers, in turn, are impacted by purchasing cellular devices from OEMs subject to such coercive arrangements.

9. There are no legitimate business justifications for Qualcomm's exclusionary and anti-competitive conduct. To the extent Qualcomm has sought to achieve any legitimate business purposes through its conduct, it has not used the least restrictive means for doing so, any claimed pro-competitive benefit is outweighed by the anti-competitive harm, and any purported legitimate business justifications are mere pretexts. Qualcomm's "no-license-no-chips" policy, refusal to license its patents to competitors, and coercive agreements with OEMs—including its *de facto* exclusive dealing arrangements with Apple—are unlawful restraints of trade.

10. Qualcomm's coercive agreements were designed to maintain its monopoly power and hide its illegal conduct. In at least one such agreement, Qualcomm included a gag order to prevent an aggrieved party from seeking judicial relief or otherwise challenging Qualcomm's anticompetitive practices in an effort to keep courts, regulators, and consumers in the dark.

11. Qualcomm's practices harm competition and the competitive process by foreclosing competitors, reducing innovation, and raising costs to consumers. Indeed, the Korean Fair Trade Commission ("KFTC") has found that Qualcomm's own internal documents show that its licensing practices were designed to drive competitor chip manufacturers out of the market.

12. Qualcomm's anticompetitive practices have allowed it to maintain its monopoly in the CDMA and premium LTE chip markets. Since 2008, nine of the other eleven modem chip manufacturers have exited the market, even though the market has more than doubled in size.

13. Qualcomm's anticompetitive practices have enabled it to artificially inflate the price of modem chips by extracting supracompetitive royalties for its patents, which are part of the all-in cost that OEMs pay for modem chips. Apple alleges that it pays Qualcomm more patent royalties than it pays to all other patent holders combined on the sale of its cellular devices, even though the other patent holders have greater intellectual property rights related to Apple's products. One study found that Qualcomm received royalties equivalent to 2% of global cell phone sales in 2013 and 2014, while four other comparable companies—each with a similar SEP

portfolio—only received between 0.2 and 0.4%. According to the Federal Trade Commission ("FTC"), Qualcomm has historically demanded a royalty rate of 5% on the net selling price of a handset—"significantly higher than those of other licensors of cellular SEPs."[1] Qualcomm's own analysis in 2015 "found that revenues from Qualcomm's licensing program are 'equivalent in size to the sum of ~12 companies with a form of technology licensing,' including leading cellular SEP licensors such as Ericsson, Nokia, and Interdigital."[2]

14. Government antitrust agencies have fined Qualcomm more than $2 billion for its anticompetitive practices, and several investigations are still pending. The KFTC fined Qualcomm $208 million in 2009 and $853 million in 2016 for Qualcomm's anticompetitive licensing practices. The Chinese National Development & Reform Commission ("NRDC") fined Qualcomm $975 million in 2015 for its licensing practices relating to SEPs. The Japanese Fair Trade Commission issued a cease and desist order against Qualcomm in 2009 for violating its FRAND obligations. The Taiwanese Fair Trade Commission announced an ongoing investigation into Qualcomm's licensing practices in December 2015. And the European Commission in December 2015 announced two statements of objection against Qualcomm for (1) paying Apple to purchase chips from Qualcomm exclusively, stifling competition in the market and (2) pricing chips below cost in order to drive out competitors.

15. On January 17, 2017, the FTC filed a complaint against Qualcomm for its licensing practices in this Court. The FTC alleges that Qualcomm unlawfully maintained a monopoly in chips and that its actions "raise[d] prices paid by consumers for cell phones and tablets."[3]

16. Apple filed an antitrust action against Qualcomm in U.S. District Court for the Southern District of California on January 20, 2017. Apple alleges that "Qualcomm's unlawful business acts and practices significantly threaten and harm competition in the market for mobile wireless handsets, tablets, and other CDMA- and LTE-compliant products, in California and

[1] Compl. ¶ 58, *Federal Trade Comm'n v. Qualcomm, Inc.*, No. 17-cv-00220, Doc. No. 1 (N.D. Cal. Jan. 17, 2017) ("FTC Compl.").
[2] *Id.* at ¶ 60.
[3] *Id.* at ¶ 1.

elsewhere, thereby causing injury to consumers. These threatened injuries include the inevitable passing on to consumers of improper royalties demanded by Qualcomm." [4]

17. Subsequent to those actions, Qualcomm filed a lawsuit against Apple's contract manufacturers in the U.S. District Court for the Southern District of California, Case No. 3:17-cv-01010-GPC-MDD, in what Apple alleges is an attempt to exert pressure on Apple to acquiesce to Qualcomm's non-FRAND royalty demands. Apple alleges that Qualcomm chose its targets deliberately, knowing that such contract manufacturers merely assemble Apple's phones according to Apple's and Qualcomm's specifications. Qualcomm alleges in that litigation that Apple devices "would infringe numerous Qualcomm patents" if such devices were not licensed. Yet, according to Apple, Qualcomm has not identified any patents that are (1) actually SEPs; (2) valid and enforceable; (3) practiced by Apple's products; and (4) not exhausted by the authorized sales of Qualcomm chips. Apple has since alleged that eighteen Qualcomm patents do not meet this standard and are instead non-essential, invalid, non-infringed, and/or exhausted.

18. Last week, Qualcomm filed a complaint in the International Trade Commission in which it seeks to bar from importation Apple cellular devices — but only those that do not incorporate a Qualcomm modem chip — for infringement of six non-SEP patents. *In re Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof.*

19. Plaintiffs bring this action on behalf of themselves and others similarly situated to recover for injuries arising from Qualcomm's violations of Sections 1 and 2 of the Sherman Act, California's Cartwright Act, and California's Unfair Competition Law. Plaintiffs seek monetary damages, injunctive relief, and any other available remedies to which they and the putative Class members are entitled.

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[4] *Apple, Inc. v. Qualcomm, Inc.*, No. 3:17-cv-00108 (S.D. Cal.) at ¶ 659.

II. THE PARTIES

A. Plaintiffs

20. Plaintiff Sarah Key, who resides in California, purchased an Apple iPhone 6 for personal use and not for resale during the past four years. Plaintiff was injured in fact and has lost money or property as a result of Qualcomm's unlawful and anticompetitive conduct.

21. Plaintiff Andrew Westley, who resides in California, purchased a Samsung Galaxy Tab-E Tablet and an Android cellular phone for personal use and not for resale during the past four years. Plaintiff was injured in fact and has lost money or property as a result of Qualcomm's unlawful and anticompetitive conduct.

22. Plaintiff Terese Russell, who resides in California, purchased an Apple iPad Mini, an Amazon Kindle Paperwhite, an Apple iPhone 6 Plus, and a Samsung smartphone for personal use and not for resale during the past four years. Plaintiff was injured in fact and has lost money or property as a result of Qualcomm's unlawful and anticompetitive conduct.

23. Plaintiff Carra Abernathy, who resides in California, purchased an Apple iPhone 7 Plus for personal use and not for resale during the past four years. Plaintiff was injured in fact and has lost money or property as a result of Qualcomm's unlawful and anticompetitive conduct.

B. Defendant

24. Defendant Qualcomm is a Delaware corporation with its principal place of business at 5775 Morehouse Drive, San Diego, California 92121. Qualcomm develops, designs, licenses, and markets worldwide its digital communications products and services through two wholly-owned subsidiaries: Qualcomm CDMA Technologies ("QCT"), which handles equipment sales, and Qualcomm Technology Licensing ("QTL"), which licenses patents and other intellectual property rights from Qualcomm's intellectual property portfolio. QCT is operated by Qualcomm Technologies, Inc. ("QTI"), another wholly-owned subsidiary of Qualcomm.

25. Qualcomm maintains offices and employees and regularly conducts business throughout this District, including in San Francisco, Santa Clara, and Alameda counties.

III. JURISDICTION AND VENUE

26. This Court has jurisdiction over the subject of this action pursuant to 15 U.S.C. §§ 4 and 16, as well as 28 U.S.C. §§ 1331 (federal question) and 1337 (commerce and antitrust regulation). This Court has supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367, since the matters at the heart of the unfair competition claims under California law form part of the same case or controversy. In addition, this Court has subject matter jurisdiction over all claims asserted in this action under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), in that the matter in controversy exceeds the sum of $5 million exclusive of interest and costs and certain members of the Class of Plaintiffs are citizens of states different from Qualcomm.

27. This Court has personal jurisdiction over Qualcomm because it resides in and has its principal place of business in the State of California and substantial parts of the anti-competitive conduct at issue took place in, originated in, or were implemented in whole or in part within the State of California.

28. Venue is proper in this Court pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391 because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District, and Qualcomm transacts business and maintains facilities in this District and thus is subject to personal jurisdiction here.

IV. FACTUAL ALLEGATIONS

A. The Introduction of the iPhone and the Revolution in Consumer Mobile Devices.

29. The introduction of the Apple iPhone in 2007, soon followed by the introduction of smartphones using the Android operating system, revolutionized the use of cellular devices throughout the world. Prior to the introduction of the iPhone, cell phones, pagers, and Blackberries had limited functionality. Smartphones soon developed functionality equivalent to what desktop computers had offered only a few years before. Smartphones offered high quality cameras, powerful video and graphics processing, better memory, and greater storage capacity.

30. The explosion in the sales of smartphones can be seen solely by reference to Apple's revenues. In 2006, Apple had $19 billion in revenues, of which 40% was attributable to the iPod, 38% to Macs, and the remainder to other products. In 2016, Apple had $216 billion in revenues and the iPhone drove 63% of Apple's sales.

31. Smartphones have become ubiquitous for consumers and have changed commerce, the development and distribution of software, and the fields of marketing and advertising.

B. <u>SSOs Standardize Cellular Communication Technology.</u>

32. Cellular devices such as smartphones and tablets include a semiconductor device known as a baseband processor or modem chip. These chips manage the radio control function of the cellular device, including signal generation, modulation, encoding, and frequency shifting, enabling the cellular device to communicate with a wireless network. The chips must comply with the communications standard that a wireless network uses. Chips that comply with multiple wireless network standards are known as "multi-mode" chips. Multi-mode chips can communicate with networks that use multiple standards or on different networks using different standards.

33. Qualcomm, along with many other companies, contributed to the development of technological standards that govern how cellular devices used by consumers connect to the voice and data networks. Companies in the wireless industry form standard setting organizations ("SSOs") to develop such technical standards to ensure interoperability and compatibility of products and wireless networks for consumer use. Patents that are essential to practicing a technical standard are called standard essential patents or "SEPs," as such patents must be licensed by companies in order to make products or services that practice the standard.

34. There are several different SSOs related to wireless communications. The International Telecommunications Union ("ITU") is a worldwide telecommunications SSO comprised of governments and private companies. The Telecommunications Industry Association ("TIA") is the primary SSO in the U.S. for the communications industry. TIA is composed of telecommunications companies that manufacture or supply products or services in the telecommunications industry. The European Telecommunications Standards Institute ("ETSI") is

an independent, non-profit organization based in France that is focused on producing global communication standards. These SSOs and others have developed several generations of cellular communications standards: 1G, 2G, 3G, and 4G.

35. When the 2G standard was first introduced in the early 1990s, two main standards were developed: (1) the Global System for Mobile Communications ("GSM") and (2) Code Division Multiple Access ("CDMA"). Qualcomm's SEPs constituted a significant portion of the overall set of SEPs for the 2G-CDMA standard. While AT&T and T-Mobile chose to design their networks around the GSM standard, Verizon and Sprint chose the 2G-CDMA standard.

36. When the 3G series of standards were introduced in the late 1990s, there were two main standards: (1) the Universal Mobile Telecommunications System ("UMTS") and (2) third-generation CDMA ("3G-CDMA"). The UMTS system also incorporated CDMA technology by using "wideband code division multiple access" ("WCDMA") technology. GSM network operators transitioned to the UMTS standard while the 2G-CDMA operators transitioned to the 3G-CDMA standard. Qualcomm had a smaller share of SEPs related to the UMTS and 3G-CDMA standard than its share of the 2G-CDMA SEPs.

37. The 4G series of standards were first introduced in 2009. 4G standards allow for substantially higher data-transmission speeds than 3G standards. Most major network operators have chosen the Long-Term-Evolution ("LTE") standard. The LTE standard does not rely on CDMA-based technology. As a result, Qualcomm's share of SEPs related to the LTE standard is much lower than its share of the standards based on CDMA technology. Qualcomm holds a share of SEPs for the LTE standard that is roughly equivalent to that of other industry competitors. One study of declared LTE SEPs found that Qualcomm had a 13% share of "highly novel" essential LTE patents, compared to 19% for Nokia and 12% for both Ericsson and Samsung.

38. Over time, competition among OEMs has developed across several handset tiers, including premium (sometimes further divided into "premium" and "high"), mid, and low tiers. Premium-tier smartphones, including flagship brands like Apple's iPhone and Samsung's Galaxy-S line, typically include advanced features and technologies. Premium smartphones have become increasingly valuable to OEMs. Premium smartphones tend to have higher prices and margins

than lower-tier products and are important for branding. The United States, where average selling prices for handsets are significantly higher than the global average, is an especially important market of leading OEMs.

39. Among cellular standards, LTE functionality, including its high data transmission speed, is central to modern cellular devices, as consumers increasingly use them to transmit large volumes of data. Cellular data traffic has grown exponentially in recent years, while the volume of cellular voice traffic has remained flat.

40. The major U.S. cellular network operators have deployed the 4G LTE standard on their networks. These network operators have also continued to use the prior standards. In some areas, network operators have not yet replaced their 2G and 3G infrastructure with the new 4G infrastructure. As a result, U.S. network operators require devices sold for use on their networks to be backward compatible with 2G and 3G standards. Therefore, OEMs must purchase multimode chips in order to make cellular devices that can function on the major U.S. wireless networks.

C. Qualcomm Makes Deceptive FRAND Commitments to SSOs in Setting Wireless Standards.

41. Qualcomm belongs to each of the leading SSOs involved in setting wireless communication standards and has made commitments to such SSOs to license its SEPs on FRAND terms. But Qualcomm has violated wholesale its FRAND commitments by refusing to license its competitors directly, tying the provision of its chip supply to OEMs acquiescing to its non-FRAND licensing terms and applying royalty terms in a discriminatory fashion.

42. Absent appropriate safeguards, SEP holders could abuse the standard-setting process via "patent hold-up," which happens "when the holder of a standard-essential patent ('SEP') demands excessive royalties after companies are locked into using a standard." *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014); *see also* U.S. Dep't of Justice & U.S. Dep't of Commerce, Patent & Trademark Office, *Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments* (Jan. 8, 2013).

43. Such abuse can be exacerbated when SEP holders like Qualcomm "over-declare" patents as being essential to practicing a standard. ETSI—like many other SSOs—claims that it has "[n]o involvement" in assessing "the validity and essentiality of patents declared as SEPs." *Legal Considerations*, ETSI Seminar 2014. These abuses contribute to "royalty stacking," where a single product-maker is required to pay "excessive royalties to many different holders of SEPs." *See Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 211217, at *11 (W.D. Wash. Apr. 25, 2013).

44. To protect against such abuses—and to ensure the collaboration among competitors embodied in the standard-setting process does not itself constitute an antitrust violation—SSOs require participants to publicly disclose any claimed SEPs and promise to license such patents to anyone who practices the standard on a royalty-free or FRAND basis. Absent such a promise, SSOs will usually design-around the claimed SEPs at issue. Qualcomm induced the relevant SSOs to adopt Qualcomm technology by promising to license its cellular SEPs on FRAND terms—promises that it knowingly repudiated after the standards were adopted.

45. FRAND royalties include several requirements designed to prevent misuse of the monopoly power conferred by the patent's adoption into a standard. FRAND royalties must include both an appropriate royalty base and royalty rate and be limited to the contribution of the patented technology to the standard. FRAND royalties do not include or reflect value attributable to (1) the mere fact that the patent has been "locked in" to the standard; (2) other technologies that contribute to the standard; or (3) other technologies outside the standard that are included in the consumer device.

46. An SEP holder who makes a FRAND commitment also promises to license its SEPs on a non-discriminatory basis, meaning in part that the SEPs will be licensed to any "willing licensee." This is a critical safeguard that prevents an SEP holder from engaging in patent "hold up" by refusing to license competitors or by licensing competitors on discriminatory and anticompetitive terms.

47. The FRAND commitment is an important tool to prevent monopoly hold-up and ensure the standard is accessible to all who wish to implement it. *Microsoft*, 2013 WL 2111217,

at *11. The FRAND obligation is also critical to ensuring that standard-setting activities themselves—which involve collaboration amongst competitors—do not run afoul of the antitrust laws. As described by the Third Circuit:

> [A] standard, by definition, eliminates alternative technologies. When a patented technology is incorporated in a standard, adoption of the standard eliminates alternatives to the patented technology. Although a patent confers a lawful monopoly over the claimed invention, its value is limited when alternative technologies exist. That value becomes significantly enhanced, however, after the patent is incorporated in a standard. Firms may become locked into a standard requiring the use of a competitor's patented technology. The patent holder's IPRs, if unconstrained, may permit it to demand supracompetitive royalties. It is in such circumstances that measures such as FRAND commitments become important safeguards against monopoly power.

Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) (citations omitted).

48. Violation of FRAND commitments can include demanding unreasonable royalties, applying royalties in a discriminatory fashion or refusing to license competitors, and asserting that non-essential patents are in fact SEPs. Qualcomm has engaged in all three forms of anticompetitive and unlawful conduct.

49. Qualcomm made commitments to ETSI, TIA, the Alliance for Telecommunications Industry Solutions ("ATIS"), and other SSOs that it would license its cellular SEPs for the 2G, 3G, and 4G technological standards on FRAND terms.

50. ETSI participants must follow its Intellectual Property Rights ("IPR") Policy, pursuant to which members are required to disclose even potential standard-essential patents and patent applications and make a written commitment to grant irrevocable patent licenses on FRAND terms. *ETSI Rules of Procedure*, Annex 6, Clause 4, *available at* http://www.etsi.org/website/document/legal/etsi_ipr-policy.pdf. Qualcomm has declared over 30,000 global assets to be "ESSENTIAL IPR." Qualcomm has submitted declarations to ETSI stating that "[t]o the extent that the IPR(s) . . . are or become, and remain ESSENTIAL in respect of the ETSI Work Item, STANDARD and/or TECHNICAL SPECIFICATION," Qualcomm is "prepared to grant irrevocable licenses under this/these IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy." Qualcomm made similar commitments to the other SSOs described above.

51. Qualcomm is thus required to license its cellular SEPs on FRAND terms to cellular device OEMs, as well as competing chip suppliers. Such potential licensees relied on Qualcomm's FRAND promises to SSOs. According to Apple, "Apple and other wireless device manufacturers made conscious decisions to develop and sell products compatible with 3G/UMTS and 4G/LTE, relying on Qualcomm's promise" to license on FRAND terms.[5] As a result, Qualcomm's voluntary FRAND commitments were profitable for Qualcomm.

52. But, as shown below, Qualcomm has violated its promise to license its cellular SEPs on FRAND terms, refusing to license to competing chip manufacturers at all and using its resulting market power in CDMA and premium LTE chips to compel OEMs to accept non-FRAND licensing terms.

D. Qualcomm Acquires and Maintains Monopoly Power in the CDMA and LTE Chip Markets Through Anticompetitive Conduct.

53. Qualcomm's QCT division manufactures Qualcomm's integrated circuit products, including modem chips. QCT produces modem chips that are compliant with 2G-CDMA, 3G-CDMA, UMTS, and LTE standards. It also manufactures multi-mode processors that are compliant with multiple standards.

54. Qualcomm's QTL division, by contrast, is responsible for licensing thousands of patents that Qualcomm has declared are essential to the 3G-CDMA, UMTS, and LTE standards. An OEM must license all SEPs for the standards—including Qualcomm's patents—in order to manufacture cellular devices without infringing.

55. While QCT generates most of Qualcomm's revenue, QTL is responsible for the majority of Qualcomm's profits. In 2015, QCT generated $17.5 billion in revenue while QTL generated $7.95 billion. Between 2013 and 2015, QCT was responsible for approximately 70% of Qualcomm's revenue while QTL collected the remaining 30%. But QTL generated the vast majority of Qualcomm's profits—$6.86 billion in earnings before taxes compared with $2.46 billion for QCT.

[5] First Am. Compl. ¶ 51, *Apple, Inc. v. Qualcomm Inc.*, No. 17-cv-00108, ECF No. 83 (S.D. Cal. Jun. 20, 2017) ("Apple FAC").

56. Qualcomm holds a monopoly position in the CDMA modem chip market. From 2001 to 2015, Qualcomm had consistent market shares exceeding 80%. Qualcomm's worldwide share of the CDMA chip market for 2016 is likely to exceed or at least meet its historically greater than 80% share of the market.

57. According to the FTC, "Qualcomm has faced limited competition for the supply of CDMA processors," over the past decade because "the only supplier of CDMA processors other than Qualcomm was Via Technologies, a Taiwan-based company."[6] The FTC alleges that "Via's CDMA processor sales focused on processors used in lower-tier handsets" in part "because Via has not offered multi-mode processors that combine CDMA functionality with UMTS or LTE functionality." Though Intel Corporation acquired Via's CDMA business in 2015, it has not yet commercialized a chip that integrates Via's CDMA technology with Intel's multi-mode technologies. According to the FTC, "MediaTek Inc., another Taiwan-based semiconductor company, licensed technology from Via in late 2013, and began to offer CDMA processors in 2015. MediaTek has not offered multi-mode CDMA processors suitable for use in flagship handsets, however, and its sales of CDMA processors have been small."[7] Qualcomm has been able to maintain its monopoly and use its dominant position to demand anticompetitive supply and licensing terms from OEMs.

58. The major U.S. wireless carriers—Verizon, AT&T, T-Mobile, and Sprint—have introduced LTE networks. As LTE functionality has advanced significantly since its introduction in 2010, SSOs have released updated standards allowing for faster data speeds, and chip manufacturers have added advanced features to support faster download and upload speeds, multiple-input multiple-output ("MIMO") capabilities, and power-saving features, among others. OEMs usually require modem chips with advanced LTE functionality for premium-tier handsets, as chips that only support earlier LTE features are not a reasonable substitute for ones that support advanced LTE standards and features.

[6] FTC Compl. ¶ 35.
[7] *Id.*

59. Competition among suppliers of LTE modem chips thus occurs in tiers, including premium (sometimes further divided into "premium" and "high"), mid, and low tiers. A premium LTE modem chip supports advanced LTE functionality. Qualcomm recognizes this distinction between chip and device tiers: its 2016 annual report refers to "premium-tier smartphones" and Qualcomm's "premium-tier integrated circuit products."

60. Qualcomm has consistently been the dominant supplier of premium LTE modem chips. From 2012 to 2014, Qualcomm's worldwide share of the LTE chip market exceeded 80%. In 2015, Qualcomm's worldwide share was 69%. Qualcomm's worldwide share of the LTE chip market sales for 2016 remained at the dominant levels it has held since 2012.

61. Currently, Qualcomm's only competitor in the LTE modem chip market is Intel. For many years, Qualcomm effectively blocked Apple from using Intel as a chip supplier. But for this exclusionary conduct, Apple would have agreed to use Intel's chips in earlier iterations of the iPhone. But because Intel's chips were excluded, Intel (a) lost sales and margin, (b) missed out on important opportunities to collaborate with Apple and cellular providers and to obtain development feedback, and (c) lacked the marketplace credibility that a supply contract with Apple would have offered. These consequences disadvantage Intel in attempting to compete against Qualcomm for future chip sales to OEMs.

62. Qualcomm is also the only supplier of LTE modem chips that include CDMA functionality. This type of chip is necessary for OEMs who manufacture cell phones and tablets that can work on the Verizon and Sprint networks.

63. Both the CDMA and premium LTE modem chip markets are protected by high barriers to entry, including (a) the required investment of hundreds of millions of dollars (at least) in R&D; (b) intellectual property licensing requirements; (c) the scale necessary to achieve cost efficiencies; and (d) Qualcomm's exclusionary and anticompetitive conduct.

1. <u>Qualcomm Refuses to License to Competing Modem Chip Suppliers.</u>

64. Qualcomm acquired and maintained its monopoly over CDMA and premium LTE modem chips by refusing to offer its SEPs on FRAND terms to competing modem chip suppliers. Qualcomm itself acknowledged in a litigation filing that FRAND commitments are supposed to

"ensure[] that all industry participants will be able to develop, manufacture and sell products compliant with the relevant standard without incurring the risk that patent holders will be able to shut down those operations."[8] But from 1999 to 2007, Qualcomm only offered its cellular SEPs to other chip manufacturers on non-FRAND terms. Since 2008, Qualcomm has simply refused to offer *any* licenses to potential competitor chip manufacturers despite requests from Intel and Samsung for FRAND licenses.

65. For example, in April 2006, Broadcom introduced a UMTS chip. Qualcomm asserted to Broadcom and Broadcom's customers that Broadcom did not have a license to Qualcomm's SEPs. Broadcom then attempted to negotiate a license with Qualcomm for its SEPs on FRAND terms. Qualcomm proposed non-FRAND terms to Broadcom and other UMTS chips manufacturers that prevented them from effectively competing. Qualcomm also demanded that its UMTS chips manufacturer licensees not sell UMTS chips to OEMs that had not licensed Qualcomm's UMTS SEPs. Qualcomm further assessed royalty rates on OEMs that included the value of UMTS chips in the overall device unit price even if those chips were not manufactured by Qualcomm. Therefore, Qualcomm ensured that it would receive double royalties, one from the OEM and another from the UMTS chip manufacturer on sales of non-Qualcomm UMTS chips. By contrast, Qualcomm allowed OEMs to deduct the cost of a Qualcomm-manufactured UMTS chip from the device unit price. These licensing practices violated Qualcomm's commitment to license on FRAND terms.

66. Qualcomm also retaliated against competitors that challenged its licensing practices by filing patent infringement lawsuits. In July 2005, Qualcomm filed a patent infringement action against Broadcom ten days after Broadcom had filed an antitrust action against Qualcomm. In November 2005, Qualcomm filed a patent infringement lawsuit against Nokia one week after Nokia filed an antitrust complaint against Qualcomm with the European Commission.

[8] FTC Compl. at ¶ 109.

67. As alleged by Apple, it would have been feasible and efficient for Qualcomm to license its cellular SEPs at the component level to competing modem chip suppliers. Indeed, in 2007, Qualcomm represented in a brief filed in the United States Supreme Court that it had licensed competing modem chip suppliers with a running royalty calculated as a percentage of the selling price of the chip.[9] Qualcomm also stated in that filing that its practice of "licensing its intellectual property to entities that produce (non-Qualcomm) chips" was one of its three "primary sources of revenue."[10]

68. Around 2007, Qualcomm transitioned away from licensing its SEPs to other chips manufacturers. For example, Qualcomm's 2006 10-K stated that it entered into "License Agreements" with competing chip manufacturers. In contrast, in its 2007 10-K Qualcomm replaced the term "License Agreements" with "Agreements." By its 2008 10-K, Qualcomm stated that in "every case, these agreements do not allow such integrated circuit suppliers to pass through rights under Qualcomm's patents to such suppliers' customers, and such customers' sales of CDMA-based wireless subscriber devices into which suppliers' integrated circuits are incorporated are subject to the payment of royalties to us in accordance with that customer's separate licensing arrangement with us." Qualcomm's 2014 10-K stated that its policy was to enter into "arrangements," but not provide licenses that exhausted all patents with competing chip manufacturers. In fact, Qualcomm expressly reserved the rights to seek royalties from the customers of chip suppliers.

69. The KFTC has stated that modem chip manufacturers Samsung, Intel, and Via have each requested SEP licenses from Qualcomm but have been refused. And the FTC alleges that "Qualcomm refuses to license FRAND-encumbered cellular SEPs to competing suppliers of chipsets, despite its FRAND commitments."[11]

70. Samsung, a potential competitor to Qualcomm for its modem chips, states that "as a direct consequence of Qualcomm's refusal to license" it does not "sell licensed CDMA or

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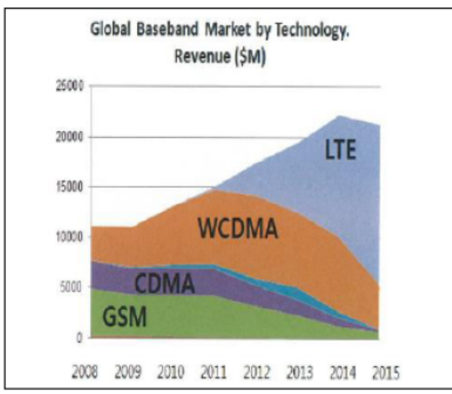
[9] Brief of Qualcomm Inc. as Amicus Curiae Supporting Respondent at 7, *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008) (No. 06-937).
[10] *Id.*
[11] FTC Compl. ¶ 59.

premium LTE chipsets in competition with Qualcomm . . . ."[12] Samsung manufactures chips for use in some of *its own* cellular devices because it has a license for end cellular devices from Qualcomm. But such self-supply does not constitute "meaningful competition."

71. A license to Qualcomm's cellular SEPs would provide substantial benefits to other modem chip suppliers and their customers. Because Qualcomm refuses to license FRAND-encumbered SEPs to its competitors, these competitors cannot offer OEMs chips that convey the rights to Qualcomm's cellular SEPs. Qualcomm violated a duty to deal by this conduct.

72. In 2008, Deutsche Bank identified eleven major suppliers of modem chips. Since 2009, the modem chip market has grown from approximately $10 billion to over $20 billion in revenue. Yet since 2008, nine of the major modem chip manufacturers have exited the market and none have entered. According to the KFTC, the Herfindahl-Hirschman index for the modem chip market has increased from 2,224 in 2008 to 4,670 in 2014. The 4G LTE modem chip market has gone from moderately concentrated to extremely concentrated in the same period of time. The KFTC prepared the following chart showing Qualcomm's success in driving competitors from the modem chip market:

<Market Growth Trend in the Modem Chipset Market and Market Exit by Major Chipset Companies>



Modem Chipset Maker	Exit (Imminent) Time
NXP	August 2008
TI	October 2008
Freescale	October 2008
ST Micro	February 2012
NEC	February 2014
Broadcom	June 2014
Ericsson	September 2014
Nvidia	May 2015
Marvell	September 2015

[12] Brief of *Amici Curiae* Samsung Electronics Co. Ltd. and Samsung Semiconductor, Inc. in Opposition to Qualcomm Incorporated's Motion to Dismiss ("Samsung Amici Br.") at 9, *Federal Trade Comm'n v. Qualcomm Inc.*, Case No. 17-cv-00220, ECF No. 99 (N.D. Cal. May 15, 2017).

2. Qualcomm Further Abuses Its Chip Monopoly via Its Anti-Competitive "No-License-No-Chips" Policy.

73. Having acquired and maintained its monopoly in CDMA and premium LTE chips, Qualcomm conditions OEMs' access to its chips on accepting a separate license to Qualcomm's cellular SEPs on Qualcomm's preferred terms, which results in the payment of substantial royalties to Qualcomm on sales of cellular devices—regardless of whether the devices use Qualcomm's or a competitor's chips. The FTC has referred to this practice as Qualcomm's "no-license-no-chips" policy.

74. As alleged by the FTC, Qualcomm's "no-license-no-chips" policy is exclusionary, as it "skews Qualcomm's license negotiations with OEMs toward outcomes that raise the all-in prices that OEMs must pay on both Qualcomm [chipsets] and those supplied by Qualcomm's competitors," which "reduce[s] demand for competitors' processors and raise[s] handset prices paid by consumers."[13]

75. The incremental royalty that OEMs pay to Qualcomm operates as a surcharge that raises OEMs' costs of using chips supplied by Qualcomm's competitors, reduces demand for competitors' processors, and reduces the ability and incentives of competitors to invest and innovate—thereby maintaining Qualcomm's monopoly power and inflating cellular device prices paid by consumers.

76. When considering cellular device designs, OEMs consider the all-in cost of a chip, consisting of both (a) the price of the chip and (b) any patent royalties the OEM must pay to use that chip in a cellular device.

77. By raising the latter cost component Qualcomm's surcharge increases the all-in cost to an OEM of using a competitor's chips and weakens demand for those chips, reducing competitors' sales and their incentive to come up with new technologies. This practice could be undercut if Qualcomm licensed its SEPs directly to its chip competitors who are not dependent on or beholden to Qualcomm's supply of chips.

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[13] FTC Compl. ¶ 63.

78. As the FTC has explained, Qualcomm's policy has also "limited competitors' ability to discipline the all-in prices that Qualcomm charges for [chipsets]," as "[i]f Qualcomm used its dominance solely to raise the nominal prices of its own processors, those price increases would spur OEMs to seek substitutes and would attract entry and competitive pricing from [chipset] competitors."[14] Instead, by imposing a surcharge on OEMs regardless of whether they use Qualcomm's chips or those of a competitor, Qualcomm is able to raise the all-in price of its chips without fear of competition.

79. Although Qualcomm nominally imposes the same surcharge on all chip sales, its surcharge does not affect all of Qualcomm's competitors equally. For Qualcomm, the surcharge is a means to extract a higher price for Qualcomm's own chips without being undercut by competing chip manufacturers. The revenue from Qualcomm's surcharge comes back to Qualcomm as a form of profit and maintains Qualcomm's chip monopoly.

80. In addition, Qualcomm can discriminate in its royalties: it can offer OEMs incentive payments to discount Qualcomm's above-FRAND royalties if an OEM uses Qualcomm's chips as opposed to those of a competitor. Qualcomm's competitors, by contrast, cannot offer OEMs such incentive payments. Qualcomm's surcharge thus reduces competitors' chip sales and margins and artificially inhibits its competitors' ability to compete against Qualcomm in the market.

81. Nor can Qualcomm contend that its royalty is non-discriminatory because it charges a 5% royalty regardless of whether an OEM purchases Qualcomm's or a competitor's chips. Because Qualcomm offers incentives or rebates on its own chips—one that is not available if an OEM buys a competitor's chips—Qualcomm's royalty and surcharge are, in fact, discriminatory. If Qualcomm added a surcharge only to its own all-in chip price, competitors would underbid Qualcomm in the market for chips. Qualcomm's chip surcharge works because Qualcomm also raises OEMs' all-in cost of using competitors' chips by the same amount.

[14] *Id.* at ¶ 94.

82. Absent Qualcomm's "no-license-no-chips" policy, OEMs could attack Qualcomm's royalty demands in court as being non-FRAND on several grounds, including that:

a. Qualcomm's royalties do not reflect the value contributed by its patented inventions to the standard and are multiples of the royalties charged by other SEP licensors with similar technical contributions;

b. Qualcomm calculates royalties as a percentage of the cellular device's price, which has been rejected under patent damages law that looks to the smallest saleable practice unit as the basis for a royalty;

c. Qualcomm's standard royalty rate has not fallen, even though many of Qualcomm's SEPs have expired; and

d. Qualcomm's royalty rate does not account for the value of any cross-licensed patents it extracts from OEMs.

83. Such suits, when litigated to judgment, have produced royalty rates far below the SEP licensor's original demands. For example, Motorola, an SEP licensor, initially demanded that Microsoft pay SEP royalties of $6-$8 for every Xbox sold, but the court ultimately set the FRAND rate at $0.04 per Xbox. *See Microsoft Corp. v. Motorola, Inc.*, No. C 10-1823, 2013 WL 2111217, at *99-101 (W.D. Wash. Apr. 25, 2013).

84. As alleged by the FTC, Qualcomm's "no-license-no-chips" policy is unique among suppliers of semiconductor and cellular-equipment components. Other component suppliers rely on component sales to convey their intellectual property rights to OEM customers, rather than selling the components and also entering into a separate intellectual property license.[15] Indeed, under the doctrine of patent exhaustion, the "authorized sale of an article that substantially embodies a patent exhausts the patent holder's rights and prevents the patent holder from invoking patent law to control postsale use of the article." *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 638 (2008). Thus, a supplier's sale of a component to an OEM would already exhaust their patent rights, obviating the need—and making it unlawful—to require a

[15] *See id.* at ¶¶ 64-68.

separate patent license. The Supreme Court recently reaffirmed that exhaustion is "triggered by the patentee's decision to give that item up and receive whatever fee it decides is appropriate" for the patented article." *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1537 (2017) (citations omitted). The Patent Act's "right to exclude just ensures that the patentee receives *one reward*—of whatever amount the patentee deems to be 'satisfactory compensation'—for every item that passes outside the scope of the patent monopoly." *Id.* (citations omitted and emphasis added). By insisting on both a license fee and the sale price of the chips, Qualcomm is violating the exhaustion doctrine. To the extent any portion of Qualcomm's portfolio is not exhausted by the sale of the Qualcomm chips, Qualcomm demands that its customers pay for the same exhausted patents in order to obtain a license for any patents that are not exhausted.

85. By violating the exhaustion doctrine, Qualcomm is exceeding the legal limits of its patent monopoly and instead unlawfully abusing its monopoly power. A patentee must respect "established limits . . . in employing the leverage of his patent to control or limit the operations of a licensee." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 136 (1969). Any license restrictions and conditions must be "reasonably within the reward which the patentee by the grant of the patent is entitled to secure." *General Talking Pictures Corp. v. W. Elec. Co.*, 305 U.S. 124, 127 (1938) (quotation omitted).

86. Moreover, the fact that Qualcomm charges a royalty based upon the price of a cellular device means that Qualcomm charges OEMs of high-value, feature-rich smartphones substantially more for a license than it charges OEMs of basic cellphones, despite the fact that the embodied wireless communications functionality in the two products is the same. This is also inconsistent with Qualcomm's FRAND commitments. *In re Innovation IP Ventures, LLCP Patent Litig.*, No. 11 C 9308, 2013 WL 5593609, at *38 (N.D. Ill. Oct. 3, 2013) (holding a FRAND licensor "cannot discriminate between licensees on the basis of their position in the market").

87. Similarly, Qualcomm demanding a royalty based on the price of the cellular device means that Qualcomm receives a higher royalty for features unrelated to Qualcomm's technology. For example, Apple sells different iPhone models with varying amounts of memory, with the

higher-memory versions selling for a significant premium (though the phones provide the same standardized cellular functionality). This means that Qualcomm receives a significantly higher royalty for the higher-memory iPhone models, notwithstanding that the difference in price between the models is not attributable to Qualcomm's cellular SEP patents or Qualcomm's products.

88. Qualcomm's practice of setting its royalty base as the wholesale price of the cellular device also ignores binding Supreme Court and Federal Circuit precedent forbidding patent owners from basing a royalty on an entire device unless the patent at issue drives consumer demand for the whole device. Otherwise, patent holders are required to base royalties on the smallest salable patent-practicing unit.

89. Starting in 2001, Qualcomm used the threat of artificial shortages in the supply of CDMA chips to discipline OEMs. Qualcomm threatened OEMs with the loss of various Qualcomm services if the OEMs purchased modem chips from Qualcomm competitors.

90. In just one example, the KFTC and Intel allege that Qualcomm originally signed a 2G-CDMA licensing agreement with a customer in 1993. In the early 2000s, the customer attempted to renegotiate the licensing agreement to reflect the decrease in the proportion of CDMA SEPs that Qualcomm owned. The customer indicated that it would stop paying certain royalties and suggested that Qualcomm agree to settle the dispute through arbitration. Qualcomm instead threatened to terminate the customer's chip supply. Because a disruption to its chip supply would have threatened its handset business, the customer quickly conceded.

91. On April 22, 2004, Qualcomm's President was quoted as describing modem chips as "very much a supply limited market" and stating that a wireless carrier had been "constrained by the number of phones they can get."

92. Throughout 2012, there was a significant shortage in Qualcomm's supply of LTE chips. This shortage increased Qualcomm's market power and allowed it to demand inflated royalty rates on its patent portfolio.

93. In 2016, LG Electronics ("LG") initiated arbitration against Qualcomm because of Qualcomm's unfair demands during patent licensing negotiations. Qualcomm and LG eventually reached a settlement in which Qualcomm agreed to increase its supply of chips to LG.

94. Absent Qualcomm's dominance in CDMA and premium LTE chips, an OEM could protect itself against a supply disruption either (a) by substituting non-Qualcomm processors in the new handset designs or (b) by using the prospect of substitution to negotiate supply terms with Qualcomm that protect the OEM from disruption. Qualcomm has prevented the former by refusing to license its competitors on FRAND terms or at all, thereby driving them from the market. And it has also prevented the latter by using its market power to force OEMs like Apple to accept supply terms that leave them vulnerable to a supply disruption in the event of a license dispute. For example, Qualcomm used its market power as leverage to require Apple to accept unreasonable contract terms, including the fact that Qualcomm refused to guarantee Apple a supply of chips and arbitrarily limited its liability for failure to supply chips.

95. Qualcomm's "no-license-no-chips" policy has significantly influenced the course of license negotiations with a number of OEMs, including Apple. To maintain access to Qualcomm's chips, OEMs have been coerced into accepting royalty and other license terms that they would not otherwise accept. As a result of the "no-license-no-chips" policy, the royalties that OEMs pay Qualcomm on handsets using non-Qualcomm chips do not reflect OEMs' assessment of patent royalties that a court or neutral arbiter would deem reasonable, including in light of Qualcomm's FRAND commitments. Instead, the royalties reflect Qualcomm's dominant position in the chip markets, and include the added increment that OEMs pay to Qualcomm to avoid disruption of processor supply. This inflated all-in modem cost is ultimately passed onto consumers of cellular devices like Plaintiffs.

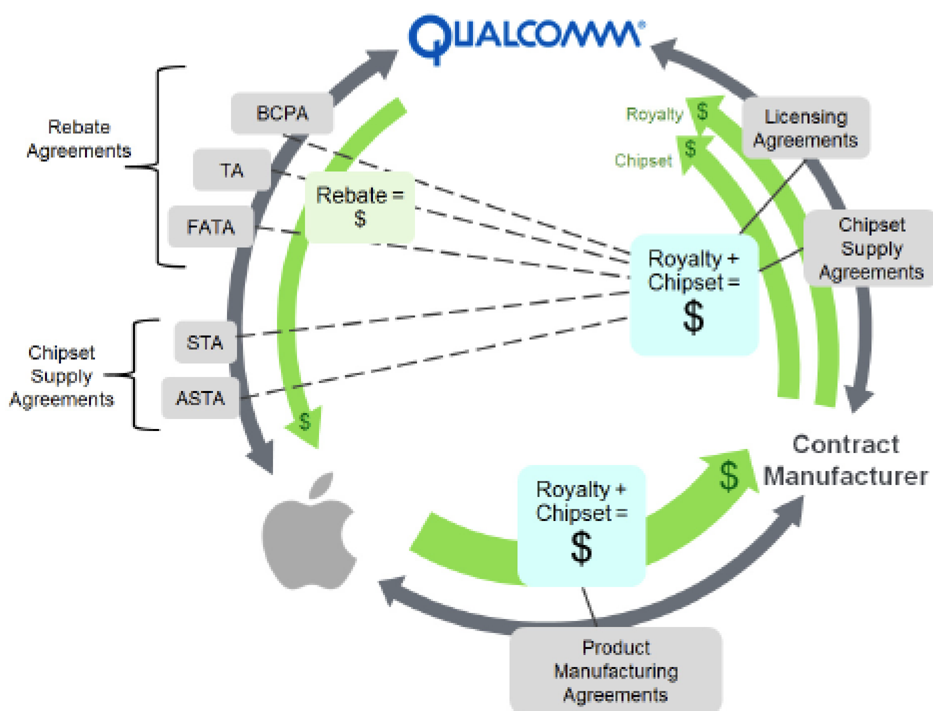
3. <u>Qualcomm Abuses its Market Power to Coerce Chip Exclusivity and Other Anticompetitive Licensing Terms from Apple.</u>

96. Apple manufactures iPhones and iPads and is one of the largest purchasers of modem chips in the world. Apple employs contract manufacturers that assemble iPhones and

iPads and who, in turn, pay patent royalties to Qualcomm, passing the cost along to Apple. Apple then passes the cost along to its customers.

97. Apple repeatedly engaged in negotiations with Qualcomm concerning the excessive royalties Qualcomm charged such contract manufacturers to license its SEPs. Qualcomm refused to negotiate SEP royalty rates for licenses directly with Apple. Instead, Qualcomm gave Apple rebates, discounts, and other incentives to ensure Apple would continue to use Qualcomm's chips and that Qualcomm could continue its "no-license-no-chips" policy. Qualcomm also required that Apple's contract manufacturers keep their license agreements with Qualcomm secret, preventing Apple from determining how much in royalties Qualcomm was charging.

98. According to Apple, the following diagram illustrates the complex web of contracts, some of them secret, that underlie Qualcomm's anticompetitive conduct relating to Apple:



99. According to Apple, in 2007, under their Marketing Incentive Agreement ("MIA"), Qualcomm agreed to give Apple a rebate of all royalties Qualcomm received from Apple's contract manufacturers over a specified per-unit cap. Apple, in turn, agreed not to incorporate the proposed 4G WiMax cellular standard that Intel advocated and Qualcomm opposed. That action helped ensure the adoption of the 4G LTE standard that contained a higher percentage of Qualcomm's SEPs.[16]

100. According to Apple, in 2009, Qualcomm and Apple entered into the Strategic Terms Agreement ("STA"), which addressed the process by which Qualcomm supplied chips and associated software to Apple. That agreement restricted Apple's ability to sue Qualcomm for patent infringement concerning Qualcomm chips. While Apple generally negotiates firm supply commitments with its component vendors, Qualcomm refused to provide Apple such a commitment, instead arbitrarily capping its liability for the failure to supply, and reserving for itself the ability to terminate its obligation to supply chips to Apple's contract manufacturers. Qualcomm's unilateral right to terminate the supply of chips to Apple's contract manufacturers was retained in the Amended and Restated Strategic Terms Agreement ("ASTA"), effective February 28, 2013.[17]

101. According to Apple, in 2011, Qualcomm and Apple entered into a new agreement—the 2011 Transition Agreement ("TA"). Qualcomm agreed to make substantial incentive payments to Apple if Apple agreed to exclusively use Qualcomm chips in all new iPhone and iPad models. Apple would forfeit all of these incentive payments if it used any non-Qualcomm chips. This royalty relief was disguised by Qualcomm as a marketing payment paid pursuant to the TA. As part of that agreement, Apple could not initiate any action or litigation against Qualcomm for intellectual property infringement. These incentive payments were distinct from those incentive payments, or rebates, Qualcomm provided Apple in furtherance of its "no-license-no-chips" policy.[18]

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[16] Apple FAC ¶ 112.
[17] *Id.* at ¶ 113.
[18] *Id.* at ¶ 114.

102. This agreement was modified in 2013 in the First Amendment to Transition Agreement ("FATA"), so that it would continue through 2016. In the 2013 modification, however, Qualcomm insisted on a new condition: Apple could neither initiate nor induce others to initiate litigation based on Qualcomm's failure to offer licenses on FRAND terms. According to Apple, Qualcomm also agreed to make separate substantial incentive payments to Apple so long as Apple exclusively sourced chips from Qualcomm. If Apple launched a new device with non-Qualcomm chips, it would forfeit past and future incentive payments. Even with rebates, Apple paid Qualcomm a higher amount in royalties than it collectively paid to other licensors who together owned a far higher percentage of the SEPs for the 4G standard.[19]

103. Apple and Qualcomm's 2013 Business Cooperation and Patent Agreement ("BCPA"), for example, expressly calculates a series of quarterly payments to Apple ("BCP Payments"), as a cap on the royalties that Apple pays to Qualcomm, setting the amount of the payment at a lump sum that effectively reduced Apple's per-device royalty payments. The rebates reduced but did not eliminate Apple's overpayment of royalties to Qualcomm. Even accounting for such rebates, Apple paid Qualcomm royalties in an amount significantly greater than the royalties Apple pays for another set of patents that collectively represent a far greater percentage of the patents declared as essential to the cellular standard (and which still fail to meet Qualcomm's FRAND obligations).

104. Qualcomm also used its market power as leverage to make Apple accept unreasonable and anticompetitive licensing terms. Qualcomm refused to guarantee Apple a supply of chips, arbitrarily limited its liability for failure to supply chips, and forced Apple to cross-license its own patents to Qualcomm or other Qualcomm licensees. Apple itself stated in its lawsuit that "[f]or several years, Qualcomm's actions deterred Apple from switching to Intel's or other potential competitors' chipsets, substantially diminishing competition in the interim" and that "[e]ven today, Qualcomm is actively engaging with network carriers in the United States, attempting to persuade them not to support or sell Apple devices with Intel chipsets."[20]

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[19] FTC Compl. ¶ 123; Apple FAC ¶ 103.

[20] Apple FAC ¶ 98.

105. As alleged by the FTC, "Qualcomm's 2011 and 2013 agreements with Apple were, and were intended by Qualcomm to be, *de facto* exclusive deals that were as effective as express purchase requirements and that essentially foreclosed Qualcomm's competitors from gaining chipset business at Apple," since:

a. "Apple had at all relevant times an interest in developing and working with additional suppliers of [chipsets]";

b. "The large penalties that Apple would face under its agreements with Qualcomm if it sourced [chipsets] from another [chipset] supplier prevented Apple from using alternative suppliers during the effective exclusivity period under these agreements"; and

c. "Although a price-cost test is not required to assess the competitive effects of Qualcomm's agreements with Apple, the penalties under these agreements are sufficiently large that, if they were attributed as discounts to the price of Qualcomm chipsets reasonably contestable by a Qualcomm competitor, the resulting price of Qualcomm's processors would be below Qualcomm's cost".[21]

106. Because of this *de facto* exclusive dealing agreement, Apple sourced chips exclusively from Qualcomm for all new iPads and iPhone products between October 2011 and September 2016.

107. Qualcomm's exclusive deal with Apple excluded competition from other chip suppliers and harmed competition. As the FTC alleges, "Apple is a particularly important OEM from the perspective of a nascent [chipset] supplier and confers benefits on a nascent supplier that make the supplier a stronger contender for other OEMs' business":

a. "Apple sells large volumes of premium handsets that require premium LTE [chipsets]. These processors ordinarily command higher prices and margins than lower-tier chipsets. Supplying Apple helps a nascent supplier achieve a scale of business that confers research-and-development flexibility";

[21] *See* FTC Compl. ¶ 125.

b. "A nascent supplier learns directly from engagement with Apple engineering teams and this engagement improves the supplier's [chipset] offerings;

c. "A nascent supplier achieves technical validation by demonstrating its ability to meet Apple's demanding technical requirements"; and

d. "A nascent supplier engaged by Apple can field-test its processors through global launches that require real-world work with network operators and infrastructure vendors."[22]

108. Qualcomm's exclusive agreements with Apple prevented Qualcomm's competitors from attaining these benefits and foreclosed a substantial share of the market for premium LTE chips. For example, Intel has stated that "Qualcomm's exclusive arrangements with Apple foreclosed the share of the market that the Ninth Circuit has required in Section 1 cases, *see Tele Atlas N.V. v. Navteq Corp.*, No. C-05-01673 RMW, 2008 WL 4809441, at *21 (N.D. Cal. Oct. 28, 2008), as well as the more relaxed standard that courts have required in Section 2 cases, *see Microsoft*, 2534 F.3d at 70."[23] Intel confirms the FTC's allegations that it had "limited LTE baseband processor sales and [had] achieved modest success . . . only recently when it began to supply a portion of Apple's baseband processor requirements for the iPhone 7."[24] Indeed, Intel's "prior performance was significantly impacted by Qualcomm's exclusive contracts with Apple, as well as Qualcomm's earlier efforts to defeat adoption of the WiMax standard," and that "Qualcomm's conduct locked Intel out of Apple for four years," causing Intel to "lose substantial revenues, the vital ability to scale to other customers more quickly, and the many benefits that come from working with the world's most commercially successful mobile phone."[25] The fact that Intel has recently begun supplying a portion of the chips Apple incorporates in the iPhone 7 is a result of the fact that the many investigations of Qualcomm's illegal practices across the globe deterred Qualcomm from imposing another illegal exclusive deal on Apple.

[22] FTC Compl. at ¶ 129.
[23] Brief of *Amicus Curiae* Intel Corporation in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss at 20, *Federal Trade Commission v. Qualcomm Inc.*, No. 17-cv-00220, ECF No. 92-1 (N.D. Cal. May 12, 2017).
[24] *Id.* (quoting FTC Compl. ¶ 45).
[25] *Id.* at 20-21 (citing FTC Comp. ¶ 120).

109. Since approximately 2014, Apple and Qualcomm have engaged in licensing discussions in recognition of the fact that certain of their agreements were set to expire at the end of 2016.

110. Apple alleges that in 2015, Qualcomm made an offer to Apple to license Qualcomm's Chinese 3G/4G declared-essential patents on terms purportedly "consistent" with those that resolved an inquiry by Chinese regulators into Qualcomm's licensing practices. Apple rejected the proposal because it was not FRAND, was excessive compared to other licenses to cellular SEPs that Apple negotiated at arms' length, and would not help resolve the parties' worldwide licensing dispute.

111. On February 5, 2016, Apple expressed its interest in exploring a direct license to certain patents in Qualcomm's portfolio. During subsequent discussions, Qualcomm refused to identify which of its purported SEPs it alleged Apple's products practiced. Shortly thereafter, Qualcomm removed from its website a public list of the U.S. patents it disclosed to ETSI and precluded archived searching of the list, thereby making it harder for licensees to determine which patents Qualcomm has declared to be SEPs.

112. After 25 months of negotiations, Qualcomm finally agreed to share with Apple patent information about Qualcomm's SEP portfolio, sharing such information right before the 2016 holidays. Over the course of two in-person meetings with Qualcomm engineers, Qualcomm outside counsel, and Apple in-house and outside counsel, Qualcomm provided infringement allegations about 20 U.S. patents it has declared to ETSI as essential to 3G/UMTS and/or 4G/LTE. Apple filed suit for declaratory judgment that many of the patents on Qualcomm's March 18, 2016 list are not infringed. Apple has since identified nine additional patents from Qualcomm's March 18, 2016 list that it alleges are not infringed by Apple or the purchasers of Apple's products. Apple further alleges that such patents are non-essential, invalid, and/or exhausted.

4. Qualcomm Attempts to Silence Apple.

113. According to Apple, Qualcomm, through the BCPA, attempted to prevent its practices from coming to light by imposing a gag order on Apple to preclude it from bringing a

claim that Qualcomm's patents were exhausted. Qualcomm has asserted a counterclaim against Apple, alleging that Apple's obligation not to file an exhaustion suit continued even beyond the expiration of the BCPA.

114. On or around December 7, 2015, Qualcomm and Apple entered into the STA Assignment Agreement, under which Qualcomm was given the right to assign its rights and obligations under the STA, as amended, to its sales subsidiary QTI. The STA Assignment Agreement also included a provision requiring Apple to forego any financial benefit from an exhaustion ruling, indicating that Qualcomm always understood that its royalty practices unlawfully violate the doctrine of patent exhaustion. Qualcomm required Apple to pay Qualcomm the same amount of royalties regardless of the outcome of an exhaustion ruling, further dis-incentivizing Apple from challenging Qualcomm's practices that violate the exhaustion doctrine.

115. Qualcomm has also attempted to evade the patent exhaustion doctrine by selling modem chips to Apple's contract manufacturers through QTC, which is operated by QTI, which is, in turn, a wholly-owned subsidiary of Qualcomm. This is nothing more than a corporate shell game. In its press release announcing the corporate restructuring of QTC, Qualcomm admitted that any change in its corporate structure would not result in "any change to the way in which it defines its operating segments for financial reporting purposes." Press Release, *Qualcomm Institutes New Corporate Structure*, Qualcomm (Oct. 1, 2012), *available at* https://www.qualcomm.news/releases/2012/10/01/qualcomm-implemenets-new-corporate-structure.

116. On May 17, 2017, in retaliation for Apple's lawsuit against it, Qualcomm sued each of Apple's contract manufacturers who manufacture Apple's iPhones and iPads for royalty payments that Qualcomm claims are due under its license agreements with the contract manufacturers (even though Qualcomm knows those payments are passed through to Apple). Qualcomm has now moved for a preliminary injunction, seeking to force the contract manufacturers to pay royalties to Qualcomm.

117. Most of the licensing fees Qualcomm seeks to recover are royalty rebates that Qualcomm has withheld from Apple. Qualcomm has expressly withheld these rebates from Apple

because of Apple's responses to requests for information from government agencies enforcing competition laws. Qualcomm thus demands that contract manufacturers pay royalties that would otherwise be rebated to Apple except for Apple's cooperation with government investigations. Such royalties also include those that Apple has challenged as unlawful in its own suit as violation of Qualcomm's FRAND obligations, the patent exhaustion doctrine, and the antitrust laws.

E. Qualcomm Has Monopoly and Market Power in Relevant Markets.

118. The relevant geographic market is worldwide. There are no material geographic barriers to competition for modem chip sales and the cellular devices that incorporate those modem chips.

119. The relevant product markets are (1) modem chips that comply with CDMA standards ("CDMA modem chips") and (2) modem chips that comply with advanced LTE standards ("premium LTE modem chips.").

120. As set forth above, Qualcomm has monopoly power with respect to CDMA chips and premium LTE chips. Direct evidence of this power includes evidence of Qualcomm's ability to use threatened loss of access to chips to raise the all-in prices of modem chips which includes: (i) the nominal price of the modem chip paid by OEMs; (ii) a FRAND royalty, which the OEM must pay to Qualcomm to practice Qualcomm's SEPs; and (iii) an added surcharge, which the OEM must pay to Qualcomm in order to ensure continued access to Qualcomm's modem chips supply.

121. Qualcomm's monopoly and market power is also established through circumstantial evidence, including dominant shares of relevant market with substantial barriers to entry. Chips without CDMA functionality are not close enough substitutes to prevent Qualcomm from raising all-in prices for CDMA processors. Similarly, chips without premium LTE functionality are not close enough substitutes to prevent Qualcomm from raising all-in prices for premium LTE processors.

122. Barriers to entry in such markets are significant, including the need to make substantial, costly, and time-consuming investments in technology R&D; the need to develop

ongoing customer relationships with leading OEMs; certification requirements imposed by network operators; and barriers to entry that Qualcomm itself has erected with its anticompetitive scheme, including the effective tax that Qualcomm imposes on the chip sales of competitors and potential competitors and Qualcomm's refusal to license its FRAND-encumbered SEPs to competitors.

123. Qualcomm's demand for a royalty rate based on the entire wholesale price of the phone or tablet is also evidence of its unlawful exercise of monopoly power, when compared to other technology companies whose business model depends on licensing SEPs. ARM Holdings ("ARMH") holds a large number of SEPs related to the 802.11 wireless standards, which is incorporated into a wide variety of devices that have wireless networking features. But unlike Qualcomm, ARMH charges a royalty rate based on the price of the specific chips that rely on ARMH's SEPs.

124. For example, Marvell, a modem chip supplier, uses ARMH's SEPs in wifi chips it produces that are incorporated into the Microsoft Xbox. ARMH charges a 1% royalty rate that is calculated off the price of Marvell's chips, rather than the cost of the overall Xbox product. Qualcomm, by comparison, charges a royalty rate of 3-5% based on the overall wholesale cost of a device, which is usually in the hundreds of dollars, even though its chips sell by themselves for between $10-20. Qualcomm's anticompetitive practice causes overcharges to OEMs (and ultimately consumers) who offer feature-rich phones or tablets at higher selling prices. Further, Qualcomm's 3-5% royalty rate is itself evidence of its anticompetitive behavior. Had Qualcomm abided by its FRAND obligations, its royalty rate would have declined. For example, Qualcomm's contribution to the SEPs applicable to cellular devices has declined over time, as devices today contain numerous features that are unrelated to cellular network connectivity (which Qualcomm's patents read on). Thus, Qualcomm's SEPs contribute far less to the value of a 2017 phone than they did to the value of a 2006 phone. Nonetheless, Qualcomm continues to collect a 5% royalty from the total value of the device today for Qualcomm's cellular communications SEPs, just as Qualcomm did a decade ago.

125. By contrast, while Apple's four other largest direct licensors for wireless communications SEPs hold a significantly higher percentage of 4G SEPs than Qualcomm's self-declared 23.5%, Qualcomm's anticompetitive practices allow it to charge Apple higher royalties than the other four companies combined.

126. Qualcomm received approximately 2% of total worldwide cell phone sales in royalties in 2013 and 2014, collecting licensing revenues of approximately $7.8 billion. Four other companies with similar SEP portfolios—Alcatel-Lucent, Ericsson, InterDigital, and Nokia—collected a combined total royalty rate of only approximately 0.7% of total cell phone sales and $2.7 billion in licensing revenue.

127. Qualcomm's anticompetitive conduct directly injures consumers in product markets for cellular devices like smartphones and tablets that incorporate modem chips. Qualcomm's anticompetitive practice means that the all-in price of any modem chip now consists of (i) price paid by the OEM for the modem chip itself; (ii) a FRAND royalty, which the OEM must pay to Qualcomm to practice Qualcomm's SEPs; and (iii) an added surcharge, which the OEM must pay to Qualcomm in order to ensure continued access to Qualcomm's modem chips supply.

128. The inflated all-in cost of a modem chip raises the prices consumers pay for cellular devices incorporating modem chips.

129. The cellular device product market is inextricably intertwined with the CDMA and premium-LTE chip markets, as shown by the fact that (1) Qualcomm uses its market power in chips to extract anticompetitive licensing terms for its SEPs, (2) such licensing terms include charging a separate royalty as a percentage of the wholesale price of the cellular device rather than the chip, and (3) such a royalty directly inflates the modem chip prices and in turn the price of the cellular device purchased by consumers like Plaintiffs and other members of the putative Class.

F. Qualcomm Fraudulently Concealed its Anticompetitive Conduct and Plaintiffs Could Not Reasonably Have Discovered It Earlier.

130. Qualcomm fraudulently concealed its anticompetitive conduct, including its failure to abide by its FRAND commitments, its "no-license-no-chips" policy, and its anticompetitive and exclusionary agreements with Apple. Plaintiffs could not reasonably have discovered Qualcomm's unlawful and anticompetitive conduct under state and federal antitrust laws until the FTC and Apple filed suit against Qualcomm this year.

131. As described above, Qualcomm made public commitments to license its cellular SEPs on FRAND terms. And yet, Qualcomm hid from the public for years to come that it was doing just the opposite.

132. Beginning as early as 2011, Qualcomm entered into confidential licenses with specific Apple contract manufacturers. Apple alleges that "Qualcomm uses these secret licenses to conceal its anticompetitive licensing practices." Apple explains that "Qualcomm knows that Apple is shouldering the entire royalty burden, but by licensing the contract manufacturers and not Apple, Qualcomm can demand higher royalties because the contract manufacturers have no incentive or power to negotiate, given the pass-through to Apple and the contract manufacturers' critical need for access to Qualcomm's chipsets for their business." According to Apple, Qualcomm insists that these agreements are confidential—even Apple has not seen or reviewed them, and certainly consumers like Plaintiffs did not have access to them. And while the contract manufacturers requested permission to share the license agreements with Apple, Qualcomm refused to grant its consent.

133. Qualcomm also took additional affirmative steps to keep its anticompetitive conduct secret and affirmatively mislead the public. Apple alleges that as a condition of giving Apple even partial relief from its non-FRAND royalties, Qualcomm sought to gag Apple and prevent it from bringing its concerns to law enforcement or challenging Qualcomm's compliance with FRAND commitments. Apple alleges that through the second paragraph of Section 7 of the BCPA with Apple, Qualcomm conditioned royalty relief on a provision that restricted Apple from initiating or inducing certain legal actions in three particular identified areas: (a) assertion of

patents against Qualcomm; (b) claims that Qualcomm failed to offer a license to its SEPs on FRAND terms; and (c) claims that Qualcomm's patent rights were exhausted. While the BCPA carved out an acknowledgement that Apple had a responsibility to respond to enforcement agencies' requests for information, in restraining Apple from initiating actions or bringing concerns to law enforcement, Qualcomm conditioned billions of dollars on Apple's silence before courts and regulators about Qualcomm's business practices. Even now, Qualcomm is interpreting that agreement to retaliate against Apple for responding to requests for information about Qualcomm's practices from competition agencies, inhibiting law-enforcement review of Qualcomm's anticompetitive practices.

134. As Apple has alleged in its own lawsuit, "[i]n at least one such agreement, Qualcomm inserted a gag order that prevented an aggrieved party from seeking relief that could curb Qualcomm's illegal conduct, in an effort to keep courts and regulators in the dark and its coerced customers quiet."[26] Apple further alleges that Qualcomm offered it a bribe of "nearly $1 billion" if Apple "retracted and corrected its statements to government agencies and instead gave false testimony favorable to Qualcomm."[27]

135. Plaintiffs did not have actual or constructive knowledge of Qualcomm's anticompetitive behavior and acted diligently in bringing this lawsuit shortly after Qualcomm's exclusionary agreement with Apple, non-FRAND licensing, and "no-license-no-chips" policy came to light through the FTC's complaint filed earlier this year.

136. For the same reasons, Plaintiffs did not discover—and could not reasonably have discovered—Qualcomm's anticompetitive conduct (and thus their state-law claims under California law) until the FTC's complaint was filed earlier this year. Although Korean and Chinese competition authorities had investigated Qualcomm's actions earlier, Plaintiffs could not reasonably have known that Qualcomm was committing the antitrust violations alleged herein in the United States until the FTC complaint was filed this year.

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[26] Apple FAC ¶ 1.
[27] *Id.* at ¶ 231-32.

137. As a result, any otherwise applicable statute of limitations is equitably tolled under the doctrine of delayed discovery dating back to at least February 11, 2011.

138. As a result, the class period in this case dates back at least to February 11, 2011, notwithstanding any shorter limitations period that might otherwise apply.

G. Qualcomm's Conduct Has Harmed Competition in the Relevant Markets and Caused Consumers to Pay Supracompetitive Prices for Cellular Devices.

139. As alleged by the FTC, "Qualcomm's anticompetitive practices have excluded competitors, suppressed innovation, and increased consumer prices."[28]

140. By raising OEMs' all-in cost of using competitors' chips, Qualcomm's conduct has diminished OEMs' demand for such processors, reduced competitors' sales and margins, and diminished competitors' ability and incentive to invest and innovate.

141. Several former competitors of Qualcomm have sold off or shut down their chip businesses, unable to achieve sales volumes and margins needed to sustain a viable business. While Intel and MediaTek have remained in the business, these firms have felt significant pressure, including on chip margins.

142. Qualcomm's practices also suppress innovation, including by foreclosing competing modem chip suppliers and by demanding what amounts to a royalty-free cross-license from its OEM customers, which reduces incentives for such OEMs to innovate.

143. Qualcomm's demand that OEMs license its entire patent portfolio prevents OEMs from determining whether or not specific Qualcomm patents actually need to be licensed—either because the OEM product does not actually infringe or the patent is invalid. Qualcomm has resisted attempts by OEMs to license its specific SEPs on FRAND terms. In April 2016, Apple attempted to license the specific patents that Qualcomm considered to be SEPs for the 3G and 4G standards. Qualcomm refused to negotiate over specific patents and removed from its website the list of patents that it had disclosed to ETSI as SEPs for the 3G and 4G standards.

[28] *See* FTC Comp. ¶ 135.

V. ANTITRUST INJURY AND CAUSATION

144. As a direct, proximate, and reasonably foreseeable result of Qualcomm's conduct, Plaintiffs and Class members were injured in the form of paying artificially-high, supra-competitive prices for cellular devices incorporating modem chips. But for Qualcomm's anticompetitive conduct, Plaintiffs and the Class would have paid less for their cellular devices (and/or would have received cellular devices of higher quality or with more features for the same price).

145. As alleged above, Qualcomm used its anticompetitive "no-license-no-chips" policy, its *de facto* exclusive dealing arrangement with Apple, and its refusal to license its patents to competitors to coerce acceptance of non-FRAND licensing rates and terms for its SEPs. The result is an inflated "all in" price for any modem chip which consists of (i) the price the OEM pays for the modem chip itself; (ii) a FRAND royalty, which the OEM must pay to Qualcomm to practice Qualcomm's SEPs; and (iii) an added surcharge, which the OEM must pay to Qualcomm in order to ensure continued access to Qualcomm's modem chips supply. The artificially inflated all-in cost for modem chips in turn resulted directly in increases for the price of cellular devices that use those chips. It was, and is (and will be unless Qualcomm is enjoined from continuing to do so), Plaintiffs and the millions of members of the Class who bore, and bear (and will continue to bear), the brunt of Qualcomm's unlawful conduct.

146. The supra-competitive all-in modem chip prices, including the surcharge, were passed down the distribution chain from the modem chip purchasers to Plaintiffs and the Class members who use the cellular devices containing such chips. Put simply, Qualcomm unlawfully overcharged OEMs, which passed on the unlawful overcharge – directly or through distributors and retailers – to the end-purchasers of cellular devices: Plaintiffs and the Class. Thus, the unlawful flow of dollars from the Class to Qualcomm can be directly traced through a straightforward distribution chain.

147. Qualcomm's anticompetitive conduct in the chip market includes extracting a surcharge in the form of a non-FRAND royalty tied to the entire wholesale price of the cellular devices at issue in this litigation. The surcharges on the modem chips and paid by OEMs were in

turn passed on to consumers. As a result, Qualcomm's anticompetitive acts, as alleged herein, directly distorted and increased the price of the cellular devices paid by Plaintiffs.

148. As noted above, Qualcomm admits that "[r]oyalties are generally based upon a percentage of the wholesale (i.e., a licensee's) selling price of complete licensed products, net of certain permissible deductions . . . ." Qualcomm's anticompetitive conduct in the chip market, including its surcharge based on licensing a percentage of the wholesale price of devices, are inextricably intertwined with the cellular devices themselves. The effect of Qualcomm's anticompetitive conduct in this case is targeted at the cellular devices as a whole rather than merely their components, as reflected by the fact that Qualcomm's anticompetitive licensing policy uses a royalty base that is the price of the cellular device as a whole.

149. Additionally, Qualcomm's coercive agreements with OEMs such as Apple impacted consumer directly, as they purchased cellular devices from OEMs subject to such anticompetitive arrangements.

150. The all-in cost of modem chips, including the royalties and surcharge paid by OEMs to preserve their chip supply, make up a substantial portion of the cost of manufacturing cellular devices. The retail price of a device is determined in substantial part by these all-in costs.

151. As a result, the inflated prices of cellular devices resulting from Qualcomm's anticompetitive practices have been passed on to Plaintiffs and other members of the proposed Class by OEMs, distributors, and retailers.

152. OEMs, cellular device designers, network carriers, and retailers are generally subject to vigorous price competition, and generally operate on thin margins; they do not readily absorb the anticompetitive rates Qualcomm charges for its modem chips, including the unlawful royalties Qualcomm demands that are based on a percentage of the cost of the device itself. Any increase in the all-in price for modem chips – which consists of 1) the price of the modem chip; and 2) any patent royalties that the OEM must pay for using that chip in a cellular device – lead to corresponding price increases at all levels of the distribution chain. For example, while modem chips cost as little as $10 to $13, royalty fees associated with the component can approach $60 for

a $400 smartphone. The surcharge resulting from Qualcomm's anticompetitive conduct results in an increased cost for the cellular device as a whole, which is directly passed on to the consumer.

153. Economic theory teaches that the only situations in which precisely zero pass-through occurs is when an industry faces a perfectly elastic demand for its product, or if supply was perfectly inelastic. These possibilities are considered implausible by economists. Either scenario is at odds with the nature of the cellular device industry and market. Existing empirical studies of the electronics industry have concluded that demand for cellular devices is not infinitely elastic. Therefore, at least a partial pass-through of an increase in the all-in costs of modem chips, including the patent royalties that OEMs must pay to use modem chips in their cellular devices and price of the chip itself, into the price of finished cellular devices – and consequent harm to Plaintiffs and members of the Class – is the predicted outcome of Qualcomm's anticompetitive behavior.

154. As Professor Jeffrey K. MacKie-Mason notes:

> As is well known in economic theory and practice, at least some of the overcharge will be passed on by distributors to end consumers. When the distribution markets are highly competitive, as they are here, all or nearly the entire overcharge will be passed on through to ultimate consumers. . . . This general phenomenon of cost pass through is well-established in antitrust laws and economics as well.[29]

155. To the extent that distributors, wholesalers, and retailers selling to consumers or to others in the distribution chain price their sales as their cost plus a fixed markup, this will create an additional reason for pass-through to exceed 100 percent through these channels. For example, if a wholesaler prices its product at the manufacturer's sales price plus 10 percent, and a retailer prices its product at wholesale plus 10 percent, the total pass through to the final consumer will be 121 percent (*i.e.*, 110 percent times 110 percent) of the manufacturer's sales price. Further, because retailers ultimately compete with direct sales to purchasers by OEMs, competitive forces would likely work to equalize end-purchaser prices between channels, after controlling for the value of differences in support across different distribution channels. This would tend to push the

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[29] Order re: Class Certification, at 13-14, *Coordination Proceedings Special Title (Rule 1550(b)) Microsoft I-V Cases*, J.C.C.P. No. 4106 (San Francisco Super. Ct. Aug. 29, 2000).

total pass-through rate from costs to end-purchaser pricing above 100 percent, since manufacturers could not sustain a pricing policy to distributors that did not cover their costs, and an additional fixed markup on top of distributor costs would result in a total pass-through rate to final consumers in excess of 100 percent. Based on economic theory and published studies in this area, it is likely that the pass-through rates for the inflated all-in costs of Qualcomm's modem chips (including related SEP licensing and royalty rates) incorporated into cellular devices will exceed 100 percent, a situation known as "overshifting."

156. Apple confirms this economic theory: Qualcomm's anticompetitive contractual, licensing, and royalty rates are passed on to consumers in the form of higher prices for cellular devices. The passing on to consumers of the improper royalties demanded from Apple by Qualcomm is "inevitable."[30]

157. In sum, Qualcomm's coercive combinations caused the following relevant anticompetitive effects:

- Price competition for the modem chips incorporated into cellular devices has been restrained;
- Price competition for cellular devices themselves has been restrained;
- Cellular device prices have been raised to artificially-inflated supra-competitive levels;
- Plaintiffs and members of the Class have been deprived of free and open competition in the markets for chips and the cellular devices that incorporate them; and
- Plaintiffs and members of the Class paid artificially-inflated, supra-competitive prices for cellular devices that incorporate modem chips.

158. By reason of Qualcomm's anticompetitive conduct, Plaintiffs and members of the Class have sustained injury to their businesses or property, having paid higher prices for cellular devices incorporating modem chips than they would have paid in the absence of Qualcomm's

[30] Apple FAC ¶ 659.

illegal contracts, combinations, or conspiracies, and as a result have suffered damages. This is an antitrust injury of the type that the antitrust laws were meant to punish and prevent.

VI. CLASS ACTION ALLEGATIONS

159. Plaintiffs bring this case on behalf of themselves and as a class action under Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of all members of the following Class (the "Nationwide Class"):

> All natural persons and entities in the United States who purchased, paid for, and/or provided reimbursement for some or all of the purchase price for CDMA and/or premium LTE cellular devices ("Relevant Cellular Devices") for their own use and not for resale from February 11, 2011, through the present (the "Class Period") in the United States. This class excludes (a) Defendant, its officers, directors, management, employees, subsidiaries, and affiliates; (b) all federal and state governmental entities; (c) all persons or entities who purchased Relevant Cellular Devices for purposes of resale; and (d) any judges or justices involved in this action and any members of their immediate families or their staff.

160. Plaintiffs do not currently know the exact number of the members of the Class, but believe that they number in the millions. Joinder of all Class members before this Court would be impracticable.

161. Common questions of law and fact exist as to all members of the Class and predominate over any individualized issues or questions. Such common questions of law and fact include but are not limited to:

(a) Whether Qualcomm possessed monopoly power over CDMA and premium LTE chips during the Class Period;

(b) Whether Qualcomm willfully acquired or maintained monopoly power over the CDMA and premium LTE chips during the Class Period;

(c) Whether Qualcomm unlawfully tied the sale of its modem chips to the licensing of its intellectual property (including SEPs and non-SEPs);

(d) Whether Qualcomm unlawfully tied the licensing of SEPs with the licensing of non-SEPs;

(e) Whether Qualcomm unlawfully coerced purchasers of its modem chips to adhere to anticompetitive sales terms;

(f) Whether Qualcomm unlawfully coerced licensees of its SEPs to adhere to anticompetitive licensing terms;

(g) Whether Qualcomm violated a duty to deal in refusing to license its FRAND encumbered SEPS to modem chip competitors;

(h) Whether Qualcomm extracted unlawful royalty payments from purchasers of modem chips (and their downstream customers) who incorporated the chips into finished cellular devices;

(i) Whether Qualcomm's SEPs for the relevant cellular communications standards are fully embodied within Qualcomm's modem chips such that Qualcomm's rights in the patents are exhausted when Qualcomm sells its chips;

(j) Whether Qualcomm's agreements related to the sale of its chips constitute unlawful combinations in restraint of trade or commerce;

(k) Whether Qualcomm's agreements to license its SEPs constitute unlawful combinations in restraint of trade or commerce;

(l) Whether Qualcomm's unlawful conduct enabled Qualcomm to increase, maintain, or stabilize above competitive levels the prices it charges for patent licenses on its cellular SEPs and the all-in modem prices it charges for its CDMA and LTE chips;

(m) Whether the inflated prices were passed on to Class members;

(n) Whether Qualcomm violated section 1 of the Sherman Act, 15 U.S.C. § 1;

(o) Whether Qualcomm's acquisition and maintenance of its monopoly in the CDMA and premium-LTE chip markets violated Section 2 of the Sherman Act;

(p) Whether Qualcomm violated California's Cartwright Act, Cal. Bus. & Professions Code § 16700, *et seq.*;

(q) Whether Qualcomm violated section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45;

(r) Whether Qualcomm violated California's Unfair Competition Law, Cal. Bus. & Professions Code § 17200, *et seq*.;

(s) Whether Qualcomm caused members of the Class to pay artificially-high, supra-competitive prices for cellular devices, and thus suffer antitrust injury, when Qualcomm: (1) unlawfully decreased and eliminated competition in the market for modem chips, (2) charged artificially-high, supra-competitive prices for its modem chips, (3) required artificially-high, supra-competitive rates to license its cellular SEPs, (4) refused to license its SEPs to other chips competitors, despite FRAND obligations to do so; and (5) required OEMs to pay non-FRAND royalties to Qualcomm;

(t) The effect of Qualcomm's conduct on the price of cellular devices containing modem chips sold in the United States and its territories during the Class Period;

(u) Whether Qualcomm's conduct caused injury to the business or property of Plaintiff and members of the Class;

(v) Whether Qualcomm unjustly enriched itself to the detriment of the Plaintiff and members of the Class, thereby entitling Plaintiff and members of the Class to disgorgement of all benefits derived by Qualcomm;

(w) The appropriate form and scope of injunctive relief necessary to prohibit further and future injury to members of the Class from Qualcomm's anticompetitive conduct;

(x) The appropriate measure and amount of damages sufficient to compensate the Class for its injuries suffered because of Qualcomm's anticompetitive conduct; and

(y) The nature, form, and amount of the equitable relief necessary to restore the inequities now existing in Qualcomm's favor and at the Class' detriment caused by Qualcomm's anticompetitive, unlawful, and unfair conduct and business practices.

162. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs purchased cellular devices incorporating modem chips during the Class Period for their own use and not for resale. In that they paid artificially-inflated, supra-competitive prices for cellular devices incorporating modem chips, Plaintiffs suffered similar injuries to all Class members, caused by the same course of unlawful, unfair and anticompetitive conduct committed by Qualcomm. Therefore, Plaintiffs' interests are coincident with and not antagonistic to the claims of all members of the Class.

163. Plaintiffs will fairly, adequately and vigorously represent the interests of the Class in prosecuting their claims against Qualcomm. Plaintiffs are represented by counsel who are competent and experienced in the prosecution of antitrust, intellectual property and class action litigation.

164. The questions of law and fact common to members of the Class predominate over any questions affecting only individual members, including any individual legal and factual issues relating to liability and damages.

165. Class action treatment is superior compared to any alternative method for the fair and efficient adjudication and resolution of the claims and controversies presented by this Complaint because, among other things, such treatment will permit a large number of similarly-situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured persons or entities with a method for obtaining redress for claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in management of this class action. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for Qualcomm.

166. This case is also appropriate for certification as a class action because Qualcomm has acted and refused to act on grounds generally applicable to the Class, so that final injunctive relief will be appropriate with respect to the Class as a whole.

VII. APPLICATION OF CALIFORNIA LAW TO THE NATIONWIDE CLASS

167. Certification of the nationwide Class, which seeks treble damages as well as injunctive and equitable relief under California's Cartwright Act and Unfair Competition Law, is proper in this case. California is the world's sixth largest economy and the home of Silicon Valley. Companies like Apple, Google and Intel have transformed the world through their inventions and created hundreds of thousands of jobs both on their own and through the companies that have grown as a result of the products that they have developed. California has a strong interest in insuring the continued development of its economy by protecting against anticompetitive conduct. California also has a strong government interest in protecting consumers from unfair and unlawful business emanating from California and conducted by companies with their principal place of business in California. Each member of the Class could bring an action in their individual capacity against Qualcomm in a California court (state or federal) for violations of California's Cartwright Act and Unfair Competition Law, based on the same operative facts alleged by Plaintiffs in this Complaint, regardless of where the Class member purchased a cellular device or suffered injury caused by Qualcomm. The application of California law to claims against Qualcomm based on purchases that occurred outside of California would not violate the Due Process Clause of the United States Constitution. Qualcomm's anticompetitive and conspiratorial conduct occurred in California, and the connection between such conduct and California is not merely "slight and casual" or *de minimis*.

168. Qualcomm is a citizen of California, with its principal place of business in San Diego, California, subject to general jurisdiction in all courts located within the State of California. California was the nexus of Qualcomm's unlawful and anticompetitive business practices alleged in this Complaint. Qualcomm devised its anticompetitive scheme in California, negotiated its anticompetitive licenses in California, extracted unlawful royalty payments from a cellular device designer and distributor in California, made anticompetitive business decisions in California, and extracted unlawful profits in California. Qualcomm's largest customer for its modem chips—Apple—is headquartered in California. Google, the creator of the Android operating system used in almost all non-Apple smartphones and tablets, is headquartered in

California. Qualcomm's largest remaining competitor in the modem chip manufacturing business—Intel—is headquartered in California. Qualcomm's chips were contained in, and Qualcomm's intellectual property was embodied in, millions of cellular devices that were sold in California, which California sales were foreseen by Qualcomm. Qualcomm's unreasonable licensing demands of Apple alleged above were made during in-person meetings at Qualcomm's offices in San Diego, California. Qualcomm has filed suit against Apple's contract manufacturers in the U.S. District Court for the Southern District of California, Case No. 3:17-cv-01010-GPC-MDD and last week, against Apple for patent infringement, Case No. 3:17-cv-01375-JAH-AGS. And Qualcomm's contracts with its customers contain choice-of-law provisions selecting the application of California law.

169. The State of California has a clear, substantial, legitimate, and compelling interest in protecting competition in California and entertaining claims by all victims of Qualcomm's unlawful and anticompetitive conduct that emanated from within California's borders, not only those by California residents, and not only those by persons who purchased their Devices within the State.

FIRST CLAIM FOR RELIEF

Violation of the Cartwright Act (Cal. Bus. & Professions Code §§ 16700 *et seq.*)

170. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully set forth herein.

171. Throughout the Class Period, Qualcomm engaged in systematic and continuous conduct with the purpose of (i) unreasonably restricting trade and commerce, and (ii) increasing the price of modem chips, which are a commodity. Qualcomm achieved these anticompetitive purposes by entering into series of coercive combinations for the sale of its modem chips and licensing of its intellectual property. Qualcomm's conduct violated California Business and Professions Code §§ 16700 *et seq*. (the "Cartwright Act").

172. The Cartwright Act applies to the anticompetitive, price-fixing, trade-restraining conduct of a single firm in certain circumstances when that firm by coercive conduct, imposes restraints to which distributors involuntarily adhere. If a "single trader" pressures customers into

anticompetitive contract terms, including exclusive dealing arrangements or illegal tie-ins, an unlawful combination is established with the meaning of the Cartwright Act, irrespective of any monopoly or conspiracy. Stated differently, a "conspiracy" or "combination" within the meaning of the Cartwright Act is formed where a trader uses coercive tactics to impose restraints on uncooperative businesses.

173. And this Qualcomm did: it successfully executed a scheme to pressure OEMs to adhere to unreasonable and supra-competitive licensing terms by threatening to withhold chip supply; coerced Apple into exclusive dealing arrangements; and agreed to pay rebates or funds in exchange for OEMs acquiescing to Qualcomm's coercive terms.

174. These arrangements, individually and collectively, were unlawful combinations within the meaning of the Cartwright Act. The effect of these unlawful combinations was to exclude competitors from the modem chip market, reinforce and grow Qualcomm's dominance and ability to extract anticompetitive profits (a perpetual cycle that will continue unless Qualcomm is enjoined), and – fundamental to this action – cause the price of cellular devices containing modem chips to rise to artificially-high, supra-competitive levels.

<u>Qualcomm's Leverage and Power to Coerce</u>

175. Qualcomm refuses to license its SEP patents to competitors (an unlawful refusal to deal with competitors per Qualcomm's FRAND obligations). A FRAND license would give competing modem chip manufacturers (and potential competitors) the right to market and sell authorized, unencumbered, patent-exhausted modem chips. Qualcomm's refusal to license on FRAND terms eliminates the ability of OEMs to purchase modem chips from Qualcomm's competitors (or potential competitors) without also paying royalties to Qualcomm. Because they have no viable alternative source of supply for chips – and because of Qualcomm's unlawful "no-license-no-chips" policy whereby it threatens to disrupt OEMs' chip supply if they do not comply with Qualcomm's anticompetitive licensing demands—OEMs have no choice but to adhere to Qualcomm's unlawful and anticompetitive contract terms, licensing rates, and royalty demands,

or face being cut off from their only supply of modem chips (a technology necessary for any cellular device).[31]

176. As Apple puts it: "But-for Qualcomm's FRAND evasion, Qualcomm would have been forced to offer exhaustive patent licenses to its cellular SEPs on FRAND terms to [competitors] Intel, Broadcom, and others. An exhaustive patent license to Qualcomm's cellular SEPs would have made these chipset suppliers more effective competitors to Qualcomm in the chipset market, leading to lower prices . . . to the benefit of Apple and ultimately of consumers."[32] Samsung states things succinctly: "because Qualcomm does not license competitors, handset manufacturers have no choice but to accept Qualcomm's onerous terms."[33]

177. Qualcomm requires purchasers of its modem chips to adhere to (a) licensing rates that are much greater than Qualcomm's contribution to the cellular standard implemented, and (b) royalty rates based on the entire price of finished cellular devices, that incorporate far more than Qualcomm's intellectual property. Qualcomm is able to do so by virtue of its coercive "no-license-no-chips" policy, whereby it threatens to disrupt OEMs' chip supply unless they concede to Qualcomm's non-FRAND, anticompetitive, and unlawful licensing terms.

178. Unless coerced, no purchaser of Qualcomm's modem chips (or their downstream customer) or licensee of Qualcomm's SEPs would agree to such royalty rates untethered to Qualcomm's contribution to the cellular devices price. In Apple's words: "Qualcomm forced purchasers of its chipsets to take a license to its SEPs at ***extortion-level royalties*** . . . [and] threaten[ed] 'disloyal' chipset customers with even less-favorable royalties and license terms if they purchased chipsets from Qualcomm's competitors[.]"[34] Samsung too confirms that Qualcomm successfully leveraged its cellular SEPs to coerce OEMs to accept unreasonable licensing terms that have anticompetitive, trade-restraining effects.[35] From Samsung's perspective: "Qualcomm coerces handset manufacturers to sign long-term licenses that

[31] Apple FAC ¶ 108 ("Qualcomm had leverage over Apple because of Qualcomm's market power in chipsets and its ability to disrupt Apple's supply of chipsets").
[32] Apple FAC at ¶ 625.
[33] Samsung Amicus Br. at 2.
[34] Apple FAC ¶ 52 (emphasis added).
[35] Samsung Amici Br. at 7

disincentivize handset manufacturers from seeking alternative chipset suppliers and enable Qualcomm to extract monopoly profits from the full handset *whether or not the value is derived from Qualcomm's SEPs.*"[36]

179. Qualcomm also forces upon purchasers of modem chips terms that violate the fundamental principle of patent exhaustion. Qualcomm will not sell modem chips unless the purchaser and certain downstream customers, including cellular device designers and sellers, agree to pay separate and additional royalties and enter Qualcomm licenses at supra-competitive rates.

180. In the absence of Qualcomm's coercion, purchasers of Qualcomm's modem chips and their downstream customers would not have agreed to Qualcomm's demands for these kinds of post-exhaustion "royalty" payments to which Qualcomm was not legally entitled.[37]

181. Qualcomm coerced Apple into entering into *de facto* exclusive dealing contracts between at least 2011 and 2016. Under the 2011 TA, Qualcomm agreed to make incentive payments or royalty rebates to Apple only if Apple agreed to exclusively use Qualcomm chips in all new iPhone and iPad models and would otherwise forfeit all such payments if it used a Qualcomm competitor's chips. The agreement was modified in 2013 so that it would continue through 2016. Again, pursuant to that agreement, Qualcomm agreed to make substantial incentive payments to Apple, so long as Apple exclusively sourced its chips from Qualcomm. Qualcomm further refused to guarantee Apple a supply of chips, limited its liability for failure to supply chips, and took other actions alleged above that coerced Apple from "switching to Intel or other potential competitors' chipsets, substantially diminishing competition in the interim . . . ."

182. As alleged above, Qualcomm's 2011 and 2013 agreements with Apple were, and were intended by Qualcomm to be, *de facto* exclusive deals that were as effective as express purchase requirements and that essentially foreclosed Qualcomm's competitors from gaining chip business at Apple, since:

[36] *Id.* at 10.

[37] It is improper and contrary to the law to leverage a patent beyond its established limits.

a. Apple had at all relevant times an interest in developing and working with additional suppliers of chips;

b. The large penalties Apple would face under its agreements with Qualcomm if it sourced chips from another baseband supplier prevented Apple from using alternative suppliers during the effective exclusivity period under these agreements; and

c. Although a price-cost test is not required to assess the competitive effects of Qualcomm's agreements with Apple, the penalties under these agreements are sufficiently large that, if they were attributed as discounts to the price of Qualcomm chips reasonably contestable by a Qualcomm competitor, the resulting price of Qualcomm's processors would be below Qualcomm's cost.

183. As a result of the exclusivity terms in its agreement with Qualcomm, Apple sourced modem chips exclusively from Qualcomm for all new iPads and iPhone products that it launched over the five-year period from October 2011 through September 2016.

184. At all relevant times, Qualcomm intended to form and formed one or more trusts through a combination or conspiracy to accomplish purposes prohibited by and contrary to the public policy of the State of California.

185. Qualcomm's actions constitute prohibited restraints on competition in violation of Business and Professions Code §§ 16720 *et seq.* in that the conduct alleged herein restricted trade and artificially inflated and/or maintained prices on CDMA and premium LTE chips and the cellular devices embodying them.

186. Qualcomm's *de facto* exclusive dealing arrangement with Apple also violates Business and Professions Code § 16727, which makes it unlawful for "any person to lease or make a sale or contract for the sale of . . . commodities . . . or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the

effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State."

187. As a direct result of Qualcomm's unlawful conduct, Plaintiffs and the Class members were overcharged when they purchased cellular devices incorporating modem chips.

188. Plaintiffs and other Class members are "persons" within the meaning of the Cartwright Act as defined in California Business and Professions Code § 16702.

189. Qualcomm's conduct violates the Cartwright Act.

190. These violations are continuing and will continue unless enjoined by the Court.

191. Plaintiffs seek damages as set forth below and in this cause of action on behalf of themselves and all Class members against Qualcomm, including but not limited to an injunction against Defendant preventing and restraining the violations alleged herein.

SECOND CLAIM FOR RELIEF

Violation of Section 1 of the Sherman Act (15 U.S.C. § 1)

192. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully set forth herein.

193. As detailed above in Plaintiffs' allegations of Qualcomm's violation of the Cartwright Act, Qualcomm engages in coercive combinations that restricted trade and commerce among the several States. As with the Cartwright Act, the "conspiracy" or "combination" necessary to support an antitrust action under section 1 of the Sherman Act can be found where a single actor successfully coerces unwilling participants to adhere to agreements that have anticompetitive effects. As fully alleged above, Qualcomm engages in a scheme of coercing others into illegal agreements in restraint of trade which caused Plaintiffs and the Class to pay artificially-high and supra-competitive prices for cellular devices incorporating modem chips. Qualcomm violated section 1 of the Sherman Act.

194. Qualcomm, by and through its officers, directors, employees, agents or other representatives, has entered into unlawful agreements and combinations in restraint of trade, in violation of 15 U.S.C. § 1. Such agreements include Qualcomm's anticompetitive agreements with Apple in 2011 and 2013; agreements with OEMs pursuant to Qualcomm's "no-license-no-

chips" policies, through which Qualcomm exacts anticompetitive, non-FRAND royalties from OEMs based on the wholesale price of cellular devices; and rebates or return of funds conditioned on the acceptance of Qualcomm's preferred licensing terms. Such conduct is actionable under the private attorney general provisions for civil litigants under the Clayton Act.

195. These conspiratorial acts, combinations, and agreements have caused unreasonable restraints in the markets for modem chips, without countervailing and offsetting pro-competitive benefits.

196. Plaintiffs and the other Class members have been harmed by injury to competition in these markets and by being forced to pay inflated prices for cellular devices which incorporate the modem chips.

197. These violations are continuing and will continue unless enjoined by the Court.

198. Plaintiffs seek damages and injunctive relief as set forth below and in this cause of action on behalf of themselves and all Class members against Qualcomm, including but not limited to an injunction against Defendant preventing and restraining the violations alleged herein.

THIRD CLAIM FOR RELIEF

Violation of Section 2 of the Sherman Act (15 U.S.C. § 2)

199. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully set forth herein.

200. Qualcomm's conduct, as alleged herein, constitutes unlawful monopolization of the market for CDMA and premium-LTE modem chips, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

201. Qualcomm has monopoly power in the CDMA and premium-LTE chip markets. First, it has maintained high and durable market shares in these markets, historically controlling over 80% of both markets.

202. There are substantial barriers to entry. CDMA and premium LTE based technology is not interchangeable with or substitutable for other technologies, and adherents of such technologies have become locked-in. Qualcomm also controls the SEPs underlying CDMA

technology, and Qualcomm has maintained this monopoly by, among other things, refusing to license to competitors and requiring purchasers of its chips to agree to license its patent portfolio. Third, Qualcomm's monopoly power is shown by its demonstrated ability to force OEMs to accept one-sided, unreasonable supply terms. Among other things, Qualcomm has used its control over the CDMA chip supply to require purchasers to agree to its license agreements and related terms, including non-FRAND royalty terms.

203. Qualcomm has acquired and maintained its market power described above through anticompetitive means – among other things, excluding competitors and forcing OEMs to agree to non-FRAND terms.

204. Qualcomm's market power over CDMA and premium-LTE chips allows it to inflate the price of modem chips by including in them a surcharge, which in turn increases the price of the cellular devices containing those modem chips.

205. There is no procompetitive justification for the anticompetitive conduct in which Qualcomm has engaged. Qualcomm has abused its monopoly power in the relevant chips markets to force OEMs into licenses with unfair and unreasonable terms, including, but not limited to, excessively high royalty rates based on the selling price of the completed device rather than the value of Qualcomm's contribution to the technology in that device. Qualcomm's acts have harmed the development of modem chips, as it has forced out competitors, thus reducing innovation and competitive pricing.

206. Plaintiffs and Class members were harmed by Qualcomm's conduct, which increased the purchase price of their cellular devices incorporating modem chips. Additionally, Qualcomm's conduct harmed innovation and foreclosed competition, which harmed Plaintiffs and Class members in the quality and price of their cellular devices incorporating modem chips.

207. These violations are continuing and will continue unless enjoined by the Court.

208. Plaintiffs seek the relief set forth below and in this cause of action on behalf of themselves and all Class Members against Qualcomm, including but not limited to an injunction against Defendant preventing and restraining the violations alleged herein.

FOURTH CLAIM FOR RELIEF

Violation of Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*)

209. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully set forth herein.

210. Qualcomm's conduct constitutes a violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*, which protects consumers from unlawful, fraudulent, and unfair business practices.

211. Plaintiffs bring this claim on behalf of themselves, members of the Class, and on behalf of the public as private attorneys general pursuant to Cal. Bus. & Prof. Code § 17204.

212. Qualcomm's conduct violates the Sherman Act, the Federal Trade Commission Act, and the Cartwright Act. As such, Qualcomm's acts also constitute unlawful conduct under section 17200. Qualcomm unlawfully acquired and maintained monopoly over the chip market through anticompetitive conduct, including, among other things, excluding competitors by refusing to license patents to them, engaging in exclusive dealing arrangements with its OEMs to exclude competitors, and forcing OEMs to license its patents on anticompetitive terms.

213. Qualcomm's conduct was also deceptive because it induced SSOs to use its technology on the promise that Qualcomm would comply with FRAND. But after SSOs selected Qualcomm's technology for their standards, Qualcomm refused to comply with its FRAND commitments.

214. Qualcomm's conduct is unfair to Plaintiffs and Class members who, as a direct result of the acts described above, were charged more for their cellular devices than they would have been but for Qualcomm's anticompetitive conduct.

215. Plaintiffs and Class members seek and are entitled to all forms of relief available under California's Unfair Competition Law. Pursuant to § 17203, Plaintiffs and Class members seek from Qualcomm restitution and disgorgement of all earnings, profits, compensation, benefits, and other ill-gotten gains obtained by Qualcomm as a result of its conduct in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*

216. Pursuant to Cal. Bus. & Prof. Code § 17204, Plaintiffs and Class members seek an order enjoining Qualcomm from continuing to engage in the acts as set forth in this Complaint. Plaintiffs, Class members, and the public will be irreparably harmed if such an order is not granted.

VIII. JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury on all issues so triable.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and a class of all others similarly situated, request that the Court enter an order or judgment against Defendants including the following:

a. That Qualcomm's conduct be adjudged and decreed to violate the laws alleged in the Complaint.

b. That Plaintiffs and the Class members recover damages, as provided by United States and California law;

c. That Qualcomm be enjoined and restrained from in any manner continuing, maintaining, or renewing its anticompetitive conduct or adopting or following any practice, plan, program, or device with a similar purpose or effect;

d. Disgorgement and/or restitution pursuant to California Business and Professions Code § 17203;

e. That Plaintiffs and the Class members be awarded pre- and post-judgment; and

f. All other relief to which Plaintiffs and the Class may be entitled at law or in equity including injunctive relief.

Dated: July 11, 2017

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