Antitrust Issues in Real Estate

June 15, 2021

10:00 a.m. - 11:00 a.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

CT: 1.0 CLE Credit (General)
NY: 1.0 CLE Credit (AOP)

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LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Antitrust Issues in Real Estate (2021CLC-RP01)

Timed Agenda

Time	Speaker	Outline Section
3 min	Zana	Welcome and introduction to program and speakers
PART I: Brokers and Listings		
7 min	Corp	Antitrust Standing - *EJ MGT LLC v. Zillow Grp., Inc.*, No. CV 18-584 (D.N.J.) - Zillow defeats challenge to Zestimates practices
14 min	Polletta	Antitrust issues with Multiple Listing Service rules
TOTAL Part I: 30 min		
PART II: Sale and Use		
7 min	Corp	Tying - *Reserve Realty, LLC v. Windemere Reserve, LLC* - Recent analysis of listback agreements
7 min	DiMarco	Restrictive Covenants - Antitrust liability for lease and deed use restrictions
7 min	DiMarco	Immunity - *Noerr-Pennington* doctrine in zoning appeals
PART III: Panel Discussion		
15 min	Moderated	Issue spotting antitrust concerns in real estate transactions in format of Q&A
TOTAL: 60 mins		
CONCLUSION		**Zana**

Robert M. Corp

Associate

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Areas of Focus

- Litigation
- Business and Commercial Litigation
- Antitrust Litigation

Robert Corp practices in the area of business litigation and has extensive experience in antitrust litigation involving technology, media, and life sciences industries, including federal and state court matters and class action.

He has conducted internal investigations and represented corporate and individual clients in matters before government agencies, including the U.S. Department of Justice and various state attorneys general.

Prior to joining Shipman, Robert was an associate at a major New York City law firm. While attending Columbia University School of Law, Robert served as an Editor for the *Foundation Moot Court* and was Publication Staff for the *Columbia Journal of Environmental Law*.

Credentials

Education

Columbia University School of Law, J.D., 2010

George Washington University, B.A., 2007, *magna cum laude*

Bar Admissions

New York

Connecticut

Court Admissions

U.S. Court of Appeals for the Second Circuit

U.S. Supreme Court

U.S. District Court, Eastern District of NY

U.S. District Court, Southern District of NY

April 24, 2020

Expedited Review for COVID-19 Procompetitive Collaborations

March 2020

Large Manufacturers Beware: DOJ's Request for Additional Antitrust Attorneys Portends Heightened Enforcement

PEOPLE / **JOHN J. DIMARCO**

John J. DiMarco

Associate

John DiMarco practices primarily in the areas of complex business and intellectual property litigation. He brings knowledge of contract negotiation, outsourcing, and compliance from prior industry experience.

Prior to joining the firm John was a Law Clerk with Shipman. John also worked as a Contract Specialist in the defense/aerospace industry.

Credentials

Education

Rensselaer Polytechnic Institute, B.S., 2005, *cum laude*

University of Connecticut School of Law, J.D., 2013, with honors

Bar Admissions

Connecticut

District of Columbia

Distinctions

- Listed as a Connecticut Super Lawyer Rising Star®: *Intellectual Property Litigation* (2018-2020)
- CALI Excellence Awards for Law and Economics (Fall 2012), IP Law Clinic (Fall 2012) & Copyright Seminar (Spring 2012)

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Areas of Focus

- Intellectual Property Litigation
- Business and Commercial Litigation
- Litigation
- Antitrust Litigation

Related Industries

- Life Sciences
- Manufacturing

October 13, 2020

CT Lawyers Recognized as 2020 Super Lawyers

April 24, 2020

Expedited Review for COVID-19 Procompetitive Collaborations

March 2020

Large Manufacturers Beware: DOJ's Request for Additional Antitrust Attorneys Portends Heightened Enforcement

March 2020

Vertical Mergers Guidelines Updated to Include Safe Harbor From Enforcement Based on Market Shares

PEOPLE / **DIANE C. POLLETTA**

Diane C. Polletta

Counsel

Stamford

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Areas of Focus

Business and Commercial Litigation

Litigation

Antitrust Litigation

Diane Polletta is a member of the firm's Business Litigation and Corporate & Financial Litigation practices, where she represents clients in a variety of complex commercial and financial disputes in state and federal courts as well as in domestic and international arbitrations.

Diane has extensive experience with sophisticated business litigation matters, including contract disputes, business torts, shareholder litigation, partnership and corporate disputes and breaches of fiduciary duties. In addition, she handles antitrust issues, unfair trade practices claims, and complex foreclosures. Her clients include financial institutions, closely held corporations, limited liability companies and partnerships.

Prior to joining the firm, she was a law clerk to the Honorable Janet Bond Arterton, United States District Judge for the District of Connecticut.

Credentials −

Education

Yale University, J.D., 2001

Connecticut College, B.A., 1996, *summa cum laude*, Phi Beta Kappa

Bar Admissions

Connecticut

New York

Court Admissions

U.S. District Court, Southern District of NY

U.S. District Court, District of CT

Distinctions +

Professional Affiliations

- American Bar Association
- Connecticut Bar Association

April 24, 2020

Expedited Review for COVID-19 Procompetitive Collaborations

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Large Manufacturers Beware: DOJ's Request for Additional Antitrust

Attorneys Portends Heightened Enforcement

March 2020

Vertical Mergers Guidelines Updated to Include Safe Harbor From Enforcement Based on Market Shares

PEOPLE / **LISA M. ZANA**

Lisa M. Zana

Partner

Lisa is a partner in the firm's Real Estate Practice Group, a national practice that includes New York-trained lawyers who, like Lisa, practiced at large national and international law firms before joining Shipman. She is able to deliver incisive, strategic and efficient counsel to clients at a significantly lower cost than many local and national competitors.

Lisa's commercial real estate clients are situated throughout the United States with a focus on New York's tri-state area, and include private developers, public companies, institutional owners, banks and lessees of millions of square feet of real estate across the country in the luxury residential, mixed-use, retail, commercial office, data centers and colocation facilities, hotel and hospitality, health care and higher education industries.

Lisa's specific experience and areas of focus include:

- Representing public and private companies that use millions of square feet of real estate, in negotiating build-to-suit and credit-tenant office leases, development agreements and state tax incentive agreements
- Structuring transactions having New York City-specific attributes, including the acquisition of development rights, utilizing mixed-use condominium units to maximize the value of an asset and taking full advantage of available mortgage recording tax savings
- Acquiring, selling, financing and leasing data centers and colocation facilities
- Negotiating ground leases
- Negotiating retail leases on behalf of developers and the end retail users
- Arranging for and negotiating debt and equity financing
- Negotiating corporate- and property-level acquisitions and sales
- Advising clients on the redevelopment of their retail and hotel properties, residential, office, industrial and warehouse facilities; corporate campuses, shopping centers and mixed-use projects.

Credentials

Education

Yale University, B.A., 1995

Duke University, J.D., 1998, cum laude

Bar Admissions

New York, 1999

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Areas of Focus

- Real Estate
- Lease Restructuring
- Commercial Finance
- Public and Private Partnerships
- Business and Corporate
- Opportunity Zones

Related Industries

- Hotels and Hospitality
- Manufacturing

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Connecticut, 2009

Distinctions

+

- Listed as a Connecticut Super Lawyer Rising Star®: *Real Estate*; 2013

Professional Affiliations

- Connecticut Bar Association
- New York State Bar Association
- Association of Corporate Counsel: Westchester/Southern Connecticut
- CREW New York (Commercial Real Estate Women)

Community Involvement

- United Way of Western Connecticut, Inc., Board Member

March 25, 2021

What to Expect When You Are Expecting to go Back to the Office

October 20, 2020

CFIUS Regulations Applicable to Real Estate Transactions

June 25, 2020

Webinar: Plotting A Way Forward for Real Estate: Understanding Your Options and Protecting Your Investments

June 4, 2020

COVID-19: Lease Build-Outs and Commencement Dates

Antitrust Issues in Real Estate

Presented by:
Robert M. Corp, John J. DiMarco, and Diane C. Polletta
Shipman & Goodwin LLP

June 15, 2021

Connecticut Legal Conference

Connecticut Bar Association

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Antitrust Standing

- Article III Standing
  - For a plaintiff to bring a claim, must first establish standing under the Constitution.
  - Must demonstrate (1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.
- Antitrust Claim Requirements
  - After meeting Article III criteria, plaintiff must demonstrate the requisite antitrust standing to bring suit under antitrust laws.
  - Courts often focus on the nature of the plaintiff's alleged injury and whether the injury is the type that the antitrust statute intended to prevent.

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Antitrust Standing

- Antitrust Standing Test
  - Following *Associated General Contractors*, the 3rd Circuit articulated multifactor test for antitrust standing:
    - 1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm;
    - 2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress;
    - 3) the directness of the injury;
    - 4) the existence of more direct victims of the alleged antitrust violations; and
    - 5) the potential for duplicative recovery or complex apportionment of damages.

Antitrust Standing

- Antitrust Injury
  - Courts have held that "[p]rivate plaintiffs pursuing claims under § 1 of the Sherman Act have standing when they suffer an antitrust injury that is causally related to the defendants' allegedly illegal anti-competitive activity." *Eichorn v. AT&T Corp.*, 248 F.3d 131, 140 (3d Cir. 2001).
  - Antitrust standing "focuses on the nature of the plaintiff's alleged injury,' [and] ask[s] 'whether it is of the type that the antitrust statute was intended to forestall.'" *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 269 (3d Cir. 2016).

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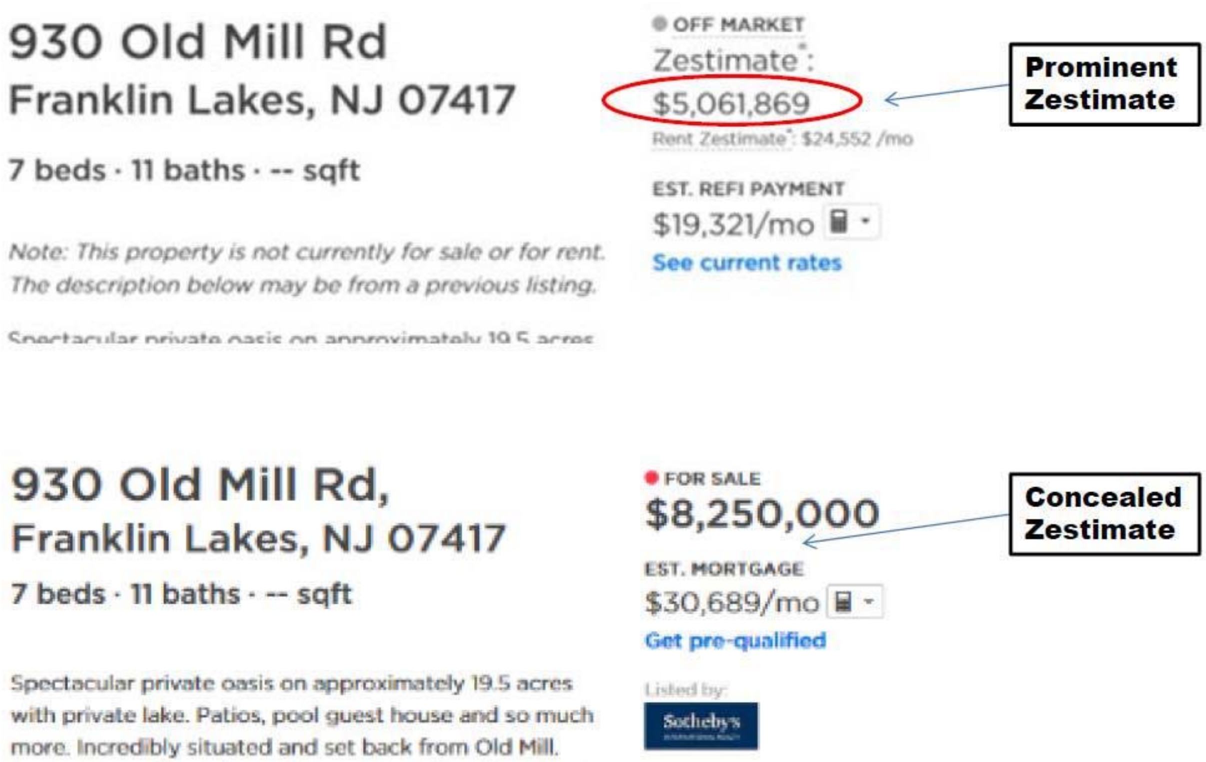
Dismissal of Zestimates Suit

- Overview of Lawsuit
  - In 2018, a New Jersey-based LLC filed a complaint against Zillow, alleging that the company restrained competition by making deals with certain brokerages to hide Zillow's home valuation estimates ("Zestimates") on those brokerages' listings on Zillow's website.
  - The plaintiff owned a property that it put on the market in January 2017, but failed to sell. The plaintiff alleged that the Zestimate price on Zillow.com of $3.7m, which was less than half of the $7.7m listing price, was the reason for the failure to sell.
  - Plaintiff asked Zillow to move the Zestimate price further down on the property's listing page, where the Zestimate price for certain other properties could be found, but that Zillow refused to do so.
  - Alleged that Zillow explained that it moved the Zestimate price for other properties as the result of agreements between Zillow and certain other brokerages.

Dismissal of Zestimates Suit



Example of conduct plaintiff alleged to be wrongdoing.

Dismissal of Zestimates Suit

- Alleged Harms from Zestimates Agreement
  - Complaint **did** allege that Zillow had agreements with brokerages that:
    - Stifled and distorted the flow of price information.
    - Created and heightened barriers to entry in the market for residential real estate listing services.
  - Plaintiff alleged that as result of those effects that Zillow users (**but not plaintiff**) were injured by:
    - 1) having to make decisions with distorted information;
    - 2) paying increased costs; and
    - 3) there being barriers to entry in the sale of real estate.

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Dismissal of Zestimates Suit

- No Antitrust Injury
  - Court held:
    - "Even taking these allegations as true, however, Plaintiff's alleged injury does not reflect any of the antitrust injuries Plaintiff vaguely argues the Zestimate Agreements cause."
    - "Plaintiff's alleged injury is of a personal nature - i.e., lost profits from its inability to sell the property."
    - "This personalized injury, however, is not of the type that the antitrust statute was intended to forestall."
  - Since plaintiff's alleged injury was not related to the allegedly anticompetitive conduct, the Court found that it lacked antitrust standing.

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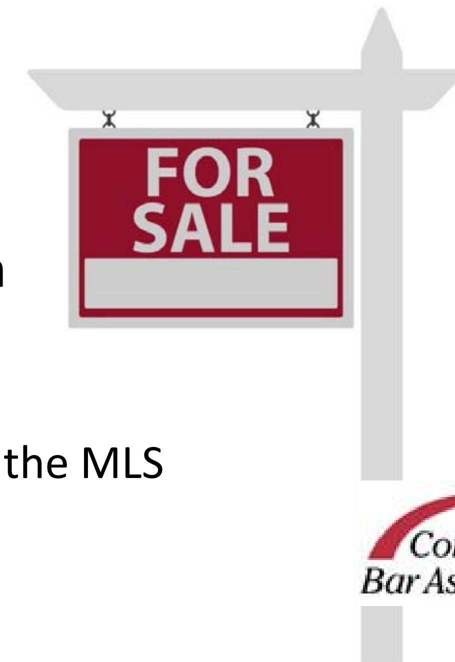
Antitrust Issues with Multiple Listing Service Rules

Role of Multiple Listing Services ("MLS"):

- Most residential real estate for sale in the United States is marketed through a MLS.
- An MLS combines its members' residential real estate listings into a central database
- MLSs are conduits of information – aggregating and disseminating real estate listing information
- MLS rules can play a critical pro-competitive role in marketplace for residential homes
  - e.g., Requirements that members place all listings in the MLS within a specified period of time enhances market information and promotes a more efficient market



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Antitrust Issues with Multiple Listing Service Rules

The Concern: An MLS relies on cooperation among competitors, and might be used for anti-competitive purposes

- Does an MLS rule or membership requirement exclude brokers?
- Does an MLS rule or membership requirement restrict alternative business models (particularly those with cheaper ways of doing business)?
- Does an MLS rule or membership requirement result in less competition for broker fees and commissions?

MLS Rules That Exclude Brokers

Historically, the U.S. Department of Justice and
Federal Trade Commission have challenged as anti-competitive
MLS rules that serve to exclude brokers.

- Broker exclusion can have anticompetitive effects:
  - The excluded broker's listings would not be distributed as widely as possible, resulting in incomplete market information and inefficient sales prices
  - the exclusion could reduce competition among brokers
  - could result in less competition for brokerage fees.

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MLS Rules That Exclude Brokers

An early example: In *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), the following MLS member requirements were deemed anticompetitive:

- have a favorable credit report,
- maintain an active real estate office open during customary business hours,
- purchase a share of that MLS's stock

Why?

- The rules were not justified by legitimate competitive needs (the state already regulated the licensing of real estate brokers)
- broker exclusion had anticompetitive effects

MLS Rules That Restrict Alternative Business Models

- Exclusive Agency Listings (where the broker is not compensated if the home seller sells the home on his or her own)
- MLS rules that prevent exclusive agency listings from being uploaded to national websites like Realtor.com have been deemed anticompetitive.
- The rule created barriers to the wide distribution of such listings, which could result in inefficient sales prices
- By incentivizing realtors to abandon exclusive agency listings, the rule was found to reduce competition among brokers, resulting in less competition for brokerage fees.
- Rule found to be not reasonably related to legitimate competitive needs of the MLS.

* See Austin Bd. Of Realtors, FTC Dkt. No. C-4167 (2006); Realcomp II, Ltd. v. F.T.C., 635 F.3d 815 (6th Cir. 2011), cert. denied, 132 S. Ct. 400 (2011).

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MLS Rules That Restrict Alternative Business Models

Virtual Office Websites ("VOWs"): VOWs are broker websites in which the consumer is able to search MLS data.

- In 2008, DOJ challenged a National Association of Realtors ("NAR") rule that required MLSs to allow brokers to withhold their clients' listings from VOW brokers by means of an "opt out".
- Rule enabled traditional brokers to block competitors' customers from having full on-line access to all of the MLS's listings.
- Rule inhibited new ways of competing by preventing internet-based brokers from providing all MLS listings that respond to a customer's search.
- Under the NAR-DOJ settlement agreement, NAR agreed to adopt a new policy that brokers participating in a NAR-affiliated MLS are not permitted to withhold their listings from brokers who serve their customers through VOWs.

  See https://www.justice.gov/atr/case-document/final-judgment-142.

MLS Rules Related To Broker Commissions

Rules limiting disclosures of broker commissions may be found to be an illegal restraint of trade.

(1) prohibiting MLSs that are affiliated with NAR from disclosing to prospective buyers the commission that the buyer broker will earn if the buyer purchases aa home listed on the MLS;

(2) allowing buyer brokers to misrepresent to buyers that a buyer broker's services are free;

(3) enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered;

In November 2020, DOJ entered into a settlement with NAR requiring NAR to repeal or modify these rules. *See U.S. v. National Association of Realtors*, No. 1:20-cv-3356 (D.D.C.).

- NAR agreed that it would repeal all such rules, that it would require all Member Boards and MLSs to repeal any such rules, and would adopt rules that ensure that all MLS participants maintain transparency about broker compensation

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MLS Rules Related To Broker Commissions

- Piggybacking the DOJ's investigation, class action plaintiffs filed suit in 2019 against NAR and four leading real estate brokerage firms alleging antitrust injury in the form of supracompetitive prices arising from NAR rules related to buyer-broker commissions.
- Challenged Conduct: Class plaintiffs allege that:
  - MLS rules require seller brokers to make "blanket, unilateral, unconditional offers of compensation" to their adversarial buyer brokers
  - MLS rules require sellers to publish buyer-broker compensation
  - Seller brokers are incentivized to offer similar buyer-broker compensation to avoid "steering"
  - The foregoing prohibits competition for reduced broker commissions
- Class action plaintiffs survived Defendants' motion to dismiss. The case is *Moehrl v. National Association of Realtors*, 1:19-cv-01610 (N.D.Ill.)

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MLS Rules Related To Pocket Listings

Pocket Listings are listings marketed outside of the MLS.

- Typically not entered into the MLS system until the listing agent has already identified a purchaser for a property.
- Much more common in recent years, particularly in high end markets.

NAR's Clear Cooperation Policy (adopted in November 2019):

- Listing broker must submit the listing to the MLS within one business day of marketing a property to the public.
- Does not apply to "office listings" (listings marketed entirely within a brokerage firm without submission to an MLS).
- Enforced by MLSs, who monitor their members' adherence to the policy and can threaten or impose penalties on members for non-compliance

Are rules prohibiting or discouraging pocket listings pro-competitive or anti-competitive?

MLS Rules Related To Pocket Listings

The pro-competitive argument:

- Such rules enhance listing exposure for homes.
- The pocket listing practice may inhibit competition by depriving the seller of the benefits of maximum exposure to the market.
- It may affect the integrity of the MLS data (property appears as on the market for a single day when in fact was marketed prior to MLS listing)
- Real estate values may also be impacted if a large number of homes are marketed off the MLS and that data is not available to appraisers, real estate agents, and sellers.
- In areas with tight inventories, the increased pocket listing practice may exacerbate inventory shortages.
- The use of off-MLS listings also may favor larger brokers at the expense of smaller ones (MLSs level the playing field by enabling equal exposure to both small and large brokerage firms).

MLS Rules Related to Pocket Listings

NAR's Clear Cooperation Policy Challenged as anti-competitive:

- *The PLS.com, LLC v. National Association of Realtors:* Antitrust suit against NAR brought by PLS.com, a new company providing an alternative network for real estate listings, before they opened up to the MLS and public facing websites relying on MLS data.

Competitive Harms may include:

- Discourages use of competitor listing network
- Deprives consumers of choice
- Inhibits innovation by services responding to consumer demand (e.g., many sellers seek privacy and do not wish to include information about their property as required by the MLS)
- Harms the competitive process in the market where real estate brokers purchase real estate listing network services, allowing the MLS to maintain a monopoly in such market

MLS Rules Related to Pocket Listings

- The U.S. Department of Justice investigated the Clear Cooperation Policy, and ultimately closed the investigation without taking action.
- District Court granted defendants' motions to dismiss, holding that PLS failed to allege any plausible facts that consumers or competition were harmed. *See The PLS.com, LLC v. National Association of Realtors,* No. 220CV04790JWHRAOX, 2021 WL 369545, at *13 (C.D. Cal. Feb. 3, 2021).
- An appeal is now pending in the Ninth Circuit.
- DOJ amicus brief takes no position on the merits of PLS's antitrust claims, but takes issue with the district court's legal analysis.
- The DOJ's position: anticompetitive conduct is directed at market intermediaries (like real estate brokers and agents) is cognizable; and reductions in quality, consumer choice, innovation, and harm to the competitive process should be considered

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MLS Rules Related to Pocket Listings

Identify whether the MLS acting as a procompetitive force, or as an exclusionary force.

Where MLS rules are driven by legitimate competitive needs of the real estate market, such as enhancing listing exposure for homes or ensuring accurate and reliable real estate market information, they tend to be upheld.

In contrast, where they serve to exclude, in particular, where they discourage maverick brokers with new ways of doing business and lower commission fees, there is a high risk such rules will be deemed anticompetitive.

Tying Agreements

What is tying?

- A "tying arrangement" is an agreement by a party to sell one product -- the tying product -- but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from any other supplier.

No longer *per se* illegal

- While tying once was treated as per se illegal under antitrust laws, the United States Supreme Court's decision in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), and other more recent federal and state decisions have significantly limited the cases in which cases involving tying will be treated under a per se analysis.

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Tying Agreements

List-back Agreements

- A list-back agreement is a tying arrangement that commits the purchaser of a parcel of real property to use the services of a particular broker when leasing or reselling the property.
- Prior to 2020, list-back arrangements were treated as *per se* illegal under Connecticut jurisprudence.
- In the recent *Reserve Realty* decision, the Connecticut Supreme Court overturned its 1980 decision in *State v. Hossan-Maxwell.*

Tying Agreements

New Standard

- The Court in *Reserve Realty* held that such agreements could not be found as unenforceable before "first engaging in a full market analysis."
- The 2nd Circuit and Connecticut test for tying asks whether:
  - 1) the sale of one product (tying product) is conditioned on purchase of a separate product (tied product);
  - 2) the seller uses actual coercion to force buyers to purchase tied product;
  - 3) the seller has sufficient economic power in tying product market to coerce purchasers into buying tied product;
  - 4) the tie-in has anticompetitive effects in tied market; and
  - 5) there is a not insubstantial amount of commerce is involved in the tied market.

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Restrictive Covenants

Rule of Reason

- Restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest.

Example: Employment

- Multifactor Disjunctive Test: (1) the length of time the restriction is to be in effect; (2) the geographical area covered by the restriction; (3) the degree of protection afforded to the interest of the party in whose favor the covenant is made; (4) the restrictions imposed on the employee's ability to pursue his occupation; and (5) the potential for undue interference with the interests of the public.

Restrictive Covenants

Rule of Reason

Reasonable

Reasonableness

Unreasonable

Attributes	Examples
• Promotes investment • Promotes market entry • Limited geographic scope	• Shopping Center Non-Compete Restrictive Covenant
• Inhibits market entry • Indefinite in time • Restricts geographic market	• Restricting “Essential Facilities” • Foreclosure of productive uses of land

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Antitrust Immunity

Noerr-Pennington doctrine

- Legitimate petitioning of the three branches of government is permitted even if the intent of the activity is to inhibit competition
- Derived from the First Amendment and the Sherman Act
- Expanded to petitioning at the state and municipal level

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Antitrust Immunity

- Legislative: *Eastern Railroad Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961)
- Rulemaking: *United Mine Workers v. Pennington,* 381 U.S. 657 (1965)
- Adjudication: *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)

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Antitrust Immunity

Sham Exception: *Professional Real Estate Investors v. Columbia Pictures Industries* (*PRE*), 508 U.S. 49 (1993).

- Applies to adjudicatory petition
- Two part test
  - ***"Objectively baseless" petitioning?*** No reasonable petitioner could expect a favorable ruling on the merits. A lawsuit is not objectively baseless where the plaintiff has probable cause to sue.
  - ***Subjective Motivation?*** Petitioner's subjective motivation is to use the adjudicatory process itself as an anticompetitive weapon, as opposed to achieving a certain outcome of that process. Sham petitioning is not aimed at a favorable outcome.

Antitrust Immunity

In *Zeller v. Consolini*, 59 Conn. App. 545 (2000), the Connecticut Appellate Court adopted ***Noerr-Pennington* Immunity** in the context of zoning appeals.

- Non-sham appeals from zoning decisions are immune under *Noerr*.
- Mere fact that petitioning is unsuccessful does not make it a sham provided there is a good faith belief in the facts supporting the appeal.

Recently affirmed by *Procurement, LLC v. Ahuja,* 197 Conn. App. 696 (2020)

- Single non-sham basis for appeal to be immune.

Antitrust Immunity

What’s a sham?

- In *Diamond 67, LLC v. Oatis*, 167 Conn. App. 659 (2016), the Connecticut Appellate Court refused to grant summary judgment on *Noerr* immunity grounds where issue of fact regarding petitioning based on facts known to be false.

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Antitrust Immunity: Summary

- Legitimate petitioning permissible even if the ends is anticompetitive
- Two part test: (1) Not "objectively baseless" and (2) subjectively motivated to achieve the result of the petitioning
- Applies to zoning appeals
- One non-sham basis for the zoning appeal
- Petitioning based on facts known to be false is not immune

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DISCUSSION

2021 CONNECTICUT LEGAL CONFERENCE
ANTITRUST ISSUES IN REAL ESTATE

By: Diane Polletta, Robert Corp, and John DiMarco

ANTITRUST STANDING OVERVIEW

The private cause of action for damages under the federal antitrust laws is established under Section 4 of the Clayton Act. 15 U.S.C. § 15(a). Connecticut's state antitrust laws, as established in the Connecticut Antitrust Act, reflect the legislative intent that Connecticut courts "shall be guided by the interpretations given by the federal courts to federal antitrust statutes." Conn. Gen. Stat. § 35-44b.

For a plaintiff to demonstrate "antitrust standing," it must first establish Article III standing. To do so, a plaintiff "must demonstrate '(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.'" *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (citation omitted).

If a plaintiff does demonstrate it has Article III standing, it must then establish that it has antitrust standing. In examining whether a plaintiff can establish the requisite antitrust standing to bring suit under antitrust laws, courts often focus on the nature of the plaintiff's alleged injury and whether the injury is the type that the antitrust statute intended to prevent. *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 269 (3d Cir. 2016) (internal quotations omitted). Antitrust standing is a "prudential limitation" that does not affect a court's subject matter jurisdiction over a matter, but rather "prevents a plaintiff from recovering under the antitrust laws." *Ethypharm S.A. v. Abbott Labs.*, 707 F.3d 223, 232 (3rd Cir. 2013).

The Supreme Court in *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters* articulated several factors to consider when determining whether a plaintiff has antitrust standing. 459 U.S. 519, 535-38 (1983). Since then, the Third Circuit has "organized those factors . . . into the following multifactor test":

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

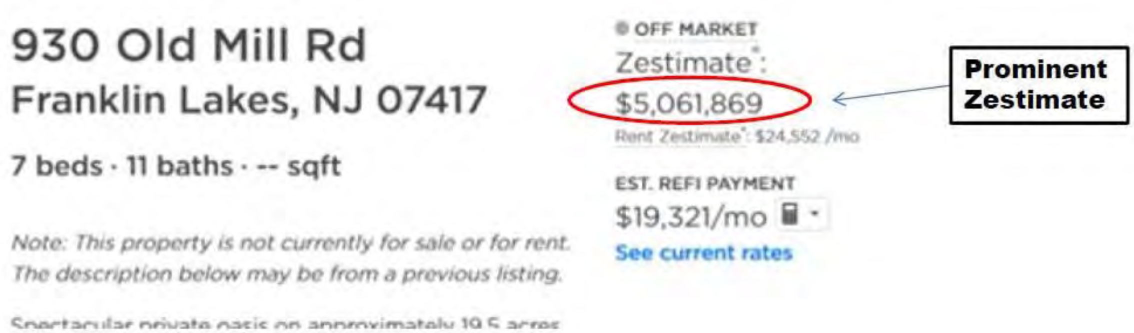
Ethypharm, 707 F.3d at 232-33. As an example, courts have held that "[p]rivate plaintiffs pursuing claims under § 1 of the Sherman Act have standing when they suffer an antitrust injury that is causally related to the defendants' allegedly illegal anti-competitive activity."

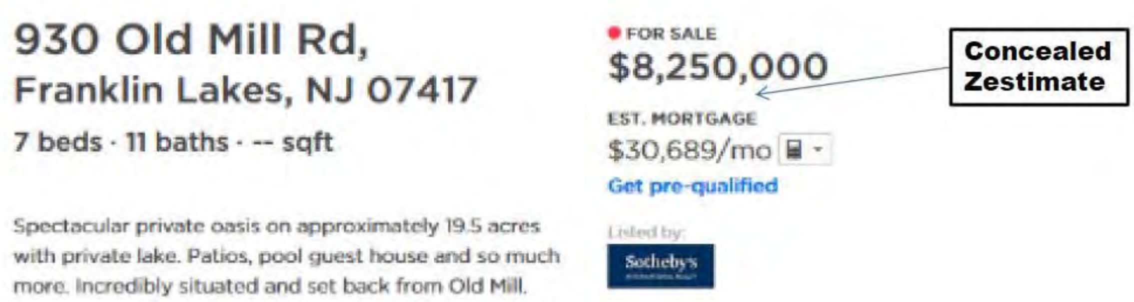
Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001) (emphasis added). Additionally, antitrust standing "focuses on the nature of the plaintiff's alleged injury, [and] ask[s] 'whether it is of the type that the antitrust statute was intended to forestall.'" *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 269 (3d Cir. 2016).

Dismissal of Suit against Zillow: In January 2018, a New Jersey-based company filed a complaint against Zillow Group, alleging that the company restrained competition by making deals with certain brokerages to hide Zillow's home valuation estimates ("Zestimates") on those brokerages' listings on Zillow's website. *EJ MGT LLC v. Zillow Group, Inc. et al.*, No. 2:18-cv-00584 (D.N.J. Jan. 15, 2018).

The plaintiff, EJ MGT LLC, owned a property purportedly worth millions of dollars, which it put on the market in January 2017, but the property failed to sell. The plaintiff alleged that the Zestimate price on Zillow.com, which estimated that the property's value was less than half of the listing price, was the reason for the failure to sell. EJ MGT had an asking price of roughly $7.7 million for the property, while the Zestimate for the property was $3.7 million. EJ MGT alleged that it asked Zillow to move the Zestimate price further down on the property's listing page, where the Zestimate price for certain other properties could be found, but that Zillow refused to do so and that it told EJ MGT that moving the Zestimate price for other properties was the result of agreements between Zillow and certain other brokerages.

EJ MGT included in its complaint screenshots comparing how Zillow displayed the Zestimate for a particular property once it was off the market to when it was on sale with an agent of one of Zillow's alleged co-conspirators.





The complaint alleged conspiracy to restrain trade under federal and New Jersey state law, along with violations of New Jersey's consumer fraud act and other counts under New Jersey common law. The complaint alleged that:

> [T]hrough illegal agreements, Zillow has conspired with the Co-conspirator Brokers to conceal the knowingly misleading and inaccurate Zestimates on the Residence Pages for their listings so that the Zestimate is not prominently displayed and not in frame when an internet user lands on a given Residence Page. Alternatively, Residence Pages for homes listed by (i) other brokers, (ii) agents who are not affiliated with the Co-conspirators ("Unaffiliated Broker/Agent"), and (iii) individual home owners who have not hired agents affiliated with the Co-conspirator Brokers are left with no choice but to have the inaccurate or otherwise misleading Zestimates appear prominently on those Residence Pages.

After allowing the plaintiffs to amend their complaint twice, the New Jersey District Court dismissed the measure with prejudice in March 2021. *EJ MGT LLC v. Zillow Grp., Inc.*, 2021 WL 822896 (D.N.J. March 4, 2021). In dismissing the first amended complaint, the District Court performed a lengthy analysis of EJ MGT's purported antitrust injury (and thus, antitrust standing). *EJ MGT LLC v. Zillow Grp., Inc.*, 2020 WL 1081851 (D.N.J. March 3, 2020). In its recent ruling dismissing the case with prejudice, the Court harkened to its March 2020 ruling extensively.

A significant component of the District Court's decision to dismiss both the first and second amended complaints was the lack of antitrust injury demonstrated by the plaintiff. The Court observed that "Plaintiff's alleged injury is of a personal nature - *i.e.*, lost profits from its inability to sell the property." *EJ MGT LLC*, 2020 WL 1081851 at 19. The Court noted that "[t]his personalized injury, however, is not 'of the type that the antitrust statute was intended to forestall.'" *Id.* (*quoting Hartig Drug Co. Inc.*, 836 F.3d at 269). EJ MGT's complaint *did* allege that Zillow had agreements with brokerages that had "the purpose and effect of stifling and distorting the flow of price related information, anticompetitively tilting the playing field in favor of the co-conspirator Brokers, and creating and heightening barriers to entry in the market for residential real estate listing services." Plaintiff alleged that as result of those effects that Zillow users were injured by having to make decisions with distorted information, paying increased costs, and there being barriers to entry in the sale of real estate. The Court noted that "[e]ven taking these allegations as true, however, Plaintiff's alleged injury does not reflect any of the antitrust injuries Plaintiff vaguely argues the Zestimate Agreements cause." *Id.* at 21.

The Court found that any antitrust injuries from the conduct at issue in the compliant would not have been suffered by EJ MGT. The plaintiff had not made an allegation that it was forced to make a decision based on distorted information, or that it had to spend extra time looking for a Zestimate on Zillow.com, or that it had to pay increased fees, or that it faced barriers of entry into the real-estate listing market. *Id.* EJ MGT's alleged injury arose from its inability to sell its property, allegedly as a result of the agreements related to the Zestimates. *Id.* As its alleged injury was not related to the allegedly anticompetitive conduct, and its effects, the Court found that it lacked antitrust standing. *Id.* at 21-22.

ANTI-TRUST ISSUES WITH MULTIPLE LISTING SERVICE RULES

Most residential real estate for sale in the United States is marketed through a multiple listing service ("MLS"). Real estate brokers and agents doing business in a particular area pay for membership in, and therefore access to, the regional MLS. They typically agree to abide by the MLS rules, and the MLS combines its members' residential real estate listings into a central database that is available to all members. By aggregating and disseminating real estate listing information, MLSs play a critical competitive role in the marketplace for residential homes. MLSs facilitate access to the listing data it aggregates through numerous channels. It is the source of data for broker IDX and Virtual Office Website (VOW) distributions, MLS consumer-facing websites, and third party websites such as Realtor.com and Zillow.

In their role as conduits of information, MLSs have clear pro-competitive effects. Not surprisingly, courts have repeatedly found MLSs to be pro-competitive under the antitrust laws. Recently in *Findling v. Realcomp II, Ltd.*, No. 17-CV-11255, 2018 WL 1425952, at *2 (E.D. Mich. Mar. 22, 2018), the district court noted that "absent allegations of unfair discrimination, it is hard to imagine that any MLS is a net anti-competitive force or violates § 1 [of the Sherman Act]." The district court reasoned that the MLS provides consumers with "aggregated, streamlined information," and that "data and choices breed competition." *Id.* MLS membership requirements, too – such as requirements that members submit a listing agreement to the MLS within a specified period of time and in a specified format -- have long been recognized as enhancing competition. *See Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 130 (5th Cir. 1989) ("If properly administered," MLS "membership requirements serve pro-competitive purposes."); *Reifert v. S. Cent. Wisconsin MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006) (noting that "[t]he near-perfect market information created by SCWMLS is the result of a requirement that members place all listings in the MLS within five days.")

Nonetheless, at its core, an MLS relies on cooperation among competitors -- real estate brokers agree to provide their listing information to the MLS in exchange for the ability to see other participants' listings, and with each listing the participating broker offers a commission to the procuring broker. Because the MLS relies on competitors cooperating, its rules and membership requirements are closely monitored for potential antitrust issues, and carefully assessed for possible anti-competitive effects, typically using a rule of reason analysis. Historically, the United States Department of Justice and the Federal Trade Commission have paid particular attention to MLS rules that might serve to exclude brokers, particularly those with with new, sometimes cheaper ways of doing business. In more recent years, the changes in the industry, many driven by technology, have led to renewed attention to the MLS rules that risk freezing out maverick brokers with lower commissions.

MLS Rules that Exclude Brokers: Broker exclusion from an MLS may present antitrust concerns (if the MLS possesses the requite degree of market power). In one notable early case, *United States v. Realty Multi-List, Inc*., 629 F.2d 1351, 1388-89 (5th Cir. 1980), the Fifth Circuit held that the membership criteria promulgated by the defendant MLS were anticompetitive because they imposed burdensome (and costly) conditions on membership that served no legitimate competitive need. These included requirements that a prospective member be found by RML to have a "favorable credit report and business reputation," that he or she maintain an active real estate office which is "open during customary business hours," and that he or she purchase a share of RML stock, at a price set by the RML Board of Directors. The Fifth Circuit found that these criteria were not justified by the competitive needs of the listing service. The court found that because the state already extensively regulated the licensing and business conduct of real estate brokers, the membership rules were overly broad and were not justified by the organization's competitive needs. The court also identified several anti-competitive effects: Membership in the listing service would be essential to a broker's ability to compete effectively, and exclusion of a broker could create unjustified harm to the broker and the public. For example, the excluded broker's listings would not be distributed as widely as possible, resulting in inefficient sales prices; and the exclusion could reduce the competition among brokers and could result in less competition for brokerage fees. *See id.* at 1370-71.

In contrast, the Seventh Circuit held that an MLS requirement that members also be members of the local realtors association did not constitute a group boycott, and did not otherwise violate the antitrust laws, where there were no competitors to the realtor association. *See Reifert v. S. Cent. Wisconsin MLS Corp.*, 450 F.3d 312, 320–21 (7th Cir. 2006). Because the court found no affront to competition, the requirement was not deemed to be an exclusionary condition. *See id.*

MLS Rules that Restrict Alternative Business Models: In more recent years, the DOJ and FTC have challenged, as antitrust violations, MLS rules that they deemed to unreasonably restrict competition by brokers who use alternative business models. In 2006, the FTC charged six regional MLSs with violating section 5 of the FTC Act by adopting MLS rules that kept exclusive agency listings (in which the broker would not be compensated if the home seller sold the home on his or her own) from being uploaded to national real estate websites like Realtor.com. *See, e.g., Austin Bd. Of Realto*rs, FTC Dkt. No. C-4167. The FTC alleged that the policy was collusive and exclusionary, and represented a joint action by a group of competitors to refuse to deal except on specified terms. The policy discouraged brokers from using exclusive agency listings, which did not give rise to any plausible efficiencies, and was "not reasonably ancillary to the legitimate and beneficial objectives of the MLS." *See, e.g., Austin Bd. Of Realtors*, FTC Dkt. No. C-4167, at ¶ 17 (2006) (complaint), available at https://www.ftc.gov/sites/default/files/documents/cases/2006/09/0510219c4167austinboardofrealtorscomplaint.pdf. The FTC obtained consent agreements with all six MLSs.

The FTC brought similar charges against Realcomp II, Ltd., in a case that ultimately went to the Sixth Circuit Court of Appeals, which affirmed the FTC

Commission finding that the policy violated Section 5 of the FTC Act. *See Realcomp II, Ltd. v. F.T.C.*, 635 F.3d 815 (6th Cir. 2011), cert. denied, 132 S. Ct. 400 (2011). In particular, the Sixth Circuit emphasized that the website policy created barriers to the dissemination of discount listings to public websites, which it found "especially pernicious because of the emerging competitive impact of the internet and of discounted brokerage services on the residential real-estate market." *Id.* at 830. While the court acknowledged that the policy did not exclude discount brokers from the MLS altogether, it nonetheless found that the policy carried similar economic harm. Listings that were not distributed as widely as possible due to the policy could result in inefficient sales prices. Moreover, since the policy incentivized realtors to abandon exclusive agency listings, it "reduce[d] the competition among brokers and could result in less competition for brokerage fees." *Id.* at 831.

In 2008, the DOJ Antitrust Division entered into a settlement with National Association of Realtors after bringing suit for violating the Sherman Act with the NAR policy on virtual office websites (VOW). *See* https://www.justice.gov/atr/case-document/final-judgment-142. That policy required NAR-affiliated MLSs to adopt rules that would allow brokers to withhold their clients' listings from VOW brokers by means of an "opt out," enabling traditional brokers to block competitors' customers from having full on-line access to all of the MLS's listings. The DOJ alleged that the policy inhibited new ways of competing by preventing internet-based brokers from providing all MLS listings that respond to a customer's search. Under the settlement agreement, NAR agreed to adopt a new policy that brokers participating in a NAR-affiliated MLS are not permitted to withhold their listings from brokers who serve their customers through virtual office websites (VOWs). As a result of the settlement, brokers are able to use VOWs to educate consumers, make referrals, and conduct brokerage services, and are not excluded from MLS membership based on their business model. *See id.*

MLS Rules Related to Broker Commissions: In November 2020, the Department of Justice filed a complaint against the National Association of Realtors ("NAR"), alleging that certain NAR rules related to disclosures of broker commissions created illegal restraints of trade in how realtors compete. *U.S. v. National Association of Realtors*, No. 1:20-cv-3356 (D.D.C,), The DOJ simultaneously filed a proposed settlement with NAR requiring NAR to repeal or modify those rules. The rules challenged as anticompetitive included: (1) prohibiting MLSs that are affiliated with NAR from disclosing to prospective buyers the commission that the buyer broker will earn if the buyer purchases a home listed on the MLS; (2) allowing buyer brokers to misrepresent to buyers that a buyer broker's services are free; (3) enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered; and (4) limiting access to the lockboxes that provide licensed brokers with access to homes for sale to brokers who work for a NAR-affiliated MLS. The DOJ alleged that these NAR policies, enforced by NAR-affiliated MLSs, resulted in decreased competition among real estate brokers. As part of the proposed settlement, NAR agreed that it would repeal all such rules, policies, or practices, that it would require all Member Boards and MLSs to repeal any such rules or policies. Under the settlement, NAR and its Member Boards and MLSs are instead required to adopt rules that ensure that all MLS participants maintain transparency about broker compensation and to allow any licensed real estate agent to access, with seller approval, the lockboxes of properties listed on an MLS.

Pocket Listings: Another recent hot-button issue for MLSs is that of pocket listings, and whether an MLS may prohibit their members from marketing properties before they are listed on the MLS. This off-MLS marketing activity is often referred to as a "pocket listing," because, for a variety of reasons -- seller privacy or otherwise -- such listings are typically not entered into the MLS system until the listing agent has already identified a purchaser for a property. The use of pocket listings proliferated in recent years, and concerns about the practice led the NAR, in November 2019, to adopt its "Clear Cooperation Policy." The policy provides that a listing broker must submit the listing to the MLS within one business day of marketing a property to the public. Marketing is defined to include flyers, yard signs, digital marketing on websites, email blasts, other multi-brokerage listing sharing networks, or other applications available to the public. An exception was made for "office listings," which are listings marketed entirely within a brokerage firm without submission to an MLS. The Clear Cooperation Policy is enforced by MLSs, who monitor their members' adherence to the policy and can threaten or impose penalties on members for non-compliance.

Policies that prohibit or discourage pocket listings can, on the one hand, be seen as procompetitive because they enhance listing exposure for homes. The pocket listing practice may inhibit competition by depriving the seller of the benefits of maximum exposure to the market. It may affect the integrity of the MLS data, for example, by making it seem as though the property was on the market for a very short time, often just a single day, when in fact it was being marketed prior to listing on the MLS. Real estate values may also be impacted if a large number of homes are marketed off the MLS and that data is not available to appraisers, real estate agents, and sellers. In areas with tight inventories, the increased pocket listing practice may exacerbate inventory shortages. The use of off-MLS listings also may favor larger brokers at the expense of smaller ones (MLSs level the playing field by enabling equal exposure to both small and large brokerage firms).

Nonetheless, NAR's Clear Cooperation Policy, with its limits on pocket listings, has been challenged as anti-competitive. In May 2020, for example, a pocket listing service in California known as The PLS.com brought an antitrust case against three regional California multiple listing services (MLSs), and the National Association of Realtors (NAR), alleging that NAR's Clear Cooperation Policy, enforced by the MLSs, was anticompetitive because it discouraged listings on its service. PLS is similar to MLS in that real estate brokers can pay a membership fee to join in order to access PLS's nationwide repository of pocket listings. PLS differs from MLS in that it offers sellers greater privacy -- they have the ability to share as much or as little information about the property as they desire. In its complaint, PLS claims that the Clear Cooperation Policy caused it antitrust injury because it discouraged listings on its service. In February of this year, the district court in the Central District of California granted defendants' motions to dismiss, holding that PLS failed to allege any plausible facts that consumers or competition were harmed. *See The PLS.com, LLC v. National Association of Realtors*, ___F.Supp. 3d ___ (2021). An appeal is now pending in the Ninth Circuit.

The common thread running through all these cases is identifying the line between an MLS acting as a procompetitive force, or rather as an exclusionary force. In general, where MLS rules are driven by legitimate competitive needs of the real estate market, such as enhancing listing exposure for homes or ensuring accurate and reliable real estate market information, they tend to be upheld. In contrast, where they serve to exclude, in particular, where they discourage maverick brokers with new ways of doing business and lower commission fees, there is a high risk such rules will be deemed anticompetitive.

TYING - *RESERVE REALTY*

A "tying arrangement" is an agreement by a party to sell one product -- the tying product -- but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from any other supplier. While tying once was treated as *per se* illegal under antitrust laws, the United States Supreme Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), and other more recent federal and state decisions have significantly limited the cases in which cases involving tying will be treated under a *per se* analysis. Connecticut Supreme Court's 2020 decision in *Reserve Realty, LLC v. Windemere Reserve, LLC*[1] is a recent example of courts rolling back the traditional treatment of cases involving tying.

Reserved Realty concerned a breach of contract claim brought by a real estate broker against purchasers that were developers, alleging breach of list-back provisions in in connection with the sale and lease of units in the apartment complex leased by the defendants. A list-back agreement is a tying arrangement that commits the purchaser of a parcel of real property to use the services of a particular broker when leasing or reselling the property. The trial court rendered judgment in favor of the plaintiff, and the Appellate Court affirmed, agreeing that the defendants' antitrust special defense barred the plaintiff's claims.

The Connecticut Supreme Court overruled the longtime precedent of *State v. Hossan-Maxwell*[2], which held that real estate list-back agreements are *per se* illegal under state law, making broker list-back agreements affecting a not insubstantial volume of commerce *not per se illegal* tying arrangements under state antitrust law where they *used to be per se illegal* tying agreements.

It used to be that that any real estate broker list-back agreement affecting more than a *de minimis* volume of commerce was *per se* illegal; now, because Connecticut's antitrust laws are tied to the federal laws and Connecticut courts follow federal precedent when interpreting Connecticut Antitrust Act unless the text of state antitrust statutes, or other pertinent state law, requires the Court to interpret the Act differently, and the trajectory of federal antitrust law as considered by recent antitrust scholarship, is diverging from the traditional *per se* treatment of tying arrangements, the Connecticut Supreme Court found that the list-back agreements at issue were not unenforceable *without first engaging in a full market analysis*. 335 Conn. at 190.

The prevailing test now followed by Connecticut for tying claims originates in the Second Circuit and asks whether (1) the sale of one product (tying product) is conditioned on purchase of a separate product (tied product); (2) the seller uses actual coercion to force buyers to purchase tied

[1] 335 Conn. 174 (2020).
[2] 181 Conn. 655 (1980).

product; (3) the seller has sufficient economic power in tying product market to coerce purchasers into buying tied product; (4) the tie-in has anticompetitive effects in tied market; and (5) there is a not insubstantial amount of commerce is involved in the tied market. 335 Conn. at 204.

A defendant's economic power, as part of test for determining existence of an illegal tying arrangement, typically must be established by proving that the defendant wields market power in a defined product and geographic market. Under federal antitrust case law, and now also Connecticut case law, the uniqueness of a tying product no longer gives rise to a presumption of economic power -- and market power in a defined product and geographic market must be established, even with respect to unique tying products such as land.

RESTRICTIVE COVENANTS

In Connecticut, courts evaluate the anticompetitive effects of restrictive covenants affecting land under the "rule of reason" standard as opposed to the "per se" standard. *Elida, Inc. v. Harmor Realty Corp.*, 177 Conn. 218, 231 (1979). To satisfy the reasonableness requirement, the Connecticut Supreme Court has stated that "the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest.'" *Elida*, 177 Conn. at 226 quoting *Scott v. Gen. Iron & Welding Co.*, 171 Conn. 132, 137 (1976). "Restrictive covenants, being in derogation of the common-law right to use land for all lawful purposes, are to be narrowly construed and are not to be extended by implication. If their language is of doubtful meaning, it will be construed against rather than in favor of the covenant." *Neptune Park Ass'n v. Steinberg*, 138 Conn. 357, 361 (1951). Those impacted by the covenant should be given adequate notice. *See Genovese Drug Stores, Inc. v. Connecticut Packing Co.*, 732 F.2d 286, 291–92 (2d Cir. 1984).

By analogy, in the employment context, the Connecticut Supreme Court has established a multifactor test for evaluating the reasonableness of restrictive covenants: (1) the length of time the restriction is to be in effect; (2) the geographic area covered by the restriction; (3) the degree of protection afforded to the party in whose favor the covenant is made; (4) the restrictions on the employee's ability to pursue his occupation; and (5) the extent of interference with the public's interests. *Scott*, 171 Conn. at 137-138. "The five prong test of *Scott* is disjunctive, rather than conjunctive; a finding of unreasonableness in any one of the criteria is enough to render the covenant unenforceable." *New Haven Tobacco Co. v. Perrelli*, 18 Conn. App. 531, 534 (1989).

With that background, the following examples attempt to demonstrate when restrictive covenants in real estate agreements may trigger antitrust scrutiny.

- **Lease Non-Compete Restrictive Covenants:** Courts generally uphold lease restrictive covenants prohibiting leases to competitive businesses within defined geographic markets (i.e. a shopping center) that do not preclude competition in the greater geographic market. *See, e.g., Scoville v. Daddeo*, No. CV030521210S, 2004 WL 3090675, at *4 (Conn. Super. Ct. Dec. 1, 2004).

- **Essential Facilities:** Under certain circumstances, facilities within a geographic market are so important to market entry that the "facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977). Where a competitor is in possession of one of these essential facilities, "[i]t is illegal restraint of trade to foreclose the scarce facility." *Id. Hecht* involved restrictive covenants in the lease for use of RFK stadium in Washington, DC, which was the only viable facility to offer viewing of professional football. On remand, plaintiff, a potential competing football franchise, was entitled instruction that that lease restriction in the RFK stadium foreclosed an essential facility in violation of the Sherman Act.

- **Onerous Deed Restrictive Covenants**: Certain restrictive covenants are so onerous that they may have no procompetitive benefits. In 2004, the Department of Justice sued the nation's largest mushroom farmer cooperative under Section 1 of the Sherman Act to enjoin the practice of buying mushroom farms to resell them with deed restrictions preventing the use of the farm for mushroom farming in the future. The DOJ and the cooperatives settled the suit and the cooperative agreed to end the practice and nullify the deed restrictions. *U.S. v. Eastern Mushroom Marketing Cooperative, Inc.*, 2:04-cv-05829-TON, E.D.PA (available at https://www.justice.gov/atr/case/us-v-eastern-mushroom-marketing-cooperative-inc.)

<u>ANTITRUST IMMUNITY IN REAL ESTATE</u>

The *Noerr-Pennington* doctrine is a judicially constructed antitrust immunity derived from the First Amendment and the text of the Sherman Act that immunizes the petitioning of competition-restricting government action. It applies to legitimate petitioning toward the three branches of government. The *Noerr-Pennington* doctrine has expanded beyond its antitrust roots to immunize other petitioning activity from liability, including petitioning before local municipalities such as zoning boards.

Background

Legislative: The doctrine originates from the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*.[3] In *Noerr*, as a group of truck operators and their trade association sued a number of railroads, an association of the railroad's presidents, and a public relations firm engaged by the association for conspiring to restrain trade in violation of Sections 1 and 2 of the Sherman Act. The plaintiffs alleged that the defendants engaged in a publicity campaign designed to foster the adoption of laws and law enforcement practices destructive to the trucking industry, create public distaste for the trucking industry, and impair their relationships with their customers. Plaintiffs alleged that the sole motivation for the railroad industries' campaign was to injure the trucking industry and destroy them as a competitor.

[3] 365 U.S. 127 (1961).

The Court held "that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[4] This immunity applies even if "sole purpose in seeking to influence the passage and enforcement of laws was to destroy [a competitor]"[5] In other words, anticompetitive intent alone did not make private petitioning of government action illegal. The Court did nod to an upper bound of immunized conduct stating that "sham" petitioning that was nothing more than an attempt to interfere with business relationships may justify application of the Sherman Act. The Supreme Court later developed the sham exception to *Noerr* in the adjudicatory context.

Rulemaking: In *United Mine Workers v. Pennington*,[6] the Supreme Court extended *Noerr* to attempts to influence administrative rulemaking.

Adjudication: In *California Motor Transport Co. v. Trucking Unlimited*,[7] the Supreme Court extended *Noerr* to efforts to influence adjudicatory processes, holding that *Noerr* applies to petitioning in the courts (or other adjudicatory-like proceedings).

Sham Exception: In *Professional Real Estate Investors v. Columbia Pictures Industries* (*PRE*),[8] the Supreme Court identified a sham exception to adjudicatory petitioning. The first test of sham petitioning is whether it is "objectively baseless" such that no reasonable petitioner could expect a favorable ruling on the merits. A lawsuit is not objectively baseless where the plaintiff has probable cause to sue. The second test is whether the petitioner's subjective motivation is to use the adjudicatory process itself as an anticompetitive weapon, as opposed to achieving a certain outcome of that process. Petitioning is a sham if it is not aimed at a favorable outcome in any form.

Noerr-Pennington doctrine and Zoning Appeals

In *Zeller v. Consolini*,[9] the Connecticut Appellate Court adopted the *Noerr-Pennington* doctrine for situations involving petitioning activity, including at local zoning and other municipality matters. Applying the doctrine to the facts of the case, the *Zeller* court held that defendants' petitioning activity of pursuing ultimately unsuccessful appeals of the plaintiff's attempt to rezone its property and to get a wetlands building permit did not constitute sham proceedings exempt from *Noerr*. The mere fact that defendants' attempts failed was not sufficient to constitute a sham where defendants' appeals were legally available and followed applicable judicial procedure. The *Zeller* court gave particular weight to the fact that the superior court heard defendants' claims on the merits. The court also found defendants' efforts to rezone plaintiff's property from restricted commercial and industrial to industrial zoning did not constitute a sham even though such petitioning was not authorized by statute. Instead, the court upheld the trial court decision

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[4] Id. at 136.
[5] Id. at 138.
6.381 U.S. 657 (1965).
7.404 U.S. 508 (1972).
8.508 U.S. 49 (1993).
[9] 59 Conn. App. 545 (2000).

that the undisputed facts established a reasonable, good faith belief in the facts supporting defendants' zoning change application and validity of the claim. Accordingly, defendants' conduct was not objectively baseless and immune.

Recently, in *Procurement, LLC v. Ahuja*,[10] the Connecticut Appellate Court reaffirmed its adoption of the *Noerr-Pennington* doctrine to local petitioning matters. In that case, the appellate court upheld the trial court's findings that two zoning appeals were not objectively baseless and, thus, qualified for *Noerr* immunity. The first appeal challenged the zoning board's compliance with notice requirements in the Stamford charter asserting that the board failed to provide adequate notice of subsequent hearings. The defendants also challenged the board's jurisdiction over the application because of a material change made mid-review that made the revised application qualify as a new application. The appellate court affirmed the trial court's holding that defendants' first unsuccessful appeal was not objectively baseless finding sufficient basis in the Stamford charter for challenging compliance with the board's notice requirements. The appellate court also affirmed the trial court's non-review of the defendants' purportedly baseless challenge to the board's jurisdiction and held, for the first time, that one non-objectively baseless claim is sufficient to make the entire lawsuit non-sham. Plaintiff's challenge to defendants' second purportedly baseless appeal unfolded similarly. Defendants' second appeal challenged, among other things, plaintiff's failure to submit a traffic impact study with an application, which the appellate court affirmed was a non-baseless reason to appeal. Under its prior ruling, the appellate court did not review the other purportedly baseless reasons that the defendants appealed plaintiff's application finding one non-sham claim sufficient.

The sham exception to *Noerr* immunity is not toothless. In *Diamond 67, LLC v. Oatis*,[11] the Connecticut Appellate Court refused to affirm summary judgment on the independent grounds that the *Noerr-Pennington* doctrine immunizes petitioning on zoning matters. There, the appellate court found evidence in the record that the defendants petitioned based on facts that it knew they were not true. Accordingly, a genuine issue of material facts precluded summary judgment based on *Noerr*.

[10] 197 Conn. App. 696 (2020).
[11] 167 Conn. App. 659, 688–89 (2016)

CASES

459 U.S. 519 (1983)

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.
v.
CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL.

No. 81-334.

Supreme Court of United States.

Argued October 5, 1982.
Decided February 22, 1983.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

520 *520 *James P. Watson* argued the cause for petitioner. With him on the briefs was *George M. Cox.*

Victor J. Van Bourg argued the cause and filed a brief for respondents.[*]

J. Albert Woll, Laurence Gold, and *George Kaufmann* filed briefs for the American Federation of Labor and Congress of Industrial Organization as *amicus curiae* urging affirmance.

Kenneth E. Ristau, Jr., and *David A. Cathcart* filed a brief for the Pacific Maritime Association as *amicus curiae.*

JUSTICE STEVENS delivered the opinion of the Court.

This case arises out of a dispute between parties to a multiemployer collective-bargaining agreement. The plaintiff unions allege that, in violation of the antitrust laws, the multiemployer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms. This coercion,
521 according to the complaint, adversely affected the trade of certain unionized firms and thereby restrained the *521 business activities of the unions. The question presented is whether the complaint sufficiently alleges that the unions have been "injured in [their] business or property by reason of anything forbidden in the antitrust laws" and may therefore recover treble damages under § 4 of the Clayton Act. 38 Stat. 731, 15 U. S. C. § 15. Unlike the majority of the Court of Appeals for the Ninth Circuit, we agree with the District Court's conclusion that the complaint is insufficient.

I

The two named plaintiffs (the Union) — the California State Council of Carpenters and the Carpenters 46 Northern Counties Conference Board — are affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. The Union represents more than 50,000 individuals employed by the defendants in the carpentry, drywall, piledriving, and related industries throughout the State of California. The Union's complaint is filed as a class action on behalf of numerous affiliated local unions and district councils. The defendants are Associated General Contractors of California, Inc. (Associated), a membership corporation composed of various building and construction contractors, approximately 250 members of Associated who are identified by name in an exhibit attached to the complaint, and 1,000 unidentified co-conspirators.

The Union and Associated, and their respective predecessors, have been parties to collective-bargaining agreements governing the terms and conditions of employment in construction-related industries in California for over 25 years. The wages and other benefits paid pursuant to these agreements amount to more than $750 million per year. In addition, approximately 3,000 contractors who are not members of Associated have entered into separate "memorandum agreements" with the Union, which bind them to the terms of the master collective-bargaining agreements between the
522 Union and Associated. The amended complaint does not *522 state the number of nonsignatory employers or the number of nonunion employees who are active in the relevant market.

In paragraphs 23 and 24 of the amended complaint, the Union alleges the factual basis for five different damages claims.[1] Paragraph 23 alleges generally that the defendants conspired to abrogate and weaken the collective-bargaining relationship between the Union and the signatory employers. In seven subsections, paragraph 24 sets forth activities allegedly committed pursuant to the conspiracy. The most specific allegations relate to the labor relations between the parties.[2] The complaint's description of actions affecting nonparties is both brief and vague. It is alleged that defendants

> "(3) Advocated, encouraged, induced, and aided non-members of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs and each of them;
>
> "(4) Advocated, encouraged, induced, *coerced,* aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;
>
> 523 *523 "(5) Advocated, induced, *coerced,* encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and `memorandum contractors' to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with plaintiffs and each of them"; App. E to Pet. for Cert. 17-19 (emphasis added).[3]

Paragraph 25 describes the alleged "purpose and effect" of these activities: first, "to weaken, destroy, and restrain the trade of certain contractors," who were either members of Associated or memorandum contractors who had signed agreements with the Union; and second, to restrain "the free exercise of the business activities of plaintiffs and each of them."[4]
524 Plaintiffs claim that these alleged antitrust violations *524 caused them $25 million in damages.[5] The complaint does not identify any specific component of this damages claim.

After hearing "lengthy oral argument" and after receiving two sets of written briefs, one filed before and the second filed after this Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters,* 421 U. S. 616 (1975), the District Court dismissed the complaint, including the federal antitrust claim. 404 F. Supp. 1067 (ND Cal. 1975).[6] The court observed that the complaint alleged "a rather vague, general conspiracy," and that the allegations "appear typical of disputes a union might have with an employer," which in the normal course are resolved by grievance and arbitration or by the NLRB. *Id.,* at 1069.[7] Without seeking to clarify or further amend the first amended complaint, the Union filed its notice of appeal on October 9, 1975.

Over five years later, on November 20, 1980, the Court of Appeals reversed the District Court's dismissal of the Union's
525 federal antitrust claim. 648 F. 2d 527.[8] The majority *525 of the Court of Appeals disagreed with the District Court's characterization of the antitrust claim; it adopted a construction of the amended complaint which is somewhat broader than the allegations in the pleading itself.[9] The Court of Appeals held (1) that a Sherman Act violation — a group boycott — had been alleged, *id.,* at 531-532; (2) that the defendants' conduct was not within the antitrust exemption for labor activities, *id.,* at 532-536; and (3) that the plaintiffs had standing to recover damages for the injury to their own business activities occasioned by the defendants' "industry-wide boycott against all subcontractors with whom the Unions had signed agreements . . . ." *Id.,* at 537. In support of the Union's standing, the majority reasoned that the Union was within the area of the economy endangered by a breakdown of competitive conditions, not only because injury to the Union was a foreseeable consequence of the antitrust violation, but also because that injury was specifically intended by the defendants. The court
526 noted that its conclusion was consistent with other cases holding that union organizational *526 and representational activities constitute a form of business protected by the antitrust laws.[10]

II

As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.[11]

We first note that the Union's most specific claims of injury involve matters that are not subject to review under the antitrust laws. The amended complaint alleges that the defendants have breached their collective-bargaining agreements in various ways, and that they have manipulated their corporate names and corporate status in order to divert business to nonunion divisions or firms that they actually control. Such deceptive diversion of business to the nonunion portion of a so-called
527 "double-breasted" operation might constitute a breach of contract, an unfair labor practice, or perhaps even a *527

common-law fraud or deceit, but in the context of the bargaining relationship between the parties to this litigation, such activities are plainly not subject to review under the federal antitrust laws.[12] Similarly, the charge that the defendants "advocated, encouraged, induced, and aided nonmembers. . . to refuse to enter into collective bargaining relationships" with the Union (¶ 24(3)) does not describe an antitrust violation.[13]

The Union's antitrust claims arise from alleged restraints caused by defendants in the market for construction contracting and subcontracting.[14] The complaint alleges that defendants "coerced"[15] two classes of persons: (1) landowners and
528 *528 others who let construction contracts, *i. e.,* the defendants' customers and potential customers; and (2) general contractors, *i. e.,* defendants' competitors and defendants themselves. Coercion against the members of both classes was designed to induce them to give some of their business — but not necessarily all of it — to nonunion firms.[16] Although the pleading does not allege that the coercive conduct increased the aggregate share of nonunion firms in the market, it does allege that defendants' activities weakened and restrained the trade "of certain contractors." See n. 4, *supra.* Thus, particular victims of coercion may have diverted particular contracts to nonunion firms and thereby caused certain unionized subcontractors to lose some business.

We think the Court of Appeals properly assumed that such coercion might violate the antitrust laws.[17] An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market. See *Associated Press* v. *United States,* 326 U. S. 1, 17 (1945). Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect. Cf. *Klors, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207, 210-214 (1959).[18]

529 *529 Even though coercion directed by defendants at third parties in order to restrain the trade of "certain" contractors and subcontractors may have been unlawful, it does not, of course, necessarily follow that still another party — the Union — is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.

III

We first consider the language in the controlling statute. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U. S. 102, 108 (1980). The class of persons who may maintain a private damages action under the antitrust laws is broadly defined in § 4 of the Clayton Act. 15 U. S. C. § 15. That section provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation. Some of our prior cases have paraphrased the statute in an equally expansive way.
530 [19] But before we hold that the statute is as broad as its *530 words suggest, we must consider whether Congress intended such an open-ended meaning.

The critical statutory language was originally enacted in 1890 as § 7 of the Sherman Act. 26 Stat. 210. The legislative history of the section shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets.[20] That history supports a broad construction of this remedial provision. A proper interpretation of the section cannot, however, ignore the larger context in which the entire statute was debated.

531 *531 The repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background.[21] Senator Sherman stated that the bill "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."[22] Thus our comments on the need for judicial interpretation of § 1 are equally applicable to § 7:

"One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that `every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. . . .

532 "Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *National Society of* *532 *Professional Engineers* v. *United States,* 435 U. S. 679, 687-688 (1978) (footnotes omitted).

Just as the substantive content of the Sherman Act draws meaning from its common-law antecedents, so must we consider the contemporary legal context in which Congress acted when we try to ascertain the intended scope of the private remedy created by § 7.

533 In 1890, notwithstanding general language in many state constitutions providing in substance that "every wrong shall have a remedy,"[23] a number of judge-made rules circumscribed the availability of damages recoveries in both tort and contract litigation — doctrines such as foreseeability and proximate cause,[24] directness of injury,[25] certainty of damages,[26] *533 and privity of contract.[27] Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation.[28]

534 The federal judges who first confronted the task of giving meaning to § 7 so understood the congressional intent. Thus in 1910 the Court of Appeals for the Third Circuit held as a matter of law that neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws could recover treble damages under § 7. *Loeb* v. *Eastman* *534 *Kodak Co.,* 183 F. 704. The court explained that the plaintiff's injury as a stockholder was "indirect, remote, and consequential." *Id.,* at 709.[29] This holding was consistent with Justice Holmes' explanation of a similar construction of the remedial provision of the Interstate Commerce Act a few years later: "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531, 533 (1918).[30] When Congress enacted § 4 of the Clayton Act in 1914, and when it reenacted that section in 1955, 69 Stat. 282, it adopted the language of § 7 and presumably also the judicial gloss that avoided a simple literal interpretation.

As this Court has observed, the lower federal courts have been "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.,* 405 U. S. 251, 263, n. 14 (1972). Just last Term we stated:

535 "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but `despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.' [*Illinois* *535 *Brick Co.* v. *Illinois,* 431 U. S.], at 760 (BRENNAN, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield of Virginia* v. *McCready,* 457 U. S. 465, 476-477 (1982).

It is plain, therefore, that the question whether the Union may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of § 4. Instead, as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.[31]

IV

536 There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause,"[32] and the struggle of federal judges to *536 articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages.[33] It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrong-doing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.[34]

537 Instead, *537 previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

The factors that favor judicial recognition of the Union's antitrust claim are easily stated. The complaint does allege a causal connection between an antitrust violation and harm to the Union and further alleges that the defendants intended to cause that harm. As we have indicated, however, the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry. We are also satisfied that an allegation of improper motive, although it may support a plaintiff's damages claim under § 4,[35] is not a panacea that will enable any complaint to withstand a motion to dismiss.[36] Indeed, in *McCready,* we specifically held: "The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." 457 U. S., at 479.[37]

538 *538 A number of other factors may be controlling. In this case it is appropriate to focus on the nature of the plaintiff's alleged injury. As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market.[38] Last Term in *Blue Shield of Virginia* v. *McCready, supra,* we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under § 4. McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services.[39] The Court stressed the fact that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." 457 U. S., at 483, citing *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477, 487-489 (1977). After noting that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," 457 U. S., at 484, the Court concluded that such an injury "falls squarely within the area of congressional concern." *Ibid.*

539 *539 In this case, however, the Union was neither a consumer nor a competitor in the market in which trade was restrained.[40] It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.[41] At common law — as well as in the early days of administration of the federal antitrust laws — the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade.[42] Federal policy has since developed not only a broad labor exemption from the antitrust
540 laws,[43] but also a separate body of *540 labor law specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra,* at 487-488. In this case, particularly in light of the longstanding collective-bargaining relationship between the parties, the Union's labor-market interests seem to predominate, and the *Brunswick* test is not satisfied.

An additional factor is the directness or indirectness of the asserted injury. In this case, the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contains several somewhat vaguely defined links. According to the complaint, defendants applied coercion against certain landowners and other contracting
541 parties in order to cause them to divert business from certain union contractors to nonunion contractors.[44] As a result, *541 the Union's complaint alleges, the Union suffered unspecified injuries in its "business activities."[45] It is obvious that any such injuries were only an indirect result of whatever harm may have been suffered by "certain" construction contractors and subcontractors.[46]

If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready,* they would have a right to maintain their own treble-damages actions
542 against the defendants. An action on their behalf would encounter none of the conceptual difficulties that *542 encumber the Union's claim.[47] The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general.[48] Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative. There is, for example, no allegation that any collective-bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members has declined, and no allegation that the Union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no assertion that any such firm was prevented from doing business with
543 any union firms or that any firm or group of firms was subjected to a complete boycott. See nn. 9, 15, and 16, *supra.* *543 Other than the alleged injuries flowing from breaches of the collective-bargaining agreements — injuries that would be remediable under other laws — nothing but speculation informs the Union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, it is appropriate for § 4 purposes "to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm." *Blue Shield of Virginia* v. *McCready,* 457 U. S., at 475, n. 11, citing *Hawaii* v. *Standard Oil Co.,* 405 U. S., at 262-263, n. 14.[49]

The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of
544 complex antitrust trials within judicially manageable limits.[50] These cases have stressed the importance of avoiding *544 either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. Thus, in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968), we refused to allow the defendants to discount the plaintiffs' damages claim to the extent that overcharges had been passed on to the plaintiffs' customers. We noted that any attempt to ascertain damages with such precision "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.,* at 493. In *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977), we held that treble damages could not be recovered by indirect purchasers of concrete blocks who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. We observed that potential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs.

> "Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge — from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.,* at 737-738.

The same concerns should guide us in determining whether the Union is a proper plaintiff under § 4 of the Clayton Act.[51]
545 *545 As the Court wrote in *Illinois Brick,* massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits. *Id.,* at 745. In this case, if the Union's complaint asserts a claim for damages under § 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities. It would be necessary to determine to what extent the coerced firms diverted business away from union subcontractors, and then to what extent those subcontractors absorbed the damage to their businesses or passed it on to employees by reducing the work force or cutting hours or wages. In turn it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues.[52]

We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors — the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy — weigh heavily against judicial enforcement of the Union's
546A antitrust claim. Accordingly, we hold that, based on the allegations of this complaint, the District *546A Court was correct in concluding that the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. The judgment of the Court of Appeals is reversed.

It is so ordered.

546B *546B JUSTICE MARSHALL, dissenting.

Section 4 of the Clayton Act provides that a damages action may be brought under the antitrust laws by "*[a]ny person* who [has been] injured in his business or property by reason of *anything* forbidden in the antitrust laws." 15 U. S. C. § 15 (emphasis added). Despite the absence of an "articulable consideration of statutory policy" supporting the denial of standing, *Blue Shield of Virginia* v. *McCready,* 457 U. S. 465, 473 (1982), the Court today holds that the intended victim of a restraint of trade does not constitute a "person who [has been] injured in his business or property by reason of anything forbidden in the antitrust laws." Because I believe that this decision imposes an unwarranted judge-made limitation on the antitrust laws, I respectfully dissent.

Congress' adoption of the broad language of § 4 was not accidental. As this Court observed in *Pfizer Inc.* v. *India,* 434 U. S. 308, 312 (1978): "Congress used the phrase `any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition." Only last Term we emphasized that the all-encompassing language of § 4 "reflects Congress' `expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Blue Shield of Virginia* v. *McCready, supra,* at 472, quoting *Pfizer Inc.* v. *India, supra,* at 313-314.

In keeping with the inclusive language and remedial purposes of § 4, this Court has "refused to engraft artificial limitations
547 *547 on the § 4 remedy." *Blue Shield of Virginia* v. *McCready, supra,* at 472 (footnote omitted).[1] Thus, for example, in *Pfizer Inc.* v. *India,* the Court held that the statutory phrase "any person" is broad enough to encompass a foreign sovereign. In *Reiter* v. *Sonotone Corp.,* 442 U. S. 330 (1979), the Court likewise adopted an expansive reading of the statutory term "property," ruling that a consumer who pays a higher price as a result of a price-fixing conspiracy has sustained an injury to his "property" and therefore has standing to sue under § 4.

The Plaintiff unions fit comfortably within the language of § 4. The complaint alleges that plaintiffs suffered injury as a result of a restraint of trade that was "designed to weaken and destroy plaintiffs and each of them." Complaint ¶ 26. The Court does not suggest that a union is not a "person' within the meaning of § 4, or that plaintiffs cannot prove injury to their "business or property." Moreover, it would require a strained reading of § 4 to conclude that a party that an antitrust violation was aimed at cannot prove that it suffered injury "by reason of" an antitrust violation.

Far from supporting the Court's conclusion, *ante,* at 531-533, the common-law background of the antitrust laws highlights the anomaly of denying a remedy to the intended victim of unlawful conduct. Since antitrust violations are essentially "tortious acts," *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U. S. 251, 264 (1946),[2] the most apt analogy is to the common
548 law of torts. Although many legal battles have been fought over the extent of tort liability for remote consequences *548 of *negligent* conduct, it has always been assumed that the victim of an *intentional* tort can recover from the tortfeasor if he proves that the tortious conduct was a cause-in-fact of his injuries. An inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.[3] For example, if one party makes false representations to another, intending them to be communicated to a third party and acted upon to his detriment, the third party can bring an action for misrepresentation against the originator of the false information if he suffers injury as a result.[4] Indeed, in many
549 situations the common law holds *549 an intentional tortfeasor liable even for the unforeseeable consequences of his conduct.[5] I am not aware of any cases exonerating an intentional tortfeasor from responsibility for the intended consequences of his actions merely because he inflicted harm upon his victim indirectly rather than directly.

This case does not implicate the sort of "articulable consideration of statutory policy" which we have deemed necessary to deny standing to a party encompassed by the language of § 4. *Blue Shield of Virginia* v. *McCready,* 457 U. S., at 473. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477 (1977), we denied standing to parties that suffered injury because an illegal acquisition prevented them from reaping profits that they would have reaped had the acquired firms been permitted to fail. We reasoned that permitting recovery for "the profits [plaintiffs] would have realized had competition been reduced" would be "inimical" to the purposes of the antitrust laws, *id.,* at 488, since plaintiffs' injuries did not "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," *id.,* at 489. This consideration of statutory policy is not applicable here, for plaintiffs allege that they suffered injury as a result of the defendants' efforts to coerce and induce letters of construction contracts and others to deal with nonunion carpentry firms solely because of their nonunion status. If plaintiffs prove their allegations, they will prove that they suffered harm attributable to the anticompetitive consequences of the defendant's restraint of trade.

Nor does the present case implicate the consideration of statutory policy underlying this Court's decisions in *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977), and *Hawaii* v. *Standard Oil Co.,* 405 U. S. 251 (1972). Critical to the denial of standing
550 in those cases was the risk of duplicative recovery that would have been created by affording the plaintiffs *550 standing.[6] In *Illinois Brick* the Court held that an indirect purchaser has no standing to sue a seller on the theory that overcharges paid to the seller by a direct purchaser were passed on to the indirect purchaser. 431 U. S., at 730-731. If the Court had held in *Illinois Brick* that the indirect purchaser has standing, sellers would have faced the prospect of two treble-damages actions based on the same overcharges. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968), had established that a direct purchaser can sue a seller for the entire amount of the seller's overcharges, and that the seller cannot assert as a defense that the direct purchaser passed the overcharges through to its customers (the indirect purchasers). Similarly, in *Hawaii* v. *Standard Oil Co.,* where the State of Hawaii sought to recover for financial harm allegedly suffered by the general economy of the State, the Court denied standing because "[a] large and ultimately indeterminable part of the injury to the `general economy,' as it is measured by economists, is no more than a reflection of injuries to the `business or property' of consumers, for which they may recover themselves under § 4." 405 U. S., at 264.[7]

There is no risk of double recovery here. The plaintiff unions seek recovery for injuries distinct from those that other parties
551 may have suffered. One such distinct injury *551 plaintiffs may have suffered is a decrease in union dues resulting from a reduction in work available to union members. In addition to regular dues, it is not uncommon for employees to pay periodic dues representing a percentage of their wages. See R. Gorman, Basic Text on Labor Law 650 (1976).[8] If union members lost work as a result of the alleged restraint of trade, their wages and thus the dues collected by the plaintiff unions may have been reduced.

Any recovery of lost dues by the plaintiff unions would not duplicate recoveries that might be obtained by either unionized carpentry firms or employees of those firms. A recovery of lost dues by a union would not duplicate a recovery for lost profits that might be obtained by a firm for which union members worked, for union dues are not an element of a firm's profits. Nor would a recovery of lost dues by a union duplicate recoveries of lost wages that employees might obtain. Although periodic union dues are based on a percentage of wages, there would be no double recovery because union dues would be subtracted from lost wages in calculating the employees' damages. The *Hanover Shoe* rule barring the assertion of a "pass-through" defense would not prevent subtraction of union dues from wages in determining the employees' damages. The *Hanover Shoe* rule was designed to avoid the "additional long and complicated proceedings involving massive evidence and complicated theories" that would be required to determine the extent to which price overcharges were passed through to an indirect purchaser. 392 U. S., at 493. In sharp contrast, where union dues are a percentage of wages, there is no difficulty in determining the amount of dues that a union lost as a result of a reduction in the wages earned by union members.

552 *552 I recognize that it may not be easy to ascertain to what extent any reduction in union dues was attributable to the defendant's conduct. But our cases make it clear that "[i]f there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins* v. *Standard Oil Co.,* 395 U. S. 642, 648 (1969) (reinstating jury verdict based on injury indirectly caused by price discrimination in violation of the Robinson-Patman Act). Insofar as the amount of damages is concerned, an antitrust plaintiff need only provide a reasonable estimate of the damages stemming from an antitrust violation. See *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U. S., at 266. " `Difficulty of ascertainment is no longer confused with right of recovery,' " *id.,* at 265, quoting *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 566 (1931), and "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," 327 U. S., at 265.

Any concern the Court may have that the plaintiffs cannot prove their case does not justify throwing them out of court solely on the basis of the pleadings. If, during discovery, it becomes apparent that plaintiffs cannot establish a reasonable inference of causation or cannot provide evidence supporting a rational estimate of damages, they will be vulnerable to a motion for summary judgment. Dismissal for failure to state a claim is too crude a procedural device to be used to vindicate the "interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *Ante,* at 543.

[*] Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Robert B. Nicholson,* and *Robert J. Wiggers* for the United States; by *Peter G. Nash* for the Associated General Contractors of America, Inc.; and by *Edward B. Miller* and *Stephen A. Bokat* for the Chamber of Commerce of the United States.

[1] The facts set forth in paragraphs 23 and 24, initially alleged in support of the Union's federal antitrust claim, are realleged in each of the other claims for relief: breach of collective-bargaining agreements (¶¶ 29-31); intentional interference with contractual relations (¶¶ 32-35); intentional interference with business relationships (¶¶ 36-39); and violation of the California antitrust statute (¶¶ 40-43).

[2] For example, it is alleged that defendants breached their collective-bargaining agreements "by failing to pay agreed-upon wages, by failing to use the hiring hall, by failing to pay Trust Fund contributions, by failing to observe other terms and conditions of employment, and by generally weakening the good faith requirement of the collective bargaining agreements"; that defendants improperly changed their names and corporate status and made use of so-called "double breasted operations"; and that they encouraged nonmembers of Associated to refuse to enter into collective-bargaining agreements with the Union.

[3] The word "coerced" did not appear in the complaint as originally filed. Even as amended after the filing of motions to dismiss, the complaint does not allege that the defendants used any coercion to persuade nonmembers of Associated to refuse to enter into collective-bargaining agreements with the Union (¶ 24(3)). The complaint alleges neither the identity nor the number of landowners, general contractors, or others who were coerced into making contracts with nonunion firms.

[4] Paragraph 25, which describes the effect of the conspiracy, reads in full as follows:

"The purpose and effect of the above described activities, plan and conspiracy are oppressive, unreasonable, and illegal, and are in restraint of trade and an unlawful interference and restraint of the free exercise of the business activities of plaintiffs and each of them, all in violation of 15 U. S. C. Section 1. The purpose and effect of the above described activities, plan and conspiracy, in addition, are to weaken, destroy, and restrain the trade of certain contractors, both members of the Associated General Contractors of California, Inc. and non-members, who are `memorandum contractors,' who have faithfully performed the terms and conditions set out in the master collective bargaining agreements described above. The effect of this restraint on trade is to further weaken and destroy plaintiffs in this matter. These activities are in restraint of the free exercise of plaintiffs' trade and an interference therein, all in violation of 15 U. S. C. Section 1." App. E to Pet. for Cert. 20-21.

[5] Plaintiffs do not seek injunctive relief under § 16 of the Clayton Act, 15 U. S. C. § 26, and they do not ask us to consider whether they have standing to request such relief.

[6] An order dismissing the federal antitrust claim and the state-law claims was filed on August 4, 1975, and an amended order dismissing the entire complaint was entered on September 10, 1975. The District Court had initially stayed the breach-of-contract claim for 120 days pending grievance and arbitration procedures. On reconsideration it also dismissed the breach-of-contract claim, deciding that the suit had been prematurely filed.

[7] Addressing the federal antitrust claim, the District Court concluded:

"The essence of plaintiffs' claim seems to be that defendants violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs, precisely the type of agreement which subjected the union in *Connell* to antitrust liability." 404 F. Supp., at 1070.

The District Court reasoned that the employers' refusal to enter into such an agreement could not provide the basis for an antitrust claim.

[8] The Court of Appeals affirmed the dismissal of all other claims.

[9] The Court of Appeals majority read subparagraph (4) of paragraph 24, quoted *supra,* at 522, as though it alleged that the defendants had coerced landowners and other persons who let construction contracts "to hire *only* construction firms, primarily subcontractors, who had not signed with the Unions." 648 F. 2d, at 532 (emphasis added); see also *id.,* at 544 (denying petition for rehearing). The word "only" does not appear in the amended complaint, and it implies that the defendants' activities gave rise to a broader restraint than was actually alleged.

The majority read subparagraph (5) of paragraph 24 to charge that defendants had "coerced and aided each other to subcontract *only* with subcontractors who had not signed with the Unions." *Id.,* at 531 (emphasis added). Again using the word "only," which does not appear in the complaint itself, the majority characterized the defendants' alleged activities as "very similar to a concerted refusal to deal, or a group boycott." *Ibid.* It concluded that the allegations "present virtually the obverse of the situation described in *Connell*": the conspiracy, if successful, "would effectively lock union-signatory subcontractors out of a portion of the market for carpentry work." *Id.,* at 532.

[10] See *Tugboat, Inc.* v. *Mobile Towing Co.,* 534 F. 2d 1172, 1176-1177 (CA5 1976); *International Assn. of Heat & Frost Insulators* v. *United Contractors Assn.,* 483 F. 2d 384, 397-398 (CA3 1973).

Circuit Judge Sneed dissented. He first rejected the majority's characterization of the complaint, agreeing instead with the District Court. Second, assuming that the complaint alleged a boycott of certain employers, he concluded that neither the employees of a victim of the boycott nor their collective-bargaining representative had standing to assert the antitrust claim. Finally, he concluded that an injury that affected only the Union's organizational and representational activity was remediable under the labor laws rather than the antitrust laws.

The Court of Appeals denied the petition for rehearing and rehearing en banc on May 22, 1981. Accompanying the order was a statement by the majority rebutting the petitioners' assertion that the opinion rendered multiemployer bargaining units unlawful, and a dissent by Circuit Judge Sneed. 648 F. 2d, at 543, 545.

[11] The Union had an adequate opportunity to amend its pleading to add factual allegations demonstrating that the District Court's decision to dismiss the complaint was based on a misunderstanding of its antitrust claim.

[12] In analyzing the antitrust allegations in the amended complaint, we therefore construe the references to "contractors and subcontractors who are not signatories to collective bargaining agreements" as referring to completely independent nonunion firms rather

than to operations covertly controlled by one or more defendants.

[13] The Court of Appeals did not reverse the District Court's dismissal of the complaint with regard to these allegations. 648 F. 2d, at 531-532, 537, 540.

[14] See Brief for Respondents 37. There is no allegation of wrongful conduct directed at nonunion subcontracting firms. We therefore assume that, if any nonunion firms refused to bargain with the Union because of the conspiracy, they did so because they were rewarded with business they would not otherwise have obtained. Thus, nonunion firms could not be considered victims of the conspiracy; rather, they appear to have been its indirect beneficiaries. None are named either as defendants or as co-conspirators.

The amended complaint also does not allege any restraint on competition in the market for labor union services. Unlike the two cases involving union plaintiffs cited by the Court of Appeals, see n. 10, *supra,* in this case there is no claim that competition between rival unions has been injured or even that any rival unions exist.

[15] The complaint does not specify the nature of the "coercion." It does not, for example, allege that the defendants refused to deal with all members of either of the two classes of persons against whom coercion was applied. Indeed, it is highly improbable that the defendants — all of whom are signatories to union contracts — would refuse to deal with all of their customers and potential customers in an attempt to divert all of their business to nonunion firms.

[16] There is no allegation that any person subjected to coercion was required to deal exclusively with nonunion firms.

[17] Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley* v. *Gibson,* 355 U. S. 41, 47-48 (1957), too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

[18] Although we do not know what kind of coercion defendants allegedly employed, we assume for purposes of decision that it had a predatory "nature or character," *Klors, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S., at 211, and that it would "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U. S. 211, 213 (1951).

[19] In *Mandeville Island Farms, Inc.* v. *Sugar Co.,* 334 U. S. 219 (1948), the Court held that growers of sugar beets could maintain a treble-damages action against refiners who had allegedly conspired to fix the price that they would pay for the beets. Although previous price-fixing cases had involved agreements among sellers to fix sales prices, the Court readily concluded that the Act applied equally to an agreement among competing buyers to fix purchase prices. The Court stated:

"The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co.* v. *United States,* 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.,* at 236.

Similarly broad language was used in later cases holding that actions could be maintained by consumers, *Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 337-338 (1979), by a foreign government, *Pfizer Inc.* v. *India,* 434 U. S. 308, 313-314 (1978), and by the direct victim of a boycott. *Blue Shield of Virginia* v. *McCready,* 457 U. S. 465, 472-473 (1982). In each of those cases, however, the actual plaintiff was directly harmed by the defendants' unlawful conduct. The paraphrasing of the language of § 4 in those opinions added nothing to the even broader language that the statute itself contains.

[20] See 21 Cong. Rec. 1767-1768, 2455-2456, 2459, 2615, 3147-3148 (1890). The original proposal, which merely allowed recovery of the amount of actual enhancement in price, was successively amended to authorize double-damages and then treble-damages recoveries, in order to provide otherwise remediless small consumers with an adequate incentive to bring suit. *Id.,* at 1765, 2455, 3145. The same purpose was served by the special venue provisions, the provision for the recovery of attorney's fees, and the elimination of any requirement that the amount in controversy exceed the jurisdictional threshold applicable in other federal litigation. See, *e. g., id.,* at 2612, 3149. Moreover, changes in the description of the remedy extended the section's coverage beyond price fixing.

[21] See, *e. g., id.,* at 2456, 2459, 3151-3152.

[22] *Id.,* at 2456. Senator Sherman added: "The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests." *Ibid.;* see also *id.,* at 2459, 3149, 3151-3152. Although Members of Congress referred particularly to common-law definitions of "monopoly" and "restraint of trade," they appear to have been generally aware that the statute would be construed by common-law courts in accordance with traditional canons. For example, at the beginning of the debate on the Sherman Act, one Senator cautioned his colleagues:

"A careful analysis of the terms of the bill is essential. We must know what it means, what its legal effect is, if we give force to it as it is written.. . . We must adopt, therefore, the known methods of the courts in determining what the bill means." *Id.,* at 1765.

[23] For example, the State Constitution of Illinois, adopted in 1870, provided: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. . . ." Art. II, § 19. Comparable provisions were found in

the State Constitutions of Arkansas, Connecticut, Delaware, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, Ohio, and Vermont. See generally F. Hough, American Constitutions (1871).

[24] One treatise stated: "Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one `to recover *any* damage.' " 3 J. Lawson, Rights, Remedies, and Practice 1740 (1890). Another leading treatise explained:

"The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety." T. Cooley, Law of Torts 73 (2d ed. 1888).

[25] In torts, a leading treatise on damages set forth the general principle that, "*[w]here the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote,* if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose." Thus, A, who had agreed with a town to support all the town paupers for a specific period, in return for a fixed sum, had no cause of action against S for assaulting and beating one of the paupers, thereby putting A to increased expense. Similarly, a purchaser under an output contract with a manufacturer had no right of recovery against a trespasser who stopped the company's machinery, and a creditor could not recover against a person who had forged a note, causing diminution in the dividends from an estate. 1 J. Sutherland, Law of Damages 55-56 (1882) (emphasis in original, footnote omitted).

Similarly, in contract, the common-law courts drew a distinction between direct and consequential damages; the latter had to be specifically included in the contract to be recoverable. See *id.,* at 74-93; 1 T. Sedgwick, Measure of Damages 203-244 (8th ed. 1891) (discussing the rule of *Hadley* v. *Baxendale,* 9 Exch. 341, 156 Eng. Rep. 145 (1854)).

[26] The common law required the plaintiff to prove, with certainty, both the existence of damages and the causal connection between the wrong and the injury. No damages could be recovered for uncertain, conjectural, or speculative losses. See generally cases cited in F. Bohlen, Cases on the Law of Torts 292-312 (2d ed. 1925) (cases alleging emotional harm to plaintiff). Even if the injury was easily provable, there would be no recovery if the plaintiff could not sufficiently establish the causal connection. See 1 Sutherland, *supra* n. 25, at 94-126; 1 Sedgwick, *supra* n. 25, at 245-294.

[27] See, *e. g., Winterbottom* v. *Wright,* 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

[28] See n. 22, *supra.* The common law, of course, is an evolving body of law. We do not mean to intimate that the limitations on damages recoveries found in common-law actions in 1890 were intended to serve permanently as limits on Sherman Act recoveries. But legislators familiar with these limits could hardly have intended the language of § 7 to be taken literally.

[29] See also *Ames* v. *American Telephone & Telegraph Co.,* 166 F. 820 (CC Mass. 1909). Applying "ordinary principles of law" to the general language of the statute, the court held that a stockholder had no legally cognizable antitrust claim against defendants for illegally acquiring the corporation, thereby rendering plaintiff's stock worthless. Plaintiff's claim was not distinguishable from any injury sustained by the company itself. Therefore, the court stated, a contrary result would "subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act." *Id.,* at 823.

[30] The Court held in that case that the plaintiff shippers could recover damages from the defendant railroad for charging an excessive freight rate, even though they had been able to pass on the damage to their purchasers. Justice Holmes wrote that the law holds the defendant "liable if proximately the plaintiff has suffered a loss," but "does not attribute remote consequences to a defendant." 245 U. S., at 533-534.

[31] The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. See Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L. J. 809, 813, n. 11 (1977); Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5, 6-7 (1966).

[32] In his comment, *Mahoney v. Beatman:* A Study in Proximate Cause, 39 Yale L. J. 532, 533 (1930), Leon Green noted: "Legal theory is too rich in content not to afford alternative ways, and frequently several of them, for stating an acceptable judgment." Earlier, in his Rationale of Proximate Cause 135-136 (1927) (footnote omitted), Green had written:

" `Cause,' although irreducible in its concept, could not escape the ruffles and decorations so generously bestowed: remote, proximate, direct, immediate, adequate, efficient, operative, inducing, moving, active, real, effective, decisive, supervening, primary, original, contributory, ultimate, concurrent, causa causans, legal, responsible, dominating, natural, probable, and others. The difficulty now is in getting any one to believe that so simple a creature could have been so extravagantly garbed."

[33] Some courts have focused on the directness of the injury, *e. g., Loeb* v. *Eastman Kodak Co.,* 183 F. 704, 709 (CA3 1910); *Productive Inventions, Inc.* v. *Trico Products Corp.,* 224 F. 2d 678, 679 (CA2 1955), cert. denied, 350 U. S. 936 (1956); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 308 F. 2d 383, 394-395 (CA6 1962), cert. denied, 372 U. S. 907 (1963). Others have applied the requirement that the plaintiff must be in the "target area" of the antitrust conspiracy, that is, the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. *E. g., Pan-Islamic Trade Corp.* v. *Exxon Corp.,* 632 F. 2d 539, 546-547 (CA5 1980); *Engine Specialties, Inc.* v. *Bombardier Ltd.,* 605 F. 2d 1, 17-18 (CA1 1979); *Calderone Enterprises Corp.* v. *United Artists Theater Circuit, Inc.,* 454

F. 2d 1292, 1292-1295 (CA2 1971). Another Court of Appeals has asked whether the injury is "arguably within the zone of interests protected by the antitrust laws." *Malamud* v. *Sinclair Oil Corp.*, 521 F. 2d 1142, 1151-1152 (CA6 1975). See generally Berger & Bernstein, *supra* n. 31.

As a number of commentators have observed, these labels may lead to contradictory and inconsistent results. See Berger & Bernstein, *supra* n. 31, at 835, 843; Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits, 71 Colum. L. Rev. 1, 27-31 (1971); Sherman, Antitrust Standing: From *Leob* to *Malamud,* 51 N. Y. U. L. Rev. 374, 407 (1976) ("it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case"). In our view, courts should analyze each situation in light of the factors set forth in the text *infra.*

[34] Cf. *Blue Shield of Virginia* v. *McCready,* 457 U. S., at 477-478, n. 13 (discussing elusiveness of test of proximate cause); *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); *id.,* at 351-352, 162 N. E., at 103 (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word `proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point").

[35] It is well settled that a defendant's specific intent may sometimes be relevant to the question whether a violation of law has been alleged. See *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522 (1948). Moreover, there no doubt are cases in which such an allegation would adequately support a plaintiff's claim under § 4. Cf. Handler, *supra* n. 33, at 30 (specific intent of defendant to cause injury to a particular class of persons should "ordinarily be dispositive" in creating standing to sue); Lytle & Purdue, Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Am. U. L. Rev. 795, 814-816 (1976) (suggesting that standing in a group boycott situation should be based on the purpose of the boycott).

[36] See Sherman, *supra* n. 33, at 389-391, citing *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183, 189 (CA2 1970), cert. denied, 401 U. S. 923 (1971).

[37] In *McCready* we rejected the contention that, because there was no specific intent to harm the plaintiff, her injury was thereby rendered remote. This case presents a different question, but in neither case is the motive allegation of controlling importance.

[38] See *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster").

[39] McCready, a Blue Shield subscriber, alleged that Blue Shield and the Neuropsychiatric Society of Virginia, Inc., had unlawfully conspired to restrain competition in the market for psychotherapeutic services by providing insurance coverage only for consumers who patronized psychiatrists, not psychologists. McCready obtained services from a psychologist and was denied reimbursement.

[40] Moreover, it has not even alleged any marketwide restraint of trade. The allegedly unlawful conduct involves predatory behavior directed at "certain" parties, rather than a claim that output has been curtailed or prices enhanced throughout an entire competitive market.

[41] In *Mine Workers* v. *Pennington,* 381 U. S. 657, 664 (1965), the Court recognized that wages lie at the heart of the subjects of mandatory collective bargaining, and that "the elimination of competition based on wages among the employers in the bargaining unit," which directly benefits the union, also has an effect on competition in the product market. See generally Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183, 1185-1188 (1980); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14, 17-20, 28-30 (1963).

[42] See, *e. g., Coronado Coal Co.* v. *Mine Workers,* 268 U. S. 295, 310 (1925) (applying Sherman Act to alleged conspiracy by unions involved in labor dispute to restrain interstate trade in coal); *Loewe* v. *Lawlor,* 208 U. S. 274 (1908) (applying Sherman Act to boycott by labor organization seeking to unionize plaintiff's hat factory); Cox, Labor and the Antitrust Laws — A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 256-262 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659, 661-666 (1965); Winter, *supra* n. 41, at 30-38.

[43] See 29 U. S. C. § 52 (statutory labor exemption); *Mine Workers* v. *Pennington, supra; Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965) (nonstatutory exemption). In this case we need not reach petitioner's contentions that the alleged activities are within the statutory and nonstatutory labor exemptions.

[44] There is a parallel between these allegations and the claim in *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616 (1975). The plaintiff in that case, a general building contractor, was coerced by the defendant union into signing an agreement not to deal with nonunion subcontractors. Similarly, in the *McCready* case, the plaintiff was the direct victim of unlawful coercion. As the Court noted, "McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services." 457 U. S., at 483. Her status was thus comparable to that of a contracting or subcontracting firm that refused to yield to the defendants' coercive practices and therefore suffered whatever sanction that coercion imposed. Like McCready, and like Connell Construction Co., such a firm could maintain an action against the defendants. In contrast, the Union is neither a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' coercive practices. We therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.

[45] Its brief merely echoes the Court of Appeals' description of its allegations: "the Unions have been injured in their business, i. e., organizing carpentry industry employees, negotiating and policing collective bargaining agreements, and securing jobs for their members." Brief for Respondents 25-26.

[46] Because of the absence of specific allegations, we can only speculate about the specific components of the Union's claim. If the Union asserts that its attempts to organize previously nonunion firms have been frustrated because nonunion firms wish to continue to obtain business from those subjected to coercion by the defendants, its harm stems most directly from the conduct of persons who are not victims of the conspiracy. See n. 14, *supra.* If the Union claims that dues payments were adversely affected because employees had less incentive to join the Union in light of expanding nonunion job opportunities, its damage is more remote than the harm allegedly suffered by unionized subcontractors. The same is true if the Union contends that revenues from dues payments declined because its members lost jobs or wages because their unionized employers lost business. That harm, moreover, is even more indirect than the already indirect injury to its members, yet a number of decisions have denied standing to employees with merely derivative injuries. See, *e. g., Pitchford* v. *PEPI, Inc.,* 531 F. 2d 92, 97 (CA3), cert. denied, 426 U. S. 935 (1976); *Contreras* v. *Grower Shipper Vegetable Assn.,* 484 F. 2d 1346 (CA9 1973), cert. denied, 415 U. S. 932 (1974); *Reibert* v. *Atlantic Richfield Co.,* 471 F. 2d 727 (CA10), cert. denied, 411 U. S. 938 (1973). But see *Nichols* v. *Spencer Int'l Press, Inc.,* 371 F. 2d 332, 334 (CA7 1967).

[47] Indeed, if there is substance to the Union's claim, it is difficult to understand why these direct victims of the conspiracy have not asserted any claim in their own right. The Union's suggested explanations of this fact tend to shed doubt on the proposition that these "victims" were actually harmed at all.

"Many unionized firms will respond to the alleged boycott . . . by setting up double-breasted operations or shifting more of their resources to the non-unionized part of their operations when double-breasted operations already exist. In this manner, unionized subcontractors can avoid losing any business and, as a result, these subcontractors will *not* `possess the classic economic incentive to file suit.' Alternatively, unionized subcontractors may simply not renew the collective bargaining agreement when it expires." Brief for Respondents 49 (citation omitted).

[48] Cf. *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 739-748 (1975) (purchaser-seller limitation on actions under § 10(b) of Securities Exchange Act of 1934).

[49] We expressly noted in *McCready:*

"[O]ur cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the Court of Appeals observed, they could be `ascertained to the penny.' " 457 U. S., at 475-476, n. 11.

[50] This interest was also identified in the legislative debates preceding the enactment of the Sherman Act. Speaking in opposition to a proposed amendment that might have complicated the procedures in private actions, Senator Edmunds said:

"Therefore I say as to the suggested amendment of my friend from Mississippi — and I repeat it in all earnestness — that if I were a lobbyist and wanted to entangle this business, I should provide that everybody might sue everybody else in one common suit and have a regular *pot-pourri* of the affair, as his amendment proposes, and leave it to the lawyers of the trust to have an interminable litigation in respect of the proper parties, whether their interests were common or diverse or how they were affected, and take twenty years in order to get a result as to a single one of them. The Judiciary Committee did not think it wise to do that sort of thing, because we were in earnest about the business, as I know my friend is." 21 Cong. Rec. 3148 (1890).

See also *id.,* at 3149 (remarks of Senator Morgan opposing same amendment: "There is as much harm in trying to do too much as there is in not trying to do anything, and I think we have stopped at about the proper line in this bill, and I shall support it just as it is").

[51] We pointed out in *McCready,* 457 U. S., at 475, n. 11:

"If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick,* it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. . . . Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system."

[52] Although the policy against duplicative recoveries may not apply to the other type of harm asserted in the Union's brief — reduction in its ability to persuade nonunion contractors to enter into union agreements — the remote and obviously speculative character of that harm is plainly sufficient to place it beyond the reach of § 4. See n. 46, *supra.*

[1] Cf. *Radovich* v. *National Football League,* 352 U. S. 445, 453-454 (1957) (given Congress' determination that the activities prohibited by the antitrust laws are "injurious to the public" and its creation of "sanctions allowing private enforcement of the antitrust laws by an aggrieved party," "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws").

[2] See *Karseal Corp.* v. *Richfield Oil Corp.,* 221 F. 2d 358, 363 (CA9 1955) (antitrust action is basically a suit to recover "for a tort").

[3] See Restatement of Torts § 279 (1934) ("If the actor's conduct is intended by him to bring about bodily harm to another which the actor is not privileged to inflict, it is the legal cause of any bodily harm of the type intended by him which it is a substantial factor in bringing

about"); *id.,* Comment *c* ("There are no rules which relieve the actor from liability because of the manner in which his conduct has resulted in the injury such as there are where the liability of a negligent actor is in question. Therefore, the fact that the actor's conduct becomes effective in harm only through the intervention of new and independent forces for which the actor is not responsible is of no importance") (citations omitted); *id.,* § 280 (same rule applies to conduct intended to cause harm other than bodily harm); *Seidel* v. *Greenberg,* 108 N. J. Super. 248, 261-269, 260 A. 2d 863, 871-876 (1969); *Derosier* v. *New England Tel. & Tel. Co.,* 81 N. H. 451, 464, 130 A. 145, 152 (1925) ("For an intended injury the law is astute to discover even very remote causation").

The Court's reliance on Sutherland's treatise on damages is misplaced. *Ante,* at 532-533, n. 25. Although Sutherland stated as a general proposition that a defendant is not liable to a plaintiff for injuries suffered as a result of the defendant's conduct with respect to a third party, he distinguished cases in which "the wrongful act is willful for that purpose," by which he presumably meant cases in which the defendant intended to injure the plaintiff. 1 J. Sutherland, Law of Damages 55 (1882) (footnote omitted). In the examples given by Sutherland and cited by the Court, there is no suggestion that the defendants intended to inflict injury upon the plaintiffs.

[4] See, *e. g., Watson* v. *Crandall,* 7 Mo. App. 233 (1879), aff'd, 78 Mo. 583 (1883); *Campbell* v. *Gooch,* 131 Kan. 456, 292 P. 752 (1930). See generally Prosser, Misrepresentation and Third Persons, 19 Vand. L. Rev. 231, 240-242 (1966).

[5] See, *e. g.,* W. Prosser, Law of Torts 32-33 (4th ed. 1971) (doctrine of transferred intent); *id.,* at 67-68 (trespasser is responsible for unforeseeable consequences of his trespass).

[6] See *Blue Shield of Virginia* v. *McCready,* 457 U. S. 465, 474-475 (1982) (noting that *Illinois Brick* and *Hawaii* v. *Standard Oil Co.* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws").

[7] Significantly, the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii* v. *Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated. See 2 P. Areeda & D. Turner, Antitrust Law § 337d (1978).

[8] Since we have only the pleadings before us, we do not know how the plaintiff unions collect their dues. However, plaintiffs are entitled to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) if there is any set of facts that, if proved at trial, would entitle them to recover.

051 0219

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Deborah Platt Majoras, Chairman** **Pamela Jones Harbour** **Jon Leibowitz** **William E. Kovacic** **J. Thomas Rosch**

In the Matter of **AUSTIN BOARD OF REALTORS,** **a corporation.**	**Docket No. C-4167**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Austin Board of Realtors ("Respondent" or "ABOR"), a corporation, also trading and doing business as Austin/Central Texas Realty Information Service has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

NATURE OF THE CASE

This case involves a local, private real estate association that operates a Multiple Listing Service, which is a joint venture among its members designed to foster real estate brokerage services. ABOR has adopted a rule that limits the publication of certain listing agreements on popular internet real estate web sites, in a manner that injures real estate brokers that use such listing agreements to offer lesser services at a lower price compared to the full service package. This rule deprives such brokers and the home sellers they represent of a significant benefit afforded by the MLS. The rule discriminates on the basis of lawful contractual terms between the listing real estate broker and the seller of the property, and lacks any justification that such a rule improves competitive efficiency. Consumers will be harmed by this rule because it denies a lower cost option to sellers and increases search costs to buyers. As such, this rule constitutes a concerted refusal to deal except on specified terms with respect to a key input for the provision of real estate services.

RESPONDENT AND ITS MEMBERS

1. Respondent Austin Board of Realtors, ("ABOR") is a not for profit corporation organized, existing and doing business under and by virtue of the laws of the State of Texas. Respondent's principal place of business is at 10900 Stonelake Boulevard, Suite 100, Austin, Texas 78759. ABOR operates for the benefit of its members.

2. ABOR has more than 5,000 real estate professionals as members, and is affiliated with the National Association of Realtors ("NAR"). The majority of ABOR's members hold an active real estate license and are active in the real estate profession.

3. The large majority of residential real estate brokerage professionals in the Austin, Texas, metropolitan area are members of ABOR. These professionals compete with one another to provide residential real estate brokerage services to consumers.

4. ABOR is now and has been providing since 1952 a Multiple Listing Service ("MLS") for members doing business in the metropolitan Austin, Texas area. A MLS is a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with members who locate purchasers.

5. The ABOR MLS is organized through the Austin/Central Texas Realty Information Service ("ACTRIS"), which is a Texas not for profit corporation, all of whose stock is owned by ABOR. ACTRIS rules and policies, and any amendments thereto, must be approved by the ABOR Board of Directors.

6. When a property is listed on ACTRIS, it is made available to all members of the MLS for the purpose of trying to match a buyer with a seller. Information about the property, including the asking price, address and property details, are made available to members of the MLS so that a suitable buyer can be found.

7. ACTRIS services the territory within central Texas, specifically metropolitan Austin, including Bastrop, Blanco, Burnet, Caldwell, Fayette, Gillespie, Hays, Hutto, Lee, Llano, Milam, Travis and Williamson counties in the State of Texas ("ACTRIS Service Area").

8. ACTRIS is the only MLS that services metropolitan Austin, Texas. ACTRIS is the dominant MLS in the ACTRIS Service Area.

JURISDICTION

9. ABOR is and has been at all times relevant to this complaint a corporation organized for its own profit or for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. The acts and practices of ABOR, including the acts and practices alleged herein, have been or are in or affecting commerce within the meaning of Section 4 of the Federal Trade Commission Act.

ABOR CONDUCT

11. In 2005, ACTRIS adopted and ABOR approved a rule that stated: "Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis" (the "Web Site Policy").

12. The Web Site Policy prevented certain lawful residential property listings provided to ACTRIS, called "Exclusive Agency Listings," from being transmitted to real estate web sites, based on the contractual relationship between the home seller and the real estate agent the seller employs to promote the property.

13. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without assistance of a broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

14. Exclusive Agency Listings are often used by members of ABOR to offer lower-cost real estate services to consumers, including lawful arrangements pursuant to which a real estate broker or agent provides that a property offered for sale shall be listed on the MLS, but the listing broker or agent will not provide some or all of the services offered by other real estate brokers or will only offer such additional services on an à la carte basis.

15. Many brokers offering real estate brokerage services pursuant to Exclusive Agency Listings, are able to provide home sellers with exposure of their listing through the MLS for a flat fee that is very small compared to the commission prices traditionally charged. Exclusive Agency Listings often reserve to the home seller the right to sell the property without owing more to the listing broker.

16. The Web Site Policy specifically prevents Exclusive Agency Listings from being published on web sites approved by ABOR and ACTRIS, including (1) ACTRIS-member web sites; (2) the ABOR-owned "Austinhomesearch.com" web site; and (3) the NAR-operated "Realtor.com" web site (collectively, "Approved Web Sites").

17. The Web Site Policy has the effect of discouraging members of ABOR and participants in ACTRIS from accepting Exclusive Agency Listings. In the first three months that the Web Site Policy was in effect, the number of Exclusive Agency Listings on the ACTRIS MLS in Austin dropped from 18 percent to approximately 2.5 percent of all the listings on the MLS.

ABOR MARKET POWER

18. The provision of residential real estate brokerage services to sellers and buyers of real property in the Austin, Texas and/or the ACTRIS Service Area is a relevant service market.

19. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through ACTRIS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the ACTRIS Service Area.

20. By virtue of industry-wide participation and control over a key input, ABOR and ACTRIS have market power in the ACTRIS Service Area.

21. Membership or participation in ACTRIS is essential to a broker providing effective residential real estate brokerage services to sellers and buyers of real property in the ACTRIS Service Area. Membership significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services in the ACTRIS Service Area.

APPROVED WEB SITES ARE KEY INPUTS

22. Access to the Approved Web Sites is a key input in the brokerage of residential real estate sales in the ACTRIS Service Area. Home buyers regularly use the Approved Web Sites to assist in their search for homes. The Approved Web Sites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on Approved Web Sites.

23. The most efficient, and at least in some cases the only, means for ABOR members to have their properties listed on the Approved Web Sites is by having ACTRIS transmit those listings.

24. Property owners and their brokers in the ACTRIS Service Area generally consider publication of listings on Approved Web Sites, in conjunction with publication of listings on the ACTRIS MLS, to be the most effective means of obtaining the broadest market exposure for residential property in the ACTRIS Service Area.

EFFECTS OF WEB SITE POLICY

25. The Web Site Policy has reduced the use of Exclusive Agency Listings in the ACTRIS Service Area. Prior to the initiation of the Web Site Policy, about 1,500 of 8,500, or 18 percent, of the listings on ACTRIS were Exclusive Agency Listings. After the Web Site Policy was

implemented, the number of Exclusive Agency Listings dropped to about 250 out of 10,000, or 2.5 percent.

26. The Web Site Policy may reduce consumer choices regarding both the purchase and sale of homes and cause consumers to pay for real estate brokerage services that they would not otherwise buy.

THE WEB SITE POLICY OFFERS NO EFFICIENCY BENEFIT

27. There is no cognizable and plausible efficiency justification for the Web Site Policy. The Web Site Policy is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

VIOLATION

28. In adopting the policies and engaging in the Acts and Practices described herein, ABOR has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services within metropolitan Austin, Texas and/or the ACTRIS Service Area.

29. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of ABOR and its members as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers.

30. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of August, 2006, issues its Complaint against Respondent Austin Board of Realtors.

By the Commission.

C. Landis Plummer
Acting Secretary

SEAL

404 U.S. 508 (1972)

CALIFORNIA MOTOR TRANSPORT CO. ET AL.
v.
TRUCKING UNLIMITED ET AL.

No. 70-92.

Supreme Court of United States.

Argued November 10, 1971
Decided January 13, 1972

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

509 *509 *Boris H. Lakusta* argued the cause for petitioners. With him on the briefs were *W. D. Benson, John MacDonald Smith,* and *Daniel H. Benson.*

Michael N. Khourie argued the cause and filed a brief for respondents.

Dennis N. Garvey filed a brief for Landmarks Holding Corp. et al. as *amici curiae.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. CHIEF JUSTICE BURGER.

This is a civil suit under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for injunctive relief and damages instituted by respondents, who are highway carriers operating in California, against petitioners, who are also highway carriers operating within, into, and from California. Respondents and petitioners are, in other words, competitors. The charge is that the petitioners conspired to monopolize trade and commerce in the transportation of goods in violation of the antitrust laws. The conspiracy alleged is a concerted action by petitioners to institute state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights. These activities, it is alleged, extend to rehearings and to reviews or appeals from agency or court decisions on these matters.

The District Court dismissed the complaint for failure to state a cause of action, 1967 Trade Cas. ¶ 72,298. The Court of Appeals reversed, 432 F. 2d 755. The case is here on a petition for a writ of certiorari, which we granted. 402 U. S. 1008.

The present case is akin to *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S. 127, where a group of trucking
510 companies sued a group of railroads to restrain them from an alleged conspiracy to monopolize *510 the long-distance freight business in violation of the antitrust laws and to obtain damages. We held that no cause of action was alleged insofar as it was predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement. We rested our decision on two grounds:

> (1) "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.,* at 137.
>
> (2) "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.,* at 138.

We followed that view in *United Mine Workers* v. *Pennington,* 381 U. S. 657, 669-671.

The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See *Johnson* v. *Avery,* 393 U. S. 483, 485; *Ex parte Hull,* 312 U. S. 546, 549.

511 We conclude that it would be destructive of rights of association and of petition to hold that groups with *511 common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.

We said, however, in *Noerr* that there may be instances where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U. S., at 144.

In that connection the complaint in the present case alleged that the aim and purpose of the conspiracy was "putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere."

More critical are other allegations, which are too lengthy to quote, and which elaborate on the "sham" theory by stating that the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them "free and unlimited access" to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners indeed became "the regulators of the grants of rights, transfers and registrations" to respondents—thereby depleting and diminishing the value of the businesses of respondents and aggrandizing petitioners' economic and monopoly power. See Note, 57 Calif. L. Rev. 518 (1969).

Petitioners rely on our statement in *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort to influence
512 public officials regardless of intent or purpose." 381 U. S., at 670. In the present case, however, *512 the allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process. It is alleged that petitioners "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be "to discourage and ultimately to prevent the respondents from invoking" the processes of the administrative agencies and courts and thus fall within the exception to *Noerr.*

The political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics. We said:

> "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." 365 U. S., at 141.

Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust
513 laws, as we held in *Walker* *513 *Process Equipment* v. *Food Machinery & Chemical Corp.,* 382 U. S. 172, 175-177. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U. S. 690, 707; *Harman* v. *Valley National Bank,* 339 F. 2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act. *Rangen, Inc.* v. *Sterling Nelson & Sons,* 351 F. 2d 851 (CA9 1965).

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.,* effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.

514 *514 It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. *Giboney* v. *Empire Storage Co.,* 336 U. S. 490. In that case Missouri enacted a statute banning secondary boycotts and we sustained an injunction against picketing to enforce the boycott, saying:

> "It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U. S., at 502.

In *Associated Press* v. *United States,* 326 U. S. 1, we held that the Associated Press was not immune from the antitrust laws by reason of the fact that the press is under the shelter of the First Amendment. We said:

> "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from
> 515 governmental interference under the *515 First Amendment does not sanction repression of that freedom by private interests." *Id.,* at 20.

Accord, *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 139-140. Cf. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600.

The rationale of those cases, when applied to the instant controversy, makes the following conclusions clear: (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers; and (2) that its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in that opposition.

First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (see *NAACP* v. *Button,* 371 U. S. 415, 444) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having "free and unlimited access" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. As stated in the opinion concurring in the judgment, that is the essence of those parts of the complaint to which we refer. If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

What the proof will show is not known, for the District Court granted the motion to dismiss the complaint. We must, of
516 course, take the allegations of the complaint at face value for the purposes of that motion. *Walker* *516 *Process Equipment* v. *Food Machinery & Chemical Corp.,* 382 U. S., at 174-175. On their face the above-quoted allegations come within the "sham" exception in the *Noerr* case, as adapted to the adjudicatory process.

Accordingly we affirm the Court of Appeals and remand the case for trial.

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

In the *Noerr* case[1] this Court held, in a unanimous opinion written by Mr. Justice Black, that a conspiracy by railroads to influence legislative and executive action in order to destroy the competition of truckers in the long-haul freight business was wholly immune from the antitrust laws.[2] This conclusion, we held, was required in order to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the First Amendment.[3] Today the Court retreats from *Noerr,* and in the process tramples upon important First Amendment values. For that reason I cannot join the Court's opinion.

517 In *Noerr* the defendants were joined together in an effort to induce legislative and executive action. Here, *517 so the complaint alleges, the defendants (petitioners) have joined to induce administrative and judicial action. The difference in type of governmental body might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery.[4] But, contrary to implications in the Court's opinion, there are in this case no allegations whatever of any such conduct on the part of the petitioners. And, in the absence of such conduct, I can see no difference, so far as the antitrust laws and the First Amendment are concerned, between trying to influence executive and legislative bodies and trying to influence administrative and judicial bodies. *NAACP* v. *Button,* 371 U. S. 415; *Brotherhood of Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1; *United Mine Workers* v. *Illinois State Bar Assn.,* 389 U. S. 217; *United Transportation Union* v. *State Bar of Michigan,* 401 U. S. 576.

The Court concedes that the petitioners' "right of access to the agencies and courts to be heard on applications sought by competitive highway carriers . . . is part of the right of petition protected by the First Amendment." Yet, says the Court, their joint agreement to exercise that right "does not necessarily give them immunity from the antitrust laws." *Ante,* at 513. It is difficult to imagine a statement more totally at odds with *Noerr.* For what that case explicitly held is that the joint exercise of the constitutional right of petition *is* given immunity from the antitrust laws.

518 While disagreeing with the Court's opinion, I would *518 nonetheless remand this case to the District Court for trial. The complaint contains allegations that the petitioners have:

> 1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing `with or without probable cause and regardless of the merits' every application, with insignificant exceptions, for additional operating rights or for the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> 2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by plaintiffs and others in like position or by instituting complaints in opposition to applications or transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each defendant's annual gross income; (c) by publicizing and making known to plaintiffs and others in like position the foregoing program.

Under these allegations, liberally construed, the respondents are entitled to prove that the real *intent* of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes. Such an intent would make the conspiracy "an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S., at 144.

It is only on this basis that I concur in the judgment of the Court.

[1] *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S. 127.

[2] See also *United Mine Workers* v. *Pennington,* 381 U. S. 657, 669-671.

[3] This conclusion, the Court held, was a corollary of our decisions in *United States* v. *Rock Royal Co-operative,* 307 U. S. 533, and *Parker* v. *Brown,* 317 U. S. 341, holding that when a monopoly or restraint of trade is the result of valid governmental action, there cannot be an antitrust violation.

[4] In *Noerr,* the Court emphasized that the defendants' "unethical" conduct did not affect their antitrust immunity for jointly exerting pressure on the Legislative and Executive Branches, 365 U. S., at 141. See, however, *Walker Process Equipment* v. *Food Machinery & Chemical Corp.,* 382 U. S. 172.

144 A.3d 1055 (2016)
167 Conn.App. 659

DIAMOND 67, LLC
v.
Derek V. OATIS, et al.

No. 37736.

Appellate Court of Connecticut.

Argued April 18, 2016.
Decided August 23, 2016.

1059 *1059 Appeal from Superior Court, judicial district of Hartford, Complex Litigation Docket, Wahla, J. [motion to cite in]; Miller, J. [motions for summary judgment; judgment].

Richard P. Weinstein, West Hartford, with whom, on the brief, was Sarah Black Lingenheld, Farmington, for the appellant (plaintiff).

James F. Sullivan, Hartford, for the appellees (named defendant et al.).

Joseph J. Arcata III, with whom, on the brief, was Daniel P. Scapellati, Hartford, for the appellee (defendant James D. Batchelder).

Jared M. Alfin and Cristin E. Sheehan, with whom, on the brief, was Robert W. Cassot, Hartford, for the appellee (defendant Amy Blaymore-Paterson).

Reed A. Slatas, for the appellee (defendant Ann Letendre).

Jeffrey G. Schwartz, Hartford, for the appellee (defendant John Summers).

Christopher P. Kriesen, Hartford, for the appellee (defendant Deborah Wilson).

ALVORD, SHELDON and MIHALAKOS, Js.

SHELDON, J.

The plaintiff, Diamond 67, LLC, appeals from the summary judgment rendered by the trial court in favor of the defendants, Derek V. Oatis, Lobo & Associates, LLC, James D. Batchelder, Glenn Montigny, Amy Blaymore-Paterson, Ann Letendre, John Summers, and Debra Wilson. The plaintiff sought to develop a Home Depot store in the town of Vernon that the defendants, a group of concerned citizens and their attorneys, opposed for environmental reasons. Certain defendants, allegedly acting with the support of their codefendants, thus sought to intervene in various administrative and mandamus actions between the plaintiff and the Planning and Zoning Commission of the Town of Vernon (planning and zoning commission). Thereafter, the plaintiff brought this action, sounding in vexatious litigation, claiming that the defendants' conduct in intervening or supporting other defendants' interventions in the planning and zoning actions, and their appeals from the denials thereof, had delayed it in obtaining the necessary final approval from the planning and zoning commission. The plaintiff claimed that because those appeals delayed the approval of the Home Depot development project by the planning and zoning commission until after the deadline agreed to for that purpose in the plaintiff's agreement with Home Depot, Home Depot abandoned the development project to the plaintiff's great financial loss. The trial court granted all of the defendants' motions for summary judgment on the ground that the plaintiff could not establish that the defendants' actions had caused Home Depot to abandon the development project, or thus to sustain any compensable losses. The plaintiff appeals, claiming that genuine issues of material fact remain as to the causation of damages. The defendants argue that summary judgment was appropriately rendered, and raise various alternative grounds for affirmance as well. We agree with the plaintiff that summary judgment was improperly granted, and decline to affirm the court's judgment on any of the alternative grounds proposed by the defendants.

1060 The facts of this case are closely related to those at issue in three other cases: *1060 *Batchelder v. Planning & Zoning Commission,* 133 Conn.App. 173, 34 A.3d 465, cert. denied, 304 Conn. 913, 40 A.3d 319 (2012), *Diamond 67, LLC v. Planning & Zoning Commission,* 127 Conn.App. 634, 15 A.3d 1112, cert. denied, 301 Conn. 915, 19 A.3d 1261 (2011), and *Diamond 67, LLC v. Planning & Zoning Commission,* 117 Conn.App. 72, 978 A.2d 122 (2009). We set forth the following relevant facts in *Batchelder.* "In 2003, [the plaintiff] applied to the Vernon inland wetlands commission (wetlands commission) for a wetlands permit and to [the planning and zoning commission] for site plan approval and related permits in connection with its proposed development [of a Home Depot]. *Diamond 67, LLC v. Planning & Zoning Commission,* [supra, at 75, 978 A.2d 122]. In 2007, after the wetlands commission issued [the plaintiff] a wetlands permit, [the plaintiff] filed a renewed application for approval of a site plan and related permits with [the planning and zoning commission]. Id. While the renewed application was pending, [the plaintiff] brought a mandamus action, claiming that [the planning and zoning commission] had failed to act on the 2003 application [by] the time limits set forth in General Statutes § 8-3(g) and General Statutes (Rev. to 2003) § 8-7d. Id., at 75-76, 978 A.2d 122. [The plaintiff] argued that it was therefore entitled to have the 2003 application automatically approved. Subsequently, [the planning and zoning commission] denied [the plaintiff's] renewed application, and [the plaintiff] filed an administrative appeal to the trial court from the denial, in addition to the mandamus action. Id., at 76, 978 A.2d 122.

"During the pendency of the mandamus action and the administrative appeal, Montigny filed motions, pursuant to [General Statutes] § 22a-19 (a),[1] to intervene in each proceeding. Id. Batchelder, however, did not seek to intervene in either proceeding. On October 17, 2007, the court, *Sferrazza, J.,* granted Montigny's motion to intervene in the administrative appeal but denied his motion to intervene in the mandamus action. Id.

"In November, 2007, [the plaintiff and the planning and zoning commission] engaged in mediation and settlement discussions, from which Montigny and Batchelder were excluded. Id., at 77, 978 A.2d 122. The discussions led to a possible agreement on a new site plan, which was scheduled to be discussed at a public forum held by [the planning and zoning commission] on November 19, 2007. Id. Prior to November 19, 2007, [Montigny and Batchelder] petitioned, pursuant to §
1061 22a-19, *1061 to intervene in the public forum, but [the planning and zoning commission] denied their petitions. On December 4, 2007, [Montigny and Batchelder] filed [an] administrative appeal from the denial of their requests to intervene in the public forum. "FIRST TWO APPEALS [ENTITLED *DIAMOND 67, LLC v. PLANNING & ZONING COMMISSION*]

"Following the public forum, [the planning and zoning commission] voted to approve the settlement, and [the plaintiff] filed a motion in the mandamus action for judgment in accordance with the settlement agreement. [Id.] On February 13, 2008, before the court took any action on [the plaintiff's] motion, Montigny filed a renewed motion to intervene in the mandamus action, claiming that the court was required to consider the environmental impact of the new plan in its review of the settlement agreement, and that he therefore was entitled to intervene pursuant to § 22a-19. Id.

"On February 14, 2008, Judge Sferrazza held a hearing on [the plaintiff's] motion for judgment in accordance with the settlement agreement. Id. At the hearing, Judge Sferrazza denied Montigny's renewed motion to intervene and rendered judgment in accordance with the terms of the settlement agreement. Id., at 77-78, 978 A.2d 122. Montigny appealed from that judgment, claiming that the trial court improperly denied his renewed motion to intervene. Id., at 79, 978 A.2d 122. [On September 15, 2009, in] *Diamond 67, LLC v. Planning & Zoning Commission,* supra, 117 Conn.App. at 84, 978 A.2d 122, this court reversed the judgment of the trial court, concluding that the substance of the settlement ... focused on the issues of the administrative appeal and not solely on the issues of the mandamus action.' This court held that Judge Sferrazza `improperly denied Montigny's renewed motion to intervene and failed to conduct a hearing compliant with [General Statutes] § 8-8(n).' Id., at 85, 978 A.2d 122. Accordingly, this court remanded the case with direction to grant Montigny's motion to intervene and to `conduct a hearing compliant with § 8-8(n) to review the settlement, in which Montigny is entitled to participate for the purpose of raising environmental issues.' Id.

"On October 21, 2009, *Hon. Lawrence C. Klaczak,* judge trial referee, held a hearing pursuant to the remand order. Montigny, who appeared through counsel but did not personally attend, was granted intervenor status. *Diamond 67, LLC v. Planning & Zoning Commission,* supra, 127 Conn.App. at 642 and n. 6, 15 A.3d 1112. Batchelder did not seek to intervene. Montigny's counsel, however, failed to present any evidence concerning environmental issues. Id., at 643, 15 A.3d 1112. On December 3, 2009, Judge Klaczak approved the settlement proposal and rendered judgment in accordance with its terms. Id., at 643-44, 15 A.3d 1112.

"Montigny also appealed from that judgment. See id., at 637, 15 A.3d 1112. Montigny claimed, in part, that Judge Klaczak improperly approved the settlement proposal because he, Montigny, did not consent to it. Id., at 650, 15 A.3d 1112. On April

5, 2011, this court released its decision in *Diamond 67, LLC v. Planning & Zoning Commission,* supra, 127 Conn. App. 634, 15 A.3d 1112, affirming the judgment of the trial court. Id., at 651, 15 A.3d 1112. This court concluded, in relevant part, that `Montigny abdicated his right of approval by abandoning his responsibility to raise environmental issues as an intervenor pursuant to § 22a-19' at the remand hearing. Id.

"[THIRD APPEAL, ENTITLED *BATCHELDER v. PLANNING & ZONING COMMISSION*]

1062 *1062 "Meanwhile, on February 25, 2010, [the planning and zoning commission] moved for summary judgment in the administrative appeal filed by [Montigny and Batchelder] from [the planning and zoning commission's] denial of their petitions to intervene in the public forum held on November 19, 2007. On June 10, 2010, Judge Sferrazza granted [the planning and zoning commission's] motion for summary judgment as to Montigny's claim on the basis of collateral estoppel and dismissed Batchelder's appeal as moot. Judge Sferrazza concluded that Judge Klaczak's ruling, rendered on December 3, 2009, approving the settlement proposal following the remand from *Diamond 67, LLC v. Planning & Zoning Commission,* supra, 117 Conn.App. at 85, 978 A.2d 122, disposed of [Montigny's and Batchelder's] claims." (Footnotes altered.) *Batchelder v. Planning & Zoning Commission,* supra, 133 Conn.App. at 176-79, 34 A.3d 465.

In the third appeal of these related cases, Batchelder and Montigny appealed from Judge Sferrazza's rendering of summary judgment. On January 24, 2012, this court held that the appeal was moot: "Boiled down to its essence, [Montigny and Batchelder] were provided the opportunity to raise environmental concerns at the October 21, 2009 hearing held by Judge Klaczak, but failed to do so. They were offered, but failed to avail themselves of, the very thing they sought to attain by seeking to intervene in the November 19, 2007 public forum. Accordingly, we cannot afford [Montigny and Batchelder] any practical relief, and, therefore, their appeal is moot." Id., at 182, 34 A.3d 465.

THE PRESENT APPEAL

The gravamen of the current action is the plaintiff's claim that the defendants' conduct in intervening or supporting their codefendants' interventions in the administrative and mandamus actions described previously caused a delay in its obtaining the necessary final approvals for the Home Depot development project from the planning and zoning commission, which ultimately led Home Depot to abandon the project.

The plaintiff had entered into a sale-leaseback agreement with Home Depot on March 9, 2006, in contemplation of its development of the Home Depot store. Under the terms of that agreement, Home Depot's duty to construct the Home Depot was conditioned on the plaintiff's obtaining all "final approvals," including all permits, licenses, variances, and approvals necessary for the construction and operation of the development, by the deadline of March 9, 2010. The contract provided that approvals would not be considered "final approvals" thereunder until they "[are] received and are valid, irrevocable, unqualified and unconditioned (except for such qualifications and/or conditions that are acceptable to Home Depot in its sole and absolute discretion), and are no longer subject to appeal or litigation...."

The defendants objected to the proposed development for environmental reasons. In the petitions to intervene filed by Montigny and Batchelder, the defendants claimed, inter alia, that the proposed site for the Home Depot was located three hundred feet from the Walker Reservoir, a source of public drinking water, and that the construction and operation of the Home Depot was "unreasonably likely to result in the unreasonable disruption, pollution, impairment and destruction of the natural resources and hydrology of the immediate area...."

On January 30, 2013, the plaintiff filed its third amended complaint (complaint), which was the operative complaint at the
1063 time summary judgment was rendered. The forty-two count complaint made identical *1063 allegations against each defendant, claiming that their interventions in the administrative action (*Diamond 67, LLC v. Planning & Zoning Commission,* Superior Court, judicial district of Tolland, Docket No. CV-074007637S) and mandamus action (*Diamond 67, LLC v. Planning & Zoning Commission,* Superior Court, judicial district of Tolland, Docket No. CV-07-4007520S) constituted both common-law vexatious litigation and statutory vexatious litigation for which double and treble damages should be awarded under General Statutes § 52-568.[2] In particular, the plaintiff alleged that Batchelder and Montigny, who were represented by Oatis, an employee or principal of the law firm of Lobo & Associates, LLC, had pursued interventions in those actions, and that Blaymore-Paterson, Letendre, Summers, and Wilson had "actively participated, supported, plotted, and planned to

bring, pursue and maintain" those interventions. In their answers, the defendants asserted various special defenses, including reliance on the advice of counsel, the bar of the statute of limitations, and the *Noerr-Pennington* doctrine. See part II C of this opinion.

All of the defendants filed motions for summary judgment between April 4 and 11, 2014. The defendants claimed that the plaintiff could not establish any of the elements of vexatious litigation, which requires a plaintiff to prove that the defendant prosecuted a civil action against it, that terminated in its favor, without probable cause. *Bernhard-Thomas Building Systems, LLC v. Dunican,* 286 Conn. 548, 553-54, 944 A.2d 329 (2008). In order to prevail on a claim of common-law vexatious litigation or to receive treble damages under § 52-568, the plaintiff must also prove that the defendants acted with malice. Id. Certain defendants also argued that summary judgment should be granted on the basis of certain of their special defenses.

The defendants also asserted that they were entitled to summary judgment because there was no genuine issue of material fact that their alleged conduct had not caused the plaintiff any compensable loss or injury. To that end, the defendants presented evidence that Home Depot had abandoned its development project in Vernon not because of the defendants' attempts to intervene in the plaintiff's actions against the planning and zoning commission, but because of an economic down-turn. For that reason, the defendants argued, Home Depot refused to consider a certificate issued by the State Traffic Commission (traffic commission) to be a "final approval" under the terms of the parties' contract due to certain unacceptable
1064 conditions contained therein.[3] In *1064 support of this argument, the defendants submitted correspondence between the plaintiff and Home Depot to show that the two had failed to come to an agreement on how to deal with the conditions imposed by the traffic commission. The correspondence showed that although Home Depot was initially under the impression that the plaintiff was willing to contribute $500,000 toward satisfying the conditions set forth in the traffic commission's letter, the plaintiff was not willing to do so. Instead, it explained, in a letter to Home Depot, that "[w]e are not interested in making a cash contribution.... However, we [are] interested in the possibility of our doing the work [required by the traffic commission] for $500,000...."

On June 18, 2008, Home Depot wrote a letter to a representative of the plaintiff, stating, "The [traffic commission] Report sets forth several conditions which require road widening and other offsite improvements [which] were not anticipated by Home Depot, are overly broad and are not currently within its construction budget.... Home Depot intends on filing an appeal of the [traffic commission] Report...." On March 8, 2010, the plaintiff requested an extension of the deadline to obtain all final approvals. In a letter dated March 19, 2010, Home Depot declined the plaintiff's request for an extension of the deadline. In that letter, Home Depot also notified the plaintiff that, because the plaintiff had failed to obtain all final approvals for the project by the deadline of March 9, 2010, it was exercising its contractual right to terminate the contract by selling the property. The March 19, 2010 letter did not state which approvals Home Depot did not consider to be "final approvals" under the terms of its contract with the plaintiff.

On April 25, 2014, the plaintiff filed an opposition to the defendants' motions for summary judgment. The plaintiff argued in its opposition that it had in fact obtained all final approvals for the project by the contract deadline except for final approval from the planning and zoning commission, which remained pending only because of the appeals being pursued by the defendants. The plaintiff argued that approval by the planning and zoning commission did not become final until 2012, after the March 9, 2010 deadline, when our Supreme Court denied certification to appeal in *Batchelder v. Planning & Zoning Commission,* supra, 133 Conn.App. 173, 34 A.3d 465. It also contended that the traffic commission certificate was a final approval, as "[a]ll approvals are subject to conditions of compliance." The plaintiff also maintained that, even if it was unable to establish causation as to the loss of the Home Depot contract, the defendants' conduct had caused it to incur losses in the form of "extensive litigation costs," to which it would still be entitled if it could otherwise establish the elements of its vexatious litigation claims.

In opposition to the defendants' motions for summary judgment, the plaintiff filed an affidavit from Richard P. Hayes, Jr., the individual tasked by the plaintiff with obtaining all final approvals for the project. Hayes averred: "As of March 9, 2010, which was the final date for securing approvals, the plaintiff had secured all necessary approvals except for the final approval from the planning and zoning commission which was subject to an appeal brought by the defendant, Montigny.... The Montigny appeal was from a decision by Judge Klaczak in December, 2009 at which time the defendants knew that there was no evidence to support the allegations of the defendants' petition for intervention, no experts to support the allegations therein
1065 and that, in fact said petition contained false allegations in regard to Walker Reservoir East being a source of *1065 public water supply.... But for the appeal, the plaintiff would have had an enforceable contract with Home Depot which was worth

multiple millions of dollars to the plaintiff.... Further, at all times and notwithstanding a claim to the contrary, Home Depot did not take an appeal of the STC approval.... If in fact an STC appeal had been taken, the plaintiff easily could have resolved same by merely agreeing to absorb the costs incidental to the improvements mandated by the STC.... Plaintiff incurred professional fees, legal fees and litigation costs in defense of defendants' petitions, inclusive of costs for defense of appeals and preparation for hearing ordered upon remand at which [the defendants] failed to present any evidence in support of their petitions."

The court, *Dubay, J.,* held a hearing on May 12, 2014, on all of the motions for summary judgment. At that hearing, counsel for the plaintiff argued that the STC had granted it a final approval, and that the STC conditions did not need to be accepted by Home Depot in order to constitute a final approval under the contract. On May 23, 2014, however, Judge Dubay recused himself from the case and the matter was reassigned.

A new hearing was held on September 28, 2014, before *Miller J.,* after Judge Dubay had recused himself. On February 24, 2015, the court granted all of the motions for summary judgment, explaining its ruling as follows: "The parties do not agree about many of the facts at issue in this case, but there are some critical and uncontested facts which are not in dispute:

"1. One of [the] plaintiff's major responsibilities, under its contract with Home Depot, was to obtain all necessary permits so that the development could take place.

"2. Ultimately, [the] plaintiff obtained all of the necessary permits, including one from the [traffic commission], and there was no regulatory obstacle, once that happened, to the development of the site.

"3. Home Depot thereafter informed [the] plaintiff that it would not proceed with the development because the [traffic commission] imposed conditions on the permit which Home Depot found to be unacceptable. The development agreement, therefore, did not go forward....

"The defendants raised several legal grounds for granting summary judgment in their favor. The court finds that one of those arguments so clearly requires a finding in favor of all the defendants that the court need only consider what was said in favor of and against that argument in granting all of the pending motions for summary judgment.

"No plaintiff in a tort action can prevail unless he or she can prove that the alleged wrongful conduct of the defendant was a proximate cause of his or her injuries. The record in this case makes it entirely clear that Home Depot did not go forward on its deal with the plaintiff because the permit which [the] plaintiff obtained from the [traffic commission] contained conditions which Home Depot refused to accept. [The] plaintiff's contention that its agreement with Home Depot was `self-executing,' which is not supported in the record, is irrelevant to this inquiry. Home Depot, rightly or wrongly, decided, after it received the unpalatable [traffic commission] permit, that it would not go forward with its plans for the store in Vernon. The store did not get built, and all of [the] plaintiff's alleged damages flow from that decision. There is nothing in the record in this case which even suggests that Home Depot walked away from this deal because of any act by any of the defendants. There is
1066 certainly no evidence from any *1066 Home Depot employee — or anyone else — which supports any other conclusion.

"There is therefore no evidence before this court which would allow a conclusion that the defendants' activities were vexatious. Under these circumstances, [the] plaintiff cannot, as a matter of law, prevail, and the court does not consider the other arguments made by the defense counsel in support of their motions."

The plaintiff claims that the trial court improperly rendered summary judgment in favor of all of the defendants. The defendants argue first that summary judgment was properly rendered and, second, that the judgment can be affirmed on several alternative grounds.

I

The plaintiff claims that summary judgment was improperly rendered because the facts found by the trial court were not supported by the record and, in any event, were not dispositive of the plaintiff's claims. In particular, the plaintiff argues that the trial court ignored the fact that the planning and zoning permit was not issued until after the contract deadline and that the defendants' actions were the cause of that delay. Moreover, the plaintiff argues that Home Depot's reasons for abandoning the development project were not dispositive of its vexatious litigation claims, for even if the defendants' challenged conduct did not cause the loss of the Home Depot deal, it was still entitled to recover damages from them for the costs it incurred in defending against the defendants' baseless claims. The defendants disagree, arguing that summary judgment was properly rendered because the plaintiff cannot establish causation. The defendants assert that Home Depot did not want to complete the development because of a downturn in the economy. According to the defendants, they presented uncontroverted evidence that Home Depot was dissatisfied with the traffic commission conditions, and that was the reason that it did not pursue the development. Certain defendants also argue that the plaintiff cannot assert that it is entitled to attorney's fees and costs because it did not specifically plead that it was seeking to recover such damages.

"Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.... A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case.... The test is whether a party would be entitled to a directed verdict on the same facts.... Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue.... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45].... The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist.... To oppose a motion for summary judgment successfully, the non-movant must recite specific facts ... which contradict those stated in the movant's affidavits and documents." (Citations omitted; internal quotation marks omitted.) *Hammer v. Lumberman's Mutual*
1067 *1067 *Casualty Co.,* 214 Conn. 573, 578-79, 573 A.2d 699 (1990).

"We begin with a brief review of the law of vexatious litigation in this state. The cause of action for vexatious litigation permits a party who has been wrongfully sued to recover damages. *Verspyck v. Franco,* 81 Conn.App. 646, 647, 841 A.2d 267 (2004), rev'd on other grounds, 274 Conn. 105, 874 A.2d 249 (2005); see 8 S. Speiser, C. Krause & A. Gans, American Law of Torts (1991) § 28:20, p. 113 (`The action for malicious prosecution is a recognition of the right of an individual to be free from unjustifiable litigation ... [and] has been extended into the field of wrongful initiation of civil suits.... The purpose of the action is to compensate a wronged individual for damage to his reputation and to reimburse him for the expense of defending against the unwarranted action.' ... In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. Both the common law and statutory causes of action [require] proof that a civil action has been prosecuted.... Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor.... The statutory cause of action for vexatious litigation exists under § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages.... In the context of a claim for vexatious litigation, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Citations omitted; footnotes omitted; internal quotation marks omitted.)) *Bernhard-Thomas Building Systems, LLC v. Dunican,* supra, 286 Conn. at 553-54, 944 A.2d 329.

We agree with the plaintiff that Home Depot's reasons for abandoning the project were not material to its claim for attorney's fees and costs in defending against the defendants' alleged vexatious litigation. "A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Hammer v. Lumberman's Mutual Casualty Co.,* supra, 214 Conn. at 578, 573 A.2d 699. The reason that Home Depot failed to continue with the development project is immaterial to the plaintiff's claims for attorney's fees and costs, which depend upon the plaintiff's having established the elements of vexatious litigation, i.e., whether the defendants prosecuted a civil action, without probable cause, and that the action was terminated in favor of the plaintiff. *Bernhard-Thomas Building Systems, LLC v. Dunican,* supra, 286 Conn. at 553-54, 944 A.2d 329. The plaintiff also would be required to prove malice to prevail on its common-law claims or to obtain treble damages for its statutory claims. See id., at 554, 944 A.2d 329.

Oatis, Montigny, and Lobo & Associates, LLC, argue that the plaintiff did not specifically plead that it was seeking attorney's fees and costs and did not present evidence in support of such a claim. Our Supreme Court has said that attorney's fees are includable as compensatory damages in a claim of common-law vexatious litigation. *Vandersluis v. Weil,* 176 Conn. 353, 360, 407 A.2d 982 (1978). The plaintiff's complaint alleged that the defendants "pursued intervention" in the planning and zoning action, "asserted groundless claims and persisted in appeals," for the purpose of "prevent[ing] the development of the site as a Home Depot," and that the defendants' actions caused the plaintiff to "[sustain] millions of dollars in damage,
1068 all to its special loss." Having *1068 properly claimed money damages for losses allegedly incurred as a result of the defendants' pursuit of vexatious litigation against it, the plaintiff was not required to plead more specifically, in the absence

of a proper request to revise, that among the particular losses for which it allegedly incurred such damages were expenses for attorney's fees and nontaxable costs to defend itself against the defendants' baseless claims. See *Sanford v. Peck,* 63 Conn. 486, 491, 27 A. 1057 (1893) ("complaint must contain averments which fairly and reasonably apprise" defendant of claims to be made); see also *Broadnax v. New Haven,* 270 Conn. 133, 173-74, 851 A.2d 1113 (2004) ("[W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically.... [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties.... Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." [Internal quotation marks omitted.]).

Oatis, Montigny, and Lobo & Associates, LLC, also argue that the plaintiff did not submit evidence, as part of its opposition to the defendants' motions for summary judgment, of any bills or invoices establishing that it had incurred losses in defending itself against the interventions. We first note that the plaintiff was not required to establish that it incurred legal fees and costs in response to the defendants' motions for summary judgment because the defendants never submitted evidence establishing that there was no genuine issue of material fact as to whether the plaintiff incurred legal fees and costs. *Marinos v. Poirot,* 308 Conn. 706, 712, 66 A.3d 860 (2013) ("[w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue" [internal quotation marks omitted]). Nevertheless, the plaintiff submitted the Hayes affidavit, which stated that the plaintiff incurred damages in the form of "legal fees and litigation costs in defense of defendants' petitions, inclusive of costs for defense of appeals and preparation for hearing ordered upon remand,"[4] thereby establishing that a genuine issue of fact remains as to whether the defendants caused the plaintiff to incur such costs and fees.

Thus, a genuine issue of material fact exists as to whether the plaintiff can establish its claim that the defendants' conduct caused it to incur fees and costs for which it is entitled to recover money damages. Accordingly, the trial court improperly rendered summary judgment on that ground.

II

We next turn to the alternative grounds for affirmance asserted by various defendants. "Our Supreme Court in *Grady v.*
1069 *Somers,* 294 Conn. 324, 349-50 n. 28, 984 A.2d 684 (2009), acknowledged that *1069 circumstances exist where although the trial court did not reach a dispositive issue and the defendant did not raise that issue in a preliminary statement of issues as an alternative ground for affirmance pursuant to Practice Book § 63-4(a)(1), a court can still affirm the judgment of a trial court so long as the plaintiff is not prejudiced or unfairly surprised by the consideration of the issue." (Footnote omitted.) *Bouchard v. Deep River,* 155 Conn.App. 490, 496, 110 A.3d 484 (2015). "Where the trial court reaches a correct decision but on [alternate] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it.... [W]e ... may affirm the court's judgment on a dispositive alternate ground for which there is support in the trial court record." (Citations omitted; internal quotation marks omitted.) *Pequonnock Yacht Club, Inc. v. Bridgeport,* 259 Conn. 592, 599, 790 A.2d 1178 (2002). "We also have held that `[i]f the alternate issue was not ruled on by the trial court, the issue must be one that the trial court would have been forced to rule in favor of the appellee. Any other test would usurp the trial court's discretion.'" *Vine v. Zoning Board of Appeals,* 281 Conn. 553, 568-69, 916 A.2d 5 (2007).

The first alternative ground, raised by all of the defendants, is that by intervening in the plaintiff's actions against the planning and zoning commission, they did not initiate or procure any civil suit against the plaintiff. The second alternative ground, raised by Wilson, Oatis, Montigny, Lobo & Associates, LLC, and Letendre, is that the plaintiff cannot establish that the civil suits in which they intervened terminated in its favor against them. The third alternative ground, raised by Summers, Batchelder, Oatis, Montigny, Lobo & Associates, LLC, Letendre, Blaymore-Paterson, and Wilson, is that they are entitled to prevail on their special defenses under the *Noerr-Pennington,* doctrine. The fourth alternative ground, raised by Summers, Batchelder, Oatis, Montigny, Lobo & Associates, LLC, and Wilson, is that the defendants are entitled to prevail on their special defenses of reliance on the advice of counsel. Fifth and finally, Wilson, Letendre, Oatis, Lobo & Associates, LLC, and Montigny claim that we can affirm the rendering of summary judgment in this case because, as to each of their challenged interventions, there is no genuine dispute that they pursued all claims they raised and prosecuted in such interventions with probable cause. We conclude that none of these alternative grounds for affirmance can appropriately be resolved in the defendants' favor on summary judgment, and thus decline to affirm the judgment on any such ground.

We address each alternative ground in turn.

A

The first alternative ground for affirmance, raised by all of the defendants, is that they did not initiate or procure any suit against the plaintiff. However, although "[b]oth the common law and statutory causes of action [for vexatious litigation] [require] proof that a civil action has been prosecuted"; (internal quotation marks omitted) *Bernhard-Thomas Building Systems, LLC v. Dunican,* supra, 286 Conn. at 554, 944 A.2d 329; it is not necessary for the defendant to have initiated the civil action. "Most courts now agree with the Restatement (Second) of Torts, § 680, which permits liability for vexatious `*initiation, continuation or procurement* of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other.'" (Emphasis added.) *DeLaurentis v. New Haven,* 220 Conn. 225, 248, 597 A.2d 807 (1991).

1070 *1070 In *Bhatia v. Debek,* 287 Conn. 397, 948 A.2d 1009 (2008), our Supreme Court explained that initiation of a suit was not an element of vexatious litigation. "We have stated that the elements of malicious prosecution and common-law vexatious litigation essentially are identical.... Although the required showing for both torts essentially is the same, there is a slight difference in that a plaintiff in a malicious prosecution action must show initiation of the proceedings by the defendant. In our cases discussing vexatious litigation claims, we have overlooked this difference because, ordinarily, it is not significant for purposes of considering a claim for vexatious litigation. The difference is evident only in our precedent addressing malicious prosecution claims. Compare *Vandersluis v. Weil,* supra, [176 Conn. at 356, 407 A.2d 982] (characterizing vexatious litigation and malicious prosecution as having three identical elements — want of probable cause, malice and termination of action in plaintiff's favor), with *McHale v. W.B.S. Corp.,* [187 Conn. 444, 447, 446 A.2d 815 (1982)].

"We have summarized the required showing for [malicious prosecution and vexatious litigation] as follows: To establish either cause of action, it is necessary to prove want of probable cause, malice and a termination of suit in the plaintiff's favor.... In a cause of action for malicious prosecution, the plaintiff additionally must establish that the defendant caused the proceeding to be instituted.... This requirement is due to the fact that, unlike a vexatious litigation claim, in which the underlying civil action was filed either by the defendant herself, acting pro se, or by an attorney acting on behalf of the defendant, in a malicious prosecution action, a public official, acting on behalf of the state, institutes the criminal action against the malicious prosecution plaintiff. It is, therefore, more problematic in a malicious prosecution action, as opposed to an action for vexatious litigation, for the plaintiff to connect the defendant with the actual institution of the underlying action. In accordance with the indirect connection between the underlying action and the defendant in a malicious prosecution action, we have specified the initiation of the underlying action as a separate element in malicious prosecution cases, as opposed to vexatious litigation cases, in which the plaintiff is not required to establish that the defendant initiated the underlying action." (Citations omitted; internal quotation marks omitted.) *Bhatia v. Debek,* supra, 287 Conn. at 405-406, 948 A.2d 1009.

The court's reasoning in *Bhatia* follows the language of the Restatement (Second) of Torts, § 674, which further provides, in comment (a) thereto: "The person who initiates civil proceedings is the person who sets the machinery of the law in motion, whether he acts in his own name or in that of a third person...." In the context of a malicious prosecution claim, our Supreme Court has said, "All who knowingly procure, direct, aid, abet or assist in, or subsequently adopt [malicious prosecution, false imprisonment or abuse of process] are liable as joint tortfeasors for the damage done by the malicious prosecution, false imprisonment or abuse of process." *McGann v. Allen,* 105 Conn. 177, 185, 134 A. 810 (1926).

Here, the plaintiff submitted evidence establishing that there is a genuine issue of material fact as to each defendant's participation in the initiation, procurement, and/or continuation of their respective interventions in the plaintiff's administrative and mandamus actions against the planning and zoning commission. The plaintiff claimed that the defendants acted
1071 together as part of a group known as Smart Growth *1071 for Vernon to prevent its development of the Home Depot store. In particular, the plaintiff submitted e-mails among the defendants that detailed their joint efforts to pursue the challenged interventions. One of those e-mails, from Summers to Wilson, Montigny, Batchelder, and Blaymore-Paterson, discusses (1) the proposed hiring of Oatis to represent the group in connection with the planned building of a Home Depot store in

Vernon; (2) the fact that Smart Growth for Vernon, as an unincorporated entity, could not sign the retainer agreement with Oatis on their behalf; and (3) the fact that they would need to hire a hydrogeologist, a civil engineer, and a traffic engineer to oppose the Home Depot project. Accordingly, genuine issues of a material fact remain as to each individual defendant's role in the initiation, continuation, and/or procurement of the actions in which they sought to intervene.[5]

B

Certain defendants argue that because the plaintiff ultimately settled its mandamus action against the planning and zoning commission, it cannot establish that that action terminated in its favor. On this score, the defendants cite to our case law that states, "When a lawsuit ends in a negotiated settlement or compromise, it does not terminate in the plaintiff's favor and therefore will not support a subsequent suit for vexatious litigation.... This conclusion recognizes that the law favors settlements, which conserve scarce judicial resources and minimize the parties' transaction costs, and avoids burdening such settlements with the threat of future litigation." (Citations omitted.) *Blake v. Levy,* 191 Conn. 257, 264, 464 A.2d 52 (1983). The plaintiff argues, however, that the operative proceedings at issue are the defendants' interventions in the mandamus and administrative actions, not the mandamus or administrative actions themselves. We agree with the plaintiff.

"Courts have taken three approaches to the termination requirement. The first, and most rigid, requires that the action have gone to judgment resulting in a verdict of acquittal, in the criminal context, or no liability, in the civil context. The second permits a vexatious suit action even if the underlying action was merely withdrawn so long as the plaintiff can demonstrate that the withdrawal took place under circumstances creating an inference that the plaintiff was innocent, in the criminal context, or not liable, in the civil context. The third approach, while nominally adhering to the favorable termination requirement, in the sense that any outcome other than a finding of guilt or liability is favorable to the accused party, permits a malicious prosecution or vexatious suit action whenever the underlying proceeding was abandoned or withdrawn without consideration, that is, withdrawn without either a plea bargain or a settlement favoring the party originating the action.

"Notwithstanding our recitation of the term favorable termination ... in *Vandersluis* and a few other cases... we have never required a plaintiff in a vexatious suit action to prove a favorable termination either by pointing to an adjudication on the merits in his favor or by showing affirmatively that the circumstances of the termination indicated his innocence or non-liability, so long as the proceeding has terminated without consideration.... Instead, we have always viewed the issue of
1072 whether the prior outcome was favorable *1072 to the plaintiff as relevant to the issue of probable cause....

"Two concerns underlie the requirement of successful termination. The first is the danger of inconsistent judgments if defendants use a vexatious suit or malicious prosecution action as a means of making a collateral attack on the judgment against them or as a counterattack to an ongoing proceeding.... The second is the unspoken distaste for rewarding a convicted felon or otherwise guilty party with damages in the event that the party who instituted the proceeding did not at that time have probable cause to do so." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *DeLaurentis v. New Haven,* supra, 220 Conn. at 250-52, 597 A.2d 807. "The question we must resolve, then, is whether the [termination of the prior action] implicates either of these concerns." *Bhatia v. Debek,* supra, 287 Conn. at 410, 948 A.2d 1009.

The defendants incorrectly assume that the settlement between the plaintiff and the planning and zoning commission is the pertinent "termination" at issue. Certain defendants intervened in actions in which the plaintiff and the planning and zoning commission were the original parties. As discussed in part II B of this opinion, the plaintiff submitted evidence demonstrating a factual issue as to whether the other defendants participated in pursuing those interventions. The defendants thus had a claim, pursuant to § 22a-19, in the dispute between the plaintiff and the planning and zoning commission. As such, in order for the defendants to prevail on summary judgment on the ground that the prior action did not terminate in the plaintiff's favor, they must have been successful in pursuing those claims. However, only the mandamus action between the plaintiff and the planning and zoning commission was settled — not the defendants' claims. The defendants were not successful in their claims, and, in fact, never even had their environmental concerns considered before the settlement was approved and the permit that the plaintiff was seeking was eventually issued. Accordingly, the defendants are not entitled to summary judgment on this ground.

C

Summers, Batchelder, Oatis, Montigny, Lobo & Associates, LLC, Letendre, Paterson, and Wilson also claim that we can affirm the summary judgment rendered by the trial court on the ground that their conduct in pursuing the interventions was speech protected under the *Noerr-Pennington* doctrine.

"In short, the *Noerr-Pennington* doctrine shields from the Sherman [Antitrust] Act [15 U.S.C. § 1 et seq.] a concerted effort to influence public officials regardless of intent or purpose.... The United States Supreme Court has reasoned that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors....

"The *Noerr-Pennington* doctrine has evolved from its antitrust origins to apply to a myriad of situations in which it shields individuals from liability for petitioning a governmental entity for redress. [A]lthough the *Noerr-Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which [seek] to assign liability on the
1073 basis of the defendant's exercise of its first amendment rights.... For example, *Noerr-Pennington* *1073 has been recognized as a defense to actions brought under the National Labor Relations Act, 29 U.S.C. § 151 et seq. ... state law claims of tortious interference with business relations ... federal securities laws ... and wrongful discharge claims....

"Although the *Noerr-Pennington* doctrine provides broad coverage to petitioning individuals or groups, its protection is not limitless. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* [365 U.S. 127, 144, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)], the United States Supreme Court, albeit in dictum, established a sham exception to the general rule, stating: There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.... In short, petitioning activity is not protected if such activity is a mere sham or pretense to interfere with no reasonable expectation of obtaining a favorable ruling.... In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 60-62, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993), the court outlined a two part test to define sham litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Id., at 60, 113 S.Ct. 1920. Second, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor ... through the use [of] the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon...." (Citations omitted; internal quotation marks omitted.) *Zeller v. Consolini,* 59 Conn. App. 545, 550-52, 758 A.2d 376 (2000). "Essentially, then, a sham involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action in any form." Id., at 552, 758 A.2d 376.

"Activities found to be a sham involve actions rife with abusive intent and absent any indicia of success. Factors present in sham litigation include, but are not limited to, the presence of repetitive litigation (although one action may constitute a sham under certain conditions), deliberate fraud, supplying false information, and whether lower courts have stated or implied that the action is frivolous or objectively baseless and whether they have dismissed it out of hand." Id., at 555, 758 A.2d 376.

The defendants claim that the *Noerr-Pennington* doctrine protects them from liability for exercising their first amendment right to petition the government for redress of claims, including in local zoning matters. Moreover, they argue that the sham exception does not apply to their conduct in this matter.

The plaintiff submitted evidence that the defendants were aware that, contrary to their assertions throughout the proceedings, Walker Reservoir was not a source of drinking water. The verified petition to intervene, signed by Batchelder and Oatis on November 16, 2007, stated that "[Diamond 67's conduct] is likely to cause unreasonable pollution, impairment or destruction of the Tankerhoosen Watershed, the Tankerhoosen River, Gage's Brook, and the Walker's Reservoir, a source of water for the citizens of Connecticut and the surrounding ecosystem, its vegetation and wildlife, which rely upon the integrity of this area [as] a necessary habitat and a source of up-[stream] water." Likewise, the verified petition in the
1074 mandamus action, which was signed by Montigny on *1074 September 21, 2007, also asserted that Walker Reservoir was a source of public drinking water. However, e-mails from Montigny and Letendre on November 13, 2009, to the other defendants clearly stated that such allegations were inaccurate. The e-mail from Letendre stated, "I'm concerned. Who drafted the petition? Walker Reservoir is NOT a source of public water supply.... The petition was drafted in 2007 — why didn't we see it and pick this error up sooner?" Furthermore, an e-mail from Montigny said, "I specifically remember that we had a discussion about the `source of drinking water' statement at the time I signed one of these petitions. When I read the petition in [Oatis'] office, I mentioned that I did not think Walker Reservoir was used for drinking water, but was still a very

important part of the ecosystem of the area. You said you would check that out and amend this. What I'm seeing ... is, it was not amended."

In addition, the plaintiff submitted evidence that the defendants were aware that they needed to obtain an expert to prevail on their environmental claims, yet failed to do so.

On the basis of the foregoing evidence, a genuine issue of material fact remains as to whether the sham exception applies in this case.[6]

D

The next alternative ground for affirmance, advanced by Summers, Batchelder, Oatis, Montigny, Lobo & Associates, LLC, and Wilson, is that they relied on the advice of counsel.

"Advice of counsel is a complete defense to an action of malicious prosecution or vexatious suit when it is shown that the defendant made the complaint in a criminal action or instituted his civil action relying in good faith on such advice, given after a full and fair statement of all facts within his knowledge, or which he was charged with knowing. The fact that the attorney's advice was unsound or erroneous will not affect the result." *Vandersluis v. Weil,* supra, 176 Conn. at 361, 407 A.2d 982. In support of their motions for summary judgment, Batchelder, Montigny, and Summers submitted affidavits averring that they had relied in good faith on the advice of Oatis, as their counsel, after providing him with full and fair statements of all facts within their knowledge, and that they believed that the Home Depot project would have a deleterious effect on the environment.[7] Similarly, Oatis submitted an affidavit attesting that Montigny had made a full and fair disclosure to him of all material facts within his knowledge.

The plaintiff contends that a disputed factual issue remains as to whether the defendants acted in good faith in relying on the advice of counsel. We agree that the evidence submitted by the plaintiff and discussed in part II C of this opinion was sufficient to raise a genuine issue of material fact as to whether the defendants acted in good faith. The defendants' conclusory statements in their affidavits were insufficient to establish that this fact was not in dispute.

E

1075 Finally, certain defendants argue that the plaintiff cannot establish want of probable cause. "[A] defendant lacks *1075 probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC v. Dunican,* supra, 286 Conn. at 554, 944 A.2d 329. As discussed previously, the plaintiff presented evidence that, for years, the defendants pursued interventions in the administrative action and mandamus action despite never having retained an expert to substantiate their environmental concerns. Moreover, the plaintiff submitted evidence that certain defendants filed verified pleadings in those actions, which asserted that the Walker Reservoir was a source of public drinking water, even though they were aware that it was not a source of public drinking water. Accordingly, genuine issues of material fact remain as to whether the defendants lacked probable cause, and this is therefore not an appropriate alternative ground for affirmance.

The judgment is reversed and the case is remanded with direction to deny the defendants' motions for summary judgment and for further proceedings according to law.

In this opinion the other judges concurred.

[1] General Statutes § 22a-19 provides in relevant part: "(a)(1) In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

"(2) The verified pleading shall contain specific factual allegations setting forth the nature of the alleged unreasonable pollution, impairment or destruction of the public trust in air, water or other natural resources of the state and should be sufficient to allow the reviewing authority to determine from the verified pleading whether the intervention implicates an issue within the reviewing authority's jurisdiction. For purposes of this section, `reviewing authority' means the board, commission or other decision-making authority in any administrative, licensing or other proceeding or the court in any judicial review...."

[2] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

[3] On May 8, 2008, the traffic commission sent the plaintiff a letter, stating that a "certificate will not be issued by this office until: (1) the Traffic Investigation Report has been recorded on the municipal land records ... (2) a bond, sufficient to cover the full cost of implementing the required improvements, has been posted with the Department of Transportation... and (3) an easement has been secured for the Town of Vernon along the north side of Reservoir Road...." Enclosed with the letter was a copy of a Traffic Investigation Report, which recommended that the traffic commission issue a certificate to the plaintiff "referenced to the following conditions," and then listing twenty-nine conditions, including the three conditions specifically mentioned in the cover letter.

[4] Blaymore-Paterson, joined by Montigny, Oatis, Lobo & Associates, LLC, and Batchelder, filed a motion to strike this portion of the affidavit as vague. The court denied the motion to strike.

[5] For the same reasons, Blaymore-Paterson's alternative ground that she was not involved in the underlying action and Letendre's alternative ground on the basis of the statute of limitations is not appropriately resolved at summary judgment.

[6] For the same reasons, there is a genuine issue of material fact as to whether the defendants acted with malice, and we decline to affirm the judgment on this alternative ground asserted by Oatis, Montigny, and Lobo & Associates, LLC.

[7] The record does not reflect that Wilson submitted a similar affidavit.

365 U.S. 127 (1961)

EASTERN RAILROAD PRESIDENTS CONFERENCE ET AL.
v.
NOERR MOTOR FREIGHT, INC., ET AL.

No. 50.

Supreme Court of United States.

Argued December 12-13, 1960.
Decided February 20, 1961.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

128 *128 *Philip Price* and *Hugh B. Cox* argued the cause for petitioners. With them on the briefs were *C. Brewster Rhoads, Gerald E. Dwyer, Arthur Littleton, Henry S. Drinker, Charles J. Biddle, Harry E. Sprogell, Lewis M. Stevens, T. W. Pomeroy, Jr., Paul Maloney, Carl E. Glock, R. Sturgis Ingersoll, Powell Pierpoint* and *Cornelius C. O'Brien, Jr.*

Harold E. Kohn argued the cause for respondents. With him on the brief was *Aaron M. Fine.*

MR. JUSTICE BLACK delivered the opinion of the Court.

American railroads have always largely depended upon income from the long-distance transportation of heavy freight for economic survival. During the early years of their existence, they had virtually no competition in this aspect of their business, but, as early as the 1920's, the growth of the trucking industry in this country began to bring about changes in this situation. For the truckers found, just as the railroads had learned earlier, that a very profitable part of the transportation business was the long hauling of heavy freight. As the trucking industry became more and more powerful, the competition between it and the railroads for this business became increasingly intense until, during the period following the conclusion of
129 World War II, at least the railroads, if not both of the competing groups, came to view the struggle *129 as one of economic life or death for their method of transportation. The present litigation is an outgrowth of one part of that struggle.

The case was commenced by a complaint filed in the United States District Court in Pennsylvania on behalf of 41 Pennsylvania truck operators and their trade association, the Pennsylvania Motor Truck Association. This complaint, which named as defendants 24 Eastern railroads, an association of the presidents of those railroads known as the Eastern Railroad Presidents Conference, and a public relations firm, Carl Byoir & Associates, Inc., charged that the defendants had conspired to restrain trade in and monopolize the long-distance freight business in violation of §§ 1[1] and 2[2] of the Sherman Act. The gist of the conspiracy alleged was that the railroads had engaged Byoir to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. The campaign so conducted was described in the complaint as "vicious, corrupt, and fraudulent," first, in that the sole motivation behind it was the desire on the part of the railroads to injure the truckers and eventually to destroy them as competitors in the long-distance freight business, and,
130 secondly, in that the defendants utilized the *130 so-called third-party technique, that is, the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by Byoir and paid for by the railroads.[3] The complaint then went on to supplement these more or less general allegations with specific charges as to particular instances in which the railroads had attempted to influence legislation by means of their publicity campaign. One of several such charges was that the defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the "Fair Truck Bill,"[4] which would have permitted truckers to carry heavier loads over Pennsylvania roads.

The prayer of the complaint was for treble damages under § 4 of the Clayton Act[5] and an injunction restraining the defendants from further acts in pursuance of the conspiracy. Insofar as the prayer for damages was concerned, a stipulation was entered that the only damages suffered by the individual truck operators was the loss of business that resulted from the veto of the "Fair Truck Bill" by the Governor of Pennsylvania, and accordingly the claim for damages was limited to an amount based upon the loss of profits as a result of this veto plus the expenses incurred by the truckers' trade association

131 *131 for the purpose of combating the railroads' publicity campaign. The prayer for injunctive relief was much broader, however, asking that the defendants be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any private or public organizations to propagate the arguments of the railroads against the truckers or their business, and from doing "any other act or thing to further . . . the objects and purposes" of the conspiracy.

In their answer to this complaint, the railroads admitted that they had conducted a publicity campaign designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations, but they denied that their campaign was motivated either by a desire to destroy the trucking business as a competitor or to interfere with the relationships between the truckers and their customers. Rather, they insisted, the campaign was conducted in furtherance of their rights "to inform the public and the legislatures of the several states of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the law limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the cost of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create . . . ." Such a campaign, the defendants maintained, did not constitute a violation of the Sherman Act, presumably because that Act could not properly be interpreted to apply either to restraints of trade or monopolizations that result from the passage or
132 enforcement of laws *132 or to efforts of individuals to bring about the passage or enforcement of laws.[6]

Subsequently, defendants broadened the scope of the litigation by filing a counterclaim in which they charged that the truckers had themselves violated §§ 1 and 2 of the Sherman Act by conspiring to destroy the railroads' competition in the long-distance freight business and to monopolize that business for heavy trucks. The means of the conspiracy alleged in the counterclaim were much the same as those with which the truckers had charged the railroads in the original complaint, including allegations of the conduct of a malicious publicity campaign designed to destroy the railroads' business by law, to create an atmosphere hostile to the railroads among the general public, and to interfere with relationships existing between the railroads and their customers. The prayer for relief of the counterclaim, like that of the truckers' original complaint, was for treble damages and an injunction restraining continuance of the allegedly unlawful practices. In their reply to this counterclaim, the truckers denied each of the allegations that charged a violation of the Sherman Act and, in addition, interposed a number of affirmative defenses, none of which are relevant here.

In this posture, the case went to trial. After hearings, the trial court entered a judgment, based upon extensive findings of
133 fact and conclusions of law, that the railroads' *133 publicity campaign had violated the Sherman Act while that of the truckers had not.[7] In reaching this conclusion, the trial court expressly disclaimed any purpose to condemn as illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law. Instead, it rested its judgment upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement authorities, was malicious and fraudulent—malicious in that its only purpose was to destroy the truckers as competitors, and fraudulent in that it was predicated upon the deceiving of those authorities through the use of the third-party technique;[8] and, secondly, that the railroads' campaign also had as an important, if not overriding, purpose the destruction of the truckers' goodwill, among both the general public and the truckers' existing customers, and thus injured the truckers in ways unrelated to the passage or enforcement of law. In line with its theory that restraints of trade and monopolizations resulting from valid laws are not actionable under the Sherman Act, however, the trial court awarded only nominal damages to the individual truckers, holding that no damages were recoverable for loss of business
134 due to the veto of the Pennsylvania "Fair Truck Bill." The judgment did, however, award substantial damages to the *134 truckers' trade association as well as the broad injunction asked for in the complaint.[9]

The conclusion that the truckers' publicity campaign had not violated the Sherman Act was reached despite findings that the truckers also had engaged in a publicity campaign designed to influence legislation, as charged in the counterclaim, and despite findings that the truckers had utilized the third-party technique in this campaign. Resting largely upon the fact that the efforts of the truckers were directed, at least for the most part,[10] at trying to get legislation passed that was beneficial to them rather than harmful to the railroads, the trial court found that the truckers' campaign was purely defensive in purpose and concluded that the truckers' campaign differed from that of the railroads in that the truckers were not trying to destroy a competitor. Accordingly, it held that the truckers' campaign, though technically in restraint of trade, was well within the rule of

135 reason which *135 governs the interpretation of §§ 1 and 2 of the Sherman Act and consequently dismissed the counterclaim.

The railroads appealed from this judgment, both as to the conclusion that they had violated the Sherman Act as charged in the original complaint and as to the conclusion that the truckers had not violated the Act as charged in the counterclaim. The Court of Appeals for the Third Circuit, one judge dissenting in part, upheld the judgment of the District Court in every respect, stating that the findings amply support the judgment and that there was sufficient evidence to support all of the findings.[11] This was followed by a petition for certiorari filed on behalf of the railroads and Byoir limited to the question of the correctness of the judgment insofar as it held that they had violated the Sherman Act. Because the case presents a new and unusual application of the Sherman Act and involves severe restrictions upon the rights of these railroads and others to seek the passage or defeat of legislation when deemed desirable, we granted that petition.[12]

We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co.* v. *United*
136 *States,*[13] that the Sherman Act forbids only those trade restraints and monopolizations *136 that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations."[14] Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.[15] These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s] . . . in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.[16] This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the
137 question of the applicability of the *137 Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would
138 have no basis whatever in the legislative history of that Act.[17] Secondly, and of at least equal significance, *138 such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. We are thus called upon to consider whether the courts below were correct in holding that, notwithstanding this principle, the Act was violated here because of the presence in the railroads' publicity campaign of additional factors sufficient to take the case out of the area in which the principle is controlling.

The first such factor relied upon was the fact, established by the finding of the District Court, that the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-

distance freight business. But we do not see how this fact, even if adequately supported in the record,[18] could transform
139 conduct otherwise lawful *139 into a violation of the Sherman Act. All of the considerations that have led us to the conclusion that the Act does not apply to mere group solicitation of governmental action are equally applicable in spite of the addition of this factor. The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. This Court has expressly recognized this fact in its opinion in *United States* v. *Rock Royal Co-op.,* where it was said: "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give coöperatives a monopoly of the market would not violate the Sherman Act . . . ."[19] Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a
140 construction of the Act and hold that, at least insofar *140 as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

The second factor relied upon by the courts below to justify the application of the Sherman Act to the railroads' publicity campaign was the use in the campaign of the so-called third-party technique. The theory under which this factor was related to the proscriptions of the Sherman Act, though not entirely clear from any of the opinions below, was apparently that it involved unethical business conduct on the part of the railroads. As pointed out above, the third-party technique, which was aptly characterized by the District Court as involving "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information," depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups. We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations,[20] is one which falls far short of the ethical standards generally approved in this country. It does not follow, however, that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act. Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already
141 pointed out, a publicity campaign to influence governmental action falls clearly into the category *141 of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.[21] All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Moreover, we think the courts below themselves recognized this fact to some extent for their disposition of the case is inconsistent with the position that the use of the third-party technique alone could constitute a violation of the Sherman Act. This much is apparent from the fact that the railroads' counterclaim against the truckers was not allowed. Since it is undisputed that the truckers were as guilty as the railroads of the use of the technique,[22] this factor could not have been in
142 any sense controlling of the holding against the railroads. Rather, *142 it appears to have been relied upon primarily as an indication of the vicious nature of the campaign against the truckers. But whatever its purpose, we have come to the conclusion that the reliance of the lower courts upon this factor was misplaced and that the railroads' use of the third-party technique was, so far as the Sherman Act is concerned, legally irrelevant.

In addition to the foregoing factors, both of which relate to the intent and methods of the railroads in seeking governmental action, the courts below rested their holding that the Sherman Act had been violated upon a finding that the purpose of the railroads was "more than merely an attempt to obtain legislation. *It was the purpose and intent* . . . *to hurt the truckers in every way possible even though they secured no legislation.*" (Emphasis in original.) Specifically, the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers among the public generally and among the truckers' customers particularly, in the hope that by doing so the over-all competitive position of the truckers would be weakened, and that the railroads were successful in these efforts to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable the principles announced above. But this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted directly to persuade anyone

not to deal with the truckers. Moreover, all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure
143 the roads, violate the *143 laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry. In the light of this, the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen.[23] Thus, the issue presented by the lower courts' conclusion of a violation of the Sherman Act on the basis of this injury is no different than the issue presented by the factors already discussed. It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such
144 injury renders the campaign itself illegal would thus be tantamount to outlawing *144 all such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case.

In rejecting each of the grounds relied upon by the courts below to justify application of the Sherman Act to the campaign of the railroads, we have rejected the very grounds upon which those courts relied to distinguish the campaign conducted by the truckers. In doing so, we have restored what appears to be the true nature of the case—a "no-holds-barred fight"[24] between two industries both of which are seeking control of a profitable source of income.[25] Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one
145 group or the other will get hurt by the arguments that are made. *145 In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement. Since the railroads have acquiesced in the dismissal of their counterclaim by not challenging the Court of Appeals' affirmance of that order in their petition for certiorari, we are here concerned only with those parts of the judgments below holding the railroads and Byoir liable for violations of the Sherman Act. And it follows from what we have said that those parts of the judgments below are wrong. They must be and are

Reversed.

[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1.

[2] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." 15 U. S. C. § 2.

[3] For a discussion of the mechanics of this technique and the purposes generally underlying its use by public relations firms, see Ross, The Image Merchants, at 118, 226-227 and 266-267.

[4] The "Fair Truck Bill" referred to was introduced in the Pennsylvania Legislature in May 1951, as Senate bill 615.

[5] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in

controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.

[6] The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment and the contention that the truckers were barred from prosecuting this suit by reason of the fact that they had themselves engaged in conduct identical to that about which they were complaining with regard to the railroads and were thus *in pari delicto.* Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses.

[7] The opinion of the District Court on the merits of the controversy is reported at 155 F. Supp. 768. An additional opinion dealing with the question of relief is reported at 166 F. Supp. 163. For reports of earlier opinions dealing with preliminary motions, see 113 F. Supp. 737, 14 F. R. D. 189, and 19 F. R. D. 146.

[8] The District Court did not expressly find that any particular part of the railroads' publicity campaign was false in its content. Rather, it found that the technique of the railroads was "to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood." 155 F. Supp., at 814.

[9] If anything, the injunction was even broader than had been requested in the complaint for it effectively enjoined the defendants from any publicity activities against the truckers whether or not the third-party technique was used. See 166 F. Supp., at 172-173.

[10] The trial court did recognize that on at least one occasion the truckers attempted to encourage legislation that would have been directly harmful to the railroads rather than beneficial to themselves. Thus, the court found: "About the middle of the decade [the 1940's] PMTA had a tax manual prepared charging that the railroads of Pennsylvania themselves did not pay their fair share of taxes as compared with other states and made a wide distribution of it to legislators, banks, security investment houses, etc." The trial court found, however, that this action of the truckers also lay within the rule of reason because "the truckers had been the target of a strong campaign directed to the public with the purpose of convincing the public that trucks did not pay their fair share of taxes," thus making it necessary for the truckers to "be permitted to likewise show the public that their competitors, the railroads, were actually guilty of the fault charged against the truckers." 155 F. Supp., at 803.

[11] 273 F. 2d 218. Chief Judge Biggs dissented from the opinion of the majority of the Court of Appeals insofar as it upheld the District Court's conclusion that the railroads and Byoir had violated the Sherman Act. For similar reasons, he concurred in that part of the majority opinion which upheld the conclusion that the truckers had not violated the Act.

[12] 362 U. S. 947.

[13] 221 U. S. 1, at 51-62.

[14] *Id.,* at 57.

[15] *United States* v. *Rock Royal Co-op.,* 307 U. S. 533; *Parker* v. *Brown,* 317 U. S. 341.

[16] See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 491-493.

[17] In *Parker* v. *Brown, supra,* this Court was unanimous in the conclusion that the language and legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade. In so holding, we rejected the contention that the program's validity under the Sherman Act was affected by the nature of the political support necessary for its implementation —a contention not unlike that rejected here. The reasoning underlying that conclusion was stated succinctly by Mr. Chief Justice Stone: "Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 317 U. S., at 352.

[18] A study of the record reveals that the only evidence or subsidiary findings upon which this conclusory finding could be based is the undisputed fact that the railroads did seek laws by arguments and propaganda that could have had the effect of damaging the competitive position of the truckers. There is thus an absence of evidence of intent independent of the efforts that were made to influence legislation and law enforcement. We nonetheless accept the finding of the District Court on this issue for, in our view, the disposition of this case must be the same regardless of that fact.

[19] 307 U. S. 533, 560.

[20] The extent to which the third-party technique is utilized in the public relations field is demonstrated by the fact, found by the District Court, that each of the several public relations firms interviewed by the railroads before they finally decided to hire the Byoir organization to conduct their publicity campaign included the use of this technique in its outline of proposed activities submitted for consideration by the railroads. See 155 F. Supp., at 778.

[21] See, *e. g., United States* v. *Harriss,* 347 U. S. 612. Cf. *United States* v. *Rumely,* 345 U. S. 41.

[22] The District Court expressly recognized this fact in its opinion: "The record discloses that both sides used, or wanted to use, fronts and/or the propaganda technique." 155 F. Supp., at 816. This conclusion was amply supported by specific findings. Thus, the court found: "The record establishes that the truckers wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks; that they had representatives of other industries write and make personal contacts with legislators in Harrisburg without disclosing trucker connections; and that they had such persons intentionally refrain from advising the legislators and the said officials that the letters and contacts had been solicited; that they solicited from legislators statements in support of their position and had news releases issued thereon." 155 F. Supp., at 803.

[23] Here again, the petitioners have leveled a vigorous attack upon the trial court's findings. As a part of this attack, they urge that there is no basis in reason for the finding that some shippers quit doing business with the truckers as a result of the railroads' publicity campaign. Their contention is that since the theme of the campaign was that the truckers had an unfair competitive advantage and could consequently charge unfairly low prices, the campaign would have encouraged, rather than discouraged, shippers who availed themselves of the truckers' services. This argument has considerable appeal but, as before, we find it unnecessary to pass upon the validity of these findings for we think the conclusion must be the same whether they are allowed to stand or not.

[24] We borrow this phrase from the dissenting opinion below of Chief Judge Biggs.

[25] Since the commencement of this litigation, a new bill increasing truck-weight limits has passed the Pennsylvania Legislature and has become law by virtue of the Governor's approval. Thus, the fight goes on.

248 F.3d 131 (2001)

Kurt H. EICHORN; William J. Huckins; T. Roger Kiang; Edward W. Landis; Orlando Napolitano, individually and on behalf of all others similarly situated; Gilbert G. Daley; Susan H. Dibona; Beth King; Michael S. Oratowski; Thomas L. Salisbury; Lawrence Walsh, individually and on behalf of all others similarly situated, Appellants, v. AT & T CORP; Lucent Technologies, Inc.; Texas Pacific Group.

No. 99-5791.

United States Court of Appeals, Third Circuit.

Argued December 12, 2000.
Filed April 23, 2001.
As Amended June 12, 2001.

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136 *136 JONATHAN E. HILL, ESQUIRE, (ARGUED), KATHY A. LAWLER, ESQUIRE, Pitney, Hardin, Kipp & Szuch, Morristown, NJ, JAMES E. TYRRELL, JR., ESQUIRE, (ARGUED), SCOTT L. WEBER, ESQUIRE, Latham & Watkins, Newark, NJ, Attorneys for Appellees, AT & T Corp. and Lucent Technologies, Inc.

DAVID M. FABIAN, ESQUIRE, (ARGUED), Traflet & Fabian, Morristown, NJ, Attorney for Appellee, Texas Pacific Group.

BEFORE: SCIRICA and AMBRO, Circuit Judges, and POLLAK, District Judge.[*]

OPINION OF THE COURT

SCIRICA, Circuit Judge.

In this appeal from the grant of summary judgment we must decide whether defendants AT & T Corp., NCR Corp., Lucent Technologies, and Texas Pacific Group's agreement to restrict the hiring of certain employees upon Lucent's sale of Paradyne Corp. was a violation of § 1 of the Sherman Antitrust Act. We also must decide whether this no-hire agreement which effectively cancelled the plaintiff employees' AT & T pension bridging rights violated § 510 of the Employee Retirement Income Security Act. We hold the no-hire agreement was a valid covenant not to compete that was reasonable in scope and therefore not a violation of § 1 of the Sherman Act. But also we hold plaintiffs have presented sufficient prima facie evidence of AT & T and Lucent's specific intent to interfere with an ERISA funded employee pension fund to survive summary judgment on the ERISA § 510 claim.

I.

In July 1995, AT & T, a long distance telephone and wireless services provider, decided to sell one of its affiliates, Paradyne Corp., a manufacturer of network access products for the telecommunications industry. Contemplating the sale, AT & T wanted to ensure that Paradyne remained a viable entity because AT & T and its other affiliates, including Lucent Technologies, purchased many of the network access products Paradyne manufactured. To make Paradyne more attractive to buyers as an ongoing business, AT & T adopted a human resource plan that placed restrictions on Paradyne employees' ability to transfer to other divisions of AT & T ("the Preliminary Net"). Specifically, the Preliminary Net precluded an employee who voluntarily left Paradyne from being hired by any other division of AT & T. The premise for the hiring bar was AT & T's belief that one of Paradyne's most marketable assets was its skilled employees. The retention of Paradyne's employees, therefore, was considered essential for the sale of Paradyne.

Shortly after adopting the Preliminary Net, A T & T consummated a business reorganization plan resulting in three independent companies: AT & T, Lucent Technologies, and NCR Corp. (the "trivestiture"). As part of the trivestiture, AT & T transferred ownership of Paradyne to Lucent. Consistent with the Preliminary Net, the Paradyne employees, now employed by Lucent, were precluded from seeking re-employment at any other AT & T division or affiliate after the trivestiture.

On July 31, 1996, Lucent sold Paradyne to Texas Pacific Group. Before closing, Lucent agreed, on behalf of itself and the
137 other former AT & T affiliates, that it would not hire, rehire, retain, or solicit the services of any Paradyne employee or *137 consultant whose annual income exceeded $50,000. This "Pre Closing Net" was consistent with the understanding that Texas Pacific Group's interest in purchasing Paradyne was based on its desire to acquire the technical skills of Paradyne's employees for a sufficient period of time to ensure a successful transition of ownership.

Once the deal was closed, Lucent and Texas Pacific Group entered a post-closing agreement ("Post Closing Net") in which Lucent warranted on behalf of itself and the other AT & T affiliates that for 245 days (8 months) following the sale and the expiration of the Pre Closing Net, it would not seek to hire, solicit or rehire any Paradyne employee or consultant whose compensation exceeded $50,000. The eight month no-hire agreement had the practical effect of cancelling the Paradyne employees' accrued pension benefits under their former AT & T pension plans. Under the AT & T pension plan, employees were entitled to "bridging rights" which allowed them to retain their level of accrued pension benefits if they left AT & T and returned within six months. After six months, the bridging rights expired. Employees rehired after the six month period would need five years of employment to regain their previous pension levels. Because the Post Closing Net barred Paradyne employees from returning to an A T & T affiliate for eight months, these employees automatically lost the bridging rights they had acquired under their AT & T pensions.

Before the sale was consummated, Texas Pacific Group hired an outside consultant to determine the benefit package it could offer the Paradyne employees. Paradyne's Vice President of Human Resources, Sherril Claus Melio, who had previously held the same position when Paradyne was owned by AT & T and Lucent, assisted the consultant in drafting various benefit plan proposals. The consultant concluded that in order to make Paradyne financially competitive, Texas Pacific Group could not offer the same pension package AT & T had previously offered its employees. Although Melio's exact role in Texas Pacific Group's decision is disputed, Texas Pacific Group ultimately decided not to offer a defined pension benefits program to its new employees.

The plaintiffs are former Paradyne employees who allege the Preliminary Net, as well as the Pre and Post Closing Nets, collectively represent an unlawful group boycott in violation of § 1 of the Sherman Act. Additionally, they contend the defendants conspired to eliminate their pension benefits thereby engaging in an illegal price fixing scheme in violation of § 1 of the Sherman Act. Furthermore, they allege the no-hire agreement, which effectively cancelled Paradyne employees' bridging rights under their AT & T pensions, violated § 510 of the Employee Retirement Income Security Act.

In addressing these claims, the District Court held that plaintiffs failed to prove a violation of § 1 of the Sherman Act and failed to produce sufficient prima facie evidence of AT & T and Lucent's specific intent to interfere with an ERISA funded pension plan to support their § 510 claim. The court, therefore, granted defendants' motion for summary judgment. After the grant of summary judgment, plaintiffs filed a discovery motion in connection with an anticipated motion for class certification which the District Court denied. This appeal followed.

II.

The District Court had jurisdiction under 15 U.S.C. § 26 and 29 U.S.C. § 1140 because plaintiffs' claims allege violations of
138 § 1 of the Sherman Antitrust Act and *138 § 510 of ERISA. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment on plaintiffs' antitrust and ERISA claims. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir.1992), *cert. denied,* 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). We exercise plenary review over the District Court's legal determinations concerning class certification and review its factual findings for abuse of discretion. *Bogus v. Am. Speech & Hearing Ass'n,* 582 F.2d 277, 289 (3d Cir.1978).

III.

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1 (1994).

Under § 1, unreasonable restraints on trade are prohibited because they inhibit competition within the market. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.,* 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir.1993). In order to assert a cause of action under S 1, plaintiffs must prove they have suffered an antitrust injury that is causally related to the defendants' allegedly illegal anti-competitive activity. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Once there is the finding of antitrust injury, courts examine the alleged illegal conduct under one of two distinct tests: per se violation or rule of reason. Under the per se test, "agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality" are found to be antitrust violations. *Nat'l Soc'y of Prof. Eng'rs v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). For those activities not within the per se invalidity category, courts employ the rule of reason test. Under this test, plaintiffs have the burden of establishing that, under all the circumstances, "the challenged acts are unreasonably restrictive of competitive conditions" in the relevant market. *Standard Oil Co. of N.J. v. United States,* 221 U.S. 1, 28, 31 S.Ct. 502, 55 L.Ed. 619 (1911). "An analysis of the reasonableness of particular restraints includes the consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." *United States v. Topco Assocs., Inc.,* 405 U.S. 596, 607, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

A.

We hold the AT & T Preliminary Net was not a violation of § 1 of the Sherman Act. The District Court found that "as of ... the date that the Preliminary Net was put into effect ..., Lucent was a wholly-owned subsidiary of A T & T, and accordingly, the two companies were a singular entity that could not conspire to violate the Antitrust laws." *Eichorn v. AT & T Corp.,* CA No. 96-3587, slip op. at *17 (D.N.J. September 10, 1999). In *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the Supreme Court held the coordinated acts of a parent and its wholly owned subsidiary cannot themselves give rise to § 1 antitrust violations. The Court reasoned, "[a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are
139 guided or determined not by two separate corporate consciousnesses, but one." *Id.* *139 at 771, 104 S.Ct. 2731. Because the Preliminary Net was an internal restriction between a single corporation, AT & T, and its wholly owned subsidiaries, Lucent and NCR, and not an agreement between separate corporate identities, it was not a violation of § 1 of the Sherman Act. *Id.* at 769, 104 S.Ct. 2731 ("An internal agreement to implement a single unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police."). Although plaintiffs assert A T & T and Lucent were not motivated by a single "corporate consciousness" because they were in the process of becoming separate entities, we believe that during the effective time period of the AT & T Preliminary Net, AT & T and Lucent retained a unified corporate interest for the purpose of antitrust analysis. It was not until AT & T divested all of its stock in Lucent and after the lapse of the Preliminary Net that the two companies became completely separate entities.

As Supreme Court and our precedent make clear, only anti-competitive actions between competitors give rise to Sherman Act liability. *Copperweld,* 467 U.S. at 771, 104 S.Ct. 2731; *Siegel Transfer, Inc. v. Carrier Exp., Inc.,* 54 F.3d 1125, 1132 (3d Cir.1995) ("The operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor."); *Weiss v. York Hosp.,* 745 F.2d 786, 813 (3d Cir.1984), *cert. denied,* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). As a single entity in a parent subsidiary relationship, the defendants in this case were incapable of conspiring to violate the antitrust laws through the Preliminary Net agreement. *Siegel,* 54 F.3d at 1132.

We next turn to plaintiffs' claim that the Pre and Post Closing Nets, collectively referred to as the no-hire agreement, represent an illegal group boycott and a horizontal price fixing conspiracy under § 1 of the Sherman Act. Plaintiffs allege Lucent, AT & T and Texas Pacific Group horizontally competed for the plaintiff employees' technical skills and services. As competitors, they argue, the defendants conspired to suspend competition for plaintiffs' technical services with the purpose and the effect of locking them out of the labor market. *See Anderson v. Shipowners' Ass'n of the Pac. Coast,* 272 U.S. 359, 47 S.Ct. 125, 71 L.Ed. 298 (1926) (agreement between most shipowners on Pacific coast to deny employment to any seaman who did not register with association was violation of § 1 of Sherman Act); *Law v. Nat'l Collegiate Athletic Assoc.,* 134 F.3d 1010 (10th Cir.) (NCAA rule limiting salary of basketball coaches was per se violation of § 1 of Sherman Act), *cert.*

denied, 525 U.S. 822, 119 S.Ct. 65, 142 L.Ed.2d 51 (1998). By locking them out and effectively cancelling their entitlement to AT & T pension rights, plaintiffs argue the defendants conspired to fix the cost of labor in the market. In support, plaintiffs cite several Supreme Court cases that hold horizontal group boycotts and price fixing conspiracies are per se violations of the Sherman Antitrust Act. *See* *FTC v. Super. Ct. Trial Lawyers Assoc.,* 493 U.S. 411, 422, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990); *Arizona v. Maricopa County Med. Soc'y,* 457 U.S. 332, 344-45, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,* 441 U.S. 1, 7-8, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

But the facts here are substantially different from the classic per se horizontal price fixing and group boycott conspiracies the Court has generally found to be per se antitrust violations. *Broad. Music, Inc.,* 441 U.S. at 8, 99 S.Ct. 1551 ("Easy labels [like price fixing] do not always supply ready answers."). Because of the fact specific inquiry required to assess antitrust
140 *140 liability under the Sherman Act, we will address each prong of the § 1 analysis.

B.

Private plaintiffs pursuing claims under § 1 of the Sherman Act have standing when they suffer an antitrust injury that is causally related to the defendants' allegedly illegal anti-competitive activity. *Brunswick,* 429 U.S. at 489, 97 S.Ct. 690. The Supreme Court has described antitrust injury as injury of

> the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations ... would be likely to cause.

Id. (internal quotes omitted).

It is well established that an antitrust injury reflects an activity's anti-competitive effect on the competitive market. *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 344, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) ("The antitrust injury requirement ... ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.") (emphasis in original). We have consistently held an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market. *See, e.g., City of Pittsburgh v. West Penn Power Comp.,* 147 F.3d 256, 266-67 (3d Cir.1998) (holding action that did not lessen competition in a "marketplace" was not antitrust injury); *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.,* 118 F.3d 178, 182 (3d Cir.1997) (the determination of whether a party has suffered an antitrust injury "depends on how the market is defined"); *Brader v. Allegheny Gen. Hosp.,* 64 F.3d 869 (3d Cir.1995). While a plaintiff may have individually suffered an injury as a result of defendants' actions, the antitrust laws were designed to protect market-wide anticompetitive activities. *Atlantic Richfield,* 495 U.S. at 338, 110 S.Ct. 1884 (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1902) ("The antitrust laws were enacted for the protection of *competition,* not *competitors.*") (emphasis in original)); *see also* *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n.,* 884 F.2d 504, 508 (9th Cir. 1989) (holding plaintiffs must "plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors").

In dismissing plaintiffs' antitrust claims the District Court stated,

> Plaintiffs apparently argue that the injury to competition is that they are prevented from providing their services to AT & T, Lucent or its affiliates. Put simply, the antitrust laws are not concerned with injury to competitors (here the plaintiffs), but with injury to competition. That these plaintiffs are prevented from working at AT & T, Lucent or their affiliates for the limited time period during which the pre-closing and post-closing nets were in effect is not an injury to competition. In our view, plaintiffs' allegations of economic injury to themselves misperceive the nature of the injury which is required to be established in order to sustain a claim under Section 1 of the Sherman Act.

Eichorn, CA No. 96-3587, slip op. at *20-21 (internal citations omitted).

While employees who are precluded from selling their labor have not necessarily suffered an antitrust injury, "employees
141 may challenge antitrust violations *141 that are premised on restraining the employment market." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 377a (rev. ed.1995) (footnotes omitted); *see also* Brian R. Henry, *`Sorry, We Can't Hire You ...*

We Promised Not To': The Antitrust Implications of Entering Into No-Hire Agreements, 11 Fall Antitrust 39 (1996) ("Most courts considering the issue have held that employees suffer `injury' recognized by the antitrust laws when their employment opportunities are restricted by a no-hire agreement between potential employers, and thus have standing to sue the entity imposing such a provision."). As a leading treatise on antitrust states:

> Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object of the law's solicitude and the persons most directly concerned-perhaps the only persons concerned-could not challenge the restraint.
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> * * *
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> An employee overcomes the primary hurdle to standing when he shows that the alleged violation restrains competition in the labor market. Of course, he must still show injury-in-fact that was proximately caused by the violation and, in damage cases, that can be quantified without undue speculation.

Areeda & Hovenkamp, *supra,* at ¶ 377c (footnotes omitted).

In *Anderson,* the Supreme Court held that a seaman, on behalf of himself and other members of the seamen's union, could sue an association of most of the shipowners in the region when the shipowners' association adopted unduly strict regulations governing employment. 272 U.S. at 359, 47 S.Ct. 125. The Court found the shipowners' agreement violated the antitrust laws because the regulations prevented the "free exercise of the rights" of the seamen to engage in trade and commerce. *Id.* at 363, 47 S.Ct. 125 (quoting *United States v. Colgate & Co.,* 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919)). Because unregistered seamen were precluded from working on any association ship, which constituted the majority of the ships in the region, they suffered an injury protected under the antitrust laws.

While *Anderson* was decided many years before the Supreme Court detailed the antitrust injury requirement in *Brunswick,*
142 [1] several courts since *Brunswick* have *142 found that no-hire agreements which preclude employees from seeking employment from a third party employer can give rise to antitrust injury. In *Cesnick v. Chrysler Corp.,* 490 F.Supp. 859 (M.D.Tenn.1980), plaintiffs who were precluded from seeking re-employment at Chrysler when their division was sold to a third party suffered an antitrust injury. The Court reasoned that it "must conclude that the market for employee skills is a market subject to the provisions of the Sherman Act." *Id.* at 864.

More recently in *Roman v. Cessna Aircraft Co.,* 55 F.3d 542 (10th Cir.1995), the Court of Appeals for the Tenth Circuit held that a plaintiff precluded from seeking employment as an airplane engineer with the Cessna Aircraft Company because of an agreement between Cessna and the Boeing Company not to hire each other's engineers suffered an antitrust injury. The Court reasoned that plaintiff

> alleged that competition in the market for his services as an employee had been directly impeded by defendants' agreement not to compete for each other's employees. He further alleges that he was injured by that agreement because it prevented him from selling his services to the highest bidder .... We believe this is sufficient to allege antitrust standing.

Id. at 545; *see also* *Law,* 134 F.3d 1010 (coach whose opportunities in employment market were impaired by agreement among members of NCAA to limit the maximum compensation paid to coaches suffered antitrust injury).

In a similar manner, plaintiffs here allege they have been precluded from selling their services to three companies within the industry, NCR, AT & T and Lucent, and that the no-hire agreement interfered with their ability to attain pension benefits. Because the no-hire agreement directly impeded plaintiffs' ability to sell their labor to at least three companies within the competitive market and effectively cancelled their AT & T pension benefits, we believe they have standing to litigate their § 1 claims. *Roman,* 55 F.3d at 545. To the extent the District Court held that plaintiffs did not suffer an antitrust injury and lacked standing to litigate their § 1 claims, it was in error.

C.

Plaintiffs contend on appeal that the no-hire agreement was a group boycott and a horizontal price fixing conspiracy. *See Klor's v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 211, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). As direct competitors for their labor, plaintiffs argue, the defendants entered the no-hire agreement as part of a concerted effort to lock them out of employment and decrease labor costs by eliminating pension benefits. *See Nat'l Soc'y of Prof. Eng'rs,* 435 U.S. at 692, 98 S.Ct. 1355 (quoting *United States v. Container Corp. of Am.,* 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969) ("[A]n agreement that `interfere[s] with the setting of price by free market forces' is illegal on its face.")). Plaintiffs maintain that group boycotts and horizontal price fixing schemes between competitors are per se violations of the antitrust laws because these agreements are manifestly uncompetitive and are "naked restraints of trade ... [that have] no purpose except stifling of competition." *White Motor Co. v. United States,* 372 U.S. 253, 263, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963); *see also N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 19-20, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). In support, they cite *NCAA v. Bd. of Regents of*
143 *the Univ. of Okla.,* 468 U.S. 85, 100, 104 S.Ct. 2948, 82 *143 L.Ed.2d 70 (1984), where the Supreme Court stated,

> Horizontal price fixing ... [is] ordinarily condemned as a matter of law under an `illegal per se' approach because the probability that these practices are anti-competitive is so high .... In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.

While plaintiffs contend the no-hire agreement was per se illegal because it was a horizontal group boycott and a price fixing conspiracy, we can find no support within the relevant case law for this label. Broad. Music, Inc., 441 U.S. at 8, 99 S.Ct. 1551 ("Easy labels do not always supply ready answers."). The per se illegality rule applies only in those cases where the business practice in question is one, which on its face, has "no purpose except stifling of competition." *White Motor Co.,* 372 U.S. at 263, 83 S.Ct. 696; *see also Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.,* 472 U.S. 284, 289-90, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) (per se rule confined to limited types of anti-competitive practices); *Larry Muko, Inc. v. Southwestern Pa. Bldg. and Const. Trades Council,* 670 F.2d 421, 429 (3d. Cir.) ("Generally the application of the per se rule has been limited to those `classic' boycotts in which a group of business competitors seek to benefit economically by excluding other competitors from the marketplace."), *cert. denied,* 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982). The Supreme Court has been cautious in extending the per se approach to claims that fall outside certain previously enumerated categories of liability. *See, e.g., Bd. of Regents of the Univ. of Okla.,* 468 U.S. at 100 n. 21, 104 S.Ct. 2948 ("Judicial inexperience with a particular arrangement counsels against extending the reach of the per se rules."); *Broad. Music, Inc.,* 441 U.S. at 20 n. 33, 99 S.Ct. 1551 ("The per se rule is not employed until after considerable experience with the type of challenged restraint."); *Maricopa County Med. Soc'y,* 457 U.S. at 344, 102 S.Ct. 2466 ("Experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it."). Because of the fact specific inquiry involved in antitrust analysis, the Supreme Court has recognized that claims not within established categories of antitrust liability are more appropriately analyzed under the rule of reason where courts can balance the effect of the alleged anti-competitive activity against its competitive purposes within the relevant product and geographic markets.

Acknowledging this judicial hesitance to extend the per se rule to new categories of antitrust claims, we note there are no Supreme Court cases nor any federal cases that have applied the per se rule in similar factual circumstances. The only two federal cases that have analyzed similar group boycott and price fixing claims have held that no-hire agreements executed upon the sale of a corporation are analyzed under the rule of reason. *Coleman v. Gen. Elec. Co.,* 643 F.Supp. 1229, 1243 (E.D.Tenn. 1986), *aff'd,* 822 F.2d 59 (6th Cir.1987); *Cesnick,* 490 F.Supp. at 866-67. In *Coleman,* the 3M Corporation sold its ceramics division to General Electric. 643 F.Supp. at 1243. After closing, 3M and General Electric entered an agreement in which 3M warranted that it would not rehire any employee who voluntarily accepted a job with General Electric. Several ceramic division employees brought suit alleging a group boycott that was per se invalid under § 1 of the Sherman Act. Disagreeing, the court reasoned that "courts have refused to apply the `group boycott' designation where the effect is not to
144 drive out competition but to achieve some other *144 goal, whether or not the goal withstands the rule of reason analysis." *Id.* (citing *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1177-78 (D.C.Cir.1979)). Because the agreement only precluded the plaintiffs from selling their services to one corporation, the court held it only had a "de minimus impact on the employment market in general," and the per se rule was "wholly inapplicable." *Id.*

Similarly in *Cesnick,* former employees of Chrysler's Non Automotive Air Conditioning Division sued under § 1 when Chrysler sold the division to the Fedders Corporation and agreed not to rehire its employees. 490 F.Supp. at 866. Although plaintiffs characterized the agreement as a group boycott and a per se violation of § 1, the court stated, "[i]n the absence of any Supreme Court cases based on facts similar to those of this case, this Court will not accept the proposition that any conduct that can be characterized as a group boycott is a per se violation." *Id.* The court reasoned the Chrysler-Fedders'

> agreement was designed to increase the likelihood that Fedders would enjoy the services of the experienced AirTemp employees, an obviously sound business purpose. To the extent that the agreement effectively restrained competition between Chrysler and Fedders for employee services, a competition whose existence is entirely conjectural, that effect was incidental as well as de minimus.

Id. at 866-67.

Cognizant that there are no Supreme Court cases holding no-hire agreements entered upon the legitimate sale of a business to a third party are per se antitrust violations,[2] and recognizing that the only two federal courts that have addressed the issue have declined to apply the per se rule, we hold the no-hire agreement here is more appropriately analyzed under the rule of reason. As several courts have recognized, the per se rules of illegality are the exception to antitrust analysis and are only employed in certain recognized categories. *DeLong Equip. Co. v. Washington Mills Abrasive Co.,* 887 F.2d 1499, 1506 (11th Cir.1989), *cert. denied,* 494 U.S. 1081, 110 S.Ct. 1813, 108 L.Ed.2d 943 (1990).

The District Court properly characterized the no-hire agreement as a common law covenant not to compete. As we discuss, courts have uniformly found that covenants not to compete should be examined under the rule of reason. *See, e.g., McDonald v. Johnson & Johnson,* 722 F.2d 1370 (11th Cir.), *cert. denied,* 469 U.S. 870, 105 S.Ct. 219, 83 L.Ed.2d 149 (1984); *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.,* 720 F.2d 1553 (11th Cir.1983); *Aydin Corp. v. Loral Corp.,* 718 F.2d 897 (9th Cir.1983); *Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255 (7th Cir.1981), *cert. denied,* 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). Therefore, we will analyze plaintiffs' claims under the rule of reason so we can examine the effect of the defendants' agreement within the wider context of its competitive purposes and its impact on the relevant product and geographic markets.

D.

145 Under the rule of reason, we look at the totality of the circumstances *145 surrounding an alleged anti-competitive activity, including facts peculiar to the relevant business, to determine the "nature or purpose" of the allegedly illegal restraint. *Topco Assocs., Inc.,* 405 U.S. at 607, 92 S.Ct. 1126. "The finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed and the restraint's history, nature and effect." *State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (citing *Maricopa,* 457 U.S. at 342, 102 S.Ct. 2466). In applying this test, we examine the competitive significance of the alleged restraint to determine whether it has an anti-competitive effect on the market and is an unreasonable restraint on trade. *Tunis Bros. Co. v. Ford Motor Co.,* 952 F.2d 715, 722 (3d Cir.1991), *cert. denied,* 505 U.S. 1221, 112 S.Ct. 3034, 120 L.Ed.2d 903 (1992). In this regard, covenants not to compete executed upon the sale of a business to a third party are generally not recognized as antitrust violations. *See Bus. Elecs. Corp.,* 485 U.S. at 730 n. 4, 108 S.Ct. 1515 ("The classic ancillary restraint is an agreement by the seller of a business not to compete within the market."); *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 689, 98 S.Ct. 1355; *Lektro-Vend Corp.,* 660 F.2d at 265 ("The recognized benefits of reasonably enforced noncompetition covenants are now beyond question."). As early as 1899, courts have recognized that covenants not to compete are not violations of § 1 of the Sherman Act because,

> It [i]s of importance, as an incentive to industry and honest dealing in trade, that, after a man ha[s] built up a business with extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell.

United States v. Addyston Pipe & Steel, 85 F. 271, 280 (6th Cir.1898), *modified,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899).

In this vein, courts have characterized covenants not to compete executed upon the legitimate transfer of ownership of a business as ancillary restraints on trade. *Id.*; *see also Bus. Elecs. Corp.,* 485 U.S. at 730 n. 4, 108 S.Ct. 1515; *United States v. Empire Gas Corp.,* 537 F.2d 296, 307 (8th Cir.1976) ("Covenants not to compete executed in conjunction with the purchase of a business allow the purchaser to obtain the value of the good will for which he has paid."), *cert. denied,* 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977). So long as these covenants are reasonable in scope, there is no antitrust violation under the rule of reason. *See, e.g., Syntex Labs., Inc., v. Norwich Pharmacal Co.,* 315 F.Supp. 45, 56

(S.D.N.Y.1970) ("[I]t is hornbook law that a covenant not to compete ancillary to the sale of a business (or part of a business), when reasonably limited to time and territory, does not fall within the prohibitions of the Sherman Act."), *aff'd,* 437 F.2d 566 (2d Cir.1971).

The District Court found,

> In our view, the pre-closing and post-closing nets at issue here are a subset of common law covenants not to compete. Moreover, it is clear that the no-hire agreements imposed restrictions which were "ancillary to legitimate transactions," and thus properly considered an ancillary restraint.

Eichorn, CA No. 96-3587, slip op. at *23 (internal citation omitted).

146 We agree that the no-hire agreement was not an unreasonable restraint of *146 trade under § 1 of the Sherman Act. *Frackowiak v. Farmers Ins. Co., Inc.,* 411 F.Supp. 1309, 1318 (D.Kan.1976) ("Numerous Courts have recognized the general rule that agreements not to compete, entered into in conjunction with the termination of employment or sale of a business, do no offend the federal antitrust provisions if they are reasonable in duration and geographical limitation."). The primary purpose of the no-hire agreement was to ensure that Texas Pacific Group, as the purchaser of Paradyne, could retain the skilled services of Paradyne's employees. Although the no-hire agreement precluded the employees from seeking employment at an AT & T affiliate for 245 days, the primary purpose of the agreement was not anti-competitive. Contrary to plaintiffs' assertions, we can find no evidence to support their claim that the no-hire agreement was executed for the improper purpose of restraining trade and the cost of labor in the telecommunications industry. The primary purpose of the no-hire agreement was to ensure the successful sale of Paradyne to Texas Pacific Group which required workforce continuity.[3] Any restraint on plaintiffs' ability to seek employment at AT & T and any effect on their pension bridging rights was incidental to the effective sale of Paradyne.

Because the no-hire agreement was a legitimate ancillary restraint on trade, we must determine whether the eight month restriction from employment at an A T & T affiliate was reasonable or whether it went further than necessary to ensure the successful transition of ownership. *Cesnick,* 490 F.Supp. at 868 (quoting *Syntex Labs.,* 315 F.Supp. at 56) ("The question in every case [involving a covenant not to compete ancillary to the sale of a business] is whether the restraint is reasonably calculated to protect the legitimate interests of the purchaser in what he has purchased, or whether it goes so far beyond what is necessary as to provide a basis for the inference that its real purpose is the fostering of monopoly.").

We do not think the eight month restriction on re-employment at an AT & T affiliate was unreasonably broad. It is reasonable to believe Texas Pacific Group would require the technical skills of these employees for at least this eight month period, if not longer, to ensure a successful transition of ownership from Lucent. Furthermore, the no-hire agreement only precluded the plaintiffs from working at Lucent or an A T & T affiliate. The employees were free to leave Texas Pacific Group and seek employment elsewhere within the telecommunications industry. Significantly, there is no evidence in the record to support plaintiffs' claim that AT & T was the only employer in the market to whom they could sell their services. As the District Court found, there are over twenty other telecommunications firms that compete for plaintiffs' technical services. Furthermore, the market for plaintiffs with more generalized educational and work backgrounds includes "a vast number of jobs" nationwide. *Eichorn,* CA No. 96-3587, slip op. at *27-28 n. 17.

Therefore, we hold the no-hire agreement was not an unreasonable restraint on trade. As an ancillary covenant not to
147 compete, the no-hire agreement was *147 reasonable in its restrictions on the plaintiffs' ability to seek employment elsewhere. *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 689, 98 S.Ct. 1355. While the no-hire agreement essentially barred the plaintiffs' ability to retain their desirable AT & T pension benefits, § 1 of the Sherman Antitrust Act is not the appropriate vehicle here for redress. In formulating their claim in antitrust parlance, plaintiffs have argued their inability to work at their former jobs was a manifestly uncompetitive restraint on trade within the relevant market. We disagree. In order to advance their antitrust claim, plaintiffs are forced to define narrowly the relevant market affected by the defendants' activity as,

> potential employers within a 35 mile radius of Holmdel/Middletown with the capacity and capability of employing or utilizing large numbers of persons with specialized experience in high speed data communications equipment of the sort Paradyne develops and makes ... who can provide continuity of the pension benefits which have accrued to [plaintiffs] under the AT & T and/or Lucent pension plans.

Eichorn, CA No. 96-3587, slip op. at *29-30 n. 18.

We believe this narrow market definition is inappropriate. As we recently stated, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.,* 124 F.3d 430, 436 (3d Cir.) (quoting *Brown Shoe Co.,* 370 U.S. at 325, 82 S.Ct. 1502), *reh'g denied,* 129 F.3d 724 (1997), *cert. denied,* 523 U.S. 1059, 118 S.Ct. 1385, 140 L.Ed.2d 645 (1998). "The test for a relevant market is not commodities [in this case technical jobs] reasonably interchangeable by a particular plaintiff, but `commodities [technical employees] reasonably interchangeable by consumers [technology companies] for the same purposes.'" *Id.* at 438 (quoting United States v. E.I. duPont Nemours and Co., 351 U.S. 377, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)). Additionally, we have said "the relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Pa. Dental Assn. v. Med. Serv. Assn. of Pa.,* 745 F.2d 248, 260 (3d Cir. 1984), *cert. denied,* 471 U.S. 1016, 105 S.Ct. 2021, 85 L.Ed.2d 303 (1985); *see also Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.,* 140 F.3d 494, 515 (3d Cir.1998). This geographic market must "conform to commercial reality." *Acme Mkts., Inc. v. Wharton Hardware & Supply Corp.,* 890 F.Supp. 1230, 1239 (D.N.J.1995) (citing *Brown Shoe Co.,* 370 U.S. at 336, 82 S.Ct. 1502).

By defining the market so narrowly that it only includes the defendants, plaintiffs' proffered geographic and product markets are unrealistic.[4] The market for the plaintiffs' labor is much broader. We agree with the District Court that the relevant market is not limited to AT & T and its affiliates but rather includes all those technology companies and network services
148 providers who actively compete *148 for employees with the skills and training possessed by plaintiffs.[5]

Because market realities reflect that the no-hire agreement did not have a significant anti-competitive effect on the plaintiffs' ability to seek employment within this broader telecommunications market nor that it fixed the cost of labor in the industry, we conclude it was not an antitrust violation under the rule of reason.[6] The antitrust laws were not designed to protect every uncompetitive activity, but rather only those activities that have anti-competitive effects on the market as a whole. *Broad. Music, Inc.,* 441 U.S. at 23, 99 S.Ct. 1551 ("Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints."). While plaintiffs' loss of their pension benefits gives us pause, we believe they can seek redress through other statutes more adequately suited to their injury than § 1 of the Sherman Antitrust Act.[7] *Chambless v. Masters, Mates & Pilots Pension Plan,* 772 F.2d 1032, 1042 (2d Cir.1985) ("To the extent that the ... [plaintiff's antitrust claim] is based on diminished retirement benefits, it is essentially an ERISA matter."), *cert. denied,* 475 U.S. 1012, 106 S.Ct. 1189, 89 L.Ed.2d 304 (1986).

IV.

We now turn to whether the no-hire agreement, which effectively cancelled plaintiffs' A T & T pension bridging rights, violated § 510 of ERISA. Section 510 of ERISA provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the employee
> 149 benefit plan ... for the purpose of interfering with the attainment *149 of any right to which such participant may become entitled under the plan.

29 U.S.C. § 1140 (1994).

Congress enacted § 510 "primarily to prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension benefits." *Dewitt v. Penn-Del Directory Corp.,* 106 F.3d 514, 522 (3d Cir.1997). We have held an employer violates § 510 when it acts with the specific intent to interfere with an employee's right to benefits. *DiFederico v. Rolm Co.,* 201 F.3d 200, 204-05 (3d Cir.2000). To prove a prima facie case under § 510 a plaintiff must show (1) that an employer took specific actions (2) for the purpose of interfering (3) with an employee's attainment of pension benefit rights. *Gavalik v. Cont'l Can Co.,* 812 F.2d 834, 852 (3d. Cir.), *cert. denied,* 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987). We held in *DiFederico* that once a plaintiff makes a prima facie showing, the employer has the burden of articulating a legitimate non-discriminatory reason for his conduct. Then, the burden shifts back to the plaintiff to show that the employer's rationale was pre-textual and that the cancellation of benefits was the "determinative influence" on the employer's actions. *DiFederico,* 201 F.3d at 205.

The crucial threshold issue in this case is whether defendants AT & T and Lucent[8] had the specific intent to interfere with the Paradyne employees' pension benefit rights or whether the cancellation of the bridging rights was merely an incidental by-product of the sale of Paradyne. *Dewitt,* 106 F.3d at 523 ("[E]mployee must show that the employer made a conscious decision to interfere with the employee's attainment of pension eligibility or additional benefits."). Plaintiffs allege the no-hire agreement and its eight month restriction on re-employment was enacted for "the direct and immediate objective and with the singular purpose of eliminating the Paradyne pensions." In support of their claim, plaintiffs argue the eight month restriction on re-employment is suspiciously close to the six month vesting period of the AT & T pension plan and that this temporal proximity provides circumstantial evidence that the cancellation of the benefits was a motivating factor in the timing of the no-hire agreement. Additionally, they point to the role of Paradyne's Vice-President of Human Resources in proposing Texas Pacific Group's ultimate pension package for the Paradyne employees. Plaintiffs also cite a confidential memorandum between Larry Knoch and Linda Roussau of Lucent Technologies, which acknowledges the eight month restriction in the no-hire agreement had the practical effect of cancelling the Paradyne employees' pension rights. Finally, plaintiffs point to the economic benefits that both Lucent and AT & T received from the no-hire agreement, specifically that neither defendant was required to pay for pension benefits, as evidence of specific intent to interfere with an ERISA pension plan in violation of § 510. *Turner v. Schering-Plough Corp.,* 901 F.2d 335, 348 (3d. Cir.1990) (savings to an employer that result from employees' termination might be viewed as a motivating factor sufficient to satisfy the intent element of § 510 liability).

150 Although the District Court found this evidence insufficient to support *150 a finding of specific intent to interfere with the plaintiffs' benefit plans,[9] *Eichorn,* CA No. 96-3587, slip op. at *9-12, we believe at this stage of the proceedings plaintiffs have presented sufficient circumstantial evidence of intent to interfere with their pension rights to create a genuine issue of material fact.[10] *Turner,* 901 F.2d at 347 ("Employee may show [a violation of § 510] ... by circumstantial evidence."). As we held in *Dewitt,* "[i]n most cases, ... `smoking gun' evidence of specific intent to discriminate does not exist. As a result, the evidentiary burden in these cases may also be satisfied by the introduction of circumstantial evidence." 106 F.3d at 523 (quoting *Gavalik,* 812 F.2d at 851). Of course we express no opinion whether plaintiffs will prevail at trial under the preponderance of evidence standard for § 510 claims. *DiFederico,* 201 F.3d at 205 ("[If] employer carries its burden, the plaintiff then must persuade the court by a preponderance of the evidence that the employer's legitimate reason is pre-textual."). Because plaintiffs have submitted sufficient prima facie evidence to withstand defendant's motion for summary judgment, we will reverse and remand for further proceedings.

V.

Plaintiffs contend the District Court erred when it denied their motion for additional discovery for a contemplated motion for class certification on their ERISA § 510 claim. In denying plaintiffs' motion the District Court stated, "[W]e do not find that ... Third Circuit[] ... [precedent] requires this Court to keep this matter open so that plaintiffs may engage in discovery and motion practice on the issue of class certification when the underlying claims have been dismissed with prejudice." *Eichorn,* CA No. 96-3887, slip op. at *18. Because we hold plaintiffs have submitted sufficient prima facie evidence to support their ERISA § 510 claim, we believe they may be entitled to additional discovery to pursue a possible motion for class certification. Accordingly, we direct the District Court on remand to address plaintiffs' motion for additional discovery and any future motion for class certification under the requirements of Fed. R.Civ.P. 23(c).

VI.

151 For these reasons, we will affirm the District Court's dismissal of plaintiffs' antitrust *151 claims. We will reverse the grant of summary judgment on plaintiffs' ERISA § 510 claims. We will also reverse the Court's order denying plaintiffs' motion for additional discovery for an anticipated class certification motion and, on remand, direct the District Court to address this issue in accordance with the requirements of Fed.R.Civ.P. 23(c).

[*] The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] Several other courts prior to *Brunswick* held that employees barred from seeking employment from a third party employer because of a no-hire agreement have standing to litigate a § 1 claim. *See, e.g., Radovich v. Nat'l Football League,* 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957) (coach precluded from working in National Football League because of agreement among all of the teams in the league had standing); *Quinonez v. Nat'l Assoc. of Secs. Dealers, Inc.,* 540 F.2d 824 (5th Cir.1976) (plaintiff who was fired by securities dealer and was unable to find employment with another securities dealer because of agreement among dealer firms not to hire an employee who was discharged by another firm suffered sufficient injury to proceed with antitrust claim); *Tugboat, Inc. v. Mobile Towing Co.,* 534 F.2d 1172, 1176 (5th Cir.) ("There can be little doubt that an employee who is deprived of a work opportunity has been injured ... because the selling of one's

labor is a commercial interest."), *reh'g denied,* 540 F.2d 1085 (5th Cir.1976); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir.1967) (plaintiff prohibited from seeking employment at competing employer because of agreement between employers in industry not to hire each other's employees suffered injury sufficient to bring antitrust claim).

[2] Similarly, we can find no cases in which a no-hire agreement entered into upon the sale of a business to a third party that resulted in the loss of employee benefits was found to be a horizontal price fixing conspiracy. *See Broad. Music, Inc.*, 441 U.S. at 9-10, 99 S.Ct. 1551 (quoting *Topco Assocs., Inc.*, 405 U.S. at 607-08, 92 S.Ct. 1126 ("It is only after considerable experience with certain business relationships that courts classify them as per se violations.")).

[3] Plaintiffs contend the true motive of the no-hire agreement was not work force continuity but eliminating pension benefits to reduce Texas Pacific Group's costs. They argue that if work force continuity were really the motive, Texas Pacific Group could have offered enhanced benefits packages to entice the work force to remain with Paradyne rather then simply agreeing to cancel their AT & T pension benefits. But the existence of alternative means to achieve a legitimate business goal does not in itself mean the defendants' chosen course of action was uncompetitive and improper.

[4] Plaintiffs argue they are under no obligation to define the relevant product and geographic markets because the defendants' conduct per se violated the antitrust laws. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). Because we find this case is governed under the rule of reason, plaintiffs necessarily have the affirmative burden of proving the relevant product and geographic markets affected by the defendants' alleged uncompetitive activity. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir.1996) (holding plaintiffs must present evidence from which rational person could conclude the relevant markets are actually what plaintiffs allege them to be).

[5] As previously noted, the District Court found there are over twenty companies that compete for employees with plaintiffs' technical skills. Additionally there are a "vast number of jobs" nationwide for plaintiffs with more generalized work and educational experience. *Eichorn,* CA No. 96-3587, slip op. at *27-28 n. 17.

[6] Plaintiffs also attempt to characterize defendants' activity as an illegal exercise of relational market power. *See* Sullivan & Grimes, *The Law of Antitrust: An Integrated Handbook* § 2.4e2iv (2000); Warren S. Grimes, *Market Definition in Antitrust Claims: Relational Market Power and the Franchisor's Conflict of Interest,* 67 Antitrust L.J. 243 (1999). They contend AT & T offered a unique pension benefits program that essentially locked the plaintiffs into working for them. *See Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). Claiming that AT & T was the only telecommunications company within the industry that offered such an extensive benefits program, plaintiffs maintain they were prevented from seeking employment at any other company, since to do so would result in the loss of valuable pension benefits. According to this argument, the no-hire agreement that precluded plaintiffs from working at an AT & T affiliate prevented them from working at the only company within the industry where they could receive these unique benefits. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); *FTC v. Texaco, Inc.*, 393 U.S. 223, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968). Central to plaintiffs' argument is the contention that the AT & T pension benefits are unique in the industry. We see no evidence for this in the record. Therefore, we need not address whether to extend the relational market power analysis to the facts of this case.

[7] Although the no-hire agreement effectively cancelled the plaintiffs' AT & T benefits, these plaintiffs were free to seek employment elsewhere in the industry where pension benefits may have been available. But even though defendants' activity was not a price fixing conspiracy under the Sherman Act, it may give rise to liability under § 510 of ERISA where a different analysis is involved.

[8] In their complaint plaintiffs did not allege that Texas Pacific Group violated § 510 of ERISA. App. at 92a, 157a ("Plaintiffs demand judgment ... declaring the refusal of AT & T and Lucent to employ members of the Class until after the expiration of their pension bridging rights to be in violation of ERISA section 510, 29 U.S.C. § 1140.").

[9] In its initial order granting summary judgment on the antitrust claims, the District Court found plaintiffs produced enough evidence to survive a motion for summary judgment on the ERISA claim. Upon reconsideration, the District Court reversed its position stating it improperly relied on circumstantial evidence that the defendants experienced an overall economic gain from the no-hire agreement and sale of Paradyne. In re-examining the relevant case law, the court said the proper inquiry should focus on the reduction in actual benefit expenses caused by the termination of employees, rather than a broader assessment of the overall financial impact of termination on the employer's business. *See Clark v. Coats & Clark*, 990 F.2d 1217, 1224 (11th Cir.1993) ("[M]easures designed to reduce costs in general that also result in an incidental reduction in benefits expenses do not suggest discriminatory intent."). We agree with the Eleventh Circuit. But we hold that plaintiffs have produced sufficient evidence that both AT & T and Lucent received a direct and substantial financial gain from the cancellation of pension benefits, namely they were relieved from paying large sums for the pension benefits of the several Paradyne employees affected by the agreement.

[10] We believe a genuine issue of material fact exists only with the Pre and Post Closing Nets' effect on the Paradyne employees' pension rights. Because the Preliminary Net did not prohibit plaintiffs from receiving their pension benefits as employees of Lucent Technologies, it did not violate § 510 of ERISA.

EJ MGT LLC, Plaintiff,

v.

ZILLOW GROUP, INC., and ZILLOW, INC., Defendants.

Civil Action No. 18-584.

United States District Court, D. New Jersey.

March 4, 2021.

Not for Publication

OPINION

JOHN MICHAEL VAZQUEZ, District Judge.

This case concerns antitrust allegations against a market leader in online real estate information. Plaintiff EJ MGT LLC brings this action against Defendants Zillow Group, Inc., and Zillow, Inc. (collectively, "Zillow" or "Defendants") for conspiracy to restrain trade under the Sherman Act, 15 U.S.C. § 1, and the New Jersey Antitrust Act, N.J.S.A. 56:9-3. Plaintiff claims that Zillow illegally contracts with certain real estate brokers to alter the location of those brokers' property listings' estimated prices, called "Zestimates," on Zillow's webpages while not offering this option to other brokers, agents, and property owners, such as Plaintiff. Currently pending before the Court is Defendants' motion to dismiss Plaintiff's Second Amended Complaint ("SAC"). D.E. 42. The Court reviewed all submissions[1] and considered this motion without oral argument pursuant to Federal Rule of Civil Procedure 78(b) and Local Civil Rule 78.1(b). For the following reasons, Defendants' motion to dismiss is granted.

I. BACKGROUND[2]

The Court included comprehensive factual backgrounds in its February 28, 2019 and March 3, 2020 Opinions, D.E. 20 ("MTD Op."), D.E. 33 ("2d MTD Op."), which are incorporated by reference here. Plaintiff EJ MGT is a New Jersey limited liability company that owns 142 Hoover Drive in Cresskill, New Jersey (the "Property"). SAC ¶ 23. Zillow is a market leader in online real estate information. *Id.* ¶¶ 1, 48. Zillow manages websites that serve as the central database for all real estate listings (including those that are not for sale) in the United States. *Id.* ¶¶ 48-54. The "Zillow Website" is Zillow's "flagship offering and the market leader in the online-real-estate-database" industry. *Id.* ¶ 48.

For all listed properties, Zillow includes a "Zestimate," which is Zillow's own estimate of the current market value of a home based on an algorithm that considers property facts (such as location, lot size, square footage, number of bedrooms/bathrooms), tax assessments, prior transactions (historical sales prices of the particular property and recent sales of comparable neighboring properties), and user data. *Id.* ¶ 56. "According to Zillow, the Zestimate home valuation is Zillow's estimated market value of the property." *Id.* ¶ 57. Zillow represents that the Zestimate is the "starting point" for determining a home's value. *Id.* ¶ 58.

In January 2017, Plaintiff listed the Property for sale. *Id.* ¶ 151. Keller Williams served as the broker and listing agent, and Zillow displayed the Property on its website. *Id.* ¶ 152. Plaintiff alleges that "[t]hroughout January of 2017 and up to the filing of the original Complaint in this matter, the Zestimate for [the Property] . . . was well below the appraised[3] value of" the Property. *Id.* ¶ 154. Plaintiff further claims that "[t]wo potential buyers have explained[4] . . . that they viewed 142 Hoover Drive in 2017 and were confronted with the prominent Zestimate at this same time . . . and were turned off from considering a potential purchase of the property." *Id.* ¶ 155. Plaintiff claims that the Zestimate for the Property "began to fluctuate shortly after the original complaint was filed." *Id.* ¶ 161. Plaintiff further contends that after Plaintiff filed its original Complaint on January 15, 2018, Zillow altered the placement of the Property's Zestimate such that the Zestimate no longer "appear[ed] at the top of the property page" under the listing price; instead, a link with "View Zestimate" appeared (presumably providing the Zestimate if the link was selected). *Id.* ¶ 159. Plaintiff has been unable to sell the Property in the 36 months that it has been listed on the market. *Id.* ¶ 166.[5]

Plaintiff contacted Zillow to remove the Property's Zestimate from directly underneath the Property's listing price, but Zillow refused. *Id.* ¶ 75. A Zillow representative explained that "this feature is only available on our premiere agent program for real estate agents" and forwarded Plaintiff information on that program. *Id.* The Zillow representative later clarified that "Zillow has various partnerships with Agents, Brokerages, and Vendors that may display a listing page differently than others." *Id.* Plaintiff alleges that even premier agents cannot gain this preferential treatment unless they are affiliated with brokers who have contracted (referred to in the SAC as "Zestimate Agreements") with Zillow to move the Zestimate on the Zillow Website (referred to in the SAC as "Zestimate Suppression"). *Id.* ¶ 79.

Plaintiff alleges "[o]n information and belief" that "Zillow offers Zestimate Suppression to only one brokerage firm within a geographic market." *Id.* ¶ 116. The Property, according to Plaintiff, is located in the "Triboro Market," which Plaintiff defines as the "high-end Cresskill-Alpine-Demarest Triboro market[.]" *Id.* ¶ 9. In the Triboro Market, "Realogy is the sole brokerage firm to which Zillow offers Zestimate Suppression." *Id.* ¶ 118. Plaintiff further alleges that "[t]here is either an express or *de facto* agreement between Zillow and Realogy that Realogy would be the only firm to have availability to Zestimate Suppression during the course of the agreement." *Id.* ¶ 119. Plaintiff asserts that those brokers, agents, and individual homeowners who are not associated with the "Co-Conspirator Brokers" "are left no choice but to have Zestimates appear prominently"[6] on their properties' Zillow pages, putting them at a distinct competitive disadvantage and harming overall competition in the local and national real estate markets. *Id.* ¶¶ 16, 93.

Plaintiff claims that Zillow participated in an anticompetitive conspiracy by contracting with certain brokers — "Co-Conspirator Brokers" — regarding the display of the Zestimate on Zillow's website for properties listed through the Co-Conspirator Brokers. *Id.* ¶ 84. Specifically, Plaintiff alleges that Zillow entered into the Zestimate Agreements which allowed the Co-Conspirator Brokers to use Zestimate Suppression to relocate their properties' Zestimates so that they did not appear directly under their properties' listing prices. *Id.* ¶¶ 3, 4.[7] Zillow, however, does not completely remove the Zestimate for any listing. *Id.* ¶ 74. Even when it removes the Zestimate from under the listing price, Zillow still makes the Zestimate available under "Zestimate details" on the property's Zillow page. *Id.* However, without Zestimate Suppression, "when a user lands on the subpage of a property that is listed for sale . . . both the sale price and the Zestimate are immediately visible and prominently displayed, side by side." *Id.* ¶ 4.[8] Plaintiff contends this is a competitive disadvantage and alleges that "a visitor spends, on average, 15.84 seconds viewing a given property's subpage" and that "on information and belief" that time "is spent looking at photographs of a given home as opposed to scrolling through written information in search of the Zestimate." *Id.* ¶ 5.

Plaintiff surmises that the Zestimate Suppression achieved through the Zestimate Agreements anticompetitively tilts "the playing field in favor of the "Co-Conspirator Brokers." *Id.* ¶ 113. Plaintiff further claims that the "[s]elective concealment" of the Zestimate "disrupts the proper functioning of a competitive marketplace." *Id.* ¶ 137. Plaintiff alleges that Zestimate Suppression "has permitted the Co-Conspirator Brokers to insulate themselves from competition" leaving the Co-Conspirator Brokers "otherwise free from . . . concerns that other brokers and individual home sellers address when faced with a prominently displayed Zestimate." *Id.* ¶ 141. Plaintiff also alleges that the Zestimate Suppression suppresses "critical price information" (apparently the Zestimates) on the Co-Conspirator Brokers' listings. *Id.* ¶ 91. *See also id.* at 7 ("The Zestimate Agreements are agreements to suppress pricing information[.]"); ¶ 8 ("The Zillow Agreements unreasonably restrain open price competition by suppression and reducing the output of pricing information."). In this regard, the SAC is seemingly contradictory in that it alleges that the Zestimates are "critical price information" but also that the Zestimate as to the Property is apparently inaccurate.

Plaintiff claims that since 2017, "Co-Conspirator Brokers that have had the benefit of Zestimate Suppression . . . have sold at least eight high-end homes in the town of Cresskill" as compared to two sales by brokers operating without the benefit of Zestimate suppression. *Id.* ¶ 164. As a result, Plaintiff asserts that, as a consumer of services from non-Co-Conspirator Brokers, it "has paid supracompetitive quality adjusted prices and, in turn, received a reduced quality of service." *Id.* Plaintiff further alleges it was injured by "the lost opportunity to sell 142 Hoover, lost profits and continuing carrying costs such as property taxes, insurance, landscaping, utilities and other expenses related to owning an investment property." *Id.* ¶ 35.

II. PROCEDURAL HISTORY

Plaintiff filed its original Complaint on January 1, 2018 alleging five causes of action: (1) conspiracy to restrain trade under Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) conspiracy to restrain trade under the New Jersey Antitrust Act, N.J.S.A. 56:9-3; (3) fraud under the New Jersey Consumer Fraud Act ("NJCFA"), N.J.S.A. 56:8-1 *et seq.;* (4) slander of title/product disparagement under New Jersey common law; and (5) interference with prospective economic advantage under New Jersey common law. D.E. 1 ¶¶ 97-127. Zillow filed a motion to dismiss Plaintiff's Complaint, D.E. 11, which the Court granted, MTD Op.

The Court provided Plaintiff an opportunity to file an amended complaint, which Plaintiff filed on March 29, 2019, alleging only two of its previous five counts: (1) conspiracy to restrain trade under Section 1 of the Sherman Act, and (2) conspiracy to restrain trade under the New Jersey Antitrust Act. D.E. 22 ("FAC"). Zillow again moved to dismiss Plaintiff's FAC, D.E. 24, which the Court granted, 2d MTD Op.

The Court provided Plaintiff an opportunity to file a second amended complaint, which Plaintiff filed on June 1, 2020, again alleging two counts: (1) conspiracy to restrain trade under Section 1 of the Sherman Act, and (2) conspiracy to restrain trade under the New Jersey Antitrust Act. D.E. 40. The current motion followed. Zillow moved to dismiss the SAC, D.E. 42, which Plaintiff opposed, D.E. 49. Defendants filed a reply. D.E. 50.

On February 25, 2021, Plaintiff filed a letter as to Zillow's motion to dismiss. *See* D.E. 51. Plaintiff requested that "the motion record be supplemented" with the "Majority Staff Report and Recommendations of the Investigation of Competition in Digital Markets" (the "Report") authored by the United States House of Representatives' Subcommittee on Antitrust, Commercial and Administrative Law (the "Subcommittee") of the Committee on the Judiciary. *Id.* at 1. Plaintiff represents that the Subcommittee issued the Report after the briefing on the motion to dismiss concluded. *Id.* However, Plaintiff admits the Report was issued on October 6, 2020, so it appears Plaintiff waited several months to bring the report to the Court's attention. Plaintiff also ignores that, in deciding a motion to dismiss, a district court may only consider "exhibits attached to the complaint and matters of public record" as well as "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir. 1993). Plaintiff's letter fails to indicate under which exception the Report falls. Accordingly, the Court did not consider the Report in resolving Zillow's motion to dismiss.

Even if the Court considered the Report, Plaintiff's letter does not point to any specific findings that would be relevant to the issues presented in the current motion. Plaintiff represents that the Subcommittee made a general finding that "dominant platforms in the digital economy `exploit gatekeeper power to dictate terms and extract concession that no one would reasonably consent to in a competitive market." *Id.* Plaintiff further represents that the Subcommittee characterized "the antitrust injury/antitrust standing doctrines as well as the heightened pleadings standard in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) as `significant obstacles' erected by courts that `hamper[] private antitrust plaintiffs.'" D.E. 51 at 2. To the extent Plaintiff is asking the Court to disregard binding precedent, the Court is without authority to do so.

III. STANDARD OF REVIEW

A. Rule 12(b)(1)

In deciding a Rule 12(b)(1) motion for lack of subject-matter jurisdiction, a court must first determine whether the party presents a facial or factual attack because the distinction determines how the pleading is reviewed. A facial attack "contests the sufficiency of the complaint because of a defect on its face," whereas a factual attack "asserts that the factual underpinnings of the basis for jurisdiction fails to comport with the jurisdictional prerequisites." *Elbeco Inc. v. Nat'l Ret. Fund,* 128 F. Supp. 3d 849, 854 (E.D. Pa. 2015) (quoting *Moore v. Angie's List, Inc.,* 118 F. Supp. 3d 802, 806 (E.D. Pa. 2015)).

For a facial attack, "the Court must consider the allegations of the complaint as true," much like a Rule 12(b)(6) motion to dismiss. *Bd. of Trs. of Trucking Emps of N. Jersey Welfare Fund, Inc. v. Caliber Auto Transfer, Inc.,* No. 09-6447, 2010 WL 2521091, at *8 (D.N.J. June 11, 2010) (quoting *Petruska v. Gannon Univ.,* 462 F.3d 294, 302 (3d Cir. 2006)). However, for a factual attack, "the court may consider and weigh evidence outside the pleadings to determine if it has jurisdiction." *Gould Elecs. Inc. v. United States,* 220 F.3d 169, 178 (3d Cir. 2000), *holding modified by Simon v. United States,* 341 F.3d 193 (3d Cir. 2003). The burden is on the plaintiff to prove that the Court has jurisdiction. *Id.*

As for a district court's power to hear the case, "Article III of the Constitution limits the jurisdiction of federal courts to `Cases' and `Controversies.'" *Lance v. Coffman,* 549 U.S. 437, 439 (2007). One key aspect of this case-or-controversy requirement is standing. *See id.* "The standing inquiry focuses on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Constitution Party of Pa.,* 757 F.3d at 360. To establish standing, a plaintiff must satisfy a three-part test, showing: "(1) an `injury in fact,' *i.e.,* an actual or imminently threatened injury that is `concrete and particularized' to the plaintiff; (2) causation, *i.e.,* traceability of the injury to the actions of the defendant; and (3) redressability of the injury by a favorable decision by the Court." *Nat'l Collegiate Athletic Ass'n v. Gov. of N.J.,* 730 F.3d 208, 218 (3d. Cir. 2013).

B. Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a count for "failure to state a claim upon which relief can be granted[.]" To withstand a motion to dismiss under Rule 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A complaint is plausible on its face when there is enough 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). Although the plausibility standard "does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted unlawfully." *Connelly v. Lane Const. Corp.,* 809 F.3d 780, 786 (3d Cir. 2016) (internal quotation marks and citations omitted). As a result, a plaintiff must "allege sufficient facts to raise a reasonable expectation that discovery will uncover proof of [his] claims." *Id.* at 789.

In evaluating the sufficiency of a complaint, a district court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Phillips v. Cty. of Allegheny,* 515 F.3d 224, 231 (3d Cir. 2008). A court, however, is "not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey,* 481 F.3d 187, 211 (3d Cir. 2007). If, after viewing the allegations in the complaint most favorable to the plaintiff, it appears that no relief could be granted under any set of facts consistent with the allegations, a court may dismiss the complaint for failure to state a claim. *DeFazio v. Leading Edge Recovery Sols.,* 2010 WL 5146765, at *1 (D.N.J. Dec. 13, 2010).

IV. ANALYSIS

A. Article III Standing

The Court previously found that Plaintiff's FAC failed to adequately establish Article III standing. 2d MTD Op. at 10-11. Defendants argue that the same infirmity plagues the SAC. Br. at 8-11. A plaintiff seeking to establish Article III standing "must demonstrate `(1) an injury-in-fact, (2) a *sufficient causal connection* between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.'" *Finkelman v. Nat'l Football League,* 810 F.3d 187, 193 (3d Cir. 2016) (emphasis added) (quoting *Neale v. Volvo Cars of N. Am., LLC,* 794 F.3d 353, 358-59 (3d Cir. 2015) (internal quotations omitted and punctuation modified)). The first element, an injury-in-fact, requires Plaintiff to show "`the invasion of a concrete and particularized legally protected interest' resulting in harm `that is actual or imminent, not conjectural or hypothetical.'" *Finkelman,* 810 F.3d at 193 (quoting *Blunt v. Lower Merion Sch. Dist.,* 767 F.3d 247, 278 (3d Cir. 2014)). The second element, causation, "requires the alleged injury to 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.'" *Finkelman,* 810 F.3d at 193 (quoting *Toll Bros., Inc. v. Twp. of Readington,* 555 F.3d 131, 137-38 (3d Cir. 2009)). The Third Circuit has explained that Article III's causation requirement is "akin to `but for' causation in tort and may be satisfied `even where the conduct in question might not have a proximate cause of the harm.'" *Finkelman,* 810 F.3d at 193 (quoting *Edmonson v. Lincoln Nat'l Life Ins. Co.,* 725 F.3d 406, 418 (3d Cir. 2013)). The third element, redressability, requires a plaintiff "to show that it is `likely, as opposed to merely speculative,' that the alleged injury will be redressed by a favorable decision." *Finkelman,* 810 F.3d at 194 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)).

"When assessing standing on the basis of the facts alleged in a complaint," courts "apply the same standard of review we use when assessing a motion to dismiss for failure to state a claim." *Id.* (citing *In re Schering Plough Corp. Intron/Temodar*

Consumer Class Action, 678 F. 3d 235, 243 (3d Cir. 2012)). The Third Circuit has described this process as a three-step inquiry:

> First, we "tak[e] note of the elements a plaintiff must plead to state a claim" — here, the three elements of Article III standing. Second, we eliminate from consideration any allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Third, "where there are well-pleaded factual allegations, [we] assume their veracity and then determine whether they plausibly" establish the prerequisites of standing. In conducting this analysis, we are mindful of the Supreme Court's teaching that all aspects of a complaint must rest on "well-pleaded factual allegations" and not "mere conclusory statements." Thus, to survive a motion to dismiss for lack of standing, a plaintiff "must allege facts that affirmatively and plausibly suggest that it has standing to sue." Speculative or conjectural assertions are not sufficient.

Id. (internal citations omitted).[9] With respect to causation, the Third Circuit has explained that

> [t]he causation element of standing requires a plaintiff to allege facts sufficient to show that his or her injury is "fairly traceable" to the alleged wrongdoing of the defendant. We have explained that traceability requires, at a minimum, that the defendant's purported misconduct was a "but for" cause of the plaintiff's injury.

Id.

Here, Plaintiff's injury-in-fact is alleged as follows:

> Plaintiff, which is in the business of buying, renovating, and selling homes, has suffered the following business injuries: the lost opportunity to sell 142 Hoover, lost profits and continuing carrying costs such as property taxes, insurance, landscaping, utilities, and other expenses related to owning an investment property.
>
> Plaintiff has also suffered injuries in fact through its having paid supracompetitive quality-adjusted prices for brokerage services and having received a lower quality of services.

SAC ¶¶ 35-36; *see also* Opp. at 6.

Defendants argue Plaintiff fails to plead Article III standing because the Court previously found that the first injury could not provide Article III standing for lack of causation and that the second, newly alleged injury, is not sufficiently pled. Br. at 8-11. Plaintiff responds that the allegations in the SAC satisfy the "but for" requirement for pleading causation under the Article III standing analysis. Opp. at 7-11. Plaintiff specifically argues that the "price anchoring effects" of the location of the Zestimate are the cause of its harm — not the Zestimate itself. *Id.* at 11.

As to the newly alleged injury — Plaintiff's payment of "supracompetitive" prices — the Court finds that Plaintiff has failed to plausibly allege an injury-in-fact. Plaintiff now claims that it was injured "through its having paid supracompetitive quality-adjusted prices for brokerage services and having received a lower quality of services." SAC ¶ 36. This conclusory allegation is repeated throughout the SAC, *id.* ¶¶ 19, 20, 36, 37, 124, 146, and is not entitled to the presumption of veracity. *Finkelman,* 810 F.3d at 194. Plaintiff provides no other factual details concerning this injury. For example, Plaintiff does not allege the amount it paid for services or facts from which the Court can infer that the price Plaintiff paid was "supracompetitive." Accordingly, the Court finds that this allegation is insufficient to establish Article III standing.[10]

The other alleged injury — the costs associated with Plaintiff's inability to sell the Property, SAC ¶ 35 — is the same as alleged in the FAC. *See* FAC ¶ 126. The Court previously found that, assuming the lost profits constituted an injury-in-fact, Plaintiff failed to adequately plead causation for that injury. 2d MTD Op. at 7-11. "The causation element of standing requires a plaintiff to allege facts sufficient to show that his or her injury is `fairly traceable' to the alleged wrongdoing of the defendant." *Finkelman,* 810 F.3d at 198. Such "traceability requires, *at a minimum,* that the defendant's purported misconduct was a `but for' cause of the plaintiff's injury." *Id.* (emphasis added). Plaintiff must establish that "but for" Defendants' Zestimate Agreements with other brokers, Plaintiff would not have suffered lost profits from its inability to sell the Property.

This Court previously found that "Plaintiff's alleged causal connection between its injury and Defendants' conduct appears to concern the *value* of the Property's Zestimate rather than the *location* of the Property's Zestimate, and certainly does not appear to concern the location of Zestimates on the *co-conspirators'* property listings." 2d MTD Op. at 10 (emphasis in original). The SAC contains the same allegations concerning the prominence of pricing information as in the FAC which this Court previously found insufficient. *Compare* SAC ¶ 78 *with* FAC ¶ 81. And as in the FAC, here Plaintiff complains that the negative pricing information on *its* page dissuades customers from purchasing the Property. *Compare* SAC ¶ 155 *with* FAC ¶ 112; *see also* SAC ¶ 6 (alleging "[d]iscrepancies between a property's Zestimate . . . substantially impacts the attituded and behavior of buyers in the luxury market.").

More importantly, Plaintiff does not allege that it lost any potential buyers to a comparable property sold by one of the Co-Conspirator Brokers in which the Zestimates were in a less prominent position. Plaintiff only indicates that two potential buyers informed Plaintiff that when they viewed the Property in 2017, they "were turned off from considering a potential purchase of the property based on the discrepancy between the listing price and the Zestimate." *Id.* ¶ 155. Putting aside the vagaries of this allegation, the SAC does not indicate that the buyers bought a comparable property at a comparable price from a Co-Conspirator Broker. Moreover, Plaintiff has characterized the Zestimate Agreements as, among other things, "depriving *consumers* access to price information as displayed in the Zestimate." SAC ¶ 139(d) (emphasis added). As pled, this alleged injury impacts consumers, not sellers like Plaintiffs. Accordingly, the SAC adds no allegations to alter the Court's previous finding that Plaintiff failed to adequately plead causation as to its lost profit injury. MTD Op. at 7-11.

Plaintiff also added a new allegation that "[o]n information and belief, Zillow offers Zestimate Suppression to only one brokerage firm within a given geographic market." *Id.* ¶ 116. However, this statement is conclusory as Plaintiff fails to set forth the facts that give rise to Plaintiff's "belief" that such an agreement exists. A plaintiff may plead facts upon information and belief "where it can be shown that the requisite factual information is peculiarly within the defendant's knowledge or control — so long as there are no boilerplate and conclusory allegations and plaintiffs accompany their legal theory with factual allegations that make their theoretically viable claim plausible." *McDermott v. Clondalkin Grp., Inc.*, 649 F. App'x 263, 267-68 (3d Cir. 2016) (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002)) (internal punctuation omitted). Here, clearly any Zestimate Agreement between Zillow and Realogy is in the possession of Zillow. But Plaintiff has pled *no* facts indicating the basis for its belief.

Plaintiff continues that a company called "Realogy" is the sole brokerage firm to which Zillow offers Zestimate Suppression to in the Triboro Market and that "[t]here is either an express or *de facto* agreement between Zillow and Realogy that Realogy would be the only firm to have availability of Zestimate Suppression during the course of the agreement." SAC ¶¶ 117-119. Plaintiff provides no other facts to support these allegations. And it certainly appears that Plaintiff has access to additional evidence. For example, the SAC indicates that as of May 1, 2020, Realogy was the broker for 36 of 49 listings in the Triboro Market as to homes with an asking price of $2,000,000 or more. *Id.* ¶ 121. It would appear that Plaintiff could allege, if accurate, that only the Zestimates for the Realogy listings are not prominently displayed on the Zillow Website. Thus, these allegations are not entitled to the presumption of truth.

However, even more fundamentally, Plaintiff's causation argument (and, indeed, its theory of the case) is based on the premise that Zestimates are considerably lower than the asking price.[11] With this premise in mind, Plaintiff's essential theory is that it is being treated unfairly, when compared to the Co-Conspirator Brokers, because the Zestimate for its Property is more prominent than the Zestimates for the properties of the Co-Conspirator Brokers.[12] Yet, the SAC lacks plausible facts to support this theory. For example, Plaintiff alleges that "[s]ince 2017 Co-Conspirator Brokers[13] that have had the benefit of Zestimate Suppression through Zestimate Agreements have sold at least eight high-end homes in the town of Cresskill, as compared to just two such sales by Unaffiliated Brokers that do not have the benefit of Zestimate Suppression." SAC ¶ 164. This allegation lacks sufficient factual support to adequately establish causation. For example, the allegation fails to indicate how many homes were on the market, the prices that the homes were listed for, the actual selling prices of the homes, the number of homes that the Co-Conspirator Brokers had vis-à-vis the unaffiliated brokers, and, critically, the Zestimates for each home when compared to the asking price and final sale price. Plaintiff does not plausibly plead but-for causation.

B. Sherman Act, 15 U.S.C. § 1[14]

Zillow also argues that Plaintiff has failed to adequately allege antitrust standing and antitrust injury. Br. at 11-15. The Court previously found that, even assuming Plaintiff had Article III standing, Plaintiff failed to establish antitrust standing. 2d MTD Op. at 11. Like the Article III analysis, the Court found that Plaintiff had failed to sufficiently allege causation to establish antitrust standing. *Id.* at 14-15.

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. To maintain a claim under Section 1, a plaintiff must allege: (1) that the defendant was a party to a "contract, combination . . . or conspiracy" (2) with an unlawful objective to put an "unreasonable restraint on competition." *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 761 (1984); *see also* *In re Ins. Brokerage Antitrust Litig.,* 618 F.3d 300, 315 (3d Cir. 2010); *Rossi v. Standard Roofing, Inc.,* 156 F.3d 452, 461 (3d Cir. 1998). The unlawful objective must relate to antitrust activities. *In re Ins. Brokerage Antitrust Litig.,* 618 F.3d at 331. In other words, an unlawful objective separate from antitrust conduct may be otherwise actionable, but not under the antitrust statutes. *Id.*

Moreover, "even [if] a plaintiff has established Article III standing, antitrust standing remains as a prerequisite to suit, focus[ing] on the nature of the plaintiff's alleged injury, [and] asking whether it is of the type that the antitrust statute was intended to forestall." *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.,* 836 F.3d 261, 269 (3d Cir. 2016) (internal quotations omitted). Antitrust standing, unlike Article III standing, is a "prudential limitation" that does not affect the Court's subject matter jurisdiction over a matter, but rather "prevents a plaintiff from recovering under the antitrust laws."[15] *Ethypharm S.A. v. Abott Labs.,* 707 F.3d 223, 232 (3rd Cir. 2013); *see also* *Sullivan v. DB Invs. Inc.,* 667 F.3d 273, 307 (3d Cir. 2011) ("[L]ack of antitrust standing affects a plaintiff's ability to recover, but does not implicate the subject matter jurisdiction of the court") (citing *Gerlinger v. Amazon.com Inc.,* 526 F.3d 1253, 1256 (9th Cir. 2008))).

The Supreme Court in *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters* articulated several factors to consider when determining whether a plaintiff has antitrust standing. 459 U.S. 519, 535-38 (1983). Since then, the Third Circuit has "organized those factors . . . into the following multifactor test":

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Ethypharm S.A. France, 707 F.3d at 232-33 (quoting *In re Lower Lake Erie Iron Ore Antitrust Litig.,* 998 F.2d 1144, 1165-66 (3d Cir. 1993)). In particular, "[p]rivate plaintiffs pursuing claims under § 1 of the Sherman Act have standing when they suffer an *antitrust injury* that is *causally related* to the defendants' allegedly illegal anti-competitive activity." *Eichorn v. AT&T Corp.,* 248 F.3d 131, 140 (3d Cir. 2001) (emphasis added). In this context, antitrust standing "focuses on the nature of the plaintiff's alleged injury,' [and] ask[s] `whether it is of the type that the antitrust statute was intended to forestall.'" *Hartig Drug Co. Inc.,* 836 F.3d at 269; *see also* *Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc.,* 886 F.3d 332, 344 (3d Cir. 2018) ("Appellants allege their own injury, namely, financial hardship. Tellingly, they fail to aver an antitrust injury, such as a negative impact on consumers or to competition in general, let alone any link between this impact and the harms Appellants have suffered."), *cert. denied sub nom.* *Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc.,* 139 S. Ct. 211 (2018).

The Court previously found that "Defendants' alleged antitrust conduct is Defendants entering into Zestimate Agreements with certain brokers so that the Zestimates for those brokers' real estate listings appear less prominently on their listing pages." 2d MTD Op. at 14. The Court reasoned that Plaintiffs' injury was of a "personal nature" and therefore held it was not an injury "of the type that the antitrust statute was intended to forestall." *Id.* (citing *Hartig Drug Co. Inc.,* 836 F.3d at 269). Defendants argue that the Court should abide by its previous holding here because "Plaintiff does not allege any new facts capable of demonstrating how its own loss of profits reflected a broader harm to competition in the market," Br. at 12-13, and because it is "the law of this case," Reply at 4. Plaintiff argues that lost profits can constitute antitrust injuries. Opp. at 14-15 (citing *Pace Electronics, Inc. v. Canon Computer Systems, Inc.,* 213 F.3d 118, 122 (3d Cir. 2000); *DNAML Pty, Ltd. v. Apple Inc.,* 25 F. Supp. 3d 422, 429 (S.D.N.Y. 2014); *Zschaler v. Claneil Enterprises, Inc.,* 958 F. Supp. 929 (D. Vt. 1997)).

Plaintiff misconstrues the Court's previous holding. The Court did not categorically rule that lost profits could never satisfy antitrust injury; instead, the Court concluded that Plaintiff's specific injury here — its inability to sell the property due to a discrepancy between the Zestimate and the alleged appraised value — was not an injury of the type the antitrust statute was intended to stop. D.E. 33 at 14; *see also* *DNAML Pty, Ltd. v. Apple Inc.,* 25 F. Supp. 3d 422, 429 (S.D.N.Y. 2014) ("A claim for lost profits can constitute a cognizable antitrust injury in the *appropriate* case." (emphasis added)). Thus, although Plaintiff is correct that the *Pace Electronics,* court held that the plaintiff could base its antitrust injury on "lost profits," that case is distinguishable. *Pace Electronics* involved allegations that the defendant terminated the plaintiff's ability to distribute the defendant's goods because the plaintiff refused to adhere to a vertical, minimum-price-fixing agreement between defendant and a third party. *See* Pace Electronics, Inc., 213 F.3d at 122-23. There is no allegation of a price fixing conspiracy here. Indeed, there are insufficient allegations that the Zestimates are routinely lower than the asking price or that the Zestimates on Co-Conspirator Brokers' listings were comparable to the alleged discrepancy between Plaintiff's Zestimate and asking price.

DNAML is similarly inapt. That case involved allegations of an agreement between Apple and major book publishers "to guarantee that [they] would lower the retail price of each e-book in Apple's iBookstore to match the lowest price offered by any other retailer [and] . . . [to] create[] pricing tiers that set caps for the maximum pricing for e-books." *DNMAL* Pty, Ltd., 25 F. Supp. 3d at 426. The agreement "eliminated" the plaintiff retailer's "ability to compete on price." *Id.* The court held that the retailers that wished to compete on price but were unable to had suffered an antitrust injury. *Id.* at 430. In rejecting the Defendants' argument that overcharges were the only kind of damages available to remedy price-fixing conspiracies, the court found that "[a] claim for lost profits can constitute a cognizable injury in the *appropriate* case." *Id.* (emphasis added). Unlike *DNMAL,* Plaintiff does not allege a price-fixing conspiracy. Plaintiff does not plausibly allege that it was somehow foreclosed from competition on price.

Zschaler, is also distinguishable. *See* 958 F. Supp. at 940. There, the plaintiffs pleaded monopolization-based claims. *Id.* at 943-47. Plaintiff does not allege a monopoly claim here. Moreover, the *Zschaler* court found a direct connection between the defendants' monopolization tactics and the harm to the plaintiffs, *id.* at 940, whereas here the Court has found no plausible factual connection between the alleged anticompetitive conduct — the Zestimate Agreements — and the injury Plaintiff allegedly suffered in failing to sell the property. *See also* 2d MTD Op. at 13-14.

However, assuming that Plaintiff has adequately pled that its lost profits are an appropriate antitrust injury in this case, the bigger issue (as with Article III standing) is the lack of plausible allegations as to causation. The Court made this finding in its earlier Opinion. *Id.* at 14 ("Plaintiff fails to demonstrate a casual link between the purported antitrust effect of the Zestimate agreements and the harm Plaintiff has suffered." (citations omitted)). The SAC suffers from the same infirmity. Plaintiff now claims that its antirust injury is that it "paid supracompetitive quality-adjusted prices for brokerage services" that were "lower quality." SAC ¶ 36. However, as discussed above, this is a conclusory allegation not entitled to the presumption of veracity. *Finkelman,* 810 F.3d at 194. The SAC's causation as to the alleged antitrust injury is insufficiently pled.

The parties next turn to the SAC's allegations that the Zestimate Agreements unfairly tilt "the competitive playing field in favor of sellers that list homes through Co-Conspirator Brokers," SAC ¶ 15; *see id.* ¶ 113, and give the Co-Conspirator Brokers "an unequal advantage over their rivals." *See id.* ¶ 77. This Court found similar allegations in the FAC were "at best, speculative and conclusory." 2d MTD Op. at 14. The Court reasoned that such allegations depended on the assumptions that (1) "the Zestimates are always less than the asking price" and (2) that "the co-conspirator brokers have been able to sell comparable properties (to the Property) at a similar price (to Plaintiff's asking amount) in a shorter amount of time." *Id.* And the Court found that the allegations in the FAC failed to adequately support either conclusion. *Id.*

Plaintiff has attempted to add allegations concerning the second assumption. *See* SAC ¶ 164. Specifically, Plaintiff alleges that, since 2017, Co-Conspirator Brokers that use Zestimate Suppression "have sold at least eight high-end homes in the town of Cresskill, as compared to just two such sales by Unaffiliated Brokers that do not have the benefit of Zestimate Suppression." *Id.* Plaintiff further contends that "[o]n information and belief, these patterns persist across the Triboro Market." *Id.* ¶ 165. As discussed above, these allegations standing alone are inadequate. In addition, the Court previously reasoned that "even taking [the FAC's allegations of market wide harm] as true . . . Plaintiff's alleged injury does not reflect any of the antitrust injuries Plaintiff vaguely argues the Zestimates Agreements cause." 2d MTD Op. at 15. Here, Plaintiff attempted to allege an injury arising from these market-wide harms: that it "paid supracompetitive quality-adjusted prices for brokerage services" that were "lower quality." SAC ¶ 36. Again, these conclusory allegations are inadequate. Thus, Plaintiff still fails to adequately plead causation to establish antitrust standing.

C. Dismissal with Prejudice and Sanctions

Defendants argue that the SAC should now be dismissed with prejudice. Br. at 21-22. Defendants also seek sanctions pursuant to this Court's "inherent power." Br. at 21-22. The Court does not find that Plaintiff is litigating in bad faith and therefore denies the motion for sanctions.

A district court may dismiss with prejudice, thus denying leave to amend only if (a) the moving party's delay in seeking amendment is undue, motivated by bad faith, or prejudicial to the non-moving party or (b) the amendment would be futile. *Adams v. Gould Inc.*, 739 F.2d 858, 864 (3d Cir. 1984); *see also Tekman v. Berkowitz,* 639 F. App'x 801, 807 (3d Cir. 2016) (affirming district court's decision dismissing case with prejudice and stating "[a] district court may deny leave to amend on the basis of `undue delay, bad faith, prejudice, or futility.'" (citation omitted)). Here, Plaintiff has been granted two opportunities to cure and the Court finds that any further attempt to cure would be futile. In granting the first motion to dismiss, the Court found that the antitrust allegations were insufficient because Plaintiff had not cited to any authority sustaining an antitrust action under similar circumstances and because Plaintiff had taken inconsistent positions in its Complaint and briefing. MTD Op. at 12-13. In granting the second motion to dismiss, the Court found that Plaintiff had not sufficiently alleged "but for" causation as to Article III standing, 2d MTD Op. at 10-11, and had not plausibly alleged antitrust standing, *id.* at 14-16.

Whether it be Article III causation, antitrust standing causation, or legal causation, Plaintiff falls well short of plausible allegations. As noted, at its core, Plaintiff's theory is that it has not been able to sell the Property due to the prominence of the Zestimate near its asking price, while Co-Conspirator Brokers have a competitive advantage because the Zestimate is not prominently featured near their asking prices.[16] To be plausible, Plaintiff would need to sufficiently allege that the Co-Conspirator Brokers' properties feature a similar asking price as Plaintiff, that the Zestimates for both Plaintiff's and the Co-Conspirator Brokers' properties are comparable, and that the reason that the Co-Conspirator Brokers were able to sell more quickly than Plaintiff was because of the placement of the Zestimates.[17] Plaintiff provides no plausible allegations in this regard, and it is clear that, at a minimum, Plaintiff has access to the Zestimates for the Co-Conspirator Brokers' properties because those Zestimates are on the Zillow Website. Thus, the Court concludes that Plaintiff does not make sufficient allegations because it is unable to do so. As a result, any attempted amendment would be futile.

V. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss, D.E. 42, is granted. The matter is dismissed with prejudice. An appropriate Order accompanies this Opinion.

[1] Defendants' brief in support of their motion to dismiss will be referred to as "Br.," D.E. 42; Plaintiff's opposition to this motion will be referred to as "Opp.," D.E. 49; and Defendants' reply to this opposition will be referred to as "Reply," D.E. 50.

[2] The facts are derived from Plaintiff's Second Amended Complaint. D.E. 40 ("SAC"). When reviewing a motion to dismiss, the Court accepts as true all well-pleaded facts in the complaint. *Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir. 2009).

[3] As the Court noted in its prior Opinion, Plaintiff only refers to the "appraised value" in a conclusory manner. 2d MTD Op. at 10 n. 6. Plaintiff does the same in the SAC.

[4] The SAC does not indicate when the two potential buyers conveyed the information to Plaintiff or how it was conveyed to Plaintiff. The SAC also fails to indicate whether the two potential buyers ultimately purchased a comparable property in the area, much less whether they bought a property that was listed by one of the Co-conspirator Brokers.

[5] Given that Plaintiff's theory of the case is that they were harmed by the prominent location of the Zestimate next to the Property's asking price, Plaintiff inexplicably fails to allege how this seemingly critical change — to the link with View Zestimate — caused them to be unable to sell the Property over such a long period, that is, from January 2018 to the present. Plaintiff also fails to explain how its antitrust allegations are not limited to January 2017 (when Plaintiff first put the Property on the market) to January 2018 (when the View Zestimate link began).

[6] This allegation as to the prominence of the Zestimate is written in the present tense. However, as noted, Plaintiff also claims that after it filed its initial Complaint, Zillow altered the placement of the Property's Zestimate such that the Zestimate no longer "appear[ed] at the top of the property page" under the listing price; instead, a link with "View Zestimate" appeared. *Id.* ¶ 159. The SAC does not clarify this apparent discrepancy.

[7] As discussed in note 6, the SAC fails to indicate how this alleged competitive advantage was impacted when Zillow switched to the "View Zestimate" link.

[8] Again, Plaintiff also alleges Zillow has altered the placement of the Property's "and *others*'" Zestimates such that the Zestimate no longer "appear[ed] at the top of the property page" under the listing price; instead, a link with "View Zestimate" appeared (presumably providing the Zestimate if the link was selected). *Id.* ¶ 159. It is therefore unclear to the Court, based on Plaintiff's allegations, what an internet user actually sees when viewing the Property.

[9] In this context, the Third Circuit has acknowledged that "[s]ome of our sister circuits have questioned how well the `plausibility' standard of *Iqbal* and *Twombly* maps onto standing doctrine." *Finkelman*, 810 F.3d at 194 n.55 (citing *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011), and *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 225 (2d Cir. 2008)). The Circuit continued, "[w]ithout wading too deeply into this particular thicket, we are content to say that, even when reviewing only the bare allegations of a complaint, *Iqbal* and *Twombly* teach that standing cannot rest on mere `legal conclusions' or `naked assertions.'" *Id.*

[10] Plaintiff also alleges that as a result of Zillow's action, Plaintiff faces "decreased quality of brokerage services." *See, e.g.,* SAC ¶ 123. This conclusory allegation is only vaguely explained as meaning that Plaintiff "has received a lower quality of broker service, which is evidenced by the inability to sell its property when compared against similarly priced properties within the Triboro Market during the relevant time period, which have been more likely to sell." *Id.* ¶ 124. Besides the circular reasoning employed (Plaintiff's brokers are of lower quality because they cannot sell the Property), Plaintiff fails to allege any facts demonstrating what it means by "similarly priced," "the relevant time period," or "more likely to sell."

[11] It can be reasonably inferred that Plaintiff would not have the same concern if the Zestimate was *higher than* the asking price because the asking price would then appear to be a relative bargain.

[12] As discussed in notes 5, 6, and 7, the current prominence of the Zestimate is, at best, ambiguous, based on the allegation in the SAC.

[13] In alleging "Co-Conspirator Brokers," Plaintiff seemingly contradicts itself in the SAC because elsewhere it claims that there is only one Co-Conspirator Broker, Realogy.

[14] Plaintiff brings claims under both the Sherman Act, 15 U.S.C. § 1, SAC ¶¶ 167-171, and the New Jersey Antitrust Act, N.J.S.A. 56:9-3, *id.* ¶¶ 172-74. The Court previously found "the New Jersey Antitrust Act shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes" and determined to analyze the claims together. 2d MTD Op. at 11, n. 7 (citing *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 402 n.11 (3d Cir. 2016) (citation omitted)). The parties appear to still agree on this point. Br. at 20; *see generally* Opp. at 18-29 (failing to separately evaluate its New Jersey Antitrust Act argument, instead implicitly relying on its Sherman Act argument). The Sherman Act claim and its analogous New Jersey counterpart will be analyzed together.

[15] This Court discussed the distinction between antitrust standing and Article III standing in its prior opinion. D.E. 33 at 12, n. 8.

[16] And this theory does not account for the change to placement of the Zestimates as alleged in the SAC. Plaintiff indicates that Zillow has altered the placement of the Property's "and *others*'" Zestimates such that the Zestimate no longer "appear[ed] at the top of the property page" under the listing price; instead, a link with "View Zestimate" appeared (presumably providing the Zestimate if the link was selected). *Id.* ¶ 159.

[17] Plaintiffs would also have to sufficiently allege the actual sales price of Co-Conspirator Brokers' properties. If those properties were sold at a discount from the asking price, Plaintiff would face another causation obstacle.

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EJ MGT LLC, *Plaintiff,* v. ZILLOW GROUP, INC., and ZILLOW, INC., *Defendants.*	Civil Action No. 18-584 (JMV)(JBC) **OPINION**

John Michael Vazquez, U.S.D.J.

This case concerns antitrust allegations against a market leader in online real estate information. Plaintiff EJ MGT LLC brings this action against Defendants Zillow Group, Inc., and Zillow, Inc. (collectively, "Zillow" or "Defendants") for conspiracy to restrain trade under the Sherman Act, 15 U.S.C. § 1, and the New Jersey Antitrust Act, N.J.S.A. 56:9-3. D.E. 22. Plaintiff claims that Zillow illegally contracts with certain real estate brokers to alter those brokers' property listings' estimated prices, called "Zestimates," while not offering this option to other brokers, agents, and property owners, such as Plaintiff. Currently pending before the Court is Defendants' motion to dismiss Plaintiff's First Amended Complaint. D.E. 24. The Court reviewed all submissions[1] and considered this motion without oral argument pursuant to Federal Rule of Civil Procedure 78(b) and Local Civil Rule 78.1(b). For the following reasons, Defendants' motion to dismiss is **GRANTED**.

[1] Defendants' brief in support of their motion to dismiss will be referred to as "Defs.' Br." (D.E. 24); Plaintiff's opposition to this motion will be referred to as "Pl.'s Opp." (D.E. 29); and Defendants' reply to this opposition will be referred to as "Defs.' Reply" (D.E. 17).

I. BACKGROUND[2]

The Court included a comprehensive factual background in its February 28, 2019 Opinion, D.E. 20, which the Court incorporates by reference here. By way of background, Plaintiff EJ MGT is a New Jersey limited liability organization that is the owner of 142 Hoover Drive in Cresskill, New Jersey (the "Property"). FAC ¶¶ 19, 37. Zillow is a market leader in online real estate information. *Id.* ¶ 2. Among other things, Zillow manages websites that serve as the central database for all real estate listings (including those that are not for sale) in the United States. *Id.* ¶¶ 51-59. For all listed properties, Zillow includes a Zestimate, which is Zillow's own estimate of the current market value of a home based on an algorithm that considers property facts (such as location, lot size, square footage, number of bedrooms/bathrooms), tax assessments, prior transactions (both of the particular property historically and neighboring properties), and user data. *Id.* ¶¶ 59-61. Zillow represents that the Zestimate is the "starting point" for determining a home's value. *Id.* ¶ 62.

In January 2017, Plaintiff listed the Property for sale. *Id.* ¶ 108. Keller Williams served as the broker and listing agent, and Zillow displayed the Property on its website. *Id.* ¶¶ 108-109. Plaintiff alleges that "the difference between the [Property's] Zestimate and the [Property's] listing price has impacted and/or informed [potential buyers'] decisions [] to [not] purchase [the Property]." *Id.* ¶ 110. For example, on January 2, 2018, the Property was listed on Zillow for $7,788,000. *Id.* ¶ 76(f). Immediately under the sale price, the Zestimate reflected a price of

[2] The facts are derived from Plaintiff's First Amended Complaint. D.E. 22 ("FAC"). When reviewing a motion to dismiss, the Court accepts as true all well-pleaded facts in the complaint. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Additionally, a district court may consider "exhibits attached to the complaint and matters of public record" as well as "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

$3,703,597. *Id.* Plaintiff alleges that certain unnamed "[p]otential buyers" have advised Plaintiff that the difference between the Property's listed price and its Zestimate "has impacted and/or informed" their decision to not purchase the Property. *Id.* ¶ 110.

Plaintiff further contends that after Plaintiff filed its original Complaint on January 15, 2018, Zillow altered the placement of the Property's Zestimate such that the Zestimate no longer "appear[ed] at the top of the property page" under the listing price; instead, a link with "View Zestimate" appeared (presumably providing the Zestimate if the link was selected).[3] *Id.* ¶¶ 115-116. Plaintiff also asserts that the Property's Zestimate on April 11, 2018 fluctuated from $3,649,959 to $6,988,251 to $3,751,865. *Id.* ¶ 119, Ex. D, E, F.[4] As of March 25, 2019, the Property's Zestimate was $5,415,788. *Id.* ¶ 121. Plaintiff claims that it has not been able to sell the Property to date, but acknowledges that the Property is currently being rented and is not presently listed for sale. *Id.* ¶ 122.

The essence of Plaintiff's claim is that Zillow participated in an anticompetitive conspiracy by contracting with certain brokers – "co-conspirator brokers" – to omit the Zestimates of particular properties from under their listing prices. *Id.* ¶¶ 1,3. As noted, at the time of the original Complaint, the Property's Zestimate was listed directly below its sales price. *Id.* ¶¶ 10, 76(f). Plaintiff alleges that Zillow entered into "Zestimate Agreements," which allowed certain brokers to relocate their properties' Zestimates so that they did not appear directly under their properties'

[3] In support of this allegation, Plaintiff cites to Exhibit B of its amended complaint, which Plaintiff describes as a "screenshot of [the Property] listing following the filing of the original Complaint." FAC ¶ 116. However, Exhibit B is not a listing of the Property, but rather a listing of a completely different property. *See* FAC, Ex. B.

[4] Plaintiff also acknowledges that these Zestimates include the following language: "The list price and Zestimate for [the Property] are very different, so we might be missing something." FAC, Ex. D, E, F.

listing prices. *Id.* ¶¶ 15-16. Importantly, however, Zillow does not completely remove the Zestimate for any listing. *Id.* ¶ 77. Even when it removes the Zestimate from under the listing price, Zillow still makes the Zestimate available under "Zestimate details" on the property's Zillow page. *Id.*

Plaintiff contacted Zillow to remove the Property's Zestimate from directly underneath the Property's listing price, but Zillow refused. *Id.* A Zillow representative explained that "this feature is only available on our premiere agent program for real estate agents" and forwarded Plaintiff information on that program. *Id.* ¶ 78. The Zillow representative later clarified that "Zillow has various partnerships with Agents, Brokerages, and Vendors that may display a listing page differently than others." *Id.* Plaintiff alleges that even premier agents cannot gain this preferential treatment unless they are affiliated with a co-conspirator broker who has a Zestimate Agreement. *Id.* ¶ 79. Plaintiff asserts that those brokers, agents, and individual homeowners who are not associated with the co-conspirator brokers "are left no choice but to have Zestimates appear prominently" on their properties' Zillow pages, putting them at a distinct competitive disadvantage and harming overall competition in the local and national real estate markets. *Id.* ¶¶ 16, 93.

II. PROCEDURAL HISTORY

Plaintiff filed its original Complaint on January 1, 2018 alleging five causes of action: (1) conspiracy to restrain trade under Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) conspiracy to restrain trade under the New Jersey Antitrust Act, N.J.S.A. 56:9-3; (3) fraud under the New Jersey Consumer Fraud Act ("NJCFA"), N.J.S.A. 56:8-1 *et seq.*; (4) slander of title/product disparagement under New Jersey common law; and (5) interference with prospective economic advantage under New Jersey common law. D.E. 1, Compl. ¶¶ 97-127. Zillow filed a motion to dismiss Plaintiff's Complaint, D.E. 11, which the Court granted, D.E. 20. The Court also provided

Plaintiff an opportunity to file an amended complaint, which Plaintiff filed on March 29, 2019, alleging only two of its previous five counts: (1) conspiracy to restrain trade under Section 1 of the Sherman Act, and (2) conspiracy to restrain trade under the New Jersey Antitrust Act. D.E. 22. Zillow again moved to dismiss Plaintiff's Amended Complaint. D.E. 24. Plaintiff filed opposition, D.E. 29, to which Zillow replied. D.E. 30.

III. STANDARD OF REVIEW

A. Rule 12(b)(1)

In deciding a Rule 12(b)(1) motion for lack of subject-matter jurisdiction, a court must first determine whether the party presents a facial or factual attack because the distinction determines how the pleading is reviewed. A facial attack "contests the sufficiency of the complaint because of a defect on its face," whereas a factual attack "asserts that the factual underpinnings of the basis for jurisdiction fails to comport with the jurisdictional prerequisites." *Elbeco Inc. v. Nat'l Ret. Fund*, 128 F. Supp. 3d 849, 854 (E.D. Pa. 2015) (quoting *Moore v. Angie's List, Inc.*, 118 F. Supp. 3d 802, 806 (E.D. Pa. 2015)).

For a facial attack, "the Court must consider the allegations of the complaint as true," much like a Rule 12(b)(6) motion to dismiss. *Bd. of Trs. of Trucking Emps of N. Jersey Welfare Fund, Inc. v. Caliber Auto Transfer, Inc.*, No. 09-6447, 2010 WL 2521091, at *8 (D.N.J. June 11, 2010) (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006)). However, for a factual attack, "the court may consider and weigh evidence outside the pleadings to determine if it has jurisdiction." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000), *holding modified by Simon v. United States*, 341 F.3d 193 (3d Cir. 2003). The burden is on the plaintiff to prove that the Court has jurisdiction. *Id.*

As for a district court's power to hear the case, "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007). One key aspect of this case-or-controversy requirement is standing. *See id.* "The standing inquiry focuses on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Constitution Party of Pa.*, 757 F.3d at 360. To establish standing, a plaintiff must satisfy a three-part test, showing: "(1) an 'injury in fact,' *i.e.,* an actual or imminently threatened injury that is 'concrete and particularized' to the plaintiff; (2) causation, *i.e.,* traceability of the injury to the actions of the defendant; and (3) redressability of the injury by a favorable decision by the Court." *Nat'l Collegiate Athletic Ass'n v. Gov. of N.J.*, 730 F.3d 208, 218 (3d. Cir. 2013).

B. Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a count for "failure to state a claim upon which relief can be granted[.]" To withstand a motion to dismiss under Rule 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is plausible on its face when there is enough 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). Although the plausibility standard "does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted unlawfully." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (internal quotation marks and citations omitted). As a result, a plaintiff must "allege sufficient facts to raise a reasonable expectation that discovery will uncover proof of [his] claims." *Id.* at 789.

In evaluating the sufficiency of a complaint, a district court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). A court, however, is "not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007). If, after viewing the allegations in the complaint most favorable to the plaintiff, it appears that no relief could be granted under any set of facts consistent with the allegations, a court may dismiss the complaint for failure to state a claim. *DeFazio v. Leading Edge Recovery Sols.*, 2010 WL 5146765, at *1 (D.N.J. Dec. 13, 2010).

IV. LAW AND ANALYSIS

A. Article III Standing

A plaintiff seeking to establish Article III standing "must demonstrate '(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.'" *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (quoting *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 358-59 (3d Cir. 2015) (internal quotations omitted and punctuation modified)). The first element, an injury-in-fact, requires Plaintiff to show "'the invasion of a concrete and particularized legally protected interest' resulting in harm 'that is actual or imminent, not conjectural or hypothetical.'" *Finkelman*, 810 F.3d at 193 (quoting *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014)). The second element, causation, "requires the alleged injury to 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.'" *Finkelman*, 810 F.3d at 193 (quoting *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137-38 (3d Cir. 2009)). The Third Circuit has explained that

Article III's causation requirement is "akin to 'but for' causation in tort and may be satisfied 'even where the conduct in question might not have a proximate cause of the harm.'" *Finkelman*, 810 F.3d at 193 (quoting *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 418 (3d Cir. 2013)). The third element, redressability, requires a plaintiff "to show that it is 'likely, as opposed to merely speculative,' that the alleged injury will be redressed by a favorable decision." *Finkelman*, 810 F.3d at 194 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

"When assessing standing on the basis of the facts alleged in a complaint," courts "apply the same standard of review we use when assessing a motion to dismiss for failure to state a claim." *Id.* (citing *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F. 3d 235, 243 (3d Cir. 2012)). The Third Circuit has described this process as a three-step inquiry:

> First, we "tak[e] note of the elements a plaintiff must plead to state a claim" – here, the three elements of Article III standing. Second, we eliminate from consideration any allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Third, "where there are well-pleaded factual allegations, [we] assume their veracity and then determine whether they plausibly" establish the prerequisites of standing. In conducting this analysis, we are mindful of the Supreme Court's teaching that all aspects of a complaint must rest on "well-pleaded factual allegations" and not "mere conclusory statements." Thus, to survive a motion to dismiss for lack of standing, a plaintiff "must allege facts that affirmatively and plausibly suggest that it has standing to sue." Speculative or conjectural assertions are not sufficient.

Id. (internal citations omitted).[5] With respect to causation, the Third Circuit has explained that

> [t]he causation element of standing requires a plaintiff to allege facts sufficient to show that his or her injury is "fairly traceable" to the

[5] In this context, the Third Circuit has acknowledged that "[s]ome of our sister circuits have questioned how well the 'plausibility' standard of *Iqbal* and *Twombly* maps onto standing doctrine." *Finkelman*, 810 F.3d at 194 n.55 (citing *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011), and *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 225 (2d Cir. 2008)). The Circuit continued, "[w]ithout wading too deeply into this particular thicket, we are content to say that, even when reviewing only the bare allegations of a complaint, *Iqbal* and *Twombly* teach that standing cannot rest on mere 'legal conclusions' or 'naked assertions.'" *Id.*

> alleged wrongdoing of the defendant. We have explained that traceability requires, at a minimum, that the defendant's purported misconduct was a "but for" cause of the plaintiff's injury.

Id. Here, Plaintiff's injury-in-fact is alleged as follows:

> Plaintiff has been injured and will continue to be injured in their business and property by taking longer to sell its property, receiving less for its property, and otherwise incurring lost profits in connection with the sale of [the Property] because of the presence of a prominently displayed Zestimate when other sellers who are represented by brokers who are part[ies] to the Zestimate Agreements are able to conceal their Zestimates.

FAC ¶126. In sum, Plaintiff's alleged injury is that, as a result of Defendants' Zestimate Agreements, Plaintiff has been unable to sell the Property, thus suffering damages. *See also* Pl.'s Opp. at 25 ("Plaintiff's injury, a lost opportunity of a sale as a result of a prominent Zestimate, was [] a foreseeable consequence of the Zestimate Agreements[.]"); *see also id.* at 29 ("Plaintiff alleges with requisite specificity how the Zestimate Agreements . . . caused Plaintiff to suffer [an] injury-in-fact in the form of lost profits."). Assuming that Plaintiff's alleged injury is sufficient to qualify as an injury-in-fact, Plaintiff nonetheless fails to establish the causation element of Article III standing.

"The causation element of standing requires a plaintiff to allege facts sufficient to show that his or her injury is 'fairly traceable' to the alleged wrongdoing of the defendant." *Finkelman*, 810 F.3d at 198. Moreover, such "traceability requires, *at a minimum*, that the defendant's purported misconduct was a 'but for' cause of the plaintiff's injury." *Id.* (emphasis added). In other words, Plaintiff must establish that "but for" Defendants' Zestimate Agreements with other brokers, Plaintiff would not have suffered lost profits from its inability to sell the Property. The facts alleged in the First Amended Complaint, however, fail to adequately establish this causal connection.

Here, Plaintiff's alleged causal connection between its injury and Defendants' conduct appears to concern the *value* of the Property's Zestimate rather than the *location* of the Property's Zestimate, and certainly does not appear to concern the *location* of Zestimates on the *co-conspirators'* property listings. For example, Plaintiff alleges that it "has been unable to sell [the Property] [because] [p]otential buyers have advised [Plaintiff's] agents and/or representatives that the *difference between the [Property's] Zestimate and the [Property's] listing price* has impacted and/or informed their decisions not to purchase [the Property]." FAC ¶ 110 (emphasis added). Plaintiff further alleges that "[t]hroughout January of 2017 and up to the filing of the original Complaint in this matter, the Zestimate for [the Property] remained around $3 million." *Id.* ¶ 111. Plaintiff contends that "[t]his Zestimate was *well below the appraised value*[6] of [the Property]," and that two potential buyers informed Plaintiff "that they viewed [the Property's listing price] and also viewed the [Property's] Zestimate at this same time when [the Property] was around [three] million and were turned off from considering a potential purchase of the property *based on the discrepancy between the listing price and the Zestimate.*" *Id.* ¶¶ 111-112 (emphasis added).

Plaintiff does not plausibly allege facts to support the reasonable inference that it has been unable to sell the Property because of the *lack of prominent* Zestimates on *other brokers'* listings, or even because of the *prominence* of the Zestimate on Plaintiff's *own* listing. Rather, it appears from Plaintiff's allegations that its injury is instead casually connected to the discrepancy in *value* between the Property's asking price and the Property's Zestimate. Presumably, if the Zestimate for the Property was *higher* than Plaintiff's asking price, then Plaintiff would not be claiming any

[6] Of note, Plaintiff's allegations as to the appraised value are conclusory. Plaintiff fails to indicate the appraised value, much less provide plausible factual support for how the appraisal was calculated.

injury – which leads to the conclusion that it is the amount of the Zestimate, rather than its location, which causes Plaintiff's alleged injury. At best, it is speculative and conjectural to infer that Plaintiff would not have encountered the same inability to sell the Property had Defendants not entered into Zestimate Agreements with other brokers. In sum, Plaintiff's allegations do not support the plausible inference that it's alleged injury (lost profits from its inability to sell the Property) is "fairly traceable" to Defendants' challenged conduct (providing certain brokers the option of altering the *positioning* of Zestimates on their *own* listings). Accordingly, the Court finds that Plaintiff has not satisfied the causation element of Article III standing, and therefore, Plaintiff does not have standing to bring its suit.

B. Sherman Act, 15 U.S.C. § 1[7]

Even assuming, however, that Plaintiff did have Article III standing, Plaintiff still fails to establish that it has antitrust standing. Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. To maintain a claim under Section 1, a plaintiff must allege: (1) that the defendant was a party to a "contract, combination . . . or conspiracy" (2) with an unlawful objective to put an "unreasonable restraint on competition." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010); *Rossi v. Standard*

[7] Plaintiff brings claims under both the Sherman Act, 15 U.S.C. § 1, FAC ¶¶ 123-127, and New Jersey Antitrust Act, N.J.S.A. 56:9-3, *id.* ¶¶ 128-130. "[T]he New Jersey Antitrust Act shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 402 n.11 (3d Cir. 2016) (quoting *State v. N.J. Trade Waste Ass'n*, 96 N.J. 8, 19 (1984)). The parties agree on this point. Defs.' Br. at 15; *see generally* Pl.'s Opp. (failing to separately evaluate its New Jersey Antitrust Act argument, instead implicitly relying on its Sherman Act argument). Therefore, the federal Sherman Act claim and its analogous New Jersey counterpart will be analyzed together.

Roofing, Inc., 156 F.3d 452, 461 (3d Cir. 1998). The unlawful objective must relate to antitrust activities. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 331. In other words, an unlawful objective separate from antitrust conduct may be otherwise actionable, but not under the antitrust statutes. *Id.*

Moreover, "even [if] a plaintiff has established Article III standing, antitrust standing remains as a prerequisite to suit, focus[ing] on the nature of the plaintiff's alleged injury, [and] asking whether it is of the type that the antitrust statute was intended to forestall." *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 269 (3d Cir. 2016) (internal quotations omitted). Antitrust standing, unlike Article III standing, is a "prudential limitation" that does not affect the Court's subject matter jurisdiction over a matter, but rather "prevents a plaintiff from recovering under the antitrust laws."[8] *Ethypharm S.A. v. Abott Labs.*, 707 F.3d 223, 232 (3rd Cir. 2013); *see also Sullivan v. DB Invs. Inc.*, 667 F.3d 273, 307 (3d Cir. 2011) ("[L]ack of antitrust standing

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[8] As recently explained by the Third Circuit in *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*,

> That Article III standing and antitrust standing both employ the term "standing" tends to confuse matters. The two concepts are distinct, with the former implicating a court's subject matter jurisdiction and the latter affecting only the plaintiff's ability to succeed on the merits. In *Ethypharm S.A. France v. Abbott Laboratories*, we explained that Article III standing is of constitutional and hence jurisdictional consequence, while antitrust standing is not[.] Constitutional standing is augmented by consideration of prudential limitations. For plaintiffs suing under federal antitrust laws, one of the prudential limitations is the requirement of antitrust standing. It does not affect the subject matter jurisdiction of the court, as Article III standing does, but prevents a plaintiff from recovering under the antitrust laws.

836 F.3d 261, 269-70 (3d Cir. 2016) (quoting *Ethypharm S.A.*, 707 F.3d at 232) (internal quotations, footnotes, and citations omitted)). Thus, for example, if a plaintiff showed an injury due to a tort, the plaintiff would have Article III standing but would lack antitrust standing.

affects a plaintiff's ability to recover, but does not implicate the subject matter jurisdiction of the court") (citing *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1256 (9th Cir. 2008))).

The Supreme Court in *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters* articulated several factors to consider when determining whether a plaintiff has antitrust standing. 459 U.S. 519, 535-38 (1983). Since then, the Third Circuit has "organized those factors . . . into the following multifactor test":

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Ethypharm S.A. France, 707 F.3d at 232-33 (quoting *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1165-66 (3d Cir. 1993)). In particular, "[p]rivate plaintiffs pursuing claims under § 1 of the Sherman Act have standing when they suffer an *antitrust injury* that is *causally related* to the defendants' allegedly illegal anti-competitive activity." *Eichorn v. AT&T Corp.*, 248 F.3d 131, 140 (3d Cir. 2001) (emphasis added). In this context, antitrust standing "focuses on the nature of the plaintiff's alleged injury,' [and] ask[s] 'whether it is of the type that the antitrust statute was intended to forestall.'" *Hartig Drug Co. Inc.*, 836 F.3d at 269; *see also Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc.*, 886 F.3d 332, 344 (3d Cir. 2018) ("Appellants allege their own injury, namely, financial hardship. Tellingly, they fail to aver an antitrust injury, such as a negative impact on consumers or to competition in general, let alone any link between this impact and the harms Appellants have suffered."), *cert. denied sub nom. Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc.*, 139 S. Ct. 211 (2018).

Here, Defendants' alleged antitrust conduct is Defendants entering into Zestimate Agreements with certain brokers so that the Zestimates for those brokers' real estate listings appear less prominently on their listing pages. FAC ¶ 1. As previously noted, however, Plaintiff's alleged injury is of a personal nature – *i.e.*, lost profits from its inability to sell the Property. FAC ¶ 126; *see also* Pl.'s Opp. at 25 ("Plaintiff's injury, a lost opportunity of a sale as a result of a prominent Zestimate, was [] a foreseeable consequence of the Zestimate Agreements[.]"); *see also id.* at 29 ("Plaintiff alleges with requisite specificity how the Zestimate Agreements . . . caused Plaintiff to suffer injury-in-fact in the form of lost profits."). This personalized injury, however, is not "of the type that the antitrust statute was intended to forestall." *Hartig Drug Co. Inc.*, 836 F.3d at 269.

To the extent Plaintiff claims that the Zestimate Agreements give the co-conspirator brokers a "powerful advantage over their rivals," FAC ¶ 21, or otherwise "tilt the playing field in [their] favor," *id.* ¶ 34, such claims are, at best, speculative and conclusory. Plaintiff's allegations rely on at least two assumptions that are not supported by an plausible facts: first, that the Zestimates are always less than the asking price, and second, that the co-conspirator brokers have been able to sell comparable properties (to the Property) at a similar price (to Plaintiff's asking amount) in a shorter amount of time. Plaintiff fails to plausibly allege facts from which the Court can reasonably infer the same. Additionally, while Plaintiff vaguely alleges various other injuries to consumers and competition in general that purportedly result from the Zestimate Agreements, *see* FAC ¶¶ 30, 34, 83, 85, 99, 124, Plaintiff fails to allege that it suffered from any of these injuries. Simply put, Plaintiff fails to demonstrate a causal link between the purported antitrust effect of the Zestimate Agreements and the harm Plaintiff has suffered. *Philadelphia Taxi Ass'n, Inc.*, 886 F.3d at 344; *see also Eichorn*, 248 F.3d at 140 ("Private plaintiffs pursuing claims under § 1 of the

Sherman Act have standing when *they suffer* an antitrust injury that is *causally related* to the defendants' allegedly illegal anti-competitive activity.").

For example, Plaintiff alleges that "[t]he Zestimate Agreements . . . have the purpose and effect of stifling and distorting the flow of price related information, anticompetitively tilting the playing field in favor of the co-conspirator Brokers, and creating and heightening barriers to entry in the market for residential real estate listing services." *Id.* ¶ 34. As a result of these effects, Plaintiff alleges that Zillow users are injured because they, *inter alia*: (1) "are forced either to make decisions based on selectively distorted information or to expend additional time and effort to scour each listing for potentially concealed information"; (2) are forced to pay "increased [costs] in the form of advertising fees, brokers' commissions, or other costs incurred solely to alter or conceal the display of Zestimates"; and (3) face barriers to entry and expansion in the listing and sale of residential real estate. *Id.* ¶¶ 30, 34, 83, 85, 99, 124. Notably, Plaintiff fails to provide adequate factual support for such allegations.

Even taking these allegations as true, however, Plaintiff's alleged injury does not reflect any of the antitrust injuries Plaintiff vaguely argues the Zestimate Agreements cause. Plaintiff does not make allegations that it was forced to make a decision based on distorted information; or that it was forced to expend extra time looking for a Zestimate; or that it had to (or imminently was going to) pay increased fees or other costs as a result of the Zestimate Agreements; or that it faced barriers of entry into the real-estate listing market. Instead, Plaintiff's alleged injury arises from its inability to sell the Property, purportedly as a result of the Zestimate Agreements. FAC ¶ 126. And, as noted above, it is not actually the placement of the Zestimates of which Plaintiff complains, but the amount of the Zestimate vis-à-vis the Property. Accordingly, the Court finds that Plaintiff lacks antitrust standing and therefore dismisses Plaintiff's claims on this alternative ground.

V. CONCLUSION

In sum, the Court **GRANTS** Defendants' motion to dismiss, D.E. 24, without prejudice. Plaintiff has thirty (30) days to file a Second Amended Complaint, if it so chooses, consistent with this Opinion. If Plaintiff fails to do so, this matter will be dismissed with prejudice. An appropriate Order accompanies this Opinion.

Date: March 3rd, 2020

John Michael Vazquez, U.S.D.J.

177 Conn. 218 (1979)

ELIDA, INC.
v.
HARMOR REALTY CORPORATION ET AL.

Supreme Court of Connecticut.

Argued December 13, 1978.
Decision released April 3, 1979.

COTTER, C. J., LOISELLE, BOGDANSKI, LONGO and PETERS, JS.

219 *219 *Robert S. Reger,* for the appellant (plaintiff).

Stephen B. Alderman, with whom were *Raymond Parlatto,* and, on the brief, *Robert A. Ginsburg* and *Dana E. Friedman,* for the appellees (defendants The Gourmet Shoppe, Inc., et al.).

John R. Lacey, assistant attorney general, with whom, on the brief, were *Carl R. Ajello,* attorney general and *Gerard J. Dowling,* assistant attorney general, for the appellee (defendant state of Connecticut).

220 *220 COTTER, C. J.

In this appeal by the plaintiff, we are required to determine the applicability of the Connecticut Anti-Trust Act[1] to a restrictive covenant contained in a commercial lease between the plaintiff and the named defendant.

The defendant Harmor Realty Corporation is the owner, landlord and lessor of premises in the Amity Shopping Center, a shopping complex located in New Haven and comprised of approximately twenty-five tenants. The plaintiff, a family-owned corporation doing business as Westville Home Bakery, entered into an agreement on October 28, 1970, with the defendant Harmor Realty Corporation wherein the plaintiff leased 2000 square feet of space located in the shopping center for the purpose of engaging in the production and retail sale of freshly baked goods. The lease continued from October 15, 1970, until November 14, 1976; and a contemporaneously-executed addendum to the lease gave the plaintiff the option to extend the term of the lease for an additional four-year period to November 14, 1980, which the plaintiff duly exercised. The lease addendum further provided that the plaintiff would have, subject to certain exceptions, "the exclusive right to sell products normally sold by a bakery shop," and that the defendant lessor would not "rent any other space in the shopping center for the purpose of baking on the premises."[2]

221 *221 On or about December 28, 1976, the Harmor Realty Corporation leased other space in its shopping complex to the defendant The Gourmet Shoppe, Inc., a business engaged in the sale of products normally sold by a bakery shop. Although Harmor Realty Corporation knew, or should have known, that The Gourmet Shoppe, Inc., would engage in the sale of bakery products,[3] it failed to take any action to prohibit the sale of such products despite the plaintiff's repeated demands. Both defendant corporations, and their respective presidents, had actual and constructive notice of the restrictive covenant contained in the plaintiff's lease.

The plaintiff brought the present action in the Superior Court seeking (1) a temporary and permanent injunction enjoining the defendant The Gourmet Shoppe, Inc., from engaging in the retail sale of bakery products for off-premises consumption; (2) a temporary and permanent injunction enjoining the defendant Harmor Realty Corporation from failing to perform its contractual obligations to the plaintiff "and/or from failing to otherwise act so as to cause the defendant The Gourmet Shoppe, Inc.... to cease and desist from the retail sale, for off-premises consumption," of bakery products; and (3) money damages and attorney's fees and costs. Following the entry of the trial court's order granting the temporary injunctions requested by the plaintiff pending a final hearing, the defendants filed special defenses alleging that the lease provision
222 upon which the plaintiff based its claim for relief constituted an unlawful *222 restraint of trade in violation of the state antitrust act and was, therefore, unenforceable. Pursuant to General Statutes § 35-32 (b), the state of Connecticut was permitted to intervene as a party to this action with the status of defendantintervenor. In a bifurcated trial for the purpose of which the defendants admitted the essential allegations of the first count of the plaintiff's amended complaint alleging irreparable injury as a result of a breach of the restrictive covenant in its lease, it was agreed that the sole issue to be

decided by the court was whether the state antitrust act should be construed so as to prohibit the enforcement of the restrictive covenant and thus prohibit the issuance of the permanent injunctions sought by the plaintiff.

The trial court concluded that the restrictive covenant sought to be enforced by the plaintiff was intended to prevent competition with the plaintiff and will have that effect if enforced; and that the covenant in question was "per se" unreasonable and contrary to the express language of General Statutes § 35-28 (d). Judgment was rendered in favor of all defendants on the first count of the plaintiff's amended complaint and the requests for permanent injunctions were denied.[4] The plaintiff appealed to this court from the judgment rendered.

I

At the outset, we consider the threshold question raised by the plaintiff whether the state antitrust act should be construed so as to apply to a claimed vested right it has in a restrictive covenant in a contract originally entered into prior to the
223 effective *223 date of the act. The plaintiff claims that such an interpretation would be contrary to well-settled principles regarding the retrospective application of statutes; violative of the plaintiff's right of redress for injuries guaranteed by article first, § 10 of the state constitution; in conflict with the contract clause of the federal constitution; and would amount to a denial of due process. In view of the accepted interpretation of the applicability of such legislation, we are not persuaded by the plaintiff's arguments in this regard.

General Statutes § 35-26 provides that any contract in restraint of trade or commerce is unlawful. The fact that a contract may have been executed before the statute took effect is immaterial if it is in existence thereafter. The prohibition is not directed at the formation and existence of the contract prior to the effective date of the act, but in the persistence of the parties in it after it has become unlawful. "The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act." *United States* v. *Trans-Missouri Freight Assn.,* 166 U.S. 290, 342, 17 S. Ct. 540, 41 L. Ed. 1007; see *State* v. *Missouri, Kansas & Texas Ry. Co. of Texas,* 99 Tex. 516, 527, 91 S.W. 214; 54 Am. Jur. 2d, Monopolies § 454.

"[I]t is settled that neither the `contract' clause nor the `due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general
224 welfare of the community ... and that all contract and property rights are held subject to its *224 fair exercise." *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U.S. 548, 558, 34 S. Ct. 364, 58 L. Ed. 721; *Ansonia* v. *Ansonia Water Co.,* 101 Conn. 151, 157, 125 A. 474. "`[C]ontracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.' *[Knox* v. *Lee,* 79 U.S. (12 Wall.) 457, 551]." *Louisville & Nashville R. Co.* v. *Mottley,* 219 U.S. 467, 482, 31 S. Ct. 265, 55 L. Ed. 297. Consequently, the state, pursuant to its lawful exercise of the police power, may rightfully prohibit the continuance in the future of those things already in existence which are deemed injurious to the rights and interests of its citizens so as to justify such an exercise of the power whether the continuance of the things is provided for by contract or not. See *Ansonia* v. *Ansonia Water Co.,* supra, 156-58. The right of private contract, therefore, "must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State." *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U.S. 372, 377, 39 S. Ct. 117, 63 L. Ed. 309.

Our conclusion that the legislation in question may constitutionally apply to the contract entered into prior to the act's passage, which included the option to extend for an additional term, is in accord with the decisions of the United States Supreme Court regarding the applicability of federal antitrust provisions. See *United States* v. *Southern Pacific Co.,* 259 U.S. 214, 234-35, 42 S. Ct. 496, 66 L. Ed. 907; *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211, 234, 20 S. Ct. 96,
225 44 L. Ed. 136; *United States* v. *Trans-Missouri Freight Assn.,* supra. In view of the position we take on this issue, *225 we need not consider whether the renewal of the plaintiff's lease for an additional four-year term after the Connecticut Anti-Trust Act was enacted might be considered the creation of a new lease as of the date of the renewal.

II

The plaintiff's principal claim of error in this appeal is directed at the trial court's determination that the restrictive covenant contained in the plaintiff's lease was "per se" unreasonable and contrary to the express langauge of § 35-28 (d) of the General Statutes.[5] The plaintiff argues that the so-called "Rule of Reason" which is utilized, in certain cases, by federal courts construing the Sherman Antitrust Act (26 Stat. 209, as amended, 15 U.S.C. §§ 1-7) was the appropriate standard for the trial court to apply in the present case. See, generally, Bork, "The Rule of Reason and the Per Se Concept," part 1, 74 Yale L.J. 775 (1965); Bork, "The Rule of Reason and the Per Se Concept," part 2, 75 Yale L.J. 373 (1966).

Under the common law, the well-settled rule is that an anticompetitive covenant ancillary to a lawful contract is enforceable if the restraint upon trade is reasonable. *Scott* v. *General Iron & Welding Co.,* 171 Conn. 132, 137, 368 A.2d 111; *Domurat* v. *Mazzaccoli,* 138 Conn. 327, 330, 84 A.2d 271; *Mattis* v. *Lally,* 138 Conn. 51, 54, 82 A.2d 155; *Dick* v. *Sears-Roebuck & Co.,*
226 115 Conn. 122, 126, 160 A. 432; *Samuel Stores, Inc.* v. *Abrams,* 94 Conn. 248, *226 252, 108 A. 541; 54 Am. Jur. 2d, Monopolies § 511; see note, "Restrictive Covenants in Shopping Center Leases," 34 N.Y.U. L. Rev. 940 (1959). To satisfy this requirement of reasonableness, we have stated that "the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest. [Citations omitted.]" *Mattis* v. *Lally,* supra, 54. A prohibition against the conduct of a rival business contained in a deed, for example, has been held not to violate public policy where the restriction upon the conduct of a certain business is limited to the particular piece of land transferred, for a reasonable purpose and for a reasonable period of time. *Dick* v. *Sears-Roebuck & Co.,* supra.

Mindful of the foregoing principles and authorities, we review the trial court's conclusion that the express language of General Statutes § 35-28 (d) renders the restrictive covenant in question per se unreasonable without resort to an examination of the "reasonableness" of that covenant under all the circumstances.

There is no dispute between the parties that the Connecticut Anti-Trust Act incorporates, in modified form, and with notable exceptions, various provisions of the federal antitrust laws, especially the Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1 et seq. See *Mazzola* v. *Southern New England Telephone Co.,* 169 Conn. 344, 347-48, 363 A.2d 170; Brodigan, "The Connecticut Antitrust Act," 47 Conn. B.J. 12, 16 (1973). In such a situation, the judicial interpretation of the federal act is particularly
227 pertinent in our construction of the state statute. *United* *227 *Aircraft Corporation* v. *International Assn. of Machinists,* 161 Conn. 79, 85, 285 A.2d 330, cert. denied, 404 U.S. 1016, 92 S. Ct. 675, 30 L. Ed. 2d 663; *Windsor* v. *Windsor Police Department Employees Assn., Inc.,* 154 Conn. 530, 536, 227 A.2d 65. Section 35-28 (d) has no specific counterpart in the federal antitrust laws, but rather, it is considered to be a codification of what have come to be known as "per se" violations of the Sherman Act, notably § 1. Brodigan, supra, 24.

In *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545, the court, while recognizing that there were some agreements whose validity depended on the surrounding circumstances, observed (p. 5): "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Since the area of per se violations is carefully limited;[6] *Walker Process*
228 *Equipment, Inc.* v. *Food Machinery & Chemical Corporation,* 382 U.S. 172, 178, 86 S. Ct. *228 347, 15 L. Ed. 2d 247; it can be stated generally that the following are recognized as "per se" violations of the federal act: (1) price fixing; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, reh. denied, 310 U.S. 658, 60 S. Ct. 1091, 84 L. Ed. 1421; (2) agreements among competitors to divide markets or allocate customers; *Continental Ore Co.* v. *Union Carbide & Carbon Corporation,* 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777; *Timkin Roller Bearing Co.* v. *United States,* 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199; (3) certain tying arrangements; *Fortner Enterprises, Inc.* v. *United States Steel Corporation,* 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495; and (4) group boycotts. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741.

In the present case, the defendants argue that the prohibition of § 35-28 (d) of our state act may be construed with reference to federal cases dealing with group boycotts or concerted refusals to deal which have been held to be per se illegal. See *United States* v. *General Motors Corporation,* 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* supra. The restrictive covenant in the present case, however, is clearly distinguishable from "collective boycott" cases which involve horizontal restraints. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* supra (agreement between suppliers); *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457, 668, 61 S. Ct. 703, 85 L. Ed. 949 (agreement between merchants); see note, "The Antitrust Implications of Restrictive Covenants in Shopping Center Leases," 86 Harv. L. Rev. 1201, 1212-18 (1973); Eagle, "Shopping Center Control: The Developer
229 Besieged," 51 Jour. Urb. Law, 586, *229 605-608 (1974). Moreover, it is interesting to note that vertical territorial restrictions are now subject to a "reasonableness" test under federal law. See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568.

The defendants nonetheless argue that the covenant contained in the plaintiff's lease is a "naked restraint of trade" which should be declared per se illegal under the provisions of our state antitrust act. While there is a general paucity of reported decisions specifically addressed to the type of restrictive covenant involved in the present case, our review of the relevant authorities leads us to reject the application of the "per se" rule urged by the defendants under the facts of this case.

In a recent case construing a state antitrust act which, not unlike our act, is similar to the federal act, the Kentucky Court of Appeals concluded that a restrictive covenant in a shopping center lease with a medium-size store which granted that store the exclusive right to sell men's and boys' clothing[7] was not unreasonable per se. *Mendell* v. *Golden-Farley of Hopkinsville, Inc.,* 1978-1 Trade Cases ¶ 61,814, p. 73,390 (Ky. Ct. App.). Applying the appropriate antitrust analysis set forth by the United States Supreme Court with regard to federal provisions, the Kentucky court concluded that its state's antitrust provisions did not effect a material change in the common law of Kentucky respecting the validity of restrictive covenants in
230 leases. Id., *230 p. 73,392. Similarly, a shopping center lease provision restraining a tenant from operating a similar sporting goods store within three miles of the center was held to be prima facie reasonable under Florida antitrust law. *Pensacola Associates* v. *Biggs Sporting Goods Co.,* 353 So. 2d 944 (Fla. Dist. Ct. App.).

In *Borman's Inc.* v. *Great Scott Super Markets, Inc.,* 433 F. Sup. 343 (D. E.D. Mich.), the court rejected (p. 349) the claim that a shopping center lease provision which granted a tenant a "partial exclusive" at the center constituted a per se violation of the antitrust laws. The court noted: "[S]uch a rule would disregard important distinctions between and among the types of shopping centers involved, the type of store involved and the type of restraint involved. Since very real distinctions should be made depending on the facts, any per se rule of illegality, or legality, should not be formulated." Id., 349. Likewise, another federal court has recently indicated that the federal antitrust implications of a restrictive lease provision granting exclusive rights to a shopping center tenant would be determined by examining all the surrounding circumstances to see if the particular lease provisions unreasonably restrain trade. *Dart Drug Corporation* v. *Peoples Drug Stores, Inc.,* 1977-1 Trade Cases ¶ 61,281, pp. 70,887-88 (D. D.C.); see *Pay Less Drug Stores Northwest, Inc.* v. *City Products Corporation,* 1975-2 Trade Cases ¶ 60,385, p. 66,676 (D. Ore.).

We find the above ratiocination persuasive in the circumstances of the present case. As under the Sherman Act, the "rule of reason" was intended to be the prevailing standard to be applied for the purpose of determining whether a particular act had
231 *231 or had not brought about the wrong against which the statute provided in a given case. *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 59-61, 31 S. Ct. 502, 55 L. Ed. 619. "Per se" rules of illegality should be applied only to conduct which is shown to be "manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* supra, 49-50. Consequently, the actual impact of particular arrangements on competition must be examined to determine whether they have a "pernicious effect on competition and lack ... any redeeming virtue." *Northern Pacific Ry. Co.* v. *United States,* supra, 5. The restrictive covenant in the present case cannot be so characterized.[8]

Hence, we conclude that the trial court was in error in determining that the plaintiff's lease provision was "per se" illegal. The "rule of reason," by which the factfinder "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"; *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* supra, 49; was the appropriate standard for the trial court to apply. Since additional evidence may be necessary for a determination of the reasonableness of the covenant in the present case, a new trial must be ordered. We note, in this regard, that the facts which may be relevant upon remand include, but are not limited to, the following: The plaintiff's store
232 was physically small in size, 20 feet by 100 feet, and located in *232 a shopping complex consisting of approximately twenty-five tenants; its "exclusive right" to sell bakery products in the shopping center specifically did "not apply to nor prevent the sale of such products by chain tenants such as the super food markets, the Jr. Department store or the Variety store and the Drug store" (see footnote 2 of this opinion); and the plaintiff was not a major or anchor tenant, but a small business which was compelled to compete with the so-called chain stores or larger anchor tenants.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.

[1] General Statutes §§ 35-24 to 35-44.

[2] "Article XIX, Section 1. It is agreed that the Tenant will have the exclusive right to sell products normally sold by a bakery shop, but this exclusive right will not apply to nor prevent the sale of such products by chain tenants such as the super food markets, the Jr. Department store or the Variety store and the Drug store. The Landlord agrees not to rent any other space in the shopping center for the purpose of baking on the premises, with the exception of the Chains, however, the Landlord agrees not to rent any space to a bakery chain."

[3] The Gourmet Shoppe, Inc. is a corporation engaged in the general business of a restauranteur and retail sales of delicatessens, including baked goods, such as those which the plaintiff produces and sells at the Amity Shopping Center.

[4] The previously issued temporary injunctions were dissolved by the court.

[5] "[General Statutes] Sec. 35-28. ACTS UNLAWFUL WHEN PURPOSE OR EFFECT IS RESTRAINT OF TRADE OR COMMERCE. Without limiting section 35-26, every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of: ... (d) refusing to deal, or coercing, persuading, or inducing third parties to refuse to deal with another person."

[6] An example of the reluctance to apply the "per se" rule in an overly broad fashion might best be found in the recent United States Supreme Court decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568, wherein the court overruled *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249, which held that a per se violation results when a manufacturer sells products to his distributor subject to territorial restrictions on resale. Although the court left unanswered the possibility that some vertical restrictions might justify per se prohibition, it concluded that a return to the "rule of reason" which governed vertical restrictions prior to *Schwinn* was warranted. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, supra, 58-59. The court noted that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." Id.

[7] Like the provision in the instant case, the clause in the *Mendell* lease did not apply to the major chains. (See footnote 2 of this opinion). That clause also made exception for other tenants whose sale of such clothing is incidental to their main line of business. *Mendell* v. *Golden-Farley of Hopkinsville, Inc.,* 1978-1 Trade Cases ¶ 61,814, p. 73,390 (Ky. Ct. App.).

[8] "It is well known that the success of a shopping center depends upon the gathering together in one area of a variety of enterprises which are able to serve the needs of the general public and that this end can often best be accomplished by offering to the individual merchants the exclusive right to sell in the center the kind of merchandise he handles." *Savon Gas Stations Number Six, Inc.* v. *Shell Oil Co.*, 309 F.2d 306 (4th Cir.).

707 F.3d 223 (2013)

ETHYPHARM S.A. FRANCE, Appellant
v.
ABBOTT LABORATORIES.

No. 11-3602.

United States Court of Appeals, Third Circuit.

Argued September 25, 2012.
Filed: January 23, 2013.

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Before: McKEE, Chief Judge, JORDAN, and VANASKIE, Circuit Judges.

OPINION OF THE COURT

JORDAN, Circuit Judge.

Ethypharm S.A. France ("Ethypharm") appeals the judgment of the United States District Court for the District of Delaware granting Abbott Laboratories ("Abbott") summary judgment on Ethypharm's antitrust and state law claims. Although the District Court ruled in Abbott's favor, it had earlier denied Abbott's motion to dismiss, a motion premised on the assertion that Ethypharm lacked standing to bring antitrust claims under §§ 1 and 2 of the Sherman Antitrust Act. Abbott has pressed its standing argument on appeal, and we conclude that the District Court erred in holding there is antitrust standing in this case. Because Ethypharm's state law claims have not been argued on appeal, the District Court's judgment on those claims will remain undisturbed, but we will vacate the District Court's grant of summary judgment as to the federal claims and will remand with directions that they be dismissed for Ethypharm's lack of standing.

I. Background

A. *Facts*[1]

226 Ethypharm is a privately held French corporation that develops and manufactures *226 pharmaceutical drug products. The drug at issue in this case is a fenofibrate[2] developed and manufactured by Ethypharm and carrying the brand name Antara®. Because, as Ethypharm observes, entry into the United States pharmaceutical market requires "substantial time and resources," it does not sell Antara directly in the United States. (J.A. at 122.) Instead, its business model was to "enter into a license and distribution agreement with a company in the United States." (J.A. at 122.) Thus, in 2001, it entered into a Development, License, and Supply Agreement ("DLS") with Reliant Pharmaceuticals, Inc. ("Reliant"), an American company, pursuant to which Reliant would sell Antara in this country. The DLS stated that Ethypharm would provide Reliant with the finished pharmaceutical product, or, at Reliant's option, the drug in bulk, which could then be encapsulated.

Reliant "was responsible for obtaining regulatory approval for the drug, preparing appropriate packaging material, and then marketing the drug through the efforts of a large, motivated, and experienced sales force." (J.A. at 122.) To that end, the DLS granted exclusive rights to Reliant in the United States and allowed it to seek approval with the U.S. Food and Drug Administration ("FDA") to market and sell Antara.[3] Ethypharm explains in its Complaint[4] that Reliant's role in exclusively marketing, selling, and obtaining FDA approval for Antara was critical because, without the "mechanism of the license and distribution agreement, Ethypharm would be foreclosed from the United States market." (J.A. at 122.) Thus, without Reliant's, or some similar distributor's, willingness to take on the risk and expense of gaining FDA approval and marketing Antara, the drug could never have reached the United States market.

Consistent with the DLS, Reliant sought FDA approval of Antara pursuant to § 505(b)(2) of the Food, Drug, and Cosmetics Act ("FDCA"). 21 U.S.C. § 355(b)(2). Reliant thus began the process of complying with the complex regulatory regime that governs how pharmaceuticals come to market in the United States. Before a drug can be released, it must be approved by the FDA pursuant to the FDCA, 21 U.S.C. §§ 301 *et seq.* The manufacturer of a new branded drug must submit detailed safety and efficacy data for the drug to the FDA in a New Drug Application ("NDA"). *Id.* § 355(a), (b)(1). The NDA must also list "the patent number and the expiration date of any patent which claims the drug ... or which claims a method of using
227 such drug." *Id.* § 355(b)(1). After approval, information about the branded drug, including patent *227 information, is published by the FDA in a publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations," which is generally called the "Orange Book," after the color of its cover. *See generally* FDA Electronic Orange Book, http://www.accessdata.fda.gov/scripts/cder/ob/default.cfm (last visited Dec. 3, 2012).

The Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act"), codified at 21 U.S.C. §§ 355, 360cc and 35 U.S.C. §§ 156, 271, 282, provides a framework for the introduction of generic versions of previously approved branded drugs. Under that framework, a generic manufacturer may submit an Abbreviated New Drug Application ("ANDA") to the FDA. 21 U.S.C. § 355(j). The ANDA process allows the generic manufacturer to incorporate efficacy and safety data submitted to the FDA in the NDA for a branded drug, as long as the generic drug is shown to be bioequivalent to that branded drug. *Id.* § 355(j)(2)(A).

There is also a third kind of application that a drug manufacturer may use to obtain FDA approval, and that is the route Reliant chose for Antara. Under § 505(b)(2) of the FDCA, a drug manufacturer may file an NDA for a drug that is not entirely new but is not simply a generic version of a branded drug. For drugs that have changes from a branded drug, such that an ANDA application is unavailable, but whose changes are so slight that a manufacturer may rightly rely on the "full reports of investigations," 21 U.S.C. § 355(b)(1), of the original drug to establish the new drug's safety and efficacy, an NDA may be filed pursuant to § 505(b)(2), even though those investigations "were not conducted by or for the applicant and ... the applicant has not obtained a right of reference or use from the person by or for whom the investigations were conducted," *id.* § 355(b)(2). The § 505(b)(2) applicant must submit additional data to the FDA that demonstrates that any differences between the original drug and the § 505(b)(2) drug will not affect the § 505(b)(2) drug's safety and efficacy. *See* 21 C.F.R. § 314.54(a) (providing that § 505(b)(2) applications must provide data that supports any modification of the drug from the relied upon NDA). But, having done that, a § 505(b)(2) applicant can avoid preclinical and certain human studies necessary in full NDA applications.

Finally, much as when filing an ANDA application, a § 505(b)(2) applicant must certify whether its drug will infringe any patents listed in the Orange Book. 21 U.S.C. § 355(b)(2)(A). Those certifications are as follows: "(i) that such patent information has not been filed (ii) that such patent has expired, (iii) of the date on which such patent will expire, or (iv) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted...." *Id.* § 355(b)(2)(A)(i)-(iv).

Rather than conducting its own clinical studies, Reliant depended on the data of another, already approved, fenofibrate drug called TriCor®, which was developed by a French company named Laboratories Fournier ("Fournier") and distributed by Abbott in the United States.[5] Antara received FDA approval in November 2004, and Reliant began marketing the drug in February 2005. Reliant chose not to make a certification under § 505(b)(2)(A)(iv) that Antara did not infringe any patents in
228 the Orange Book or that those patents were invalid, but elected to market Antara immediately *228 after gaining FDA approval.[6] That marketing exposed Reliant to a possible infringement suit from Abbott, making Reliant's launch of Antara "at risk."[7] In a prophylactic maneuver, Reliant filed a declaratory judgment action in the United States District Court for the District of Delaware in June 2004, seeking a declaration of noninfringement with respect to four of Abbott's fenofibrate patents, U.S. Patent Nos. 6,074,670 (the "'670 patent"), 6,277,405 (the "'405 patent"), 6,589,552 (the "'552 patent"), and 6,652,881 (the "'881 patent"). Reliant also argued that the patents were unenforceable due to inequitable conduct. Abbott counterclaimed for infringement of two of the four patents. Despite that lawsuit, Antara's net sales in 2005 were $23.5 million, and for the first half of 2006 they were $18.9 million.

In April 2006, Abbott and Reliant settled their patent dispute. Fournier, TriCor's developer, was also a party to the settlement. The three entered into a Settlement Term Sheet ("STS") providing that Abbott and Fournier would grant a non-exclusive license to Reliant for the patents that were the subject of the lawsuit, along with U.S. Patent No. 4,895,726 (the "'726 patent"), another fenofibrate patent. (*See* J.A. at 247 ("Abbott and Fournier would grant Reliant a nonexclusive license ... under the [patents] to exploit [Antara[8]] in the United States....").) In exchange, "Reliant would make quarterly royalty payments to Abbott and Fournier in the total amount of 7% of Net Sales."[9] (J.A. at 248.) If, however, Reliant was acquired or it sold off the Antara portion of its business,[10] the new owner would not receive the benefit of a 7 percent royalty;
229 instead, "the License Fee ... would increase to 10% of Net Sales." (*Id.*) Relevant here, § 8 of the *229 STS (the "Restricted Entity provision") provided that:

> The license would contain additional customary terms and conditions including, without limitation, the following: ... (ii) no assignment, sublicense or other transfer of any rights relating to the Reliant Products (including the right to market and promote the Reliant Products) except: ... (e) to acquirers ... of any portion of Reliant [or its business] relating to the Reliant Products other than pursuant to a Change of Control, provided that any assignment, sublicense or other transfer of rights granted pursuant to Section 8(ii)(e), (A) to a Restricted Entity or Affiliate thereof, shall require the prior written consent of Abbott and (B) to any entity other than a Restricted Entity or Affiliate thereof shall be limited to [the '726, '670, '405, '552 and '881 patents] unless Abbott consents to the assignment, sublicense or other transfer (in which case, Reliant's rights to [the patents and their continuations] may be included).

(J.A. at 255-56.) That provision effectively foreclosed Reliant from assigning its rights in Antara to any "Restricted Entity" or partnering with such an entity to market Antara in the United States. The term "Restricted Entity" was defined to include, as the District Court summarized it, "about 20 large pharmaceutical companies, 10 generic companies[,] and a few specialty pharmaceutical companies." (J.A. at 10.)

In April 2006, Abbott and Reliant entered a stipulation of dismissal of the patent litigation in accordance with the STS. A few months later, in July 2006, Reliant sold to Oscient Pharmaceutical Company ("Oscient") the exclusive rights to market and sell Antara in the United States. Oscient, a business that did not appear on the Restricted Entity list, paid Reliant $78 million for the exclusive rights to Antara, plus the cost of Reliant's remaining Antara inventory.[11] Ethypharm had a right of first refusal under the DLS, pursuant to which it could "acquire all rights in relation with [Antara] and the relevant Intellectual Property and Confidential Information belonging to RELIANT...." (J.A. at 320.) But it declined to exercise that right and instead approved the sale to Oscient. Abbott, however, exercising its rights under the DLS, did not give its approval. As a result, Reliant was only able to assign its license to the five Abbott patents contained in the STS and not any future continuation or divisional applications. (*See* J.A. at 255 (noting that an assignment of Reliant's license from Abbott "to any entity other than a Restricted Entity or Affiliate thereof shall be limited to [the '726, '670, '405, '552 and '881 patents] unless Abbott consents to the assignment, sublicense or other transfer (in which case, Reliant's rights to [the patents and their continuations] may be included).").)

Oscient had some initial success with Antara. Sales in 2007 and 2008 were approximately $53.6 million and $73.8 million
230 respectively, up from $42.5 million in 2006. *230 But sales stagnated in 2009, with Oscient losing market share to generic fenofibrate manufacturers. By the summer of 2009, Oscient had discontinued its promotion of Antara and filed for bankruptcy. Lupin, a manufacturer of generic pharmaceuticals, purchased the rights to Antara for $38 million from Oscient's bankruptcy estate, and, although Lupin is currently attempting to grow the market for the drug, its CEO testified that it is a difficult task because Abbott had solidified its place in the market while Oscient was floundering. To that end, as of 2010, Antara's market share was only 2 to 4 percent, a far cry from the 25 to 33 percent Reliant initially hoped to capture when it launched Antara, but in line with the 2.2 and 3.4 percent market share Reliant had actually captured in 2005 and 2006, respectively.

B. *Procedural History*

Believing that the failure of Antara to compete with TriCor was a direct result of Abbott's patent suit against Reliant and of the resulting STS, particularly the Restricted Entity provision, Ethypharm filed this action against Abbott. The Complaint features antitrust and sham litigation claims under §§ 1 and 2 of the Sherman Act. *See* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); *id.* § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...."), as well as a number of state law claims, including unfair competition, tortious interference with contract, tortious interference with prospective economic advantage, and common law restraint of trade. According to Ethypharm, the STS was designed to make sure that Antara would be put in the hands of a company with "limited resources and a relatively small sales force," so that it could not effectively compete with TriCor. (J.A. at 11.)

In addition to citing the allegedly anticompetitive nature of the Restricted Entity provision, Ethypharm averred that the 7 percent royalty payment Reliant owed to Abbott restrained Ethypharm's ability to compete because, by collecting a royalty from Ethypharm's exclusive distributor, Abbott weakened Antara's profitability. Ethypharm also claimed that the provisions of the STS preventing Oscient from developing new combination drugs or different doses of Antara further restricted the ability of Antara to compete against TriCor.

Abbott initially moved to dismiss the Complaint for lack of antitrust standing, but the District Court denied that motion, holding that Ethypharm had the necessary standing to sue. The Court determined that "a foreign name-brand manufacturer, which does not itself market and distribute its product in the United States but does so through an exclusive United States distributor, is entitled to avail itself of the protection of the antitrust laws for the purpose of challenging the conduct of a manufacturer of a competing brand name drug." (J.A. at 11, 35.)[12]

231 *231 Following discovery, Abbott moved for summary judgment. The District Court granted that motion, determining that Ethypharm had not presented enough evidence from which a reasonable jury could find a causal connection between the alleged antitrust injury and the damage it suffered. Specifically, the Court concluded there was insufficient evidence that Abbott's allegedly anticompetitive conduct caused Antara's failure in the market and, therefore, Ethypharm's antitrust claim was untenable. (*See* J.A. at 20 ("Put simply, there are many market influences that may have contributed to Oscient's failure with Antara.").)[13]

Ethypharm timely appealed.

II. Discussion[14]

Abbott argues that the District Court erred in concluding that Ethypharm had standing to bring its antitrust claims. Specifically, Abbott says that Ethypharm does not compete with it because Ethypharm is not a supplier of Antara in the
232 United States and, therefore, it cannot claim to have been harmed by any anticompetitive *232 conduct here. In short, it lacks antitrust standing.[15]

Standing is a threshold requirement in all actions in federal court. It is moored in the constitutional principle that the judiciary's power only extends to cases or controversies. *See* U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Constitutional standing is "augmented by consideration of prudential limitations." *City of Pittsburgh v. W. Penn Power Co.,* 147 F.3d 256, 264 (3d Cir.1998). For plaintiffs suing under federal antitrust laws,[16] one of the prudential limitations is the requirement of "antitrust standing." *W. Penn Power Co.,* 147 F.3d at 264.[17] It does not affect the subject matter jurisdiction of the court, as Article III standing does, but prevents a plaintiff from recovering under the antitrust laws. *Gerlinger v. Amazon.com Inc.,* 526 F.3d 1253, 1256 (9th Cir.2008).

The Supreme Court, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), articulated several factors to be considered when deciding whether a complainant has antitrust standing. We have organized those factors (the "*AGC* factors") into the following multifactor test:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged
> 233 injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness *233 of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993). The second factor, antitrust injury, "is a necessary but insufficient condition of antitrust standing." *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.,* 118 F.3d 178, 182 (3d Cir.1997). If it is lacking, we need not address the remaining *AGC factors.*

Generally, antitrust injury — that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) — "is limited to consumers and competitors in the restrained market and to those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends," *W. Penn Allegheny Health Sys., Inc. v. UPMC,* 627 F.3d 85, 102 (3d Cir. 2010). Ethypharm, of course, does not claim to be a consumer. Therefore, for Ethypharm to have standing it must be either a competitor in the defined relevant market or it must have suffered such injuries as "are the means by which the defendant[] seek[s] to achieve [its] anticompetitive ends." *Id.*

Abbott contends that Ethypharm fits neither qualification. First, Abbott argues that Ethypharm is not a supplier of Antara in the United States but only an offerer of intellectual property licenses and raw materials, which are not interchangeable with the drug that Abbott offers. Second, Abbott contends that "Ethypharm's alleged injury is not the `means' by which Abbott" allegedly restrained competition. (Appellee's Br. at 43.) Abbott reasons that it effectuated its allegedly illegal restraint of trade without any need to affect Ethypharm because Abbott needed only to place restrictions on Reliant, the sole United States distributor of Antara.

Ethypharm counters that it produces not just raw materials but a finished drug that directly competes with Abbott's product. According to Ethypharm, the fact that it markets and sells Antara through an exclusive distributor to bring that product to the United States is irrelevant. Thus, Ethypharm argues, its "offering of the manufactured product is reasonably interchangeable with Abbott's offering of TriCor." (Appellant's Reply Br. at 17 (internal quotation marks omitted).) Ethypharm also contends that even if it did not directly compete with Abbott, it has suffered antitrust injury because the harm caused by Abbott to Ethypharm is "inextricably intertwined with Abbott's alleged wrongdoing." (*Id.* (internal quotation marks omitted).)

In making their arguments about whether Ethypharm and Abbott are competitors in the relevant market, the parties focus on two of our precedents in particular, *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.,* 118 F.3d 178 (3d Cir.1997), and *Carpet Group International v. Oriental Rug Importers Association, Inc.,* 227 F.3d 62 (3d Cir.2000), *abrogated on other grounds by Animal Sci. Prods., Inc. v. China Minmetals Corp.,* 654 F.3d 462 (3d Cir.2011).[18] In *Barton & Pittinos,* we
234 determined *234 that a drug marketing company did not have antitrust standing to sue a drug manufacturer after the manufacturer chose to sever its relationship with the marketer. Barton & Pittinos had entered into an agreement with SmithKline to market SmithKline's hepatitis-B vaccine to nursing homes. Barton & Pittinos would solicit orders from nursing homes and pass those orders on to a third party, General Injectables and Vaccines, Inc. ("GIV"), "which would buy the vaccine from [SmithKline] and then resell it to the nursing homes." *Barton & Pittinos,* 118 F.3d at 179. Previously, pharmacists had supplied nursing homes with SmithKline's vaccine, and those pharmacists complained to SmithKline about the arrangement with Barton & Pittinos. In response to those complaints, SmithKline terminated its arrangement with Barton & Pittinos. Barton & Pittinos then brought suit contending that SmithKline had conspired with the pharmacists to restrain competition in the distribution of the vaccine, in violation of § 1 of the Sherman Act.

We held that Barton & Pittinos had no standing to avail itself of the antitrust laws because it was not a competitor in the market and, accordingly, could not suffer antitrust injury. Speaking for the court, then-Judge Alito reasoned that Barton & Pittinos was essentially an advertiser and not a competitor in the relevant drug market. *Id.* at 182. We first defined the proper market, as Barton & Pittinos had, as "all hepatitis-B vaccine *sold* to nursing homes in the United States." *Id.* at 182 (internal quotation marks omitted). Then, we considered whether Barton & Pittinos was a competitor by determining if there was cross-elasticity of demand between the pharmacists' offerings and Barton & Pittinos's offerings. In analyzing that question, we focused not on the overall marketing program devised by SmithKline, but on what Barton & Pittinos itself offered. That is, Barton & Pittinos offered marketing services but did not have direct access to the vaccine and could not supply the vaccine to nursing homes without GIV. The pharmacists, in contrast, could supply nursing homes directly with the vaccine. Because nursing homes only had indirect access to the vaccine through Barton & Pittinos, "there was no cross-elasticity of demand as between the pharmacists' offerings and [Barton & Pittinos's] offerings; no matter how much the pharmacists raised the price of the package of the goods and services that they offered, the nursing homes could not have switched to [Barton & Pittinos]." *Id.* at 183.

We concluded that Barton & Pittinos's position as an advertiser made its injury different from the type of injury that the antitrust laws were designed to redress. *See id.* at 184 ("Because [Barton & Pittinos] was thus not a competitor or consumer in the market in which trade was allegedly restrained by the antitrust violations pled by [Barton & Pittinos], we hold that [its] alleged injury is not `antitrust injury,' meaning injury `of the type that the antitrust statute was intended to forestall.'" (quoting *Associated Gen. Contractors,* 459 U.S. at 540, 103 S.Ct. 897)). Barton & Pittinos thus lacked antitrust standing.

In contrast to *Barton & Pittinos,* we concluded in *Carpet Group International* that a plaintiff did have antitrust standing. *Carpet Grp. Int'l,* 227 F.3d at 78. In that case, Carpet Group International sought to provide a direct link between oriental rug manufacturers and domestic retailers, cutting out middlemen wholesalers, who were united by a trade group, the Oriental
235 Rug Importers Association. Carpet Group International *235 bypassed the wholesalers by inviting manufacturers and retailers to trade shows where the retailers could buy directly from the manufacturers. Carpet Group International also organized buying trips where the retailers could go abroad to see and directly purchase rugs. Oriental Rug Importers responded by, among other tactics, threatening not to buy from any manufacturer who attended a trade show or sold directly to a retailer during a buying trip. Those actions prompted Carpet Group International to bring an antitrust action.

Oriental Rug Importers relied on *Barton & Pittinos* to argue that Carpet Group International did not have antitrust standing. We noted, however, that Carpet Group International's role in the oriental rug market was different from Barton & Pittinos's role in the relevant drug market. Barton & Pittinos, as an unlicensed entity, could not supply drugs to consumers, but, in contrast, Carpet Group International and Oriental Rug Importers could and did offer the exact same service to consumers — a way to procure rugs from manufacturers. "In other words, there [was] a cross-elasticity of demand between the plaintiffs' offering and the defendants' offering." *Id.* at 77; *see id.* ("If the wholesaler/importers raised the prices at which they sold oriental rugs to domestic retailers, those retailers could go to [Carpet Group International's] trade shows and purchase rugs there directly from manufacturers."). Thus, the injury that Carpet Group International claimed to have suffered was an antitrust injury.

As one might expect, Abbott contends that this case is controlled by *Barton & Pittinos,* and Ethypharm says it is not and that *Carpet Group* is the pertinent authority. Although this is a closer case than *Barton & Pittinos* because Ethypharm does manufacture a product ultimately sold in the relevant market, we think Abbott has the better of the arguments. Ethypharm is not a competitor because, in the highly regulated pharmaceutical market in this country, there is no cross-elasticity of demand between Ethypharm's offerings and Abbott's offerings. In this case, as in *Barton & Pittinos,* customers in the United States cannot purchase the drug at issue from Ethypharm. Ethypharm structured its business in a way that assured that only Reliant or someone to whom Reliant sold the rights to Antara could supply the drug. Ethypharm has chosen, for reasons sufficient to itself, not to seek the necessary approval to sell pharmaceuticals in the United States.[19] It is thus forbidden to compete in the relevant market. Because of its choice to leave to an exclusive licensee the responsibility of obtaining FDA approval for Antara and of selling and marketing that drug in the United States, there is no cross-elasticity of demand between what Ethypharm can lawfully offer, *i.e.,* bulk drug sales from outside the United States to an FDA-approved entity, and what Abbott offers, a finished pharmaceutical product within the United States.

Indeed, Ethypharm's own Complaint defines the relevant market in this case as the sale of fenofibrate products in the United States. (J.A. at 143 ("For purposes of this Complaint, the relevant geographic market is the United States. The
236 relevant product market is products containing fenofibrate.").) When looking through that market lens, Ethypharm does *236 not and cannot compete with Abbott. Similar to Barton & Pittinos, Ethypharm, on its own, cannot directly supply the United States market with the drug in question. *See Barton & Pittinos,* 118 F.3d at 180 (recognizing that Barton & Pittinos "lacked the required [regulatory] license to... sell the vaccine"). It did not enter the United States market and receive the required FDA approval to market Antara; Reliant alone obtained that approval. *Cf.* 21 U.S.C. § 355(a) (requiring pharmaceutical companies to obtain FDA approval before marketing prescription drugs). In fact, as Ethypharm explained in its Complaint, that was its entire business plan:

> While Ethypharm develops, formulates, and manufactures its fenofibrate product for sale in the United States, it does not directly sell and distribute this product in this country. Instead, Ethypharm sought a business partner who would enter into an agreement to: license Ethypharm's underlying patent and intellectual property rights; obtain U.S. regulatory approval for the product; and market the product in the U.S.

(J.A. at 113.) And without a license of its own, Ethypharm admits that it "would be foreclosed from the United States market." (J.A. at 122.) Therefore, just like the pharmacists' ability to raise prices of the vaccine in *Barton & Pittinos* and the nursing homes' inability to procure that vaccine directly from Barton & Pittinos, Abbott could raise the price of TriCor and consumers could not turn to Ethypharm for Antara.

Ethypharm argues, and the District Court appeared to agree, that "Reliant's role as the holder of the Antara NDA makes no difference" with respect to the antitrust injury inquiry. (Appellant's Reply Br. at 17.) We disagree; Ethypharm's inability to participate in the United States fenofibrate market makes all the difference. Contrary to Ethypharm's contention, Reliant was not a mere conduit in bringing Antara to market. Reliant was the entity that took the risk and bore the expense of filing the NDA and gaining FDA approval. The FDA carefully regulates the pharmaceutical industry and imposes stringent requirements on entities seeking to sell drugs in the United States. *See generally* 21 U.S.C. § 355 (describing requirements for NDA approvals); *id.* § 393 (establishing the FDA and providing its scope). It is that high legal barrier to entry, specific to the United States pharmaceutical market, that differentiates this case from others in which a manufacturer has a legal right to sell a good in the United States but chooses to utilize an exclusive distributor.

Ethypharm wants to have it both ways: it wants to pass on to a licensee the expense and risk of qualifying to compete in the United States pharmaceutical market, but, when that arrangement fails to achieve success, Ethypharm seeks to avail itself of the United States laws protecting fair competition. The rules of antitrust standing do not permit that tactic. We stress that it is not the general arrangement of manufacturer and distributor that is problematic; it is the fact that Ethypharm cannot sell Antara in the United States because of legal barriers particular to the pharmaceutical market, barriers that Ethypharm chose not to surmount. Ethypharm is literally not a lawful competitor in the United States fenofibrate market, and so it cannot be considered a competitor for purposes of antitrust injury.[20]

237 *237 Ethypharm also argues that even if it is not a competitor in the United States fenofibrate market, it suffered antitrust injury because its injury is "inextricably intertwined" with Abbott's conduct such that Ethypharm's "injuries are the means by which the defendants seek to achieve their anticompetitive ends." *W. Penn Allegheny Health,* 627 F.3d at 102. In *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.,* we recognized the "inextricably intertwined" exception to the usual requirement that an antitrust plaintiff be either a competitor or consumer. 995 F.2d 425, 429 (3d Cir.1993).[21] There, we stated that antitrust injury occurs if "there exists a `significant causal connection' such that the harm to the plaintiff can be said to be `inextricably intertwined' with the antitrust conspiracy." *Id.* at 429; *see also* *Carpet Group,* 227 F.3d at 77 (concluding there was antitrust injury because of inextricable intertwinement). Since that time, however, we have not extended the "`inextricably intertwined' exception beyond cases in which both plaintiffs and defendants are in the business of selling goods or services *in the same relevant market,*" though they may not directly compete against each other. *Broadcom Corp. v. Qualcomm, Inc.,* 501 F.3d 297, 320-21 (3d Cir.2007) (emphasis added). Thus, Ethypharm's argument that its injuries are inextricably intertwined with Abbott's conduct — that is, the "injuries are the means by which [Abbott] seek[s] to achieve [its] anticompetitive ends," *W. Penn Allegheny Health,* 627 F.3d at 102 — fails for the same reason its argument that it is a competitor fails: Ethypharm itself, by its own choice, is not in the United States fenofibrate market.

Accordingly, we conclude that Ethypharm did not suffer antitrust injury because it does not and indeed cannot compete in the United States fenofibrate market, unless and until it acquires the required FDA approval to do so. As a result, Ethypharm lacks antitrust standing to sue Abbott.[22]

III. Conclusion

For the reasons above, we will vacate the grant of summary judgment as to Ethypharm's federal claims, leave undisturbed
238 *238 the grant of summary judgment as to Ethypharm's state law claims, and remand the case to the District Court to dismiss the federal claims for lack of standing.

[1] Because we are primarily reviewing the District Court's denial of Abbott's motion to dismiss for lack of antitrust standing, we take as true all the factual allegations in the complaint and the reasonable inferences that can be drawn from those facts. *Sheridan v. NGK Metals Corp.,* 609 F.3d 239, 262 n. 27 (3d Cir.2010); *see also* *In re Warfarin Sodium Antitrust Litig.,* 214 F.3d 395, 398-99 (3d Cir. 2000) (applying Rule 12(b)(6) on motion to dismiss for lack of antitrust standing). To the extent we recount facts outside of the complaint, we do so for informational purposes only and do not rest our decision on those facts.

[2] "Fenofibric acid, the active metabolite of fenofibrate, produces reductions in total cholesterol, LDL cholesterol, apolipoprotein B, total triglycerides and triglyceride rich lipoprotein (VLDL) in treated patients." *Physicians' Desk Reference* 565 (66th ed.2012).

[3] The DLS also gave Ethypharm a right of first refusal should Reliant seek to divest its rights in Antara.

[4] Ethypharm filed its initial complaint on March 3, 2008. After Abbott filed a motion to dismiss that complaint, Ethypharm filed its Amended Complaint, the operative pleading, on July 2, 2008. For simplicity, we refer to the Amended Complaint as the Complaint.

[5] Fournier granted Abbott an exclusive license to manufacture and sell TriCor in the United States. Abbott listed the patents for TriCor in the Orange Book.

[6] As explained above, a § 505(b)(2) applicant must make a certification pursuant to 21 U.S.C. § 355(b)(2)(A). Although Ethypharm admits in its Complaint that Reliant did not make a Paragraph IV certification, it also states in that Complaint that "Reliant provided notice of a regulatory filing and certification to Abbott in February 2004." (J.A. at 137.) The record is unclear what certification Reliant made, and it is also unclear what the consequences of not making a certification would have been for Reliant. Neither party contends that such failure is relevant here.

[7] In its Complaint, Ethypharm says that "Abbott responded in writing [to Reliant's regulatory filings] with a thinly-veiled threat to bring suit." (J.A. at 137.)

[8] The STS also provided for a specific set of products that could be manufactured by Reliant:

[T]he 43 mg, 87 mg and 130 mg fenofibrate capsule products that are the subject of Reliant's New Drug Application 21-695, as supplemented and/or amended from time to time. Reliant Products do not include (i) any pharmaceutical products where fenofibrate is not the sole active ingredient, (ii) any combination therapy products or (iii) any products in a form other than a 43 mg, 87 mg or 130 mg fenofibrate capsule.

(J.A. at 246.) Thus, the STS would not allow Reliant to create new doses or combination drugs that would be covered by the non-exclusive license.

[9] The STS defines Net Sales as "the gross invoiced sales of the Reliant Products in the Territory under the License Agreement...." (J.A. at 244.) The STS defines the Reliant Products to be "the 43 mg, 87 mg and 130 mg fenofibrate capsule products that are the subject of Reliant's New Drug Application 21-695...." (J.A. at 246.)

[10] The STS referred to this as a "Change of Control," which was to include "the sale, lease, exchange, license or other disposition of all or substantially all of such Reliant['s] assets related to ... [Antara] and ... Reliant['s] other assets...."; "a merger, consolidation, share exchange or similar corporate transaction as a result of which the holders of" Reliant's stock no longer owned the company; or "the acquisition" of Reliant by any person or company. (J.A. at 249.)

[11] Although called a "New Drug Application," an approved NDA is no longer an "application" in the commonly understood sense of the word. It is, rather, the approval to participate in the United States pharmaceutical market. *See* 21 C.F.R. § 314.105(a) (explaining that once notice of an approved application is received by letter, marketing of the drug may begin, unless the FDA or some other provision of law has delayed that effective date). The rights to an NDA are readily transferrable between owners, so long as the new owners comply with certain regulatory requirements. *See id.* § 314.72(a) ("An applicant may transfer ownership of its application."); *id.* § 314.72(b) ("The new owner shall advise FDA about any change in the conditions in the approved application under § 314.70....").

[12] The District Court did grant Abbott's motion to dismiss Ethypharm's "unlawful restraint of trade" claim. Specifically, Abbott contended that Delaware's Antitrust Act, which codified a restraint of trade claim, *see* Del.Code Ann. tit. 6, § 2103, preempted a common law restraint of trade claim. Ethypharm failed to respond to that argument, and the Court concluded that that failure doomed the claim. (*See* J.A. at 43) (dismissing Ethypharm's restraint of trade claim because it failed to "articulate in some manner how its pleading meets the legal requirements of its claims").

[13] The District Court also granted summary judgment in favor of Abbott on Ethypharm's sham litigation claims. Ethypharm does not dispute that determination on appeal.

In addition, the District Court granted summary judgment in favor of Abbott on Ethypharm's state law claims. With respect to those claims, Ethypharm says, in a footnote at the close of its Opening Brief before us, that the District Court dismissed its state law claims without articulating a basis for that ruling. (*See* Appellant's Opening Br. at 61 n.27 ("The district court's decision did not separately address Ethypharm's three remaining state common law claims for unfair competition.").) In response, Abbott states it "is clear [as to why] the district court decided to dismiss the state law claims: Ethypharm cannot prove injury in fact." (Appellee's Br. at 58-59; J.A. at 20.) We have consistently held that "[a]n issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue ... will not suffice to bring that issue before this court." *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir.1994) (internal quotation marks omitted); *see* *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 (3d Cir.1997) ("[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived."); *see also* *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 n. 6 (Fed.Cir.2006) ("[A]rguments raised in footnotes are not preserved."). Thus, Ethypharm waived its appeal of its state law claims. And because of Ethypharm's waiver, and because the District Court had diversity jurisdiction over those state law claims, *see infra* note 14, we will not disturb the District Court's grant of summary judgment for Abbott with respect to Ethypharm's state law claims.

[14] The District Court had jurisdiction over the federal antitrust claims pursuant to 28 U.S.C. § 1331 and over the state law claims both as pendent claims pursuant to § 1367, and under diversity jurisdiction pursuant to § 1332 because Ethypharm is a French company, Abbott is an Illinois corporation, and the amount in controversy exceeds $75,000. We have jurisdiction under 28 U.S.C. § 1291.

Our review of the District Court's denial of Abbott's motion to dismiss for lack of standing is plenary. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir.2009). We take as true all the factual allegations in the Complaint and the reasonable inferences that can be drawn from those facts, *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n. 27 (3d Cir.2010), but we disregard legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct.

1937, 173 L.Ed.2d 868 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sheridan*, 609 F.3d at 262 n. 27 (internal quotation marks omitted). "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.* (internal quotation marks omitted).

[15] Although Abbott did not file a cross-appeal, its standing argument is properly before us because it is "well established that an appellee may, without taking a cross-appeal, support the judgment as entered through any matter appearing in the record, though his argument may attack the lower court's reasoning or bring forth a matter overlooked or ignored by the court." *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, 1048 (3d Cir. 1993). We have held that antitrust standing "is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 307 (3d Cir. 2011) (en banc), *cert. denied,* ___ U.S. ___, 132 S.Ct. 1876, 182 L.Ed.2d 646 (2012). Thus, by that reasoning, failure to establish antitrust standing is a merits issue properly before us.

[16] Section 4 of the Clayton Act provides the statutory authorization for a private antitrust suit: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may maintain a "private action for treble damages." 15 U.S.C. § 15.

[17] Although not free from debate, we have explained that antitrust standing is based on prudential principles. *See W. Penn Power Co.*, 147 F.3d at 264 ("Thus, the crux of the issue in this case is whether the City satisfies the `prudential' requirements of standing; that is, does the City have `antitrust standing,' and is the plaintiff a proper party to bring a private antitrust action?"); *see also Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1299 (11th Cir.2010) ("To have antitrust standing, a party must do more than meet the basic `case or controversy' requirement that would satisfy constitutional standing; instead, the party must show that it satisfies a number of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." (internal quotation marks omitted)); *cf.* Erwin Chemerinski, *Federal Jurisdiction* § 2.3.6 (5th ed.2007) (explaining prudential standing requirement that a plaintiff be within the zone of interest protected by a statute). We have also indicated, however, that, at least in a state law context, antitrust standing is a kind of "statutory standing." *Sullivan*, 667 F.3d at 307 (characterizing state law antitrust claims as involving "statutory standing"). In this case, whether the standing inquiry is characterized as "prudential" or "statutory" makes no difference because neither deprives us of Article III jurisdiction and both bar a plaintiff's ability to recover.

[18] Abbott's argument relies heavily on our non-precedential opinion in *SigmaPharm, Inc. v. Mutual Pharm. Co.*, 454 Fed.Appx. 64 (3d Cir.2011). We do not address that case, *see* 3d Cir. I.O.P. 5.7 (2010) ("The court by tradition does not cite to its not precedential opinions as authority."), but instead look to the case upon which *SigmaPharm* rests its reasoning, our precedential opinion in *Barton & Pittinos.*

[19] Not only did Ethypharm choose not to initially enter the United States market with Antara, it passed on a second opportunity to do so when it declined to exercise its right of first refusal at the time Reliant transferred its rights in Antara, complete with the approved NDA.

[20] Ethypharm cites a district court case, *Chemi SpA v. GlaxoSmithKline*, 356 F.Supp.2d 495 (E.D.Pa.2005), in support of its position that it has antitrust standing. That decision, however, fails to consider *Barton & Pittinos* under the antitrust injury prong of antitrust standing. It also appears to rest its decision on the "inextricably intertwined" theory of antitrust injury, which we conclude is lacking in this case, *see infra.* In addition, the plaintiff in that case, a foreign drug manufacturer, filed a Drug Master File with the FDA and "set forth other required information for FDA approval" of its drug. *Id.* at 497. Therefore, the plaintiff's involvement in the FDA approval process distinguishes *Chemi SpA* from this case.

[21] The "inextricably intertwined" antitrust injury originated in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). There, the Court recognized that antitrust injury may be suffered by those other than competitors when the "injury alleged is so integral an aspect" of the alleged anticompetitive conduct that "the loss was precisely the type of loss that the claimed violations ... would be likely to cause." *Id.* at 479, 102 S.Ct. 2540 (omission in original) (internal quotation marks omitted). It went on to conclude that that test had been met because "the injury [the plaintiff] suffered was inextricably intertwined with the injury the conspirators sought to inflict." *Id.* at 484, 102 S.Ct. 2540. Thus, an "inextricably intertwined" antitrust injury is limited to plaintiffs "whose injuries are the essential means by which defendants' illegal conduct brings about its ultimate injury to the marketplace." IIA Philip E. Areeda, *et al., Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 339, at 123 (3d ed.2007).

[22] Because we conclude that Ethypharm did not suffer antitrust injury, we do not address any of the other *AGC* factors in the antitrust standing analysis. Nor do we reach the issue of whether the District Court erred in its analysis of the merit of Abbott's motion for summary judgment.

DAVID FINDLING, Plaintiff,
v.
REALCOMP II, LTD., et al. Defendants.

Civil Action No. 17-CV-11255.

United States District Court, E.D. Michigan, Southern Division.

March 22, 2018.

David Findling, Plaintiff, represented by Eric H. Lipsitt, The Findling Law Firm & David M. Findling, Findling Law Firm.

Realcomp II, Ltd., Doing business as Realcomp, Inc., Defendant, represented by Harvey R. Weingarden, Lippitt O'Keefe, PLLC.

Greater Metropolitan Association Realtors, Doing business as Western Wayne Oakland County Association of Realtors, Dearborn Area Board of Realtors, Detroit Association of Realtors, Eastern Thumb Association of Realtors, Grosse Pointe Board of Realtors, Lapeer and Upper Thumb Association of Realtors, Livingston County Association of Realtors & North Oakland County Board of Realtors, Defendants, represented by Gregory L. McClelland, McClelland & Anderson, L.L.P..

OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

BERNARD A. FRIEDMAN, District Judge.

This matter is before the Court on defendants' motions to dismiss [docket entries 15 and 23]. These motions are fully briefed. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide them without a hearing.

FACTS

The following facts are summarized from the complaint and its exhibits: Plaintiff is a lawyer in southeast Michigan. In his practice, he serves as a court-appointed receiver, an assignee for the benefit of creditors, and a bankruptcy trustee. Michigan law requires anyone who regularly sells real estate to have a real estate broker license. But attorneys acting as receivers or trustees are exempt from this requirement. *See* Mich. Comp. Laws § 339.2503(2).

Defendant Realcomp is a multiple listing service (MLS) controlled by the eight defendant realtor associations. MLSs compile extensive details on properties for sale within a certain geographic area—in this case, in southeast Michigan. Realcomp also maintains statistics on sold properties. Plaintiff says that Realcomp's MLS is "the most effective marketing tool for residential real estate in" southeast Michigan. Compl. p. 2. Realcomp's MLS is "available only to the members of the Realcomp Owners." *Id.* at 3. To become a Realcomp member, an applicant must be a licensed broker in southeast Michigan actively endeavoring to make or accept offers on property.[1] They must also be a member or affiliate of one of the eight controlling realtor associations and pay a membership fee.

Because plaintiff is not a licensed real estate broker or member of Realcomp or any of its controlling realtor associations, when he wants to list a piece of property in the MLS, he must pay a member broker a listing fee. Plaintiff wants to use the MLS because he feels it is more effective than self-advertising. But he also wants to avoid paying the listing fee or, alternately, the inconvenience of becoming a licensed broker and paying a membership fee. So in July 2016 plaintiff applied to one of the defendant realtor associations, Greater Metropolitan Association Realtors (GMAR). GMAR denied plaintiff's application because he is not a real estate agent, broker, or appraiser and has not obtained a license.[2] Plaintiff insisted that because Michigan law exempts him from its real estate broker licensing requirements, GMAR could not deny him membership because he lacks such a license.

In April 2017, plaintiff filed the instant complaint, asserting four counts: Counts I and IV assert that defendants are illegally maintaining a monopoly in the southeastern Michigan market for the listing and sale of real estate; and Counts II and III assert that defendants are illegally tying membership in the defendant realtor associations to access to the MLS.

STANDARD

Fed. R. Civ. P. 12(b)(6) states that the Court may dismiss a complaint if it fails "to state a claim upon which relief can be granted." For a complaint to survive a Rule 12(b)(6) motion, it "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A claim is facially plausible "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.*

DISCUSSION

I. Substantive Law

The Sherman Act, 15 U.S.C § 1, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Under § 2, persons shall not "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

II. Analysis

a. Antitrust Standing

"[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law." *NicSand, Inc. v. 3M Co.,* 507 F.3d 442, 450 (6th Cir. 2007). The Court must consider five factors when deciding whether a plaintiff has antitrust standing:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983).

The Court will decide these motions based on factor (2), which is also called "antitrust injury." Antitrust injury is a "necessary, but not always sufficient," condition of antitrust standing, *Cargill, Inc. v. Monfort of Colo., Inc.,* 479 U.S. 104, 110 n.5 (1986), and is an "injury of the type the antitrust laws were intended to prevent," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977). A plaintiff must show that defendants caused a "market-wide injury." *Care Heating & Cooling, Inc. v. Am. Standard, Inc.,* 427 F.3d 1008, 1014 (6th Cir. 2005). Further, antitrust laws protect "competition, not competitors." *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). Therefore, an injury "causally related to an antitrust violation . . . will not qualify as `antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 334 (1990). The Sixth Circuit "has been reasonably aggressive in using the antitrust injury doctrine to bar recovery." *Valley Prods. Co., Inc. v. Landmark, A Div. of Hosp. Franchise Sys., Inc.,* 128 F.3d 398, 403 (6th Cir. 1997).

Plaintiff does not state an antitrust claim because he fails to sufficiently allege antitrust injury and, thus, antitrust standing. The Court must first determine the precise scope of the alleged antitrust injury. The product here is not real estate, but a real estate advertising platform—the MLS. Plaintiff fails to allege any facts about the real estate advertising market or who the major real estate advertising competitors may be. His vague allegations about injuries to the unidentified "others" are wholly conclusory. Under *Iqbal,* they are not enough. As plaintiff fails to sufficiently allege a market, competitors, or any other injured person, the Court cannot reasonably infer a market-wide injury.

Plaintiff further fails to allege antitrust injury because the complained-of practice— Realcomp's MLS administration—actually promotes competition. Plaintiff's major contention is that the defendants substantially hurt competition by impermissibly tying access to the MLS to membership in a realtor association. But the alleged facts do not bear this out. The MLS is nothing more than an information-aggregating advertising platform. Generally, the more informed a consumer base is, the more likely it is that it will channel its scarce resources to the most attractive, competitively priced product. In other words, data and choices breed competition. This is precisely what the MLS does by providing customers with aggregated, streamlined information. Indeed, absent allegations of unfair discrimination, it is hard to imagine that any MLS is a net anti-competitive force or violates § 1. *See* *Reifert v. South Cent. Wisconsin MLS Corp.*, 450 F.3d 312, 320-21, (7th Cir. 2006) (holding that an MLS did not deny access and that it did not negatively impact competition). Because pro-competition behavior does not violate § 1, and because plaintiff fails to show that defendants' MLS is anti-competitive, he fails to show antitrust injury. *See* *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 976 (6th Cir. 2000).

Finally, plaintiff fails to show antitrust injury because he fails to allege that Realcomp's tying of access to the MLS to membership in a defendant real estate association forecloses other sales. The United States District Court for the Eastern District of Kentucky recently explained why this omission is fatal to an antitrust claim:

> Viewing the facts and drawing inferences most favorable to plaintiffs, the court concludes that they lack antitrust standing as a matter of law. Although plaintiffs assert standing on the basis that they were forced to purchase an unwanted product—membership in a local Realtor® association—such "harm" does not constitute "antitrust injury" necessary for standing.
>
> In *Jefferson Parish,* the Supreme Court was careful to point out that no antitrust claim would lie just because the plaintiff was "forced" to purchase an unwanted product if, absent the tie, he would not have bought it elsewhere. *Jefferson Parish,* 466 U.S. at 16, 104 S.Ct. 1551. This is because, in such a situation, no sales in the tied product market were foreclosed on account of the tie and, thus, there has been no harm to competition. *Id.* The plaintiff merely ends up with a product he did not want. . . . *See also* *Young v. Lehigh Corp.,* No. 80C4376, 1989 WL 117960, at *15 (N. D. Ill. Sept.28, 1989) ("Although the plaintiff may have suffered an `injury' in paying for club membership that he did not need or want, he did not suffer an `antitrust injury' and, therefore, does not have standing to assert an antitrust tying claim.").
>
> Thus, while plaintiffs may not have wanted to purchase a Realtor® membership, in order to bring this antitrust claim they must show that they have suffered an injury caused by some anticompetitive harm or effect flowing from that requirement. This they have not done.

Buyer's Corner Realty, Inc. v. N. Ky. Ass'n of Realtors, 410 F. Supp. 2d 574, 580 (E.D. Ky.), *aff'd sub nom., Buyer's Corner Realty, Inc. v. N. Ky. Ass'n of Realtors, Inc.,* 198 F. App'x 485 (6th Cir. 2006). In other words, if a defendant's tie does not cause a competitor to lose a sale, plaintiff fails to show antitrust injury. Here, as in *Buyer's Corner,* plaintiff fails to allege that he would have joined a different realtor association absent the tie of access to the MLS to membership in one of the defendant realtor associations. As no competitor is losing a sale, plaintiff fails to show antitrust injury.

Plaintiff may not like having to secure a broker's license and pay his dues, but categorizing plaintiff's claims as an antitrust matter would "trivializ[e] the Act." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993). Because plaintiff has not alleged facts sufficient for the Court to reasonably infer that defendants' requirements cause antitrust injury, he lacks antitrust standing.

b. Sherman Act § 1—Counts II and III

Even if plaintiff did have standing, the Court cannot reasonably infer that defendants' membership requirements unreasonably restrain trade. Here, the antitrust violation plaintiff asserts is an alleged tying arrangement. A tying arrangement is a requirement by a seller that the sale of a product or service which possesses market power (access to the MLS) will only be made on the condition that the purchaser buy a second product or service (membership in a defendant realtor association) from the producer. There is no question that defendants are tying access to membership, but the question is whether plaintiff alleges facts such that the Court can reasonably infer that this arrangement violates § 1?

"Antitrust cases under Section 1 involve two modes of analysis depending on the nature of the claim. The `rule of reason' governs most allegations of restraints on trade." *Hyland v. HomeServices of Am., Inc.,* 771 F.3d 310, 318 (6th Cir. 2014) (quotation omitted). "A `restraint' is unlawful it if is `unreasonable,'" *id.,* based on all of "the relevant circumstances," *Monsanto Co. v. Spray-rite Serv. Corp.,* 465 U.S. 752, 761 (1984). When deciding whether a local realtor board's requirements violate § 1, the Court should use the rule of reason. *See* *United States v. Realty Multi-List, Inc.,* 629 F.2d 1351, 1358 (5th Cir. 1980).

Plaintiff fails to sufficiently allege that defendants' tying arrangement violates § 1 because he alleges only that Realcomp is a voluntary trade association[3] with membership benefits. One of its membership benefits is access to the MLS. This, without more, is not a § 1 violation. *FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 458-59 (1986).[4]

Indeed, it is widely recognized that private organizations may reasonably tie their benefits and services to membership. In *United States v. Associated Press,* the Court considered a § 1 challenge to the Associated Press bylaws, which severely restricted membership and allowed existing AP members to block a competitor's membership application. 326 U.S. 1 (1945). Without the competitor's consent, the applicant could gain membership only upon several conditions, including a majority vote of some 1200 AP members. *Id.* at 9, 11. Also, AP members could not share their news stories with nonmembers. *Id.* at 9. The Court held that arbitrary and discriminatory application of membership criteria illegally restrained competition. *Id.* at 12. But, critically, it also held that the AP's refusal to provide member benefits to nonmembers did not violate § 1. *Id.* at 21-23. In other words, a private organization may restrict even economically necessary services to its members so long as it does not deny membership arbitrarily. *Id.*

Here, plaintiff's allegations fail to show that defendants are unreasonably or discriminatorily restricting access to the MLS. He does not argue that, were he to meet the realtor associations' membership requirements (i.e., broker's license and membership dues), they would deny his application or access to the MLS. Nor does he allege that the license and dues requirements are unreasonable. Because plaintiff does not allege unreasonableness or discrimination, under *Associated Press,* defendants' requirements do not violate § 1.

This holding mirrors the nationwide consensus that MLS providers do not violate § 1 when they restrict access to member brokers who have paid reasonable fees.[5] Of the myriad cases that discuss this, *Pope v. Miss. Real Estate Comm'n,* 695 F. Supp. 253 (N.D. Miss. 1988), *aff'd,* 872 F.2d 127 (5th Cir. 1989), is particularly instructive. In *Pope,* the plaintiffs claimed that the defendants denied them "access to the multiple listing service in violation of antitrust laws." 695 F. Supp. at 266. The court held that defendants did not violate § 1 for three reasons.

First, plaintiffs failed to allege discriminatory application of membership criteria. The plaintiffs voluntarily chose not to be fee-paying members of the local Board of Realtors, but demanded full access to member benefits. *Id.* The court found that they failed "to establish that they would be excluded from board membership or denied participation in the multiple listing service if they were willing to pay membership dues"—i.e., that defendants would discriminate. *Id.* Consequently, their tying claim was "severely diminished." *Id.* at 267.

Second, the court held that the complained-of fees—i.e., the standard, pro-rated membership fee—did not unreasonably restrain trade. It noted that "[p]rivate organizations often charge membership fees on a pro-rata basis. This practice distributes the organizations' expenses among all persons who receive either direct or indirect benefits of the organization." *Id.* at 268. Because the plaintiffs failed to show that the fees were "anti-competitive," "unreasonable or discriminatory," they failed to sufficiently allege a claim under § 1. *Id.* at 268-69.

Third, defendant's tie of access to the MLS to membership in a realtor association did not violate § 1 because it was reasonable. *Id.* at 269. Indeed, the court noted, such a restriction is integral to a trade association's function. *Id.* *Associated Press* "did not allow competing nonmembers to by-pass membership but required the private organization to open up membership to these non-members." *Id.* at 270.

The Court finds *Pope* persuasive and adopts its reasoning in its entirety. Here, similar to *Pope,* plaintiff refuses to join a realtor association. Nowhere does plaintiff allege that if he obtained a broker's license and paid his dues defendants would deny his application. Simply put, plaintiff wants membership benefits without the costs. Defendants' reasonable denial of plaintiff's demand does not violate § 1.

c. Sherman Act § 2—Counts I and IV: Even if plaintiff has standing, the Court cannot reasonably infer that defendants have § 2 monopoly power.

Plaintiff argues that Realcomp maintains a monopoly over the southeast Michigan real estate market. In support, he quotes *Realcomp II, Ltd. v. F.T.C.,* 635 F.3d 815, 829 (6th Cir. 2011), which states: "Given the extensive and undisputed market analysis undertaken by the ALJ and adopted by the Commission, substantial evidence supports the Commission's findings that Realcomp possessed substantial market power." Plaintiff alleges that "Realcomp continues to be organized and operate in a substantially similar manner as it did when the FTC made its findings in 2007." Compl. ¶ 33. This, plaintiff argues, is enough to show a violation of § 2.

Plaintiff's argument suffers from two flaws. First, markets and organizations change.[6] Plaintiff fails to allege any facts showing the current state of the real-estate market. Second, monopoly power under § 2 is something greater than the substantial market power under § 1. *Eastman Kodak Co. v. Image Tech. Servs.,* 504 U.S. 451, 481 (1992). Yet plaintiff alleges only that Realcomp formerly possessed substantial market power. This allegation alone is not enough for the Court to reasonably infer that Realcomp possesses § 2 monopoly market power.

III. Conclusion

For the reasons stated above, the Court concludes that plaintiff has failed to state claim under §§ 1 and 2 of the Sherman Act.

Accordingly,

IT IS ORDERED that defendants' motions to dismiss are granted.

[1] Realcomp's rules emphasize that this does not preclude part-time, online-only, or unsuccessful realtors, or allow Realcomp to arbitrarily discriminate.

[2] The seven other defendant realtor associations maintain similar rules.

[3] In every way, Realcomp acts as a voluntary trade association. Comparison with another, well-recognized voluntary trade organization—a farmers market—is helpful: In a farmers market, each member is a farmer or works for one; many sell the same or similar goods and, thus, are competitors; members pay a fee in exchange for a shared space to advertise their goods; and there is no market for farmers markets themselves. In the same way, each member of Realcomp is a licensed broker or affiliated with one; all sell the same goods (real estate); all pay a fee in exchange for a shared space to advertise their products (the MLS); and there is no market for MLSs. That Realcomp has no identifiable competitors and does not sell or market its MLS is strong evidence that it is nothing more than a voluntary trade association.

[4] *See also Anderson v. United States,* 171 U.S. 604, 618-19 (1974) ("That an agreement might give the parties to it an edge over competitors is not" alone a violation of § 1); *Martin-Trigona v. Nat'l Ass'n of Realtors,* 1978 WL 1310 (E.D. Ill. Feb. 22, 1978) ("The defendant realtors are all members of a voluntary trade association and as such may properly exclude any non-member from participation in its activities. Such exclusion does not constitute a violation of the antitrust laws");

[5] *See, e.g., State v. Cedar Rapids Bd. of Realtors,* 300 N.W.2d 127, 131 (Iowa 1981). In *Cedar Rapids,* "a few" local brokers "want[ed] access to the MLS without the `unnecessary barrier' of Board membership." 300 N.W. 2d at 129. They asked that the Court remove "`the price of admission to a non-related activity,' i.e., Board membership and fees, because one broker testified MLS access is an `economic necessity.'" *Id.* The court refused, holding that because "Board membership [was] available to all on a non-discriminatory basis," it would "not compel this private trade association to share one of its membership benefits with brokers who, for whatever personal or business reasons, declined to join." *Id.* at 131. The board's "reasonable" membership criteria "and its rule against non-member MLS participation" did not violate § 1. *Id.* Federal district courts have said the same. *See, e.g., Prencipe v. Spokane Bd. of Realtors,* 2006 WL 1310402 (E.D. Wash. 2006) ("[A] lawful exercise of a trade association's right to limit its services to its members and such membership is not the product of [a] conspiracy"), and *Venture Resources Group, Inc. v. Greater New Jersey Regional Multiple Listing Service, Inc.,* 1995 WL 866841 (D.N.J. 1995) (holding that conditioning access to an MLS on membership in a board of realtors does not violate § 1). As have federal appeals courts. *See, e.g., Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors,* 850 F.2d 803 (1st Cir. 1988) (holding that conditioning access to an MLS on membership in a realtor association does not show an unlawful tying arrangement).

[6] For example, today, Realcomp participates in data-sharing arrangements not in effect in 2007.

810 F.3d 187 (2016)

Josh FINKELMAN; Ben Hoch-Parker on behalf of themselves and the Putative Class, Appellants v. NATIONAL FOOTBALL LEAGUE; NFL Ventures, L.P.; NFL Properties, LLC; NFL Ventures, Inc.; NFL Enterprises LLC.

No. 15-1435.

United States Court of Appeals, Third Circuit.

Argued October 8, 2015.
Opinion Filed: January 14, 2016.

On Appeal from the District Court for the District of New Jersey, (Civil No. 3-14-cv-00096), District Judge: Honorable Peter G. Sheridan.

Bruce H. Nagel, Esq. [ARGUED], Robert H. Solomon, Esq., Greg M. Kohn, Esq., Andrew Pepper, Esq., Nagel Rice, LLP, Roseland, NJ, Attorneys for Appellants.

Jonathan D. Pressment, Esq. [ARGUED], William Feldman, Esq., Haynes & Boone, LLP, New York, N.Y., Karen A. Confoy, Esq., Steven J. Daroci, Esq., Fox Rothschild LLP, Lawrenceville, NJ, Attorneys for Appellees.

Before: FUENTES, SMITH, and BARRY, Circuit Judges.

188 *188 # OPINION OF THE COURT

FUENTES, Circuit Judge:

Many of us have felt the disappointment of wanting to attend a concert or athletic event only to discover that the event has sold out. When an artist or sports team is especially popular, the gap between the supply of tickets and the demand for those tickets can be enormous. Some people will be able to attend such an event; others will not.

The Super Bowl is perhaps the ultimate example of an event where demand for tickets exceeds supply. The two named plaintiffs in this case, Josh Finkelman and Ben Hoch-Parker, wanted to attend Super Bowl XLVIII, which was held in New Jersey in 2014. Finkelman bought two tickets on the resale market, allegedly for much more than face price. Hoch-Parker — confronted with the high prices in that market — opted not to purchase any. Plaintiffs then brought a class action against
189 the National Football League ("NFL") and various affiliated entities in the District of New Jersey, alleging that *189 the NFL's ticketing practices for the Super Bowl violated New Jersey law.[1] The District Court dismissed plaintiffs' suit for failure to state a claim, and plaintiffs now appeal.

We need not grapple with the meaning of New Jersey law in order to resolve this case. Our inquiry is more basic. Just as the realities of supply and demand mean that not everyone who wants to attend a popular event will be able to do so, federal courts, too, are not open to everyone who might want to litigate in them. Our courts are courts of limited subject matter jurisdiction, empowered by Article III of the Constitution to hear only "cases" and "controversies." Over time, those words have come to signify certain minimum requirements that are necessary to establish constitutional standing. These requirements are unyielding. Plaintiffs who are able to establish them will be able to sue in federal courts; others will not.

We conclude that neither Hoch-Parker nor Finkelman has constitutional standing to bring this case. Were we to decide otherwise, anyone who purchased a Super Bowl ticket on the resale market would have standing to sue in federal court based on nothing more than conjectural assertions of causation and injury. Article III requires more.

I. Background

Plaintiffs rely on a rarely litigated New Jersey statute, N.J. Stat. Ann. § 56:8-35.1 (the "Ticket Law"), which appears in New Jersey's Consumer Fraud Act. It says:

> It shall be an unlawful practice for a person, who has access to tickets to an event prior to the tickets' release for sale to the general public, to withhold those tickets from sale to the general public in an amount exceeding 5% of all available seating for the event.

The Consumer Fraud Act permits private plaintiffs to sue any person who violates the Act and causes them to suffer ascertainable damages.[2] Plaintiffs assert that the NFL's method of selling tickets to Super Bowl XLVIII violated the Ticket Law and resulted in unjust enrichment.

The New Jersey Legislature passed the Ticket Law in 2002 as part of an effort to reform its statutes regulating ticket resale, more commonly known as "scalping." New Jersey has regulated ticket resale since at least 1983.[3] In the late 1990s, there was an effort to reexamine the effectiveness of these laws, leading to the creation of a gubernatorial Ticket Brokering Study Commission.[4] Its mission was to "compare the impact of a regulated and deregulated ticket resale market on the cost and
190 availability of tickets to New Jersey *190 entertainment events" and to consider various proposed reforms.[5]

The Commission heard two days of testimony from a dozen witnesses before publishing its final report in October 2001. It found that, "[i]n a typical year, 90% to 95% of events in New Jersey do not sell out," but getting tickets to the "premium events" that do sell out "is not easy."[6] The Commission focused heavily on "hold-backs" of tickets by event organizers, concluding that "[h]old-backs disproportionately affect the general public's opportunity to obtain tickets in favor of privileged insiders," and that the practice should be "eliminated or limited by statute or regulation."[7] The Commission therefore recommended new legislation to "[l]imit the number of tickets which can be held back from sale to the general public to 5 percent of the available seating in any venue or performance."[8] The Legislature took up the Commission's suggestion, and Governor Whitman signed the bill enacting the Ticket Law on January 8, 2002.[9]

Since the Ticket Law's passage, very few courts have grappled with its meaning. Indeed, the parties point to only one case in which a New Jersey state court has interpreted the Law.[10]

A. Factual Allegations

Super Bowl XLVIII took place at MetLife Stadium in East Rutherford, New Jersey on February 2, 2014.[11] Plaintiffs allege that the NFL distributed 99% of Super Bowl tickets to NFL teams and League insiders.[12] Of that amount, 75% of tickets allegedly went to teams, with 5% going to the host team, 17.5% going to each team playing in the Super Bowl, and 35% going to the remaining teams in the League. The remaining 25% of tickets are said to have been distributed to "companies, broadcast networks, media sponsors, the host committee and other league insiders."[13] Only about 1% of Super Bowl tickets were available for purchase by members of the general public, and the only way for someone to obtain one of *those* tickets was to participate in a League-sponsored lottery.[14] In order to acquire a ticket in the lottery, a person had to (i) enter by the deadline, (ii) be selected as a winner, and (iii) choose to actually purchase a ticket.[15]

Neither Hoch-Parker nor Finkelman entered the NFL's ticket lottery. Instead, on December 30, 2013, Finkelman purchased two tickets to the Super Bowl in the resale market at a price of $2,000 per ticket (which he alleges was well in excess of the
191 tickets' $800 face price).[16] Hoch-Parker *191 wanted to purchase five Super Bowl tickets for himself and his family, hoping to pay no more than $1,000 per ticket.[17] He decided not to purchase any when, after researching the availability of tickets between November and December of 2013, the only tickets he could find were for $4,200 (or more).[18]

B. Procedural History in the District Court

Finkelman filed a putative class action against the NFL in January 2014 in the District of New Jersey. One month later, he filed an amended complaint that added several defendants and identified Hoch-Parker as a second named plaintiff.

The District Court granted the NFL's motion to dismiss the complaint — with prejudice — on January 20, 2015, in an oral decision read into the record.[19] Four aspects of its decision merit further discussion here.

First, the District Court concluded that plaintiffs failed to plead a viable claim under the Ticket Law. It reasoned that the NFL did not "withhold" any tickets to the Super Bowl within the meaning of the Law, but rather "distributed or allocated [all tickets] according to [its] existing system."[20] It also determined that the Ticket Law's 5% limitation on withholding tickets "applies solely to tickets that are intended for release to the general public."[21] At most, that portion was the 1% of tickets sold through the NFL's lottery — and none of those tickets were withheld.[22] Consequently, the District Court decided that the NFL's ticketing practices did not run afoul of the Ticket Law.

Second, the District Court concluded that Finkelman failed to plead causation under the New Jersey Consumer Fraud Act. It reasoned that Finkelman's decision not to enter the NFL's ticket lottery precluded him from proving causation because he could not demonstrate that he suffered any injury resulting from the NFL's alleged misconduct.[23] The District Court stated that it would be "unreasonable" for Finkelman to recover under the Act because he "failed to avail himself of the very mechanism ... whereby his harm would have been avoided" — *i.e.,* entering the lottery and possibly winning a face-price ticket.[24] The District Court viewed the causation issue as a fatal pleading defect under the state statute, although it noted that Finkelman's failure to enter the NFL ticket lottery raised "clear standing issues" under Article III.[25]

Moreover, the District Court was skeptical that Finkelman would be able to show causation even if he had entered the lottery *and lost.* It noted that the tickets Finkelman purchased on the secondary market might well have been sold to him by
192 a lottery winner who purchased them at face price. The District Court stated that, if this were true, it would be "hard to *192 discern any wrongdoing on the part of the NFL that could have served as a cause of harm of which Finkelman now complains."[26]

Third, the District Court concluded that Hoch-Parker lacked Article III standing. In its view, having chosen not to purchase any Super Bowl tickets, Hoch-Parker could not show that he suffered any harm "beyond pure speculation or the merely hypothetical."[27]

Fourth, the District Court dismissed plaintiffs' unjust enrichment claim. It reasoned that, as a quasi-contractual remedy, unjust enrichment requires a "sufficiently direct relationship" between the alleged wrongdoer and the plaintiff.[28] Here, by contrast, the relationship between the plaintiffs and the NFL was "too ambiguous, remote or attenuated" for plaintiffs' unjust enrichment claim to be viable.[29]

II. Appellate Jurisdiction and Standard of Review

This is a diversity suit brought by plaintiffs under the Class Action Fairness Act.[30] This Court has appellate jurisdiction over the final judgment of the District Court under 28 U.S.C. § 1291.[31] The District Court entered an order dismissing the case on January 21, 2015, and plaintiffs filed a notice of appeal on February 13, 2015.[32]

The Court's review of a decision dismissing a complaint is plenary.[33]

III. Article III Standing

The question we confront is whether plaintiffs have alleged facts which, if true, would be sufficient to establish Article III standing.

We begin by noting that our inquiry is more searching than the one originally contemplated by the parties. In its principal brief, the NFL asked this Court to affirm the District Court's dismissal of Hoch-Parker's claims on standing grounds, but, with respect to Finkelman, focused exclusively on the viability of plaintiffs' claim under the Ticket Law. In litigating the appeal this way, the NFL was following the lead of the District Court, which concluded that Finkelman failed to allege causation under the New Jersey Consumer Fraud Act. In doing so, the District Court noted that Finkelman's failure to enter the NFL ticket lottery raised "certain standing issues," but decided "the issue [was] more properly examined" in the context of New Jersey law "as opposed to standing."[34]

193 *193 We must take a different approach. A federal court's obligation to assure itself that it has subject matter jurisdiction over a claim is antecedent to its power to reach the merits of that claim.[35] To that end, even when appellees do not address standing, we must determine on our own whether standing exists.[36] Cognizant of our "bedrock obligation to examine [our] own subject matter jurisdiction," we therefore asked the parties to submit supplemental briefs addressing standing.[37]

A. The Minimum Requirements of Article III Standing

To establish Article III standing, a plaintiff must demonstrate "(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision."[38]

To allege the first element, injury-in-fact, a plaintiff must claim "the invasion of a concrete and particularized legally protected interest" resulting in harm "that is actual or imminent, not conjectural or hypothetical."[39] To be "concrete," an injury must be "real, or distinct and palpable, as opposed to merely abstract."[40] To be sufficiently "particularized," an injury must "affect the plaintiff in a personal and individual way."[41] Plaintiffs do not allege an injury-in-fact when they rely on a "chain of contingencies" or "mere speculation."[42]

The second element of Article III standing is causation. This element requires the alleged injury to 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."[43] This requirement is "akin to `but for' causation" in tort and may be satisfied "even where the conduct in question might not have been a proximate cause of the harm."[44] An "indirect causal relationship will suffice," provided that "there is a `fairly
194 traceable connection between the alleged *194 injury in fact and the alleged conduct of the defendant.'"[45]

Finally, the plaintiff must establish redressability. This requires the plaintiff to show that it is "likely, as opposed to merely speculative," that the alleged injury will be redressed by a favorable decision.[46]

The burden to establish standing rests with the plaintiffs.[47] The manner in which plaintiffs go about satisfying that burden depends on the posture of the case. The Supreme Court has said that "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation."[48] When assessing standing on the basis of the facts alleged in a complaint, this means we apply the same standard of review we use when assessing a motion to dismiss for failure to state a claim.[49]

We have described this inquiry as a three-step process. First, we "tak[e] note of the elements a plaintiff must plead to state a claim" — here, the three elements of Article III standing.[50] Second, we eliminate from consideration any allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth."[51] Third, "where there are well-pleaded factual allegations, [we] assume their veracity and then determine whether they plausibly" establish the prerequisites of standing.[52] In conducting this analysis, we are mindful of the Supreme Court's teaching that all aspects of a complaint must rest on "well-pleaded factual allegations" and not "mere conclusory statements."[53] Thus, to survive a motion to dismiss for lack of standing, a plaintiff "must allege facts that affirmatively and plausibly suggest that it has standing to sue."[54] Speculative or conjectural assertions are not sufficient.[55]

195 *195 Absent standing on the part of the named plaintiffs, we must dismiss a putative class action for lack of subject matter jurisdiction.[56] As will become apparent, we have no choice but to do so here.

B. Hoch-Parker Does Not Allege an Article III Injury

The District Court concluded that Hoch-Parker lacks Article III standing because he never purchased a ticket to the Super Bowl, meaning that he suffered no out-of-pocket loss and, in the District Court's view, no injury-in-fact. This is plainly correct.[57] Injuries-in-fact must be "particularized" in the sense of "affect[ing] the plaintiff in a personal and individual way."[58] Because Hoch-Parker never purchased a ticket on the secondary market, he suffered no more injury than any of the possibly tens of thousands of people who thought about purchasing a ticket to the Super Bowl and chose not to. Nor does Hoch-Parker allege an "actual" injury, as opposed to one that is "conjectural or hypothetical."[59] Because he chose not to purchase any tickets, the amount of any damages Hoch-Parker might have suffered due to the NFL's alleged misconduct is completely indeterminate.

Perhaps sensing the weakness of his claim to have suffered an injury-in-fact, Hoch-Parker tries to recast his injury as the "lost opportunity" he suffered when he was unable to attend the Super Bowl. He cites our decision in *Howard v. New Jersey Department of Civil Service* in support of that assertion.[60] We find this "lost opportunity" argument completely unpersuasive. Indeed, any analogy between *Howard* and the circumstances here is, at best, extremely strained.

The *Howard* plaintiffs alleged that the physical agility test then required of applicants to become police officers in Newark discriminated on the basis of sex.[61] In assessing whether the plaintiffs had standing, the Court concluded that the alleged loss of the opportunity to obtain a job with the police force was sufficient to make out an injury-in-fact.[62] Of course, the *Howard* plaintiffs had already entered a competitive application process that they claimed was derailed by unconstitutional conduct on the part of state actors. Hoch-Parker, by contrast, merely "researched the availability of tickets" for the Super Bowl.[63] He took no meaningful action to pursue the "opportunity" to attend the game at all.

196 Moreover, Hoch-Parker completely glosses over the *Howard* Court's actual *196 resolution of the standing issue in that case. Since the *Howard* plaintiffs "were refused employment because they failed the initial written examination, not because they failed the physical agility test," the Court concluded that they *lacked* standing because they could not show any "causal connection between the claimed injury (loss of job opportunity) and the challenged conduct (use of the physical agility test)."[64] Hoch-Parker faces the same causation problem. Demand for Super Bowl tickets was so great that Hoch-Parker might have been unable to obtain any tickets at his preferred price even if the NFL had made *all* tickets to the Super Bowl available to members of the general public. As in *Howard,* there is thus an insufficient connection between Hoch-Parker's claimed injury (the loss of an opportunity to attend the Super Bowl) and the challenged conduct (withholding of tickets).

Our conclusion that Hoch-Parker lacks standing is not a hard call. If the Court were to credit Hoch-Parker's concept of injury, *everyone* who contemplated buying a Super Bowl ticket but decided against it would have standing to bring a claim under the Ticket Law. Article III is simply not that expansive.[65]

Accordingly, we will uphold the District Court's dismissal of Hoch-Parker's Ticket Law claim for lack of Article III standing.[66]

C. Finkelman Does Not Allege an Article III Injury

197 We also conclude that Finkelman has failed to allege facts which, if true, *197 would be sufficient to establish Article III standing.

The complaint purports to bring a class action on behalf of "all persons who paid for ... tickets to Super Bowl XLVIII in excess of the printed ticket price" and alleges that class members "suffered ascertainable losses consisting of the purchase price of the ticket in excess of the face value."[67] Whereas Hoch-Parker never purchased any tickets, we will assume that Finkelman purchased two $2,000 tickets with an original face price of $800 each.[68] The question is whether this $2,400 difference — or any portion of it — amounts to an injury-in-fact caused by the NFL's alleged misconduct.

In exploring this question, we are cognizant of the fact that "[t]he choice among alternative definitions of the injury may control the determination of causation."[69] We will therefore examine the allegations in the complaint from a number of different angles to see if Finkelman's purported injury can be framed in a way that satisfies Article III.

1. Theory One: The NFL's Alleged Misconduct Prevented Finkelman from Purchasing a Face-Price Ticket

One way to understand Finkelman's claim is that, but for the NFL's withholding of more than 5% of Super Bowl tickets from sale to the general public, he would have been able to buy such a ticket at face price. In view of the facts alleged in the complaint, however, Finkelman has not adequately asserted that his inability to buy a face-price ticket is fairly traceable to any actions by the NFL.

In order to explain why causation is such a difficult issue in this case, it is helpful to start with an example. Imagine that there are ten people in line to attend a concert at a venue with only ten seats. It turns out, unbeknownst to the would-be ticket buyers, that the event organizer has violated the Ticket Law by withholding 50% of tickets for corporate insiders. The first five people in line are able to buy a ticket at face price, but just as the sixth person reaches the ticket counter, the clerk puts a "SOLD OUT" sign in the window and turns off the lights. The sixth person in line then (i) buys a ticket from one of the five insiders in the resale market at a price higher than face value, and (ii) sues the event organizer under the Ticket Law. She seeks, as damages, the difference between the face price of the ticket and the higher price she actually paid.

In this scenario, our plaintiff should have no trouble alleging that she suffered an injury-in-fact fairly traceable to the defendant's conduct. But for the defendant's illegal withholding, our plaintiff — as the sixth person in line — would have been able to buy a ticket at face price.[70]

This example reflects the same theory that Finkelman proffers here. He seeks as damages the difference between the $800
198 face price of Super Bowl tickets and the $2,000 price he paid in the resale market.[71] *198 But while this theory of recovery works very well as applied to our hypothetical, it completely falls apart in relation to Finkelman.

The problem is that Finkelman failed to enter the NFL's ticket lottery. Irrespective of whether the NFL withheld tickets in violation of the Ticket Law — a question we do not reach here — Finkelman chose to buy his tickets on the secondary market. As a result, there was always a *zero* percent chance that he could procure a face-price ticket. In this sense, any harm that Finkelman suffered is properly attributed not to the NFL, but rather to his own decision not to enter the ticket lottery.[72]

Finkelman tries to rebut this view by arguing that it would be unfair to require him to have entered the lottery in order to assert standing. As Finkelman puts it, such a ruling would "amount to no less than conditioning Plaintiffs' standing to seek redress for Defendants' unlawful conduct upon their participation in the very wrongdoing they seek to challenge."[73] Though this argument may have some intuitive appeal, it ultimately misses the mark.

Finkelman is of course correct that the law does not always require a plaintiff to participate in some allegedly unlawful practice in order to bring a lawsuit challenging that practice.[74] Even so, the obstacle facing Finkelman is more fundamental. The causation element of standing requires a plaintiff to allege facts sufficient to show that his or her injury is "fairly traceable" to the alleged wrongdoing of the defendant.[75] We have explained that traceability requires, at a minimum, that the defendant's purported misconduct was a "but for" cause of the plaintiff's injury.[76] And, if we treat Finkelman's injury-in-fact as his inability to obtain face-price tickets to the Super Bowl, *that* injury is simply not traceable to the NFL's withholding of tickets given that Finkelman sought tickets only in the resale market.[77]

199 *199 Any other conclusion is untenable. Were we to adopt Finkelman's view of standing, *anyone* who bought a Super Bowl ticket from a reseller could sue the NFL to recover three-times the difference between the purchase price and face price.[78] One might ask: what if the only ticket Finkelman could find was on sale for $10,000? Or $15,000? Or $20,000? No matter. On the theory of injury articulated in plaintiffs' complaint, everyone who bought a resold ticket could sue the NFL for any costs above face price, irrespective of having chosen not to enter the ticket lottery. Because this theory of standing fails to account for the need to show a causal connection between plaintiffs' alleged injury and the NFL's conduct, we have no choice but to reject it.

Indeed, Finkelman's standing difficulties would likely be insuperable even if the NFL had committed only a *de minimis* violation of the Ticket Law by distributing 6% of tickets to League insiders and selling 94% of tickets to members of the general public on a first-come, first-served basis. Unless Finkelman could allege facts indicating that, as in our hypothetical, he was one of the "next people in line," demand for Super Bowl tickets so far exceeds supply that Finkelman's probability of obtaining a face-price ticket in a public sale would have been effectively nil regardless of the NFL's ticketing practices. Any argument that Finkelman could have procured a face-price ticket to the Super Bowl — at least on the facts alleged in the complaint before us — is ultimately conjectural and speculative. It is, in short, precisely the kind of allegation that cannot sustain Article III standing.[79]

Consequently, Finkelman has failed to allege standing on the theory that, but for the NFL's alleged withholding, he would have been able to purchase a face-price ticket.

2. Theory Two: Finkelman Paid a Higher Price in the Resale Market Due to the NFL's Withholding of Tickets

We will also consider another way of framing the Article III injury in this case — one emphasized by plaintiffs' counsel at oral argument. Instead of thinking of Finkelman's injury as his inability to acquire a face-price ticket, we might focus instead on the increased price he allegedly paid for his tickets *on the resale market.* In other words, it may be the case that, but for the NFL's alleged wrongdoing, the price Finkelman paid for a resold ticket would have been cheaper. This argument relies on the basic principle that "[a] reduction in supply will cause prices to rise."[80] One might suppose that if the NFL were withholding Super Bowl tickets, its behavior would have had the effect of decreasing the supply of tickets in the resale market and driving up those tickets' prices.

To give a concrete example, imagine that, for a given event, the face price of a ticket is $100 and its price on the resale market is $200. If we assume that an event organizer's illegal withholding drives up the price on the resale market, it may be
200 that, but for the withholding, the price *200 on the resale market would have been $180. In this example, a plaintiff's injury-in-fact is not $100 (the difference between the face price and the resale price), but $20 (the difference between the resale price with and without the defendant's illegal withholding).

In conceptualizing Finkelman's injury this way, we recognize that the First Amended Complaint did not allege this theory of harm as clearly as it could have. Indeed, Finkelman primarily sought as damages "the purchase price of the ticket in excess of the face value."[81] Nonetheless, drawing all reasonable inferences in Finkelman's favor, we find that he sufficiently raised this price-inflation theory of injury below. We will therefore consider the argument that his Article III injury is *not* the $1,200 premium he paid per ticket, but rather some unspecified portion of that amount attributable to the NFL's alleged withholding.

At first blush, this might seem to be a promising way for Finkelman to establish standing. But there is a problem. Demand for tickets to the Super Bowl is so high that those tickets command, on plaintiffs' own telling, several times their face price in the resale market.[82] Assuming that Finkelman is correct that the NFL allocated some 99% of Super Bowl tickets to League insiders, those insiders had the same incentive to resell their tickets as the unnamed broker who sold Finkelman *his* two tickets: they could make an enormous profit by doing so. Thus, while it *might* be the case that the NFL's withholding increased ticket prices on the resale market, it might *also* be the case that it had *no* effect on the resale market.[83]

Indeed, on the facts alleged here, withholding tickets from the general public and distributing them to League insiders might have even *increased* the supply of tickets on the resale market, leading to *lower* prices. The complaint never specifies whether the NFL insiders who received the vast majority of Super Bowl tickets had to pay for those tickets in the first instance. Now, compare two potential ticket resellers. The first, an individual fan, could resell his or her ticket and pocket as profit the difference between the resale price and the up-front cost of the ticket. The second, a League insider who received a ticket for free, could make even more money by pocketing the entire resale price of the ticket as profit. For this reason, League insiders might have been especially eager to resell their tickets-meaning that the NFL's ticket distribution practices may have actually *increased* the number of ticket sellers in the secondary market. Since an increase in supply leads to lower prices, it is entirely possible that Finkelman was able to a buy a ticket for *less* money than if members of the general public had been able to purchase 95% of all tickets in the first instance.

To state the problem succinctly: we have no way of knowing whether the NFL's withholding of tickets would have had the effect of increasing or decreasing prices on the secondary market. We can only speculate — and speculation is not enough to sustain Article III standing.

201 *201 This conclusion may seem counterintuitive. After all, Finkelman is pursuing a simple price inflation theory based on the relationship between supply and demand in the ticket resale market, and federal courts typically credit allegations of injury that involve no more than "application of basic economic logic."[84] But there is a difference between allegations that stand on well-pleaded facts and allegations that stand on nothing more than supposition.

In explaining that difference, it may be helpful to compare failure to allege an Article III injury with failure to state a plausible claim under Rule 12(b)(6). The Supreme Court's decision in *Bell Atlantic v. Twombly* is the touchstone. The plaintiffs there, who purported to represent a class of telephone and high-speed Internet service subscribers, alleged that the companies that provided these services had conspired to minimize competition and to inflate service charges.[85] So far, so good: a person who claims to have paid inflated prices resulting from an antitrust conspiracy clearly alleges an Article III injury. Where plaintiffs fell short was in alleging facts that would lead to the plausible inference that the defendants had entered a conspiracy at all. The complaint focused only on defendants' "parallel conduct," and parallel conduct, standing alone, is not necessarily "suggestive of conspiracy."[86] Because plaintiffs' allegations were not sufficient to "nudge[] their claims across the line from conceivable to plausible," they failed to state a claim under Rule 12(b)(6).[87]

It is thus fair to say that, in *Twombly,* the plaintiffs looked around and saw conduct *consistent* with a conspiracy, but they saw no facts that indicated more plausibly that a conspiracy actually existed. Finkelman's situation is different. Given the NFL's ticket distribution practices, he knows precisely how the NFL allegedly violated the law. But when it comes to injury, he looks only to the difference between a ticket's $800 face price and the price he paid and says, "I have a strong suspicion that this ticket would have been cheaper if more tickets had been available for purchase by members of the general public." *That* claim rests on no additional facts at all. It is pure conjecture about what the ticket resale market might have looked like if the NFL had sold its tickets differently. Article III injuries require a firmer foundation.

The D.C. Circuit's decision in *Dominguez v. UAL Corp.* provides a helpful point of comparison.[88] The plaintiff there sued United Air Lines under the federal antitrust laws, asserting that United's prohibition on reselling airplane tickets deprived him of a secondary market in which he might have been able to purchase tickets for less money than he paid United.[89] While the district court granted summary judgment in favor of the defendant, the D.C. Circuit concluded that the district court should have dismissed the case for lack of Article III standing.

The D.C. Circuit reached this conclusion even though the plaintiff had introduced testimony from an expert who surveyed United's customers and concluded that "a high percentage of respondents would consider using a feature that allowed them
202 to legally sell or give away airline tickets *202 they are unable to use."[90] In the plaintiff's view, this was sufficient to show that United's prohibition on a secondary market for airplane tickets caused him an injury-in-fact. The D.C. Circuit disagreed. It noted that the plaintiff's expert had failed to take into account the costs of changing United's reservation system, the possible introduction of new, seller-imposed fees, and myriad other factors that might influence prices in a hypothetical resale market. Thus, the plaintiff could not show "that any secondary market would have led to a lower price than what [the plaintiff] paid," and the absence of a plausible injury-in-fact required dismissal.[91]

Dominguez illustrates the intractable standing problems that may arise when a lawsuit rests on allegations about a hypothetical resale market. Like the plaintiff in that case, Finkelman only can speculate as to whether, absent the NFL's withholding, the prices he paid in the resale market would have been cheaper. He has to guess. In the final analysis, Article III requires more than this kind of conjecture.[92]

To be fair, one might point out that *Dominguez* was handed down after discovery had concluded, whereas Finkelman has not had a chance to introduce evidence that might more fully flesh out his theories of injury and causation. Indeed, at oral argument, his counsel suggested that he had an economist ready to testify that the NFL's withholding of tickets increased the price that Finkelman paid in the resale market.[93]

We are of course mindful that, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim."[94] But we have been careful to note that, even at the pleading stage, "we need not accept as true unsupported conclusions and unwarranted inferences."[95] Insofar as we construe the complaint to allege that Finkelman paid more for his tickets than he would have absent the NFL's alleged misconduct, that contention is a "bald assertion" unsupported by well-pleaded facts.[96] Nor are we persuaded by plaintiffs' counsel's promises of future expert testimony when no facts supporting plaintiffs' theory of injury appear within the four corners of the complaint.[97]

203 *203 We conclude that Finkelman's difficulties in alleging an injury-in-fact are insurmountable. Because the District Court lacked subject matter jurisdiction to reach the merits of plaintiffs' claims, we will therefore vacate its dismissal of Finkelman's Ticket Law and unjust enrichment claims under Rule 12(b)(6).[98]

IV. Conclusion

The threshold requirements of standing are "moored in the constitutional principle that the judiciary's power only extends to cases or controversies."[99] In reaching our conclusions in this case, we neither interpret the Ticket Law's meaning nor pass judgment on future Ticket Law claims. The New Jersey Attorney General can always sue to enforce the Law, and the courts of New Jersey remain open to such suits. But Hoch-Parker and Finkelman chose to sue in federal court, and their failure to allege the elements of standing means that we lack jurisdiction to adjudicate their claims.

We will therefore affirm the District Court's judgment with respect to Hoch-Parker and vacate the District Court's judgment with respect to Finkelman. Because the NFL did not raise the issue of Finkelman's Article III standing before the District Court,[100] we will dismiss this appeal without prejudice for lack of jurisdiction and remand to the District Court for further proceedings consistent with this Opinion.[101] On remand, the District Court may exercise its discretion as to whether plaintiffs should be granted leave to amend their complaint.[102]

[1] The other defendants include NFL Ventures, L.P., NFL Properties, LLC, NFL Ventures, Inc., and NFL Enterprises LLC. Plaintiffs initially sued another defendant, NFL on Location, but later filed a stipulation voluntarily dismissing that defendant. (*See* Appellants' Br. at 12 n.5.) We will refer to the defendants collectively as "the NFL."

[2] N.J. Stat. Ann. § 56:8-19. As originally drafted, the Act empowered only the New Jersey Attorney General to sue to enforce its provisions. The Legislature amended the statute in 1971 to permit private suits, but required private plaintiffs (unlike the Attorney General) to prove that they suffered an ascertainable loss caused by a defendant's misconduct. *See* *Bosland v. Warnock Dodge, Inc.,* 197 N.J. 543, 964 A.2d 741, 747-48 (2009).

[3] J.A. Vol. II at 203-04, 208-09 (N.J. Dep't of L. & Pub. Safety, Div. of Consumer Affairs, Report to Governor Christine Todd Whitman on Access to Entertainment in New Jersey (Apr. 7, 1997)).

[4] J.A. Vol. II at 171-200 (Ticket Brokering Study Comm'n, Ticket Broker Report (Oct. 31, 2001)).

[5] *Id.* at 173.

[6] *Id.* at 175.

[7] *Id.* at 197.

[8] *Id.* at 191.

[9] 2001 N.J. Laws 394.

[10] *Harvey v. GSAC Partners, Inc.,* No. L-736-03 (N.J.Super.Ct.Law Div., Monmouth Cnty. Mar. 21, 2003). *See* J.A. Vol. II at 155-65 (a copy of the *Harvey* opinion).

[11] First. Am. Compl. (J.A. Vol. II at 76-92) ¶ 17. In resolving an appeal from the grant of a motion to dismiss, we accept all factual allegations in the complaint as true and draw all reasonable inferences in plaintiffs' favor. *Hansler v. Lehigh Valley Hosp. Network,* 798 F.3d 149, 152 n. 2 (3d Cir.2015).

[12] First Am. Compl. ¶ 18.

[13] *Id.* ¶¶ 18-19.

[14] *Id.* ¶¶ 1, 18.

[15] Appellees' Br. at 34 n.13.

[16] First. Am. Compl. ¶¶ 31-32. The $800 figure appears on page 11 of appellants' opening brief. As the NFL points out, the First Amended Complaint does not actually allege the face price of tickets to Super Bowl XLVIII. (Appellees' Br. at 11 n.2.)

[17] First. Am. Compl. ¶¶ 33-34.

[18] *Id.* ¶¶ 34-35. The First Amended Complaint states that Hoch-Parker searched for tickets in 2012, but this is clearly a scrivener's error.

[19] *See* J.A. Vol. I at 31-41. The District Court entered an order granting the NFL's motion to dismiss on January 21, 2015. *Id.* at 3.

[20] *Id.* at 38:2-4.

[21] *Id.* at 38:5-7.

[22] *Id.* at 38:23-39:3.

[23] *Id.* at 39:19-22.

[24] *Id.* at 39:22-25.

[25] *Id.* at 36:9-13.

[26] *Id.* at 40:15-18. On appeal, Finkelman asserts that this scenario is impossible because the NFL requires lottery winners to pick up their tickets in person. (Appellants' Br. at 17 & n.8.)

[27] J.A. Vol. I at 35:21-23.

[28] *Id.* at 41:8-11.

[29] *Id.* at 41:12-16.

[30] 28 U.S.C. § 1332(d)(2)(A).

[31] Of course, notwithstanding the presence of statutory appellate jurisdiction, our conclusion that the named plaintiffs lack Article III standing means that we do not have subject matter jurisdiction to reach the merits of plaintiffs' claims. *See, e.g., Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101-02, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

[32] J.A. Vol. I at 1-2.

[33] *Brown v. Card Serv. Ctr.,* 464 F.3d 450, 452 (3d Cir.2006).

[34] J.A. Vol. I at 36:2-13.

[35] *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.,* 549 U.S. 422, 430-31, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007).

[36] *Steele v. Blackman,* 236 F.3d 130, 134 n. 4 (3d Cir.2001).

[37] *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.,* 123 F.3d 111, 117 (3d Cir.1997).

[38] *Neale v. Volvo Cars of N. Am., LLC,* 794 F.3d 353, 358-59 (3d Cir.2015) (internal quotation marks omitted and punctuation modified) (quoting *Susan B. Anthony List v. Driehaus,* ___ U.S. ___, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246 (2014)).

[39] *Blunt v. Lower Merion Sch. Dist.,* 767 F.3d 247, 278 (3d Cir.2014) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)), *cert. denied,* ___ U.S. ___, 135 S.Ct. 1738, 191 L.Ed.2d 702 (2015).

[40] *N.J. Physicians, Inc. v. President of the United States,* 653 F.3d 234, 238 (3d Cir.2011) (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), and *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)).

[41] *Defenders of Wildlife,* 504 U.S. at 560 n. 1, 112 S.Ct. 2130.

[42] *Constitution Party of Pa. v. Aichele,* 757 F.3d 347, 364 (3d Cir.2014) (quoting *Clapper v. Amnesty Int'l USA,* ___ U.S. ___, 133 S.Ct. 1138, 1148, 185 L.Ed.2d 264 (2013)).

[43] *Toll Bros., Inc. v. Twp. of Readington,* 555 F.3d 131, 137-38 (3d Cir.2009) (quoting *Defenders of Wildlife,* 504 U.S. at 560, 112 S.Ct. 2130).

[44] *Edmonson v. Lincoln Nat'l Life Ins. Co.,* 725 F.3d 406, 418 (3d Cir.2013) (citing *The Pitt News v. Fisher,* 215 F.3d 354, 360-61 (3d Cir.2000)).

[45] *Toll Bros.,* 555 F.3d at 142 (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000)).

[46] *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. 2130 (internal quotation marks omitted).

[47] *Berg v. Obama,* 586 F.3d 234, 238 (3d Cir.2009).

[48] *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. 2130.

[49] *In re Schering Plough Corp. Intron/Temodar Consumer Class Action,* 678 F.3d 235, 243 (3d Cir.2012).

[50] *Id.* (quoting *Santiago v. Warminster Twp.,* 629 F.3d 121, 130 (3d Cir.2010)).

[51] *Id.*

[52] *Id.*

[53] *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (discussing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

[54] *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir.2011).

[55] *Schering Plough*, 678 F.3d at 248 (rejecting the sufficiency of an allegation that rested on "pure conjecture").

Some of our sister circuits have questioned how well the "plausibility" standard of *Iqbal* and *Twombly* maps onto standing doctrine. *See, e.g., Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir.2011) ("We simply note that *Twombly* and *Iqbal* deal with a fundamentally different issue, and that the court's focus should be on the jurisprudence that deals with constitutional standing."); *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 225 (2d Cir.2008) ("However, plausibility is not at issue at this point, as we are considering only Article III standing.").

Without wading too deeply into this particular thicket, we are content to say that, even when reviewing only the bare allegations of a complaint, *Iqbal* and *Twombly* teach that standing cannot rest on mere "legal conclusions" or "naked assertions." *David v. Alphin*, 704 F.3d 327, 333 (4th Cir.2013); *see also Maya*, 658 F.3d at 1068 (a plaintiff cannot "rely on a bare legal conclusion to assert injury-in-fact, or engage in an ingenious academic exercise in the conceivable to explain how defendants' actions caused his injury") (internal quotation marks omitted); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir.1997) ("[A] court need not credit a complaint's `bald assertions' or `legal conclusions' when deciding a motion to dismiss.").

[56] *Neale*, 794 F.3d at 362 ("[T]he `cases or controversies' requirement is satisfied so long as a class representative has standing.").

[57] Even plaintiffs' counsel "conceded" at oral argument that the question of whether Hoch-Parker has standing is a "troubling," "troublesome," and "difficult issue." Oral Arg. Recording at 1:42, 5:35, 6:46, *available at* http://www2.ca3.uscourts.gov/oralargument/audio/15-1435Finkelmanv.NationalFootball.mp3.

[58] *Defenders of Wildlife*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130.

[59] *Id.* at 560, 112 S.Ct. 2130 (quotation marks omitted).

[60] 667 F.2d 1099 (3d Cir.1981).

[61] *Id.* at 1100-01.

[62] *Id.* at 1101.

[63] First Am. Compl. ¶ 34.

[64] 667 F.2d at 1101.

[65] Hoch-Parker suggests that the Supreme Court may decide in *Spokeo, Inc. v. Robins* that "naked statutory violations" are sufficient to confer Article III standing and encourages us to consider the "direct application" of *Spokeo* to this case. (Appellants' Ltr. to Ct. at 6 (Sept. 29, 2015).) The Supreme Court there granted certiorari to address the question of "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." Supreme Court, No. 13-1339, Question Presented, http://www.supremecourt.gov/qp/13-01339qp.pdf (last visited Nov. 16, 2015). We need not wait for an opinion in *Spokeo* to decide that Hoch-Parker lacks standing.

As an initial matter, *Spokeo* involves the assertion of standing absent a showing of "concrete harm." The question presented does not address the separate requirement that an Article III injury must be sufficiently "particularized." Having chosen not to purchase a Super Bowl ticket, Hoch-Parker asserts *no* particularized harm at all.

Second, *Spokeo* concerns the limits that Article III places on Congress's ability to create a statutory cause of action. It does not address the separate issue of whether a *state legislature* can elevate harms to the status of Article III injuries in the context of diversity jurisdiction. That issue raises serious federalism concerns absent from the *Spokeo* case.

Third, Hoch-Parker's *Spokeo* argument is ultimately futile. Whatever the contours of Article III, the New Jersey Consumer Fraud Act only permits a private plaintiff to sue when that plaintiff has suffered an "ascertainable loss of moneys or property." N.J. Stat. Ann. § 56:8-19. Although we do not reach the merits of Hoch-Parker's claims, we nonetheless observe that Hoch-Parker nowhere explains how, even if *constitutional* standing can rest on a bare statutory violation, he would have *statutory* standing absent the kind of injury that New Jersey law requires.

[66] The complaint is somewhat ambiguous as to whether plaintiffs' unjust enrichment claim is brought in the name of Finkelman, Hoch-Parker, or both. Because that claim alleges that "[p]laintiffs and the putative Class paid an amount for tickets that exceed [sic] the value of the tickets" (First.Am.Compl. ¶ 53), and since Hoch-Parker paid nothing for any tickets, we will construe the unjust enrichment claim as being brought by Finkelman as the sole class representative.

[67] *Id.* ¶¶ 38, 50.

[68] *See supra* note 16.

[69] 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3531.5 (3d ed.2008).

[70] One might also ask whether the eleventh person in line would have standing. It seems clear to us that if the defendant in such a case could show that (i) there were only ten tickets available, and (ii) the plaintiff was the eleventh person in line, and then moved for dismissal

on causation grounds, the district court would have no choice but to dismiss the case for lack of standing.

[71] Indeed, presumably Finkelman actually seeks more than this difference as damages. The Consumer Fraud Act *mandates* that successful plaintiffs receive treble damages and attorneys' fees and costs. *See* N.J. Stat. Ann. § 56:8-19.

[72] We note that Finkelman's inability to obtain a face-price ticket in the resale market is itself a consequence of the incredibly high demand for Super Bowl tickets. Since 95% of entertainment events in New Jersey do not sell out, *see supra* note 6, it is almost never clear ahead of time whether buying tickets to an event with the plan to resell them for a profit will be a good investment. Ticket brokers therefore "assume the risk of not being able to sell [their] tickets." Stephen Happel & Marianne M. Jennings, *The Eight Principles of the Microeconomic and Regulatory Future of Ticket Scalping, Ticket Brokers, and Secondary Ticket Markets,* 28 J.L. & Com. 115, 129 (2010).

Thus, for most events, a fan might be able to obtain a ticket for face price (or less!) from a broker desperate to recoup some portion of his or her investment in the waning moments before an event begins. Here, by contrast, plaintiffs assert that the demand for Super Bowl tickets is so overwhelming that, once in the secondary market, a fan "*must* pay substantially more than the ticket's face value." (First Am. Compl. ¶ 1 (emphasis added).) Plaintiffs therefore agree: once Finkelman chose not to enter the lottery, it was impossible for him to pay face price for a ticket.

[73] Appellants' Br. at 36.

[74] *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 489-91, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (describing circumstances in which district courts have subject matter jurisdiction to consider a challenge to an administrative adjudication even when the agency action has not yet terminated).

[75] *Toll Bros.,* 555 F.3d at 142.

[76] *See Edmonson,* 725 F.3d at 418.

[77] One might argue that, even if Finkelman cannot allege that the NFL *prevented* him from obtaining a face-price ticket, the NFL's alleged withholding of tickets perhaps *diminished his chances* of acquiring a face-price ticket. Here again, though, Finkelman runs into the problem that he failed to enter the ticket lottery. His chance of obtaining a face-price ticket was always zero.

[78] *See supra* note 71 (discussing mandatory damages under the Consumer Fraud Act).

[79] *See Blunt,* 767 F.3d at 278; *Aichele,* 757 F.3d at 364.

[80] *In re Linerboard Antitrust Litig.,* 305 F.3d 145, 152 (3d Cir.2002).

[81] First Am. Compl. ¶ 50.

[82] *See id.* ¶ 27 (alleging that tickets for the 2013 Super Bowl with a face price of $600 sold in the secondary market for $3,000); *id.* ¶ 35 (alleging that Hoch-Parker could not find a ticket to the 2014 Super Bowl for less than $4,200).

[83] *See* Happel & Jennings, *The Eight Principles of the Microeconomic and Regulatory Future of Ticket Scalping,* 28 J.L. & Com. at 162 (explaining that held-back tickets "do make their way into secondary markets").

[84] *United Transp. Union v. I.C.C.,* 891 F.2d 908, 912 n. 7 (D.C.Cir.1989).

[85] 550 U.S. at 550, 127 S.Ct. 1955.

[86] *Id.* at 568, 127 S.Ct. 1955.

[87] *Id.* at 570, 127 S.Ct. 1955.

[88] 666 F.3d 1359 (D.C.Cir.2012).

[89] *Id.* at 1360-61.

[90] *Id.* at 1363.

[91] *Id.*

[92] We emphasize that Finkelman's standing issues arise from an unusual combination of factors, including reliance on claims about a hypothetical resale market and the NFL's idiosyncratic ticketing practices. In the mine run of cases, where a complaint alleges that the defendant committed an unlawful act that caused a traditional injury, the most plausible inference will be that the plaintiff sustained an Article III injury. The *amount* of damages is then a question of proof. Here, by contrast, the complaint does not permit the plausible inference that Finkelman suffered any injury at all.

[93] Oral Arg. Recording at 23:26-24:07.

[94] *Nat'l Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 256, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) (quoting *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. 2130).

[95] *Maio v. Aetna, Inc.*, 221 F.3d 472, 500 (3d Cir.2000) (internal quotation marks omitted).

[96] *Morse*, 132 F.3d at 906.

[97] In its current posture, this case does not require us to consider the correct result if plaintiffs' counsel had included allegations about his proffered expert in the complaint itself. We simply note that, in circumstances where the sufficiency of an allegation regarding an injury-in-fact is contested at the motion to dismiss stage, district courts have numerous procedural devices available to them to satisfy themselves of their Article III jurisdiction. *See In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 184 F.3d 280, 288 (3d Cir.1999) (explaining that a district court may convert a motion to dismiss into one for summary judgment, provided that all parties receive a "reasonable opportunity" to present relevant evidence); *Doherty v. Rutgers Sch. of Law-Newark*, 651 F.2d 893, 898 n. 6 (3d Cir.1981) (district courts, when assessing pre-discovery challenges to standing, may consider plaintiffs' affidavits or conduct preliminary evidentiary hearings).

[98] While standing arises on a claim-by-claim basis, Finkelman alleges the same injury for purposes of his Ticket Law and unjust enrichment claims. We therefore need not engage in a "claim-by-claim" discussion of standing. *Toll Bros.*, 555 F.3d at 138 n. 5.

[99] *Ethypharm S.A. France v. Abbott Labs.*, 707 F.3d 223, 232 (3d Cir.2013) (internal quotation marks omitted).

[100] *See* NFL Mem. of Law, Case No. 14-cv-96 (PGS), ECF No. 19-1 (discussing standing in relation to Hoch-Parker but not Finkelman); NFL Reply Mem., ECF No. 50 (same).

[101] *See Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 169 (3d Cir.2007) (dismissing an appeal without prejudice for lack of jurisdiction when, "[b]ecause the issue of standing was raised for the first time on appeal, none of the plaintiffs have had the opportunity to present evidence or to litigate this issue.").

[102] *See Newark Branch, N.A.A.C.P. v. Town of Harrison*, 907 F.2d 1408, 1418 (3d Cir.1990) (holding that a district court may consider a motion to file an amended complaint when the earlier complaint fails to adequately allege standing).

732 F.2d 286 (1984)

GENOVESE DRUG STORES, INC., Plaintiff-Appellee,
v.
CONNECTICUT PACKING COMPANY, INC., et al., Defendants, and
Fotomat Corporation, Defendant-Appellant.

No. 493, Docket 83-7540.

United States Court of Appeals, Second Circuit.

Argued December 8, 1983.
Decided April 6, 1984.

Mark R. Kravitz, New Haven, Conn. (Shaun S. Sullivan, Wiggin & Dana, New Haven, Conn., on the brief), for defendant-appellant.

287 *287 Thomas A. Rouse, Hartford, Conn. (Barry S. Feigenbaum, Martin H. Sokolow, Jr., Byrne & Slater, P.C., Hartford, Conn., on the brief), for plaintiff-appellee.

Before TIMBERS, VAN GRAAFEILAND and NEWMAN, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

Fotomat Corporation ("Fotomat") appeals from an order of the District Court for the District of Connecticut (T. Emmet Clarie, Judge) granting a motion by Genovese Drug Stores, Inc. ("Genovese") for a preliminary injunction barring Fotomat from operating a film processing business from a kiosk constructed in the parking lot of a shopping center in which Genovese rents space for operation of a drug store. The injunction was issued to enforce a restrictive covenant in Genovese's lease. Since the undisputed facts establish that Fotomat had neither actual nor constructive notice of the restrictive covenant at the time it leased the portion of the parking lot on which its kiosk stands, we vacate the injunction and direct that judgment enter in favor of Fotomat.

Facts

The litigation concerns a shopping center in Bloomfield, Connecticut. The property on which the shopping center is located was purchased in 1947 by defendant Connecticut Packing Company, Inc. ("Copaco"), a Connecticut corporation. One-third of the shares of Copaco are owned by Irving Bercowetz, one-third by Herman Bercowetz, and one-third by Israel and Rhoda Rosenthal. In 1970 Copaco conveyed a portion of the Bloomfield property to Bercrose Associates ("Bercrose"), a Connecticut partnership composed of Irving and Herman Bercowetz and Israel Rosenthal, three of the four owners of Copaco. In 1971 Copaco and Bercrose executed an agreement ("Joint Development Agreement") concerning the shopping center property. A "whereas" clause of the Joint Development Agreement recited that it was the parties' desire, "notwithstanding their separate ownership of ... portions of the shopping center," to "develop, construct, operate and manage said shopping center as one, fully-integrated facility so that neither the business establishments located therein nor their customers will be affected, in any practical respect, by the separate ownership of portions thereof." An operative provision of the Joint Development Agreement provided:

> Neither of the parties shall build or erect, or suffer to be built or erected, any building or structure upon any portion of the property owned by it which is ... used or reserved as a common area for the use and benefit of the entire shopping center, including ... areas shown as parking ... unless the party desiring to erect such additional building(s) or structure(s) shall have first obtained the written consent of the other party.

The Joint Development Agreement was recorded on the land records of the Town of Bloomfield and listed in the grantor index under the names of both Copaco and Bercrose.

On October 16, 1971, Bercrose leased a portion of its part of the shopping center property to Genovese for the operation of a retail drug store. The Bercrose-Genovese lease contained a restrictive covenant in which Bercrose agreed that it would not demise any portion of the shopping enter to any "drive-in operation whose principal business is the receipt and processing of photographic film for development, including, but not limited to, drive-ins known as `Foto-Mat'." Concurrent with the execution of the lease, Irving Bercowetz, acting in his capcity as president of Copaco, executed a statement entitled "Consent and Agreement" ("Consent"), in which Copaco agreed to be bound by the lease terms with respect to the portions of the shopping center owned by Copaco. The Consent was appended to the Bercrose-Genovese lease. On March 10, 1972, pursuant to Conn.Gen.Stat. § 47-19 (1977) which provides for the recording of a "notice of lease" in lieu of the lease
288 document, a Memorandum of Lease was recorded on the Bloomfield land records and indexed under the name of *288 Bercrose as grantor and Genovese as grantee. As required by section 47-19, the Memorandum of Lease states the location where the lease is on file, in this case, the offices of Bercrose's attorneys. The Memorandum of Lease makes no mention of the restrictive covenant prohibiting drive-in photo kiosks nor of the Consent in which Copaco agreed to be bound by the terms of the Bercrose-Genovese lease.

In 1982 Fotomat negotiated with Philip Johnson, who was in charge of leasing for both Copaco and Bercrose, to lease space at the shopping center. Ultimately they agreed upon the leasing of space for a drive-in kiosk in the parking lot of the shopping center. The kiosk was initially planned to be located on the Bercrose portion of the shopping center property, but was finally decided to be placed on the portion owned by Copaco. In June of 1982, Copaco, acting by its president Irving Bercowetz, executed a lease with Fotomat for a 36-square-foot portion of parking lot owned by Copaco. At no time during the lease negotiations did Johnson, Irving Bercowetz, or anyone else inform Fotomat of the restrictive covenant in the Bercrose-Genovese lease. Fotomat did not make a title search of the land records concerning the 36-square-foot area it was leasing, relying instead on a guarantee from Copaco that there were no restrictions on Fotomat's use of the property for operation of a drive-in kiosk.

Fotomat began site preparation and, on September 16, 1982, placed on its leased space a prefabricated kiosk. Eight days later Genovese made demand upon Johnson to have the kiosk removed and on November 9, 1982, filed suit in the District Court against Copaco, Bercrose, and Fotomat. Operation of the kiosk has been prohibited since that date, initially by a temporary restraining order, which was extended by stipulation, and ultimately by the preliminary injunction challenged on this appeal.

Discussion

In issuing the preliminary injunction, 563 F.Supp. 1299, the District Court made several determinations, but in resolving this appeal, we need consider only the Court's conclusion that Fotomat had constructive notice of the restrictive covenant in the Bercrose-Genovese lease.[1] At oral argument the parties agreed that the correctness of this conclusion can be determined on the undisputed facts and that, if this Court ruled that the undisputed facts already established did not suffice to give Fotomat constructive notice of the restrictive covenant, Genovese's claim against Fotomat could be finally adjudicated
289 without the need for a plenary trial.[2] It is undisputed *289 that Fotomat had no actual notice of the restrictive covenant.

The District Court rested its conclusion as to constructive notice on two subsidiary determinations. First, Judge Clarie ruled that the recordation of the Memorandum of Lease in compliance with Conn.Gen.Stat. § 47-19 provided adequate notice of all the terms of the Bercrose-Genovese lease, including the restrictive covenant. Second, the District Judge ruled that under all the circumstances Fotomat had a duty to search the land records under the chains of title of both Copaco and Bercrose. In support of this second determination, Judge Clarie noted the following: The Joint Development Agreement was recorded in the chains of title of both Copaco and Bercrose and would have been discovered had Fotomat searched the chain of title of its lessor, Copaco; notice of the Joint Development Agreement would have alerted Fotomat to the requirement of consent by owners of both portions of the shopping center for any construction in the parking area; Fotomat did not obtain the written consent of both owners; the Joint Development Agreement recites that the separate ownership of portions of the shopping center by Copaco and Bercrose would have no practical effect on tenants; and "the commonality of ownership between Bercrose and Copaco, which share the same owners, as well as the same business address and key employees, suggests that Bercrose and Copaco cannot fairly be treated as separate entities." 563 F.Supp. at 1306.

We start from two premises of real estate law that enjoy support in Connecticut and elsewhere. First, since restrictive covenants, especially those endeavoring to restrict commercial activity for competitive advantage, are not favorites of the law, those who seek to benefit from them must expect that their terms and effectiveness will be strictly construed. *See* *Saphir v. Neustadt,* 177 Conn. 191, 204, 413 A.2d 843, 851 (1979); *Pulver v. Mascolo,* 155 Conn. 644, 649, 237 A.2d 97, 99-100 (1967); C. Clark, *Real Covenants and Other Interests Which "Run With Land"* 105, n. 38 (2d ed. 1947); 3 M. Friedman, *Friedman on Leases* § 28.1 at 1239-40 (2d ed. 1983). Second, the rules concerning land records and the constructive notice they provide should be relatively uncomplicated and should promote a high degree of certainty as to the extent of searching necessary to afford protection to buyers. *See* *Sadd v. Heim,* 143 Conn. 582, 585, 124 A.2d 522, 524 (1956); *Second National Bank v. Dyer,* 121 Conn. 263, 271, 184 A. 386, 389 (1936); *Hawley v. McCabe,* 117 Conn. 558, 564, 169 A. 192, 194 (1933); *see also* *Buffalo Academy of the Sacred Heart v. Boehm Bros.,* 267 N.Y. 242, 250, 196 N.E. 42, 45 (1935); *Glorieux v. Lighthipe,* 88 N.J.L. 199, 203, 96 A. 94, 95-96 (1915); 4 *American Law of Property* § 17.17 at 592-93 (Casner ed. 1952).

With these premises in mind, we turn to the issue of whether the Bloomfield land records gave Fotomat constructive notice of Genovese's restrictive covenant. We are not as certain as Judge Clarie that Connecticut courts, which appear not yet to have faced the issue, will construe section 47-19 to mean that recordation of a notice of lease provides constructive notice of a restrictive covenant contained in that lease, at least a covenant burdening property other than the leased premises by restricting commercial activity for competitive advantage. Other states construing similar statutes have obliged the beneficiaries of restrictive covenants to record them, ruling that notices of lease provide constructive notice only of terms that do not implicate the rights of third parties, unless they are endeavoring to acquire an interest in property subject to the notice of lease. *See, e.g.,* *Howard D. Johnson Co. v. Parkside Development Corp.,* 169 Ind.App. 379, 348 N.E.2d 656, 661 (1976). *See generally* 3 Friedman, *Friedman on Leases, supra,* § 31.2; Report of Special Committee on Leases, *Some Considerations to be Observed in the Recording of Leases,* 12 Real Prop., Prob. & Trust J. 256, 264-67 (1977).

290 We need not construe the application of section 47-19 to restrictive covenants, however, because we disagree with *290 the District Court's view that Fotomat had a duty to search the Bercrose chain of title, in which the Memorandum of Lease was recorded. The traditional rule is that a purchaser or lessee of property is charged with constructive notice only of those encumbrances that appear in his direct chain of title.[3] *Hawley v. McCabe,* 117 Conn. 558, 563-64, 169 A. 192, 194 (1933); *Wheeler v. Young,* 76 Conn. 44, 50-51, 55 A. 670, 673 (1903); *see* 3 Friedman, *Friedman on Leases, supra,* § 28.601; Clark, *Real Covenants, supra,* at 183; *Connecticut Standards of Title* § 2.3 (Ct.Bar Ass'n 1980); Philbrick, *Limits of Record Search and Therefore of Notice,* 93 U.Pa.L.Rev. 125, 174 (1944). As a lessee of Copaco, Fotomat had no obligation, as a general matter, to search the chain of title of any entity other than Copaco.

Nor do we agree that any circumstances of this case placed a special obligation on Fotomat to search beyond the Copaco chain, specifically to examine the Bercrose chain. The happenstance that Fotomat initially contemplated placing its kiosk on the Bercrose portion of the property is irrelevant. A lessee has constructive notice of what would be disclosed by a search of the chain of the lessor from whom it acquires an interest, not one from whom it once considered leasing.

Of more arguable relevance is the fact that a search of the Copaco chain would have disclosed the Joint Development Agreement. Knowledge of that agreement would have alerted Fotomat to the requirement of the written consent of both owners for any construction in the parking area. But knowledge of that requirement would not have obliged Fotomat to search the Bercrose chain to see if by chance Bercrose had restricted its authority to give consent.[4] The consent requirement gave each of the contracting parties to the Joint Development Agreement an enforceable right against the other. Fotomat's failure to learn of the consent requirement and its failure to insist on seeing evidence of Bercrose's written consent to the proposed kiosk exposed it to the risk that Bercrose, having recorded the parking-area-construction restriction on Copaco's property under the Copaco chain of title, might object to any construction undertaken by a Copaco lessee without Bercrose's written consent.[5] However, Fotomat did not assume any risk of objection by a lessee of Bercrose, simply because the Joint Development Agreement existed. That point was clear to Genovese because it did not rely on the Joint Development Agreement to protect itself against Copaco and Copaco's lessees, after it had obtained the restrictive covenant from Bercrose. Instead, Genovese, as it was obliged to do as a first step toward protection from competitive activity on Copaco's property, secured the written agreement of Copaco to the terms of the Bercrose-Genovese lease. What
291 Genovese failed to do was take the required second step of recording *291 Copaco's restriction upon its own property in Copaco's chain of title, where it would give constructive notice to a lessee of Copaco.

True, knowledge of the Joint Development Agreement would have alerted Fotomat to the recited intention of Copaco and Bercrose not to let their ownership of separate portions of the shopping center affect business establishments in the center "in any practical respect." That recital has no bearing on Genovese's rights for two reasons. First, an expression of intent in a "whereas" clause of an agreement between two parties may be useful as an aid in construing the rights and obligations created by the agreement, but it cannot create any right beyond those arising from the operative terms of the document. Second, even an agreement between private parties cannot alter the obligations that the law imposes upon a buyer or lessee concerning the scope of a title search. Parties may, within limits, encumber property,[6] but they cannot set the ground rules as to what type of recordation constitutes constructive notice of their restrictions.

More plausible still, but not persuasive, is the District Court's "suggestion" that Copaco and Bercrose cannot be treated as separate entities. There are surely points of commonality between the two entities. But it would be going rather far to hold that either is a sham structure to be disregarded in favor of ownership by the other of the entire property. Moreover, even if for some purposes the separate identities of Copaco and Bercrose could be disregarded, we see no basis in Connecticut law, or comparable law that might supply guidance from other states, that the separateness of corporate and partnership entities should be disregarded for purposes of searching titles. The doctrine of piercing a corporate veil, or disregarding any formal business structure, was developed to ensure that those who suffer injury will not be blocked by the interposition of a sham structure from recovering against persons who should be responsible for the loss. In the context of this case, that doctrine, if applicable, might have aided Genovese in looking directly to Copaco for damages caused by Bercrose, if Copaco had not formally agreed to the terms of the Bercrose-Genovese lease. But we know of no authority for disregarding the formal identity of a grantor and imposing a duty to search the chain of title of some other entity, simply because of its close relationship to the grantor. A title searcher must be able to rely on the identification of the grantor in a proposed deed or lease; he need not investigate the business relationship between that grantor and some other entity and speculate whether some court may hold him to a duty to search the chain of title of that other entity.

Since we hold that Fotomat had no duty to search the Bercrose chain of title, Fotomat had no constructive notice of the restrictive covenant, and the fact that it made no title search, relying instead on Copaco's guarantee, is of no consequence. As the beneficiary of a restrictive covenant, Genovese had the obligation to give its potential competitors constructive notice of the restriction it had obtained on their ability to compete from premises located on property owned by Copaco. It could easily have done so by recording on the land records under Copaco's name the agreement by which Copaco bound itself to honor the restrictive covenant in the Bercrose-Genovese lease. Having failed to do so, it should not expect a diversity court to predict that a Connecticut court would enlarge the duty of a title searcher for a lessee to search beyond the chain of its lessor's title under the circumstances of this case.[7]

292 *292 On the undisputed facts, Fotomat is entitled to have the preliminary injunction vacated and to have the claims against it dismissed. *See Triumph Hosiery Mills, Inc. v. Triumph International Corp.,* 308 F.2d 196, 200 (2d Cir.1962) (complaint dismissed on reversal of preliminary injunction); *see also Hurwitz v. Directors Guild of America, Inc.,* 364 F.2d 67, 70 (2d Cir.), *cert. denied,* 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435 (1966); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2962 at 629 (1973).

Dismissal of the claims against Fotomat leaves pending Genovese's damage claims against Bercrose and Copaco. Though Genovese cannot secure injunctive relief against Bercrose or Copaco that would impair Fotomat's rights, it remains to be determined whether Genovese can secure damages from Bercrose for breach of the covenant in the Bercrose-Genovese lease and from Copaco for breach of Copaco's Consent, in which it agreed to be bound by the terms of Genovese's lease with respect to the portions of the shopping center owned by Copaco. Even though Bercrose did not give written consent to Fotomat, the conduct of Bercrose in connection with the negotiation of Fotomat's lease and Bercrose's relationship with Copaco may well render Bercrose liable for breach of its restrictive covenant, and, in any event, Copaco may well be liable on its Consent agreement. *See Reeve v. Hawke,* 37 Del.Ch. 25, 136 A.2d 196 (1957) (covenantee may obtain damages from landlord for landlord's breach of restrictive covenant, but, in absence of notice to lessee, may not obtain injunctive relief against landlord or lessee); *Senn v. Ladd,* 179 Misc. 306, 38 N.Y.S.2d 820 (N.Y.Sup.Ct.1942) (same). Alternatively, perhaps as a third-party beneficiary of the Joint Development Agreement Genovese may be able to recover damages from Bercrose and Copaco for permitting construction in the parking area without obtaining the required written consent.

Injunction vacated and case remanded for further proceedings consistent with this opinion. Fotomat may recover its costs on appeal.

[1] Though we need not consider all of the other conclusions reached by the District Court, we pause to comment upon one of them. Recognizing that state law governs this diversity action, the District Court cited *Perfect Fit Industries, Inc. v. Acme Quilting Co.,* 646 F.2d 800, 806 (2d Cir.1981), *cert. denied,* 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 71 (1982), and *Franke v. Wiltschek,* 209 F.2d 493 (2d Cir.1953), for the proposition that "[w]here injunctive relief is sought, a federal court must look to state law to determine whether a party is

entitled to equitable remedial rights." 563 F.Supp. at 1304. The Court then relied upon *Hartford Electric Light Co. v. Levitz,* 173 Conn. 15, 376 A.2d 381 (1977), for the proposition that "an action for the enforcement of a restrictive covenant is an exception to the general rule that substantial irreparable injury must threaten before an injunction will issue." 563 F.Supp. at 1304.

Whatever rule is to be derived from *Perfect Fit* and *Franke,* it does not permit a district court exercising diversity jurisdiction to ignore the federal law requirement that threatened irreparable injury be shown before a *preliminary* injunction may issue. *See System Operations, Inc. v. Scientific Games Development Corp.,* 555 F.2d 1131, 1141 (3d Cir.1977); *but see Borman's, Inc. v. Great Scott Super Markets, Inc.,* 433 F.Supp. 343, 346 (E.D.Mich.1975). We express no view on Genovese's contention that, even if federal law establishes an irreparable injury requirement for a district court's grant of a preliminary injunction, state law supplies the standard in a diversity case for determining whether a threatened injury is irreparable; nor do we express any view on the Connecticut standard.

[2] Each side contends that the undisputed facts suffice to support its position on the issue of constructive notice. In addition, Fotomat contends that its position draws further support from the testimony of a witness who furnished expert opinions on the subject of title search law and practice in Connecticut. Our resolution of this appeal is based solely on the undisputed facts, and no consideration has been given to the witness's testimony.

[3] Indeed, there is some force to Fotomat's argument that knowledge of the Joint Development Agreement would have suggested to Fotomat that Bercrose would not encumber or restrict Copaco's portion of the shopping center without Copaco's written consent and that the absence of a written consent by Copaco in Copaco's chain of title would provide Fotomat with a justifiable basis for believing that Bercrose had not made any agreement that purported to restrict the Copaco property.

[4] There is some variation among states as to whether a lessee or purchaser must search all chains of title from a common grantor. *Compare Guillette v. Daly Dry Wall, Inc.,* 367 Mass. 355, 325 N.E.2d 572, 574-75 (1975) (must search all conveyances from common grantor), *with Buffalo Academy of the Sacred Heart v. Boehm Bros.,* 267 N.Y. 242, 250, 196 N.E. 42, 45 (1935) (need search only land records covering specific parcel conveyed). *Dick v. Sears-Roebuck & Co.,* 115 Conn. 122, 160 A. 432 (1932), has been cited for the proposition that a tenant must "examine the contents of all the deeds given by his grantor (and presumably of all his predecessors in title)." Note, *Restrictive Covenants in Shopping Center Leases,* 34 N.Y.U.L.Rev. 940, 946 & n. 48 (1959). Properly read, that case merely requires a lessee to examine the deed his grantor received from his predecessor in title. Even if read broadly, that decision would not require Fotomat to search the chain of Bercrose, which was not its lessor.

[5] Bercrose has made no objection to the Fotomat kiosk and is not suing to enforce its rights under the Joint Development Agreement.

[6] For example, in this case, Fotomat would presumably have had an obligation to search the Bercrose chain if in the Joint Development Agreement Copaco and Bercrose had both agreed to encumber both properties with any covenants granted by either owner to its lessees. *See generally* Philbrick, *Limits of Record Search and Therefore of Notice,* 93 U.Pa.L.Rev. 125, 174 & n. 160 (1944).

[7] We need not reach Fotomat's argument that, even if it had a duty to search the Bercrose chain, that search would not have discovered Copaco's agreement to be bound by the Bercrose-Genovese lease, since Copaco's agreement was not recorded. We doubt that Connecticut would construe section 47-19 to mean that Bercrose's notice of lease, which a search of Bercrose's chain would have discovered, gives constructive notice not only of all the terms of the lease but also of the terms of another party's agreement burdening that party's property, even though the agreement is appended to the lease. And we are uncertain whether Connecticut courts would consider constructive notice of the restrictive covenant (assuming such was given by the notice of lease) sufficient to enforce the covenant against Copaco's lessee in the absence of constructive notice to the lessee of Copaco's consent to the covenant. In this diversity case, we deem it best to leave such issues for the state courts in subsequent cases.

836 F.3d 261 (2016)

HARTIG DRUG COMPANY INC., on behalf of itself and all others similarly situated, Appellant
v.
SENJU PHARMACEUTICAL CO. LTD.; Kyorin Pharmaceutical Co. Ltd.; Allergan Inc.

No. 15-3289.

United States Court of Appeals, Third Circuit.

Argued June 13, 2016.
(Filed: September 7, 2016).

263 *263 On Appeal from the United States District Court for the District of Delaware, (D.C. No. 1-14-cv-00719), District Judge: Hon. Sue L. Robinson.

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Before: AMBRO, JORDAN, and GREENBERG, Circuit Judges

OPINION OF THE COURT

JORDAN, Circuit Judge

This appeal arises from a putative class action in which Hartig Drug Company Inc. ("Hartig") filed a complaint against Senju Pharmaceutical Co., Ltd. ("Senju"), Kyorin Pharmaceutical Co., Ltd. ("Kyorin"), and Allergan Inc. ("Allergan") (collectively, the "Defendants"), alleging antitrust violations involving medicated eyedrops manufactured by the Defendants. Hartig argues that the Defendants' wrongful suppression of generic competition resulted in supracompetitive pricing of those eyedrops. Although not a direct purchaser of the medications, Hartig claims it has standing to sue because of an assignment of rights from AmerisourceBergen Drug Corporation ("Amerisource") which is a direct purchaser.

The District Court dismissed Hartig's complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. In its opinion, the Court ruled that an anti-assignment clause in a distribution agreement between Allergan and Amerisource barred any assignment of antitrust claims from Amerisource to Hartig, leaving Hartig without standing to sue and divesting the Court of subject matter jurisdiction. We conclude that the District Court erred in treating antitrust standing as an issue of subject-matter jurisdiction. Accordingly, we will vacate and remand for further proceedings.

I. BACKGROUND

A. Factual Background[1]

Kyorin researchers developed an antibiotic called gatifloxacin and, in 1990, were awarded a patent on the drug. In 1997, Kyorin licensed Senju to develop, manufacture, and commercialize ophthalmic solutions containing gatifloxacin. Later, in 2001, Senju researchers obtained U.S. Patent No. 6,333,045 (the "'045 Patent") claiming aqueous liquid pharmaceutical compositions containing gatifloxacin and methods of utilizing them. The named inventors on that patent assigned their rights to Kyorin and Senju jointly.

Kyorin and Senju also "licensed to Allergan the right—including a license under the '045 [P]atent—to market aqueous liquid
265 *265 gatifloxacin ophthalmic products in the United States." (A33.) Allergan filed New Drug Applications ("NDAs") with the Food and Drug Administration for a 0.3% gatifloxacin solution (branded "Zymar"), and for a 0.5% gatifloxacin solution (branded "Zymaxid"); those NDAs were approved in 2003 and 2010 respectively. Amerisource subsequently began purchasing Zymar and Zymaxid eyedrops directly from the Defendants and selling them to Hartig, an Iowa-based drug store chain.

Hartig alleged that the Defendants engaged in a number of illegal practices to prevent or delay the introduction into the market of generic alternatives to Zymar and Zymaxid.[2] First, the Defendants filed a baseless lawsuit against another pharmaceutical company, Apotex, claiming patent infringement and delaying FDA approval of that company's generic version of Zymar. Next, the Defendants engaged in so-called "product hopping" (A35)—discouraging doctors from prescribing generic alternatives to the original 0.3% Zymar eyedrops by phasing out that product in favor of "new" 0.5% Zymaxid eyedrops. To buy time for that shift in marketing strategy, the Defendants prolonged the Apotex litigation by filing a frivolous motion for a new trial. They also asked the United States Patent and Trademark Office to reexamine claims of the '045 Patent, but failed to disclose material information both from the trial record in the Apotex case and from their own expert that undermined their reexamination claims. After the FDA approved Apotex's 0.3% gatifloxacin eyedrops, the Defendants sued Apotex a second time. Although the courts ultimately held that the Defendants' suit was barred by claim preclusion, Apotex was deterred from launching a generic competitor to Zymar. Since then, the Defendants have filed numerous lawsuits against competing drug manufacturers to bar the market entry of generic equivalents to both Zymar and Zymaxid.

B. Procedural Background

Hartig filed its complaint in the United States District Court for the District of Delaware on June 6, 2014. Styled as a class action, the complaint alleged that, were it not for the Defendants' violations of the Sherman Antitrust Act, generic versions of the gatifloxacin eyedrops would have been sold after Kyorin's patent on gatifloxacin expired in 2010.[3] Hartig alleged that the "Defendants' unlawful scheme effectively denied direct purchasers of Zymar and Zymaxid the benefits of competition and of less expensive, generic versions. As a result, [Hartig] and members of the Class ... have paid supracompetitive prices for Zymar and Zymaxid and [Zymaxid's] generic equivalent[]."[4] (A24.)

The complaint acknowledged that Hartig was only an indirect purchaser of the two gatifloxacin products and that Hartig
266 obtained the products through Amerisource, *266 a direct purchaser. That point was—and is—significant because, under the so-called "direct purchaser rule" recognized in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), a direct purchaser of a product has standing to sue under federal antitrust statutes whereas an indirect purchaser does not. Nevertheless, the complaint alleged that Amerisource had entered an assignment agreement with Hartig that

> conveyed, assigned, and transferred to Hartig all of its rights, title and interest in and to all causes of action it may have against Defendants under the antitrust laws of the United States or of any state arising out of or relating to Amerisource's purchase of Zymar and Zymaxid to the extent such product was subsequently resold to Hartig....[5]

(A24-25 ¶ 9.)

Allergan responded to Hartig's suit by filing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Kyorin and Senju jointly filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.[6] Allergan's 12(b)(1) motion argued that Hartig lacked "[s]tanding to sue under the antitrust laws" because an anti-assignment clause in the Distribution Services Agreement ("DSA") that Allergan had with Amerisource expressly prohibited either party from assigning the agreement or related rights and obligations without prior written consent from the other party. *Hartig v. Senju, et al.,* D. Del., CA No. 14-719-SLR Docket Item ("D.I.") 15, at 4; *see id.,* at 5-9. The DSA is not mentioned in Hartig's complaint, but it was appended to Allergan's motion to dismiss as an exhibit to a declaration from one of Allergan's corporate officers, a Mr. Kafer. The anti-assignment clause of the DSA provides as follows:

> This Agreement may not be assigned by either party without the prior written consent of the other party. Notwithstanding the foregoing, either party may assign its rights and obligations hereunder without the consent of the other party to a subsidiary or affiliate or to an entity which purchases all or substantially all of the assigning party's stock or assets or acquires control of the assigning party, whether by merger, consolidation or any other means.

(A108-109 § 14.b.) The Kafer declaration stated that Hartig was not a direct purchaser from Allergan and that Amerisource had not sought or obtained written consent from Allergan for the alleged assignment, as purportedly required by the DSA's anti-assignment clause.

After briefing on both the 12(b)(1) and 12(b)(6) motions, the District Court granted Allergan's 12(b)(1) motion and, in an order dated August 19, 2015, dismissed the action for lack of subject matter jurisdiction. The District Court relied on the anti-assignment clause in the DSA to conclude that Hartig lacked standing, reasoning that the clause's prohibition applied to
267 antitrust claims and therefore barred the *267 assignment of the very claims on which Hartig's standing relied. Hartig timely appealed. Later, a group of seven drug retailers joined the appeal as *amici curiae* in support of Hartig.[7]

II. DISCUSSION[8]

A. The Appropriateness of Review under Rule 12(b)(1)

The parties have not challenged the District Court's decision to address antitrust standing as a question of subject matter jurisdiction. Rather, it is the *amici* who contend that Allergan's anti-assignment argument implicated only antitrust standing and that such standing is different from Article III standing, so that the District Court's subject matter jurisdiction has never been rightly in question.

An *amicus* normally "cannot expand the scope of an appeal with issues not presented by the parties on appeal," *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.,* 692 F.3d 283, 300 n.10 (3d Cir. 2012), at least not "in cases where the parties are competently represented by counsel," *id.* (quoting *Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 445 (2d Cir. 2001)). And yet, federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *see also id.* (affirming that "subject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived") (internal quotation marks omitted). A court's non-waivable obligation to inquire into its own jurisdiction is most frequently exercised in the negative—that is, by questioning whether federal jurisdiction exists even when all parties assume that it does. But "federal courts [also] have a strict duty to exercise the jurisdiction that is conferred upon them by Congress," *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996), and "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not," *id.* (quoting *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821)). "[S]ubject-matter delineations must be policed by the courts on their own initiative," irrespective of whether that policing of jurisdictional authority is voiced in the positive or the negative. *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999). Thus, regardless of the acquiescence or wishes of the parties, we must question whether the District Court properly treated antitrust standing as a jurisdictional issue under Rule 12(b)(1).

We recently confronted a similar jurisdictional issue—presented in a similar posture—in *Group Against Smog and Pollution, Inc. v. Shenango Inc.,* 810 F.3d 116 (3d Cir. 2016). In that case, the District Court treated the "diligent prosecution" bar of 42 U.S.C. § 7604(b)(1)(B) as a limitation on its subject matter jurisdiction, and therefore dismissed the action under Rule 12(b)
268 (1). *Id.* at 121. On appeal, *amici* *268 *curiae* "raise[d] the issue of whether the diligent prosecution bar is jurisdictional and appropriately decided through a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, or whether the diligent

prosecution bar is nonjurisdictional and should be decided through a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Id.* at 122. We noted that the appellants themselves had not raised that argument but had proceeded under the assumption that the bar was jurisdictional. *Id.* at 122 n.5. Nevertheless, we affirmed our independent obligation to "raise and decide jurisdictional questions that the parties either overlook or elect not to press," *id.* (quoting *Henderson ex rel. Henderson v. Shinseki,* 562 U.S. 428, 434, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011)), an obligation made all the more significant because "branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system," *id.* at 122 (internal quotation marks and brackets omitted). We ultimately concluded that the District Court erred in treating the diligent prosecution bar as a jurisdictional limitation, and therefore should have dealt with the motion to dismiss under Rule 12(b)(6) rather than Rule 12(b)(1). *Id.* at 132.

Similarly, the *amici* here argue that the District Court erred by addressing Allergan's motion to dismiss as a factual challenge to jurisdiction under Rule 12(b)(1), and that the Court should have addressed the motion under Rule 12(b)(6) for failure to state a claim. The distinction between Rules 12(b)(1) and 12(b)(6) is important because the 12(b)(6) standard affords significantly more protections to a nonmovant. "In deciding a Rule 12(b)(6) motion, a court ... consider[s] only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick,* 605 F.3d 223, 230 (3d Cir. 2010). Moreover, the court is "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the nonmovant." *Foglia v. Renal Ventures Mgmt., LLC,* 754 F.3d 153, 154 n.1 (3d Cir. 2014) (quotation marks and citations omitted).

A Rule 12(b)(1) attack can be a very different matter. A facial 12(b)(1) challenge, which attacks the complaint on its face without contesting its alleged facts, is like a 12(b)(6) motion in requiring the court to "consider the allegations of the complaint as true." *Petruska v. Gannon Univ.,* 462 F.3d 294, 302 n.3 (3d Cir. 2006) (internal quotation marks omitted). But a factual 12(b)(1) challenge attacks allegations underlying the assertion of jurisdiction in the complaint, and it allows the defendant to present competing facts. *Constitution Party of Pa. v. Aichele,* 757 F.3d 347, 358 (3d Cir. 2014). When considering a factual challenge, "the plaintiff [has] the burden of proof that jurisdiction does in fact exist," the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case," and "no presumptive truthfulness attaches to [the] plaintiff's allegations...." *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977). And, when reviewing a factual challenge, "a court may weigh and consider evidence outside the pleadings." *Constitution Party of Pa.,* 757 F.3d at 358 (internal quotation marks omitted). Therefore, a 12(b)(1) factual challenge strips the plaintiff of the protections and factual deference provided under 12(b)(6) review. *See, e.g., Davis v. Wells Fargo,* 824 F.3d 333, 348-50 (3d Cir. 2016).

In arguing the motions to dismiss in the District Court, no one questioned whether Allergan's attack on Hartig's antitrust
269 standing should have been brought under *269 Rule 12(b)(6) instead of as a matter of subject-matter jurisdiction under Rule 12(b)(1). As mentioned above, it is the *amici* who have raised the question on appeal. Remarkably, Hartig neglects to address the argument at all, except to acknowledge that the *amici* have raised it. Even at oral argument, when squarely faced with the question, Hartig's counsel did not ask for consideration under 12(b)(6) but voiced an apparent preference to confront Allergan's 12(b)(1) challenge head-on—that is, by reaching the issue of whether the DSA precluded the assignment of Amerisource's antitrust causes of action. Nevertheless, in keeping with our independent obligation to consider the boundaries of subject matter jurisdiction, we conclude that the District Court should have treated antitrust standing not as an Article III jurisdictional issue, but rather as a merits issue, and thus should have resolved the motion to dismiss under Rule 12(b)(6) rather than Rule 12(b)(1).

B. Article III Standing versus Antitrust Standing

To meet the "irreducible constitutional minimum" of Article III standing, a plaintiff invoking federal jurisdiction bears the burden of establishing three elements, as set forth in the now familiar case of *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). First, it must establish that it has suffered an "injury in fact," meaning a concrete and particularized invasion of a legally protected interest. *Id.* Second, it must establish a "causal connection between the injury and the conduct complained of—the injury has to 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.* (internal quotation and editorial marks omitted). Third, it must show a likelihood "that the injury will be redressed by a favorable decision." *Id.* at 561, 112 S.Ct. 2130 (internal quotation marks omitted). Article III standing is essential to federal subject matter jurisdiction and is thus "a threshold issue that must be addressed before considering issues of prudential standing." *Miller v. Nissan Motor Acceptance Corp.,* 362 F.3d 209, 221 n.16 (3d Cir. 2004) (citation omitted).

In a case like this, even after a plaintiff has established Article III standing, antitrust standing remains as a prerequisite to suit, "`focus[ing] on the nature of the plaintiff's alleged injury,' [and] asking `whether it is of the type that the antitrust statute was intended to forestall.'" *Barton & Pittinos, Inc. v. Smith-Kline Beecham Corp.,* 118 F.3d 178, 181 (3d Cir. 1997) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 538, 540, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)).

> If the injury is not of the requisite type, even though the would-be plaintiff may have suffered an injury as a result of conduct that violated the antitrust laws, he or she has no standing to bring a private action under the antitrust laws to recover for it.... Therefore, the plaintiff might be able to sue under a different statute or common law rule ... but the plaintiff [would have] no standing to sue under the antitrust laws.

Id.

That Article III standing and antitrust standing both employ the term "standing" tends to confuse matters. The two concepts are distinct, with the former implicating a court's subject matter jurisdiction and the latter affecting only the plaintiff's ability to succeed on the merits. In *Ethypharm S.A. France v. Abbott Laboratories,* we explained that Article III standing is of constitutional and hence jurisdictional consequence, while antitrust standing is not:

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> Constitutional standing is augmented by consideration of prudential limitations. *270 For plaintiffs suing under federal antitrust laws, one of the prudential limitations is the requirement of antitrust standing. It does not affect the subject matter jurisdiction of the court, as Article III standing does, but prevents a plaintiff from recovering under the antitrust laws.

707 F.3d 223, 232 (3d Cir. 2013) (internal quotation marks, footnotes, and citations omitted). The difference between Article III standing and antitrust standing is apparent from the Supreme Court's explanation of the direct purchaser rule in *Illinois Brick,* which recognized that, although indirect purchasers "may have been actually injured by antitrust violations" through passed-on overcharges, the "legislative purpose[s]" underlying the antitrust statutes would still be better served by limiting recovery to the direct purchasers paying those overcharges in the first instance. 431 U.S. at 746, 97 S.Ct. 2061; *see generally id.* at 737-47, 97 S.Ct. 2061. Thus, the direct purchaser rule represents a policy decision intended to aid the purposes of the antitrust statutes and does not speak to whether there is an Article III case or controversy.

Sometimes antitrust standing is discussed in terms of "statutory standing." *See* *Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 307 n.35 (3d Cir. 2011) (en banc) (clarifying that the term "statutory standing" refers "to the possession of a viable claim or right to relief, not to a jurisdictional requirement"). Again, however, labels can be misleading. A lack of "statutory standing" means the absence of a valid cause of action under a statute, but it "does not implicate subject-matter jurisdiction, *i.e.,* the court's statutory or constitutional *power* to adjudicate the case." *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* ___ U.S. ___, 134 S.Ct. 1377, 1387 n.4, 188 L.Ed.2d 392 (2014) (original emphasis) (internal quotation marks omitted). "Accordingly, statutory standing is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place." *Sullivan,* 667 F.3d at 307. In the end, it does not matter "whether the [antitrust] standing inquiry is characterized as `prudential' or `statutory'... because neither deprives us of Article III jurisdiction and both bar a plaintiff's ability to recover." *Ethypharm,* 707 F.3d at 232 n.17.

At oral argument before us, the Defendants continued to press the position that the DSA's anti-assignment clause implicated Article III standing. But that is simply not so. Allergan's motion to dismiss under Rule 12(b)(1) was always premised, at bottom, on Hartig's purported lack of antitrust standing. True, Allergan framed its 12(b)(1) motion in terms of Article III standing, referring to the "case-or-controversy requirement of Article III." D.I. 15, at 4 (quoting *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130). But the substance of Allergan's argument focused solely on the Supreme Court's holding in *Illinois Brick* that an indirect purchaser lacks "[s]tanding to sue under the antitrust laws."[9] *Id.*

We have repeatedly interpreted *Illinois Brick* and its progeny as addressing not the threshold question of whether an indirect purchaser has Article III standing to sue in federal court at all, but rather the subsequent question of whether such a
271 purchaser has standing to recover under *271 federal antitrust statutes. *See, e.g.,* *Warren Gen. Hosp. v. Amgen Inc.,* 643 F.3d 77, 79 (3d Cir. 2011) ("In *Illinois Brick,* the Supreme Court held that only direct purchasers have standing under Section 4 of the Clayton Act."); *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.,* 424 F.3d 363, 366 n.2 (3d Cir. 2005) ("*Illinois*

Brick determined that direct purchasers are the only parties `injured' in a manner that permits them to recover damages. It thus held that indirect purchaser plaintiffs do not have statutory standing to recover damages under Section 4 of the Clayton Act.") (internal citations omitted); *Merican, Inc. v. Caterpillar Tractor Co.,* 713 F.2d 958, 963 (3d Cir. 1983) (identifying *Illinois Brick* as recognizing "that there are certain classes of plaintiffs who, although able to trace an injury to an antitrust violation, are generally not within the group of private attorneys general Congress created to enforce the antitrust laws under section 4") (internal quotation marks omitted).

Forced to confront the distinction between constitutional and antitrust standing, the Defendants now attempt to change the discussion by arguing that Hartig's assertion of antitrust standing via assignment was actually a fatal misstep, somehow undermining its ability to establish constitutional standing. In a supplemental filing, they endeavor to reformulate the arguments that Allergan made in the 12(b)(1) motion in the District Court, saying,

> Had Hartig sued for its *own* injury—the alleged overcharge it paid to Amerisource —Allergan would have moved to dismiss for lack of antitrust standing under Rule 12(b)(6). Because Hartig sued for *someone else's injury*—the alleged overcharge paid by Amerisource—Allergan properly moved under Rule 12(b)(1) advancing a constitutional standing argument.

(Defendants' Letter Dated June 24, 2016, at 2.) This is a wholly new argument. Allergan's motion to dismiss was always premised upon Hartig's lack of antitrust standing as an indirect purchaser, which was an *Illinois Brick* argument and not a constitutional challenge to standing. *See* D.I. 15, at 4-5 ("Indirect purchasers ... lack standing." (citing *Illinois Brick,* 431 U.S. at 746, 97 S.Ct. 2061)); *see also id.* at 5 n.1 (urging that, even if the District Court were to consider Allergan's motion under Rule 12(b)(6), the Court could still consider the DSA "in deciding whether Hartig satisfies the *indispensable element of antitrust standing*" (emphasis added)).

But, even ignoring that none of the Defendants previously made the argument that the assignment from Amerisource to Hartig created a problem of constitutional magnitude, the substance of the Defendants' new argument is unpersuasive. For purposes of constitutional standing, the underlying questions raised by the argument are captured in the first two of the well-known *Lujan* factors.[10] In particular, those questions are whether Hartig has suffered an injury in fact and whether that injury is fairly traceable to the Defendants. On these matters, the distinction between direct and indirect purchasers is of little relevance.[11]

272 Hartig certainly has alleged such an injury. Its complaint asserted that it bought Zymar and Zymaxid from Amerisource, *272 which in turn purchased those products from the Defendants. (A24-25.) Thus, notwithstanding that the "direct purchaser rule" from *Illinois Brick* would disqualify Hartig from serving as a private attorney general under the antitrust statutes,[12] Hartig's allegations are that it was in fact harmed by the downstream effects of the Defendants' anticompetitive behavior. Indeed, while the Defendants argued that Hartig did not assert its own injuries, in the same breath they recognized that Hartig has "alleged" it paid "overcharge[s]" for the Zymar and Zymaxid products. (Defendants' Letter Dated June 24, 2016, at 2.) The complaint plainly and repeatedly emphasizes that, as a result of the Defendants' anticompetitive behavior in suppressing generic equivalents of Zymar and Zymaxid, Hartig has paid inflated prices for those products.[13] Those allegations, together with the complaint's specific descriptions of anticompetitive behavior indulged in by the Defendants, are sufficient to establish a judicially redressable injury-in-fact that is fairly traceable to the Defendants—or, in other words, an Article III case or controversy.

We recognize that the conflation of Article III standing with antitrust standing may arise, at least in part, from those doctrines' overlap in both the factual questions they can involve and in their terminology. Nevertheless, we again caution against expanding Rule 12(b)(1) "beyond its proper purpose," and reaffirm that, in general, "Rule 12(b)(6)—with its attendant procedural and substantive protections for plaintiffs—is the proper vehicle for the early testing of a plaintiff's claims." *Davis,*
273 824 F.3d at 348-49.[14] As we *273 recently reaffirmed in *Davis v. Wells Fargo,* "dismissal via a Rule 12(b)(1) factual challenge to standing should be granted sparingly," *id.* at 350, and it is only the "unusual" case that will be properly dismissed under 12(b)(1) "when the facts necessary to succeed on the merits are at least in part the same as must be alleged or proven to withstand jurisdictional attacks," *id.* (citing *Mortensen,* 549 F.2d at 892) (internal quotation marks omitted). In this case, Hartig has not alleged claims "so... completely devoid of merit as to not involve a federal controversy." *Kulick v. Pocono Downs Racing Ass'n, Inc.,* 816 F.2d 895, 899 (3d Cir. 1987) (quoting *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 666, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974)). On the contrary, it had Article III standing sufficient to give the District Court subject matter jurisdiction, and thus a dismissal under Rule 12(b)(1) was not legitimately in play.

C. Review Under Rule 12(b)(6) Rather than Rule 12(b)(1)

Because "we may affirm on any basis supported by the record," we next consider whether the District Court could have granted Allergan's motion to dismiss under the Rule 12(b)(6) framework. *Davis,* 824 F.3d at 350. The Defendants admit that Allergan, in styling its Rule 12(b)(1) argument as one of constitutional standing, "did not make an argument in the alternative under Rule 12(b)(6)." (Defendants' Letter Dated June 24, 2016, at 2 n.1.) Even had the Court treated the 12(b)(1) motion in the alternative as the 12(b)(6) motion that it actually was, the decision would nonetheless be unsound because the Court relied upon the DSA, whereas it should have measured Allergan's motion primarily "against the bare allegations of the complaint." *JM Mech. Corp. v. HUD,* 716 F.2d 190, 196-97 (3d Cir. 1983). As mentioned above, for purposes of Rule 12(b)(6), a court "must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complaint's claims are based upon these documents." *Mayer,* 605 F.3d at 230.

Allergan has argued that the DSA can be considered in a 12(b)(6) analysis because it is a document "integral to or explicitly relied upon in the complaint." D.I. 15, at 5 n.1 (quoting *Warren Gen. Hosp.,* 643 F.3d at 82 n.4). Not so. The DSA was never mentioned in Hartig's complaint, was not attached to the complaint, was not a matter of public record,[15] and did not form a basis for any of the claims.[16] Although Allergan cites authority suggesting that the District Court could have considered the
274 DSA "to determine *274 whether the plaintiff was a direct purchaser," *id.* Hartig's complaint readily acknowledged that the company was an indirect purchaser, and instead predicated its antitrust standing on an assignment from Amerisource, itself a direct purchaser. Rule 12(b)(6) requires that those specific allegations be accepted as true and viewed in the light most favorable to Hartig. Thus, we cannot say that the DSA was integral to Hartig's claims. It is integral only to the Defendants' attack on those claims. Because the DSA is extrinsic to the complaint, the District Court could not have properly considered it for purposes of a Rule 12(b)(6) motion to dismiss, and, without the DSA, Allergan's entire challenge to the validity of Amerisource's assignment lacks a foundation.

For the District Court to have considered documents that, like the DSA, lie outside the bounds of the complaint, it would have had to do so by "convert[ing the 12(b)(6) motion] into a summary judgment proceeding and afford[ing] the plaintiff a reasonable opportunity to present all material made pertinent to a summary judgment motion by Rule 56." *JM Mech. Corp.,* 716 F.2d at 197; *see also Rose v. Bartle,* 871 F.2d 331, 342 (3d Cir. 1989) ("We have held that it is reversible error for a district court to convert a motion under Rule 12(b)(6) ... into a motion for summary judgment unless the court provides notice of its intention to convert the motion and allows an opportunity to submit materials admissible in a summary judgment proceeding or allows a hearing."). Because the District Court considered the DSA under Rule 12(b)(1), none of those procedures were followed. It may be, as the Defendants urge, that "Hartig would not have objected to the district court considering the DSA on a Rule 12(b)(6) motion." (Defendants' Letter Dated June 24, 2016, at 2 n.1.) Based on the record before us, though, that assent is still theoretical: Allergan did not proffer its anti-assignment argument in the alternative as grounds for dismissal under Rule 12(b)(6); the District Court did not consider the DSA under that framework; and Hartig thus had no occasion to formally waive any of its 12(b)(6) protections or to respond, after proper notice, to a converted motion for summary judgment. We will not affirm on such a record, but instead will remand so that the parties may have the opportunity to make their arguments under the proper procedural framework, with its attendant safeguards.

Once the correct procedures have been followed, the District Court may have occasion to interpret the effect of the DSA. Therefore, considerations of judicial economy merit our noting some doubt about the Court's interpretation of the DSA as barring the assignment of antitrust causes of action.

In light of the DSA's choice-of-law provision, the District Court correctly looked to Pennsylvania law to determine the DSA's effect, but it may have misstepped in its choice of interpretive principles. It cited *Crawford Central School District v. Commonwealth,* 585 Pa. 131, 888 A.2d 616, 623 (2005), for the idea that "an assignment will ordinarily be construed in accordance with the rules governing contract interpretation and the circumstances surrounding the execution of the assignment document." In Pennsylvania, the "[c]onsideration of the surrounding circumstances" does not appear to be a general principle of contract law, *U.S. Nat'l Bank in Johnstown v. Campbell,* 354 Pa. 483, 47 A.2d 697, 700 (1946), but rather has developed as a principle of interpretation specific to assignments. *See Horbal v. Moxham Nat'l Bank,* 548 Pa. 394, 697 A.2d 577, 583 (2001) ("In interpreting an assignment, it will ordinarily be construed in accordance with the rules of
275 construction governing contracts and the circumstances surrounding *275 the execution of the assignment document."). Perhaps because this case implicated an assignment, the District Court considered not only the language of the DSA, but also expressly considered the "circumstances" surrounding that agreement. (A11 n.4.) The problem with that approach is

that the Court was not interpreting an assignment. The DSA, not the assignment agreement, was under scrutiny, and the DSA is simply a contract, not an assignment. Thus, it seems likely that Pennsylvania's general principles of contract interpretation should have applied, which focus on the "clear and unambiguous" language of an agreement "as *manifestly expressed,* rather than as, perhaps, silently intended."[17] *Amoco Oil Co. v. Snyder,* 505 Pa. 214, 478 A.2d 795, 798 (1984) (original emphasis) (internal quotation marks omitted); *see also* *LJL Transp., Inc. v Pilot Air Freight Corp.,* 599 Pa. 546, 962 A.2d 639, 647 (2009) ("When the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement, which will be given its commonly accepted and plain meaning." (internal citations omitted)). But that is a question for the District Court to address, if necessary, on remand.

V. CONCLUSION

We part from the District Court in its treatment of antitrust standing as a factual challenge to subject matter jurisdiction under Rule 12(b)(1), and we reject the proposition that the Court could have considered the extrinsic evidence of the DSA's anti-assignment clause under Rule 12(b)(6). The case should not have been dismissed pursuant to Allergan's Rule 12(b)(1) motion. Therefore, we will vacate the order of dismissal and remand for further proceedings.

[1] As explained in greater detail hereafter, it was error for the District Court to dismiss the action under Rule 12(b)(1). Treating the motion to dismiss as one under Rule 12(b)(6), we recount the facts as alleged by the non-movant, Hartig, accepting them as true. *Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir. 2009).

[2] We deliberately refer to the Defendants collectively in describing the alleged anticompetitive conduct, as Hartig claims that all the Defendants, and not merely Allergan, engaged in such conduct.

[3] The complaint alleges that Apotex, when it filed its Abbreviated New Drug Application ("ANDA") for a 0.3% gatifloxacin ophthalmic solution, certified that it would not market that product until Kyorin's patent expired on June 15, 2010, and Apotex notified the Defendants that its proposed ANDA product would not infringe on any valid claim of the separate '045 Patent. The complaint also alleges that the Defendants knew that the claims of the '045 Patent were invalid as obvious.

[4] Specifically, Hartig alleged that "Defendants' anticompetitive actions delayed the entry of any generic competition from the market for over three years (at least from June 15, 2010 until October 3, 2013), and has limited generic competition even today to a single generic competitor offering a generic to Zymaxid only." (A48.)

[5] The Defendants contend that Hartig failed to establish the existence of the assignment agreement. Because, as we ultimately conclude, the District Court should have considered Allergan's motion to dismiss under Rule 12(b)(6) rather than Rule 12(b)(1), the Court was obligated to accept the complaint's factual allegations as true and view them in the light most favorable to Hartig. *See* *Foglia v. Renal Ventures Mgmt., LLC,* 754 F.3d 153, 154 n.1 (3d Cir. 2014). Thus, even without the introduction of a written copy of the assignment agreement, the complaint's allegation that an assignment of antitrust rights had occurred suffices at this stage of the proceedings.

[6] Allergan subsequently joined that 12(b)(6) motion as well.

[7] The *amici* are Walgreen Co., The Kroger Co., Safeway Inc., Albertson's LLC, HEB Grocery Company LP, CVS Health Corporation, and Rite Aid Corporation.

[8] The District Court's subject matter jurisdiction is the primary issue in this appeal. We have appellate jurisdiction to review the final decision of the District Court pursuant to 28 U.S.C. § 1291. The question of whether the District Court had subject matter jurisdiction is an issue of law that we review *de novo.* *In re Phar-Mor, Inc. Sec. Litig.,* 172 F.3d 270, 273 (3d Cir. 1999). Likewise, the determination of a contract's legal effect is a question of law subject to plenary review. *Ram Constr. Co. v. Am. States Ins. Co.,* 749 F.2d 1049, 1053 (3d Cir. 1984).

[9] Indeed, Allergan's legal argument on this point was as follows:

Standing to sue under the antitrust laws is limited to parties that were direct purchasers of the product at issue. *Ill. Brick,* 431 U.S. at 746, 97 S.Ct. 2061. Indirect purchasers—that is, parties who allegedly paid an overcharge that was passed on by a party that made a purchase directly from the defendants—lack standing.

D.I. 15, at 4-5.

[10] The third element from *Lujan,* redressibility, is not raised by the Defendants' new Article III standing argument.

[11] We are careful not to say that the distinction between direct and indirect purchasers is wholly irrelevant to the question of Article III standing, since an indirect purchaser could be so remote as to be unable to meet its burden of establishing either that it had suffered an injury in fact or that such injury was fairly traceable to the defendant's actions.

[12] That disqualification may or may not be overcome by the alleged assignment from Amerisource. That is a question for the District Court in the first instance.

[13] *See* A24 ¶ 8 ("Defendants' unlawful scheme effectively denied direct purchasers of Zymar and Zymaxid the benefits of competition and of less expensive, generic versions. As a result, Plaintiff [Hartig] ... ha[s] paid supracompetitive prices for Zymar and Zymaxid and its generic equivalents."); A48 ¶ 124 ("Defendants' anticompetitive actions resulted in Plaintiff [Hartig] ... paying higher prices for gatifloxacin ophthalmic formulations than [it] would have paid if a generic equivalent to Zymar and Zymaxid had been available throughout the class period."); A51 ¶ 141 (same); A50 ¶¶ 136-37 (alleging that, "[a]s a result of the Defendants' illegal conduct," Hartig and other "purchasers of Zymar and Zymaxid have sustained substantial losses and damage to their business and property in the form of overcharges"); A52 ¶ 143 (asserting that, "as a direct and proximate result of Defendants' wrongful conduct," Hartig and other class members "paid artificially inflated prices for Zymar and Zymaxid and were deprived of the benefits of earlier and robust competition from cheaper generic versions of those products"); A55-56 ¶¶ 164-65 (claiming that, "[b]ut for Defendants' unlawful actions," Hartig "would have benefitted from the presence of [ ] low-cost generic ... alternative[s]" to Zymar and Zymaxid that the Defendants' embattled competitors "could and would have supplied"); A57 ¶¶ 177-78 (same); A59 ¶¶ 190-91 (same).

[14] We have repeatedly cautioned against allowing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction to be turned into an attack on the merits. Caution is necessary because the standards governing the two rules differ markedly, as Rule 12(b)(6) provides greater procedural safeguards for plaintiffs than does Rule 12(b)(1). First, proceeding under Rule 12(b)(1) inverts the burden of persuasion. When presenting a Rule 12(b)(6) motion, the defendant bears the burden to show that the plaintiff has not stated a claim. But under Rule 12(b)(1), the plaintiff must prove the court has subject matter jurisdiction. The two rules also treat the complaint's factual allegations very differently. Unlike Rule 12(b)(6), under which a defendant cannot contest the plaintiff's factual allegations, Rule 12(b)(1) allows a defendant to attack the allegations in the complaint and submit contrary evidence in its effort to show that the court lacks jurisdiction. Thus, improper consideration of a merits question under Rule 12(b)(1) significantly raises both the factual and legal burden on the plaintiff. Given the differences between the two rules, a plaintiff may be prejudiced if what is, in essence, a Rule 12(b)(6) challenge to the complaint is treated as a Rule 12(b)(1) motion.

Davis, 824 F.3d at 348-49 (internal citations, quotation marks, and brackets omitted). Because Rule 12(b)(6) is the preferred mechanism for the early testing of a plaintiff's claims, and because defendants are nevertheless likely to prefer the relaxed standards of Rule 12(b)(1), district courts confronted with arguments framed as 12(b)(1) challenges to jurisdiction should approach those arguments with particular care.

[15] In fact, for purposes of this appeal, the DSA has been filed separately under seal, and it states at the bottom of every page that it is "confidential" and "not to be shared with any third party." (A100-15.)

[16] The complaint does not mention Amerisource at all except for the single paragraph alleging that (1) Amerisource "directly purchased branded Zymar and Zymaxid from Defendants" (A25 ¶ 9), (2) Hartig purchased those same drugs from Amerisource, and (3) Amerisource assigned its antitrust rights to Hartig.

[17] The DSA's limitation on assignments provides that "[t]his *Agreement* may not be assigned" without prior written consent, but that "either party may assign its *rights and obligations hereunder*" without written consent if the assignment is to a "subsidiary or affiliate." (A108 (emphasis added).) Because Amerisource's antitrust causes of action arise by statute, there is a serious argument that they do not fall within the DSA's plain language limiting assignment of "rights and obligations hereunder"—that is, they arise by operation of an extrinsic legal regime rather than by contract.

570 F.2d 982 (1977)

Norman F. HECHT, Harry Kagan and Marc A. Miller, joint venturers, Appellants, Washington Federals, Inc., a corporation, et al. v. PRO-FOOTBALL, INC., a corporation, et al.

No. 75-1819.

United States Court of Appeals, District of Columbia Circuit.

Argued December 20, 1976.
Decided December 20, 1977.

985 *983 *984 *985 William Joseph H. Smith, Washington, D. C., for appellants.

Bernard I. Nordlinger, Washington, D. C., with whom Robert B. Frank, Washington, D. C., was on the brief, for appellee, Pro-Football, Inc., also argued for appellee, D.C. Armory Board.

Louis P. Robbins, Principal Asst. Corp. Counsel for District of Columbia, Richard W. Barton, and Leo N. Gorman, Asst. Corp. Counsels, Washington, D. C., at the time the brief was filed, were on the brief for appellee, D.C. Armory Board. C. Francis Murphy, Corp. Counsel, Washington, D. C., at the time the record was filed, also entered an appearance for appellee, D.C. Armory Board.

Before McGOWAN, Circuit Judge, HARRISON L. WINTER,[*] Circuit Judge for the Fourth Circuit and WILKEY, Circuit Judge.

Opinion for the Court filed by Circuit Judge WILKEY.

WILKEY, Circuit Judge:

This is a private antitrust action. Plaintiffs Hecht, Kagan, and Miller (hereafter collectively "Hecht") are a group of promoters who in 1965 sought unsuccessfully to obtain an American Football League (AFL) franchise for Washington, D.C. Defendants are Pro-Football, Inc., operator of the Washington Redskins (the Redskins), and the District of Columbia Armory Board, an unincorporated instrumentality of the District of Columbia which operates and maintains Robert F. Kennedy (RFK) Stadium under contract with the Interior Department.[1] The Armory Board leases RFK Stadium to the Redskins. Hecht attacks a restrictive covenant in that lease.[2]

986 Hecht contends that RFK Stadium is the only stadium in the Washington metropolitan area suitable for the exhibition of professional football games; that the restrictive *986 covenant prevented him from obtaining the use of the stadium; and that his inability to obtain the use of the stadium prevented him from submitting an acceptable franchise application to the AFL owners, and thus from competing with the Redskins in the Washington professional football market. Hecht's complaint alleges that the restrictive covenant constitutes a contract in restraint of trade, in violation of Sherman Act §§ 1 and 3;[3] and that the Redskins, in obtaining the covenant and refusing to waive it, have monopolized professional football in Washington, D.C., in violation of Sherman Act § 2.[4] The case was tried to a jury,[5] which rendered a verdict for defendants. Hecht appeals numerous instructions and evidentiary rulings. We reverse and remand for a new trial.

I. FACTS

Formed in 1959-60 with eight franchised teams, the AFL by 1965 was seriously considering expansion. It planned to grant two new franchises, one to a city with an NFL franchise and one to a city with no professional football team. The granting of any new franchise required the affirmative votes of six clubs.

In June 1965 Hecht and his associates organized an original group of investors. This group had no football experience and limited financial strength, but possessed a general familiarity with business affairs. Hecht sent a franchise application form to the AFL, and followed it with a meeting in late June with AFL Commissioner Foss. They discussed details of the application, the need for Hecht to bolster his group's financial position, and the feasibility of gaining access to RFK Stadium in view of the Redskins' lease. In that connection, Hecht and Foss discussed the advisability of soliciting the aid of the Interior Department in obtaining the use of RFK Stadium.

Shortly after this meeting, Hecht persuaded three additional investors to join his promotional group. These were men of considerable means. Hecht also met with Stewart Udall, then Secretary of the Interior. Udall apparently responded favorably to Hecht's proposal, and told Hecht that his staff would investigate the legality of the restrictive covenant in the Redskins' lease.

In July 1965 Hecht submitted a written offer to purchase an AFL franchise, couching the application in a form suggested by Commissioner Foss. During July and August there were numerous interchanges between Hecht and the AFL group, about which there was conflicting evidence. These events need not be detailed. Hecht presented evidence which tended to show that his promotional activities were serious and that at least some members of the AFL expansion committee favored his
987 application; he presented one piece of evidence *987 which suggested that if he got the stadium he would get the franchise. The Redskins presented evidence which tended to show that the AFL owners never seriously considered expansion to Washington and that Hecht's application never had a chance of being approved.

On 7 September 1965 Hecht submitted a written proposal to the Armory Board for shared use of RFK Stadium. The Board told Hecht that it could not negotiate a lease with him owing to the restrictive covenant in the Redskins' lease. The Board also said, however, that it would gladly consider any arrangement acceptable to the Redskins under which Hecht could use the stadium (*i. e.,* a waiver of the restrictive covenant) and by which the Board's financial condition would be improved.[6] There was conflicting evidence about the practicality of any plan for sharing the stadium between two professional football teams.

On 4 October 1965 Hecht received a memorandum from the Interior Department expressing its opinion that the restrictive covenant in the Redskins' lease violated the antitrust laws. Hecht distributed copies of this memorandum to the AFL owners and to the Armory Board. Months of intermittent and frustrating meetings followed. The Redskins presented evidence which tended to show that they had reason to doubt the sufficiency of Hecht's financial resources and the integrity with which he pursued the negotiations. During this period, Hecht was whipsawed between the positions of the Redskins and the AFL. The Redskins would not seriously negotiate for Hecht's use of the stadium unless Hecht had an AFL franchise; the AFL would not seriously consider Hecht's application for a franchise unless he had the use of RFK Stadium. In his quandary, Hecht made representations to both sides which were optimistic at best. In August 1966 the Redskins broke off negotiations. In October 1966 Hecht filed his original complaint in this action.

II. OVERALL ANALYSIS

At the outset, the Redskins contend that we need not reach Hecht's various assignments of error because the trial conclusively demonstrated that Hecht lacks standing to sue. Section 4 of the Clayton Act confers the right to sue for treble damages on "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."[7] This section establishes a two-fold standing requirement: the plaintiff must show both an *injury-in-fact* to his "business or property" and a *causal connection* between that injury and the defendant's allegedly illegal acts.[8] The Redskins contend that Hecht has shown neither.

First, they argue that Hecht's promotional group had a shifting and impermanent structure; that no money had been contributed or even committed by its members; that Hecht had no prospect of ever receiving a franchise; that Hecht failed to negotiate toward a franchise in a serious and businesslike manner; and that Hecht consequently lacked "business or property" for antitrust purposes. As will be pointed out more fully below,[9] however, the courts have generally not insisted that a plaintiff actually be engaged in a going business in order to have antitrust standing; it is sufficient if he has manifested an intention to enter the business and has demonstrated his preparedness to do so.[10] Our review of the record indicates
988 that the evidence presented a question of fact for the jury on these *988 issues. We cannot hold that Hecht lacked "business or property" as a matter of law.

Second, the Redskins argue that Hecht's inability to submit an acceptable franchise application was due entirely to his own bad faith in negotiating with them for use of RFK Stadium, and that Hecht consequently failed to show a causal connection between his injury and the restrictive covenant in the Redskins' lease. We find this argument sanctimonious and somewhat sophistical. The negotiations, plainly, were frustrating for all concerned. The question, in any event, was peculiarly one for the jury.[11] We cannot hold, in defiance of plain evidence and common sense, that the restrictive covenant was causally unrelated to the injury of which Hecht complains; the degree of causality may be another matter.

Having disposed of the Redskins' threshold contentions, we consider plaintiffs' various assignments of error.

III. INSTRUCTIONS

A. *Relevant Geographic Market.*

In suits brought under the Sherman Act the threatened foreclosure of competition must be assessed "in relation to the market affected."[12] The relevant product market in this case is indisputably the business of professional football. The parties disagree, however, as to the relevant geographic market. Hecht contends that it is the metropolitan area of Washington, D.C.; the Redskins contend that it is the entire United States. The trial judge effectively instructed the jury that the relevant geographic market was the nation as a whole.[13] We hold that his instruction was clearly erroneous as a matter of law.

The relevant geographic market is "the area of effective competition,"[14] the area "in which the seller operates, and to which the purchaser can practicably turn for supplies."[15] It is well settled that the relevant market "need not be nationwide,"[16] and that "where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area."[17] Indeed, courts have regularly identified relevant geographic markets as single cities or towns, and even portions thereof.[18]

989 *989 In this case Hecht sought to enter the market for professional football in Washington, D.C. He argues that the Redskins frustrated his entry by denying him use of RFK stadium, access to which was a condition precedent to his submitting a successful franchise application. Given this posture of the case, it seems evident that the relevant geographical market is the D.C. metropolitan area: it is here that "the seller operates;" It is here alone that the Redskins' customers (primarily, their ticket purchasers) can "practicably turn" for the supply of professional football. Hecht sought to compete for these customers by obtaining a franchise of his own, and it can scarcely be doubted that "the area of effective competition" between him and the Redskins would be the nation's capital.

The trial court, however, defined the relevant geographical market as "the area of effective competition for the acquisition, location and operation of a professional football franchise in the years 1965 and 1966."[19] It is true, of course, that Hecht had to "compete" with other cities before he could assure himself of a franchise for Washington; yet this is hardly the competition that is at issue here. Hecht is not complaining that the Redskins' restrictive covenant prevented him from entering "the national market for football franchises;" obviously, Hecht could have entered that market, notwithstanding the Redskins' lease, from any other city. Hecht is complaining, rather, that the restrictive covenant on RFK Stadium in Washington, D.C., prevented him from entering the market for professional football in Washington; this is "the area which the alleged restraints affect."[20] The "national competition" was but a preliminary, if necessary, step to a distinctly local end. We hold, therefore, that the trial judge erred in failing to instruct the jury that the relevant geographic market is the area of metropolitan Washington, D.C., in which Hecht and the Redskins would have effectively competed for customers.[21]

990 *990 B. *Monopolistic Intent and "Natural Monopoly."*

The offense of "monopolization" under Sherman Act § 2 implicates both the possession of monopoly power — "monopoly in the concrete"[22] — and an element of willfulness or intent.[23] To demonstrate intent to monopolize, however, a plaintiff need not always prove that the defendant acquired or maintained his monopoly power by means of exclusionary, unfair, or predatory acts. At least since *Alcoa,*[24] it has been clear that the requisite intent can be inferred if a defendant maintains his power by conscious and willful business policies, however legal, that inevitably result in the exclusion or limitation of actual or potential competition.[25] In accordance with *Alcoa,* Hecht requested an instruction that the jury could find monopolistic intent if it found that the Redskins had consciously engaged in acts or contracts, whether lawful or unlawful, that "maintained and protected" their monopoly over professional football in Washington. The trial judge refused to give this instruction. Instead, he ruled that the *Alcoa* theory of intent (*viz.,* an inference of monopolistic intent without a showing of specific unfair practices) was not available to Hecht unless he proved that the Washington metropolitan area could support two professional football teams. We hold that this instruction was error.

In order to explain the trial judge's chain of reasoning, it is necessary to elaborate somewhat the teaching of *Alcoa.* In that opinion, Judge Hand recognized, as noted above, that monopolistic intent may be inferred from conscious business practices that inevitably produce or maintain monopoly power. Judge Hand also recognized, of course, that there are situations in which an inference of monopolistic intent absent a showing of specific unfair practices would be improper. One such situation is where defendant has a "natural monopoly" — where, in Judge Hand's words, "[a] market [is] so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand."[26] In the wake of *Alcoa,* accordingly, a substantial body of case law has developed, holding that the "characteristics of a natural monopoly make it inappropriate to apply the usual rule that success in driving competitors from the market is evidence of illegal monopolization."[27] These cases hold, in short, that a natural monopolist does not violate § 2 unless he "acquired or maintained [his] power through the use of means which are `exclusionary, unfair or predatory.'"[28]
991 In this case, therefore, the trial *991 judge properly told the jury that if it found the Redskins to have a natural monopoly, "such a monopoly does not violate the antitrust laws unless it was acquired or maintained by exclusionary, unfair, or predatory means."[29]

The trial judge further instructed the jury, however, that Hecht bore the burden of proving that the Redskins did *not* have a natural monopoly:[30]

> In this connection, you are instructed that an established operating professional football team may be said to have a natural monopoly in a particular city, if that city cannot support two professional teams under existing circumstances. Accordingly, the plaintiffs must prove by a preponderance of the evidence that [the D.C. metropolitan area,] in 1965 and 1966, could have reasonably supported both the defendant Redskins and an [AFL] team.

This part of the instruction, we think, was incorrect. It is the clear thrust of *Alcoa* that, once a plaintiff has proven the defendant's maintenance of its monopoly power through conscious business practices, a rebuttable presumption is established that defendant has the requisite intent to monopolize. The defendant can defeat this presumption by showing that it had monopoly, as some have greatness, "thrust upon it"[31] — that its power derives from "superior skill, foresight and industry" or (as is particularly relevant here) from the advantages of natural monopoly conditions.[32] Both the Supreme Court, and the lower courts, have echoed this position.[33] We are not called upon in this case to elaborate the various circumstances under which the burden of proof in § 2 cases might shift to defendant; we hold merely that when, as here, a defendant seeks to avoid a charge of monopolization by asserting that it has a natural monopoly owing to the market's inability to support two competitors, the defendant, and not the plaintiff, bears the burden of proof on that score.

This holding finds firm grounding in antitrust policy. To hold otherwise could effectively mean that a defendant is entitled to remain free of competition unless the plaintiff can prove, not only that he would be a viable competitor, but also that he and defendant both would survive. This result would be ironic indeed: we cannot say that it is in the public interest to have the incumbent as its sole theatre, or its sole newspaper, or its sole football team, merely because the incumbent got there first. Assuming that there is no identity of performance, the public has an obvious interest in competition, "even though that
992 competition be an elimination bout."[34] "It has been the *992 law for centuries," Justice Holmes once wrote, "that a man may set up a business in a small country town, too small to support more than one, although thereby he expects and intends to ruin some one already there, and succeeds in his intent."[35] The newcomer and the incumbent may both succeed, or either or both may fail; this is what competition is all about.

C. *Essential Facility.*

Hecht contends that the District Court erred in failing to give his requested instruction concerning the "essential facility" doctrine. We agree. The essential facility doctrine, also called the "bottleneck principle," states that "where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.

It is illegal restraint of trade to foreclose the scarce facility."[36] This principle of antitrust law derives from the Supreme Court's 1912 decision in *United States v. Terminal R. R. Ass'n,*[37] and was recently reaffirmed in *Otter Tail Power Co. v. United States*;[38] the principle has regularly been invoked by the lower courts.[39] To be "essential" a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.[40] Necessarily, this principle must be carefully delimited: the antitrust laws do
993 not require that an essential facility be shared if such sharing would be impractical or would inhibit *993 the defendant's ability to serve its customers adequately.[41]

In this case Hecht presented evidence that RFK stadium is the only stadium in the D.C. metropolitan area that is suitable for the exhibition of professional football games.[42] He also presented evidence that proper agreements regarding locker facilities, practice sessions, choice of playing dates, and so forth would have made sharing of the stadium practical and convenient.[43] Accordingly, Hecht requested an instruction that if the jury found (1) that use of RFK stadium was essential to the operation of a professional football team in Washington; (2) that such stadium facilities could not practicably be duplicated by potential competitors; (3) that another team could use RFK stadium in the Redskins' absence without interfering with the Redskins' use; and (4) that the restrictive covenant in the lease prevented equitable sharing of the stadium by potential competitors, then the jury must find the restrictive covenant to constitute a contract in unreasonable restraint of trade, in violation of Sherman Act §§ 1 and 3.[44] This instruction was substantially correct and failure to give it was prejudicial error.[45]

D. *Business or Property.*

Under § 4 of the Clayton Act a plaintiff has standing to complain of an antitrust infraction only if he has been "injured in his business or property" by reason of the defendant's acts.[46] Hecht contends that the trial judge erred in failing to make the disjunctive character of this requirement sufficiently clear to the jury. Although we would not reverse on this point alone, we think Hecht's contention has merit.[47] On remand, the trial judge should take greater care to instruct the jury that it need only find that plaintiffs sustained injury *either* to their business *or* to their property, and that it need not find that they sustained injury to both.

994 *994 Hecht also contends that the trial court erred in failing to give his requested instructions on the meaning of "business" and "property." We disagree, and hold that the trial judge's instructions on this score were substantially correct.

Hecht argues that "*promotion* of obtaining a professional football franchise" is, without more, "business" for purposes of § 4.[48] His experts testified that "promotion" is an important part of business.[49] It is true, of course, that every business must have had a promotional stage, since every business must have started somewhere; and that promotion is important to the mature business, as conception is "important" to the adult. But it does not follow from this that promotion *is* business, at least not for purposes of the antitrust laws. One can be a "promoter" though he be a pauper, a tyro, and a dreamer; it is a question of where the line shall be drawn. Uniformly, the courts have drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is accompanied by certain indicia of ultimate success.[50] Put another way, the courts have held that a potential competitor cannot achieve standing merely by demonstrating his *intention* to enter a field; he must also demonstrate his *preparedness* to do so.[51] Indicia of preparedness include adequate background and experience in the new field, sufficient financial capability to enter it, and the taking of actual and substantial affirmative steps toward entry, "such as the consummation of relevant contracts and procurement of necessary facilities and equipment."[52] The district judge painstakingly explained these factors to the jury,[53] and his instruction correctly stated the law.

Alternatively, Hecht contends that the "negotiation of contracts" constitutes "business"[54] and that the "right to negotiate a lease or a contract constitutes `property'"[55] under the antitrust laws. Of course, the courts generally have held that a valid and binding contract constitutes "property," injury to which will give a plaintiff standing under § 4.[56] But they have uniformly
995 *995 held that mere negotiations toward contracts are not "business or property" deserving of antitrust protection.[57] *Everyone* has the "right" to negotiate contracts; if, as Hecht contends, "all interests that the law protects" constitute "property" within the meaning of § 4,[58] standing is conferred on all the world. The statutory words cannot so lightly be

robbed of meaning. The trial judge's "property" instruction, while perhaps subject to some clarification,[59] sufficiently conveyed by examples the substance of what was at issue. The court correctly refused to give the instruction that Hecht requested.

E. *Unreasonable Restraint of Trade.*

Under the rule of *Standard Oil Co. v. United States,*[60] § 1 of the Sherman Act condemns only *unreasonable* restraints of trade. The trial judge instructed the jury as to the various factors it should consider in determining whether the Redskins' restrictive covenant was an unreasonable restraint.[61] This instruction was based on Justice Brandeis' oft-quoted language in *Chicago Board of Trade v. United States,*[62] and was, as far as it went, correct.

Hecht contends, however, that the instruction was incomplete: although the court told the jury what *factors* to consider, it failed to tell them what those factors must *prove* — it failed, in other words, to explain what an unreasonable restraint *was.* Hecht argues that the jury should have been instructed that a restraint is unreasonable if it "has a substantially adverse effect upon competition . . ., that is, [if] it suppresses or prevents competition."[63] This is the standard definition of an
996 "unreasonable" restraint, sanctioned *996 both by *Chicago Board of Trade*[64] and later cases,[65] and the trial judge should have included it in his instruction.

Elaborating the *Chicago Board of Trade* factors, the judge told the jury that in considering whether the restrictive covenant was reasonable they should "consider whether the provision [was] fairly related to business considerations that the Redskins or the Armory Board had to deal with at the time they entered into the lease."[66] The court thus implied that if there existed good business reasons for the restrictive covenant the jury should not find the restraint unreasonable. As Hecht points out, however, it is settled that the "antitrust outcome does not turn merely on the presence of sound business reason or motive" and that the "promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct."[67] The latter part of the judge's instruction was thus misleading and should have been deleted.

F. *Proximate Cause.*

Hecht contends that the trial judge neglected to instruct the jury clearly that the restrictive covenant need not be the *sole* cause of Hecht's failure to obtain a franchise, but merely a proximate cause. However, the judge stated plainly that proximate causation "does not mean that the law seeks and recognizes only one proximate cause of an injury" and that, "[t]o the contrary, several factors . . . may work concurrently as the efficient causes of an injury, and, in such case, each of the participating acts or omissions is regarded in law as a proximate cause."[68] Although the judge might well have incorporated phrases like "substantial factor" and "material contributing cause" into his instruction, as Hecht requested,[69] failure to do so did not make the instruction inadequate, misleading, or incomprehensible.

IV. EVIDENTIARY RULINGS

A. *Hecht's Dealings with the Interior Department.*

The trial court excluded from evidence all testimony and documents relating to Hecht's activities in obtaining and using the assistance of the Interior Department in his effort to win a franchise. This testimony concerned Hecht's meetings with the Department staff (including the Secretary); the Department's favorable response to Hecht and its willingness to draft a memorandum in support of his application; the Department's conclusion, expressed in a memorandum of law, that the restrictive covenant in the Redskins' lease was illegal; and the delivery of this memorandum to the AFL owners and the Armory Board. Hecht does not seriously contend that the trial court erred in refusing to admit the memorandum itself into
997 evidence.[70] Hecht does *997 contend, however, that all the Interior Department material other than the Department's legal opinion should have been admitted, including evidence that the "memorandum supported the use of the stadium by two teams."[71] The trial judge refused to admit this material into evidence on the ground that its probative value was outweighed by its prejudicial effect. We hold that this was a proper exercise of his discretion.[72]

Admission of the Interior Department material would have prejudiced the Redskins in two ways. First, as defendants argue, it might well have been impossible to permit Hecht "to adduce before the jury the details of his dealings with Interior without letting the jury know about Interior's legal opinion on the validity of the Redskins' lease."[73] But risk of divulging the Interior Department's conclusion of law is not the only, or even the most serious, source of prejudice here. The mere fact that the Government was cooperating with Hecht and favored his proposal — the fact that the Government was "rooting" for him to win — would have portrayed the Redskins as obstructing the will of the people in pursuit of their own selfish ends.[74] Whose side the Government was on, of course, is of no conceivable relevance to the issues the jury had to decide, and we cannot doubt that disclosure of its partisanship would severely have prejudiced the Redskins' position. The probative value of the Interior Department material, on the other hand, seems slight. Most of the evidence excluded was, by Hecht's admission, circumstantial;[75] and the record contains ample evidence for almost all the propositions which Hecht wished to use the Interior Department material to support.[76] On balance, the judge's decision to exclude the material was well within his discretion.

B. *The Promoters' Percentage Interests.*

The trial judge excluded from evidence all testimony concerning an alleged oral agreement among the promoters dictating their percentage shares in the prospective franchise. This testimony was excluded because Hecht's pretrial narrative statements did not specifically allege such an agreement; the pretrial order said that factual contentions omitted from the narrative statements would be deemed abandoned.[77] The judge declined to amend the order to permit introduction of the testimony, reasoning that amendment was not required "to prevent manifest injustice."[78] We hold that the exclusion of this testimony was error. In so holding, however, we do not consider whether admission of the testimony was mandated under
998 the "manifest *998 injustice" rule. In our view, the pretrial order did not need to be amended, for Hecht's allegations as to the oral agreement were fairly comprised within the factual contentions that his pretrial statement contained.

In that statement, Hecht contended that his promotional group was "financially able" to purchase a franchise,[79] and that the promotion "always had available to it the support of local businessmen who were ready, willing and able to supply the money required. . . ."[80] It was clear from the outset that Hecht and his original investors had limited financial resources, and that the financial strength of the promotional group derived largely from the more moneyed investors who came in later. It must be assumed that these "additional investors"[81] would contribute capital only in proportion to their percentage interest in the franchise. In order to show that the group as a whole was "financially able," therefore, Hecht obviously had to show that its financially able members, *i. e.,* the "additional investors," were going to own a large percentage share. This he proposed to do by offering evidence of an oral agreement under which the "additional investors" were to own at least 51% of the franchise, while Hecht would retain only 10%.[82]

We think that evidence of some such agreement was necessarily implicated in Hecht's factual contention that his group was "financially able". Unless the jury was to be expected to assume that the additional investors' motivations were eleemosynary, Hecht could not demonstrate financial ability merely by reciting that they "belonged" to his group; he had to show that they had a controlling stake in it. For this reason, testimony as to the alleged oral agreement was encompassed within Hecht's pretrial narrative statement and there was thus no bar to its admission.[83]

C. *Expert Testimony.*

The trial judge admitted into evidence testimony of plaintiffs' experts that it was customary and usual business practice for tenants and landlords in the D.C. area to bargain for restrictive covenants in leases. Hecht argues that this testimony was irrelevant and should have been excluded. We agree. The witnesses concededly possessed no expertise about football stadiums, and testified only about garden-variety commercial leases.[84] There is, however, no analogy between a shopping center lease which, *e. g.,* stipulates that only one drug store can rent space in the center, and the restrictive covenant in the Redskins' lease: another drug store can be built down the road, whereas RFK Stadium is an essential facility that cannot be duplicated.[85] It is settled, moreover, that evidence of customs and practices in an industry is irrelevant in determining whether the defendant has violated the antitrust laws.[86] Although we would not reverse on this point alone, we conclude that the trial judge erred in admitting the experts' testimony.

CONCLUSION

999 Because the trial judge erred in giving, or failing to give, at least four important instructions *999 to the jury, and in admitting, or failing to admit, at least two important pieces of evidence, the judgment must be reversed and the case remanded for another trial. On remand, we strongly suggest that the trial judge use his discretion to submit the case to the jury on special interrogatories,[87] rather than elicit a mere general verdict. Antitrust cases present difficult problems for jurors; written interrogatories would help them to focus on the salient issues, and would help to pinpoint what went wrong should this case, *horribile dictu,* come to this Court a third time.

So ordered.

[*] Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

[1] The land on which the stadium is located is owned by the United States.

[2] The lease runs from 1961 to 1990. Paragraph II(e) thereof provides that "at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins." Plaintiffs'-Appellants' Appendix (App.) 34-35.

[3] Sherman Act § 1, 15 U.S.C. § 1 (Supp. V 1975) provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Sherman Act § 3, 15 U.S.C. § 3 (Supp. V 1975) provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

[4] Sherman Act § 2, 15 U.S.C. § 2 (Supp. V 1975) provides in pertinent part:

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

[5] The trial was held on remand from this Court. *Hecht v. Pro-Football, Inc.* (*Hecht I*), 144 U.S.App.D.C. 56, 72, 444 F.2d 931, 947 (1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). In *Hecht I,* the district court granted summary judgment for the defendants on the ground that the Board's leasing of RFK Stadium was governmental action immune from the antitrust laws. We reversed and remanded for trial on the merits, concluding that Congress had evinced no intention to confer such immunity.

[6] The Armory Board operated RFK Stadium at a net loss before depreciation in each year from 1966 to 1974. Transcript (Tr.) 721-24, App. 110-27.

[7] 15 U.S.C. § 15 (1970).

[8] *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 Yale L.J. 809, 810-13 (1977).

[9] *See* pp. ___-___ of 187 U.S.App.D.C., p. 994 of 570 F.2d *infra.*

[10] *See* *Martin v. Phillips Petrol. Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied,* 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966).

[11] Indeed, the jury could have found that bad faith might more properly be attributed to the Redskins. Their protestations that they would have been only too happy to negotiate seriously with Hecht once he had a franchise ring hollow, for they knew full well that Hecht could not get a franchise until he had access to the stadium. There was certainly no willingness to negotiate any arrangement *conditioned on* Hecht's getting the AFL franchise; this might well have been all Hecht needed to obtain it. If the Redskins were as sure as they now assert they were that Hecht and associates could never have obtained a franchise because of lack of financial resources and other reasons, the Redskins could have avoided this lawsuit by waiving their restrictive covenant and then watching the AFL turn down the Hecht application.

[12] *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961).

[13] Although the trial judge purported to leave the question of relevant geographical area to the jury, Tr. 2833, he defined that area as the area of competition for football franchises. *See* p. ___ of ___ U.S.App.D.C., p. 989 of 570 F.2d *infra.* Since the trial established beyond peradventure that numerous cities were competing for franchises, the judge's instruction virtually directed the jury to find a national market. Not surprisingly, the jury seems to have been confused by the "relevant market" instructions. *See* Tr. 2851-53.

[14] *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 321, 328, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961).

[15] *Id.,* at 327, 81 S.Ct., at 628, *quoted in* *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 359, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

[16] *Standard Oil Co. v. United States,* 337 U.S. 293, 299 n. 5, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

[17] *United States v. Columbia Steel Co.,* 334 U.S. 495, 519, 68 S.Ct. 1107, 1120, 92 L.Ed. 1533 (1948).

[18] *E. g., Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953) (relevant market is city of New Orleans); *Lorain Journal Co. v. United States,* 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951) (relevant market is city of Lorain, Ohio); *Kansas City Star Co. v. United States,* 240 F.2d 643 (8th Cir. 1957) (relevant market is Kansas City, Mo.); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.,* 194 F.2d 484 (1st Cir.), *cert. denied,* 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952) (relevant market is Providence, R.I.); *William Goldman Theatres, Inc. v. Loew's, Inc.,* 150 F.2d 738 (3d Cir. 1945), *cert. denied,* 334 U.S. 811, 68 S.Ct. 1016, 92 L.Ed. 1742 (1948) (relevant market is downtown theatre district).

[19] Tr. 2833, 2863.

[20] *United States v. Columbia Steel Co.,* 334 U.S. 495, 520, 68 S.Ct. 1107, 1120, 92 L.Ed. 1533 (1948). Defendants' citation of *American Football League v. National Football League,* 323 F.2d 124 (4th Cir. 1963), is inapposite. That case concerned the "competition between the leagues for franchise locations;" since each league was considering expansion to a host of desirable sites, the court properly held that the market, geographically, was "at least as broad as the United States, including Hawaii and portions of Canada." 323 F.2d at 130. This case, by contrast, concerns the potential competition between two teams for customers in one location. Unlike the NFL, the Redskins as "sellers" do not operate nationally; unlike the AFL, Hecht is not trying to expand nationally. He sought merely to compete with the Redskins on their home turf.

[21] These customers would include potential season ticket holders and occasional ticket buyers, and, to a lesser extent, purchasers of local radio and pre-season television broadcasting rights. Most of a professional football team's broadcasting revenue, of course, derives from the national television contract, which is negotiated by the league. As testimony at trial indicated, however, individual teams have very little control over the revenue they derive from this contract, and thus the most important factor in considering location of a franchise is the potential "gate" in the home city. Tr. (4 Apr. 1975) at 31. For this reason, national television audiences and national television contract revenues should be ignored in ascertaining the relevant market here. *Cf.* *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 361, 83 S.Ct. 1715, 1740, 10 L.Ed.2d 915 (1963) (holding relevant market to be metropolitan area of Philadelphia, Pa.):

[In ascertaining the relevant geographic market,] a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest . . . customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered.

See generally P. Areeda, Antitrust Analysis ¶ 231 (2d ed. 1974).

[22] *Standard Oil Co. v. United States,* 221 U.S. 1, 62, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

[23] *United States v. Grinnell Corp.,* 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *United States v. Griffith,* 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948); *Yoder Bros., Inc. v. California-Florida Plant Corp.,* 537 F.2d 1347, 1366 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977).

[24] *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945) (Learned Hand, J.).

[25] *Id.* at 428-31. *See, e. g., United States v. Griffith,* 334 U.S. 100, 105-08, 68 S.Ct. 941, 92 L.Ed. 1236 (1948); *Helix Milling Co. v. Terminal Flour Mills Co.,* 523 F.2d 1317, 1321 (9th Cir. 1975), *cert. denied,* 423 U.S. 1053, 96 S.Ct. 782, 46 L.Ed.2d 642 (1976); *United States v. United Shoe Mach. Corp.,* 110 F.Supp. 295, 344-45 (D.Mass.1953), *aff'd per curiam,* 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954).

[26] *United States v. Aluminum Co. of America,* 148 F.2d at 430. *See* C. Kaysen & D. Turner, Antitrust Policy 191 (1959):

Natural monopoly. In the economic sense, natural monopoly is monopoly resulting from economies of scale, a relationship between the size of the market and the size of the most efficient firm such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business.

[27] *Greenville Pub. Co., Inc. v. Daily Reflector, Inc.,* 496 F.2d 391, 397 (4th Cir. 1974).

[28] *Ovitron Corp. v. General Motors Corp.,* 295 F.Supp. 373, 378 (S.D.N.Y.1969), *quoting* *American Football League v. National Football League,* 323 F.2d 124, 131 (4th Cir. 1963). *See, e. g., John Wright & Assoc., Inc. v. Ullrich,* 328 F.2d 474, 479 (8th Cir. 1964); *Union Leader Corp. v. Newspapers of New England, Inc.,* 284 F.2d 582, 584 (1st Cir. 1960); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.,* 351 F.Supp. 457, 511 (E.D.Pa.1972); *United States v. Harte-Hanks Newspapers, Inc.,* 170 F.Supp. 227, 229 (N.D.Tex.1959).

[29] Tr. 2832, 2862.

[30] Tr. 2832, 2862; *cf.* Tr. 2703-06.

[31] *United States v. Aluminum Co. of America,* 148 F.2d at 429.

[32] *Id.* at 429-30.

[33] *See* *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 392, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956) ("[T]his Court [has concluded] in prior cases that, when an alleged monopolist has power over price and competition, an intention to monopolize in a proper case may be assumed") (footnote omitted); *Standard Oil Co. v. United States*, 221 U.S. 1, 75, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *United States v. Grinnell Corp.*, 236 F.Supp. 244, 248 (D.R.I.1964) (Wyzanski, J.), *aff'd and remanded on the question of relief,* 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) ("[O]nce the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of § 2"); *United States v. United Shoe Mach. Corp.*, 110 F.Supp. 295, 342, 343-46 (D.Mass.1953) (Wyzanski, J.), *aff'd per curiam,* 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). *But see* *United States v. Grinnell Corp.*, 384 U.S. at 576 n. 7, 86 S.Ct. at 1707 ("Since the record clearly shows that this monopoly power was consciously acquired, we have no reason to reach the further position of the District Court that once monopoly power is shown to exist, the burden is on the defendants to show that their dominance is due to skill, acumen, and the like").

[34] *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 n. 4 (1st Cir.1960). *See* *Greenville Pub. Co., Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 397 (4th Cir. 1974).

[35] *Vegelahn v. Gunter*, 167 Mass. 92, 44 N.E. 1077, 1080 (1896).

[36] A. D. Neale, The Antitrust Laws of the United States 67 (2d ed., 1970); *id.* at 66-69, 127-31. *See* L. A. Sullivan Antitrust 131 (1977):

[I]f a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom, or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable, non-discriminatory terms.

[37] 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912). In *Terminal R.R.,* a group of railroads had won control of all railroad switching facilities in St. Louis; topographical factors prevented potential competitors from gaining access to the city via other routes. The Court held:

[W]hen, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the [Sherman Act].

Id. at 409, 32 S.Ct. at 515. The Court ordered the railroads to amend their agreement to provide "for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties" on equal terms. *Id.* at 411, 32 S.Ct. at 516.

[38] 410 U.S. 366, 377-78, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), *affirming in relevant part* 331 F.Supp. 54, 59-61 (D.Minn.1971). In *Otter Tail,* municipalities sought to compete with defendant power company by building their own electric facilities. The municipalities could not afford to construct their own subtransmission lines, however, and defendant refused to "wheel" power for them over its own lines. The court found that Otter Tail's subtransmission lines were a scarce facility and that its refusal to share them violated § 2. 331 F.Supp. at 61.

[39] *E. g., Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1320 (9th Cir. 1975), *cert. denied,* 423 U.S. 1053, 96 S.Ct. 783, 46 L.Ed.2d 642 (1976) (plaintiff, whose mill had been destroyed by fire, sought to buy defendant's mill; defendant instead sold it to plaintiff's pre-fire competitor; *held,* plaintiff stated a cause of action under § 1: "In a closed market, where the acquisition of existing production facilities is the only economically feasible method of entry, an agreement to acquire the only available facilities necessarily excludes a potential entrant."); *United States v. Standard Oil Co.*, 362 F.Supp. 1331, 1341 (N.D.Cal.1972), *aff'd on appeal,* 412 U.S. 924, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973) (defendant had rights to exclusive use of fuel storage facilities essential to give potential competitors access to airport; *held,* defendant violated § 3 and was "ordered to take all necessary steps so as to enable other suppliers or distributors of petroleum products to use an adequate portion of the . . . storage facilities on a shared cost basis to enable said suppliers or distributors to compete in the Samoan market").

[40] *See* *Helix Milling*, 523 F.2d at 1320; *Otter Tail*, 331 F.Supp. at 60, 61; A. D. Neale, *supra* note 36 at 68, 131.

[41] *See* *Otter Tail*, 410 U.S. at 378, 381, 93 S.Ct. 1022; L. A. Sullivan, *supra* note 36 at 127-28; A. D. Neale, *supra* note 36 at 131.

[42] Tr. 243-44, 304-05, 1298-99.

[43] Tr. 244-45.

[44] App. 146. It seems clear that the essential facility doctrine would also support an allegation that the Redskins' refusal to waive the restrictive covenant constituted illegal monopolization under § 2. *See* note 11 supra. *Cf.* *Otter Tail, supra* note 38 and *Terminal R.R., supra* note 37. Hecht, however, did not request an instruction to this effect.

[45] Defendants offer two objections to this conclusion. First, they argue that the requested instruction presupposes the area of competition to be restricted to Washington, D.C. In view of our disposition of the relevant market issue, *supra* p. ___ of 187 U.S.App.D.C., p. 990 of 570 F.2d, this argument need not detain us further. Second, defendants argue that, notwithstanding the essential facility doctrine, the jury could still have found the restrictive covenant *reasonable. See* pp. ___-___ of 187 U.S.App.D.C. pp. 995-996 of 570 F.2d *infra.* This argument robs the essential facility doctrine of any significance, and we reject it. The garden-variety restrictive covenant does not violate § 1 unless it unreasonably restrains trade; when the restrictive covenant covers an essential facility, however, all possible competition is by definition

excluded and the restraint is thus unreasonable *per se* — provided, of course, that the facility can be shared practically. The requested instruction adequately accommodated this *proviso.*

[46] 15 U.S.C. § 15 (1970).

[47] In the course of a seven-page instruction on the meaning of "business or property," the judge's *only* reference to the "either/or" nature of the statutory requirement was as follows: "Section 4 of the Clayton Act, to which I have referred, uses the words `injury to business or property.' Thus, business and property are words in the disjunctive." Tr. 2823. Plaintiff requested the judge to amend his instruction: "[W]hen you use the word disjunctive, I would like you to sort of explain that [it means] either one or the other must be injured." Tr. 2684. The judge refused. *Id.* During its deliberations, the jury asked to hear the instruction on "injury to property" again. Plaintiff again asked the judge to make clear to the jury that they had to "find either damage to property or to business." Tr. 2852. The judge again refused. *Id.* The final paragraph of the "property" instruction might be taken to imply that the jury had to find an injury to property if Hecht were to have standing. *See* Tr. 2856. The record suggests no reason for the trial judge's refusal to offer the relatively simple yet important clarification requested.

[48] Plaintiffs' Revised Instruction No. 17, App. 138-39 (emphasis added); Brief at 30-31.

[49] Tr. (4 Apr. 1975) at 89-90.

[50] *See* L. A. Sullivan, *supra* note 36 at 772 ("plans and preparations to enter into a business constitute business or property . . . if they have materialized sufficiently to constitute an asset of reasonably determinate value which might, for example, be bought and sold or taxed, and which is capable of being appraised") (citing cases); ABA, Antitrust Law Developments 262 (1975) ("injury to an enterprise in the planning stage is equally actionable as injury in the operating stage provided a sufficiently advanced state of preparation for entering a market has been achieved") (citing cases). *Compare* *Broadcasters, Inc. v. Morristown Broadcasting Corp.,* 185 F.Supp. 641 (D.N.J.1960) (plaintiff applied for FCC license to construct radio station and was allegedly impeded by defendants' conduct; *held,* plaintiff lacked standing because he "entertained nothing more than an expectation" that he would be engaged in business if license were granted) *with* *Deterjet Corp. v. United Aircraft Corp.,* 211 F.Supp. 348 (D.Del.1962) ("fledgling" corporation had standing where it had facilities to produce new device, including leased building, necessary machines, and arrangements for products).

[51] *E. g.,* *Woods Explor. & Prod. Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1310 (5th Cir.1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) (citing cases); *Martin v. Phillips Petrol. Co.,* 365 F.2d 629, 633-34 (5th Cir.), *cert. denied,* 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966); *Denver Petrol. Co. v. Shell Oil Co.,* 306 F.Supp. 289, 307-08 (D.Colo.1969) (citing cases).

[52] *Id.* at 308. *See, e. g.,* *Martin v. Phillips Petrol. Co.,* 365 F.2d 629, 633-34 (5th Cir.), *cert. denied,* 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966); *Waldron v. British Petrol. Co.,* 231 F.Supp. 72, 81-82 (S.D.N.Y.1964).

[53] Tr. 2821-23.

[54] Brief at 32, 33.

[55] *Id.* at 34-36; Plaintiffs' Instr. No. 19, App. 141-42.

[56] *See, e. g.,* *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.,* 467 F.2d 178, 184 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973); *Waldron v. British Petrol. Co.,* 231 F.Supp. 72, 86-87 (S.D.N.Y.1964) (citing *North Texas Producers Ass'n v. Young,* 308 F.2d 235, 243 (5th Cir. 1962), *cert. denied,* 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733 (1963)). *But see* *VTR, Inc. v. Goodyear Tire & Rubber Co.,* 303 F.Supp. 773, 783 (S.D.N.Y.1969) (no property interest in contract where benefits subject to termination by unilateral action of other party).

[57] *See, e. g.,* *Peller v. International Boxing Club, Inc.,* 227 F.2d 593, 595-96 (7th Cir. 1955) (negotiations toward promotion of professional boxing match, including preliminary financial arrangements, "informal understanding," and conversations with boxers, not business or property under § 4; plaintiff "at most . . . desired to enter the business"); *Brownlee v. Malco Theatres, Inc.,* 99 F.Supp. 312, 317 (W.D.Ark.1951) (failure of plaintiff's negotiations for purchase of theatre "did not injure him in his business or property any more than it may have injured any member of the general public who might have been desirous of buying the property"). *Utah Gas Pipelines Corp. v. El Paso Nat. Gas Co.,* 233 F.Supp. 955 (D.Utah 1964), cited by Hecht, is not to the contrary. *Utah Gas* held that a corporation, which had been formed for the purpose of constructing a pipeline and which had "partially implemented its plans to construct, own and operate" the pipeline, *id.* at 957, had "business or property" under § 4 even though it had not yet obtained a certificate of public convenience from the state regulatory commission. The court did not hold that "negotiations for contracts" without more conferred standing under § 4. Nor does *Washington Prof. Basketball Corp. v. National Basketball Ass'n,* 147 F.Supp. 154 (S.D.N.Y.1956), stand for the proposition that mere negotiations confer standing. In that case, which arose on a motion to dismiss, there was a question of fact as to whether a binding contract had been entered into. *Id.* at 155.

[58] Plaintiffs' Instr. No. 19, App. 141-42.

[59] The judge defined property as "the possession of something that deserves legal protection," Tr. 2823, and told the jury to consider all evidence it regarded as "pertinent to the question of whether the plaintiffs possessed property . . . which deserved legal protection." Tr. 2825. The instruction was somewhat circular, for it assumed that the jury already knew which species of alleged "property" deserved legal protection and which did not.

[60] 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

[61] Tr. 2827-28.

[62] 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918), *quoted in* *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557-58 n. 15, 53 L.Ed.2d 568 (1977):

To determine [whether a restraint is unreasonable] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

[63] Plaintiffs' Instr. No. 23A, App. 145.

[64] 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.")

[65] *E. g.,* *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375, 87 S.Ct. 1856, 1863, 18 L.Ed.2d 1249 (1967) (inquiry in assessing whether restraint is unreasonable is whether "the effect upon competition in the marketplace is substantially adverse").

[66] Tr. 2828.

[67] *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375, 87 S.Ct. 1856, 1863, 18 L.Ed.2d 1249 (1967). This aspect of *Schwinn* was not affected by the Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). *Continental* overruled *Schwinn* insofar as *Schwinn* held certain vertical territorial restraints illegal *per se.*

[68] Tr. 2838.

[69] Plaintiffs' Instr. No. 32, App. 149.

[70] Revelation of the Department's legal opinion would have been both highly prejudicial to defendants, Fed.R.Ev. 403, and without value to the jury, Fed.R.Ev. 702. *See* C. McCormick, Evidence 26-27 (2d ed. E. Cleary 1972); J. Wigmore, 7 Evidence § 1952 at 81-82 (1940). Hecht admits in brief that he "has been unable to find any . . . support" for the memorandum's admissibility, Brief at 16, and seemingly agreed at trial that the memorandum should not be admitted. *See* Tr. 1416-17.

[71] Brief at 16.

[72] A trial judge, of course, is accorded great deference in exercising his discretion to exclude prejudicial evidence. *See* J. Weinstein, 1 Evidence ¶ 403[03] at 403-20 (1976).

[73] Brief at 27.

[74] The Department of the Interior and the Armory Board had a thoroughly practical public interest motive in supporting Hecht's efforts to land an AFL franchise for Washington, *i. e.,* the increased stadium rentals would reduce the persistent stadium operating deficit and save taxpayer money. *See* p. ___ of 187 U.S.App.D.C., p. 987 of 570 F.2d and note 6 *supra.*

[75] *See* Brief at 14-15.

[76] Hecht argues that this material evidenced the seriousness of his promotional activities, the favorable disposition of Commissioner Foss toward his application, and the reason for his three-month delay in submitting a proposal to the Armory Board for use of RFK Stadium. *See* p. ___ of 187 U.S.App.D.C., p. 987 of 570 F.2d *supra.* The record contains a great deal of evidence on the first two issues. The record does not seem to contain any other evidence on the third issue. Although we hold that the trial judge did not abuse his discretion in excluding the Interior Department material, our holding will not bar Hecht from attempting to introduce on retrial some portion of the material for the limited purpose of explaining his delay, provided that this can be done without prejudicing the Redskins by revealing the Department's legal opinion or general support for Hecht. We leave this to the sound discretion of the trial judge on remand.

[77] Defendants'-Appellees' Appendix 148-49.

[78] Under F.R.Civ.P. 16, the pretrial order "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

[79] App. 134.

[80] *Id.* at 135-36.

[81] *Id.* at 135.

[82] The remaining 39% was to be owned by the original investors whom Hecht listed in his June 1965 application for an AFL franchise, prior to his meeting with Commissioner Foss. *See* p. ___ of 187 U.S.App.D.C., p. 986 of 570 F.2d *supra.*

[83] The Redskins argue that the recitals in Hecht's pretrial statement gave them no notice "that plaintiffs were claiming to have advanced their promotion to the point of specific ownership agreements." Brief at 29. Defendants, we think, unduly impugn their deductive powers. In any event, the Redskins will have ample notice of plaintiffs' contentions on retrial.

[84] Tr. 2056-58.

[85] *See* pp. ___-___ of 187 U.S.App.D.C., pp. 992-993 of 570 F.2d *supra.*

[86] *E. g., United States v. National City Lines, Inc.,* 186 F.2d 562, 572 (7th Cir.), *cert. denied,* 341 U.S. 916, 71 S.Ct. 735, 95 L.Ed. 1351 (1951). *See* pp. ___-___ of 187 U.S.App.D.C., pp. 995-996 of 570 F.2d *supra.*

[87] F.R.Civ.P. 49(b).

466 U.S. 2 (1984)

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 ET AL.
v.
HYDE

No. 82-1031.

Supreme Court of United States.

Argued November 2, 1983
Decided March 27, 1984

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

4 *4 *Frank H. Easterbrook* argued the cause for petitioners. With him on the briefs were *Lucas J. Giordano, Thomas J. Reed,* and *Henry S. Allen, Jr.*

Jerrold J. Ganzfried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Lipsky, Barry Grossman,* and *Andrea Limmer.*

John M. Landis argued the cause for respondent. With him on the brief was *Phillip A. Wittman.*[*]

Briefs of *amici curiae* urging affirmance were filed for the American Society of Anesthesiologists, Inc., by *John Landsdale, Jr.,* and *Michael Scott;* for the Association of American Physicians & Surgeons, Inc., by *Kent Masterson Brown;* and for the Louisiana State Medical Society by *Henry B. Alsobrook, Jr., Frank M. Adkins,* and *Richard B. Eason II.*

Briefs of *amici curiae* were filed for the American Association of Nurse Anesthetists by *Phil David Fine, Robert F. Sylvia, Richard E. Verville,* and *Susan M. Jenkins;* and for the Louisiana Hospital Association et al. by *Ricardo M. Guevara.*

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a *per se* violation of § 1 of the Sherman Act[1] because every patient undergoing
5 *5 surgery at the hospital must use the services of one firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

In July 1977, respondent Edwin G. Hyde, a board-certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him to the hospital staff.[2] After trial, the District Court denied relief, finding that the anticompetitive consequences of the Roux contract were minimal and outweighed by benefits in the form of improved patient care. 513 F. Supp. 532 (ED La. 1981). The Court of Appeals reversed because it was persuaded that the contract was illegal *"per se."* 686 F. 2d 286 (CA5 1982). We granted certiorari, 460 U. S. 1021 (1983), and now reverse.

I

In February 1971, shortly before East Jefferson Hospital opened, it entered into an "Anesthesiology Agreement" with Roux & Associates (Roux), a firm that had recently been organized by Dr. Kermit Roux. The contract provided that any
6 anesthesiologist designated by Roux would be admitted to the hospital's medical staff. The hospital agreed to *6 provide the space, equipment, maintenance, and other supporting services necessary to operate the anesthesiology department. It also agreed to purchase all necessary drugs and other supplies. All nursing personnel required by the anesthesia department were to be supplied by the hospital, but Roux had the right to approve their selection and retention.[3] The hospital agreed to

"restrict the use of its anesthesia department to Roux & Associates and [that] no other persons, parties or entities shall perform such services within the Hospital for the ter[m] of this contract." App. 19.[4]

The 1971 contract provided for a 1-year term automatically renewable for successive 1-year periods unless either party elected to terminate. In 1976, a second written contract was executed containing most of the provisions of the 1971 agreement. Its term was five years and the clause excluding other anesthesiologists from the hospital was deleted;[5] the hospital nevertheless continued to regard itself as committed to a closed anesthesiology department. Only Roux was
7 permitted to practice anesthesiology at the hospital. At the *7 time of trial the department included four anesthesiologists. The hospital usually employed 13 or 14 certified registered nurse anesthetists.[6]

The exclusive contract had an impact on two different segments of the economy: consumers of medical services, and providers of anesthesiological services. Any consumer of medical services who elects to have an operation performed at East Jefferson Hospital may not employ any anesthesiologist not associated with Roux. No anesthesiologists except those employed by Roux may practice at East Jefferson.

There are at least 20 hospitals in the New Orleans metropolitan area and about 70 percent of the patients living in Jefferson Parish go to hospitals other than East Jefferson. Because it regarded the entire New Orleans metropolitan area as the relevant geographic market in which hospitals compete, this evidence convinced the District Court that East Jefferson does not possess any significant "market power"; therefore it concluded that petitioners could not use the Roux contract to anticompetitive ends.[7] The same evidence led the Court of Appeals to draw a different conclusion. Noting that 30 percent of the residents of the parish go to East Jefferson Hospital, and that in fact "patients tend to choose hospitals by location
8 rather than price or quality," the Court of *8 Appeals concluded that the relevant geographic market was the East Bank of Jefferson Parish. 686 F. 2d, at 290. The conclusion that East Jefferson Hospital possessed market power in that area was buttressed by the facts that the prevalence of health insurance eliminates a patient's incentive to compare costs, that the patient is not sufficiently informed to compare quality, and that family convenience tends to magnify the importance of location.[8]

The Court of Appeals held that the case involves a "tying arrangement" because the "users of the hospital's operating rooms (the tying product) are also compelled to purchase the hospital's chosen anesthesia service (the tied product)." *Id.,* at 289. Having defined the relevant geographic market for the tying product as the East Bank of Jefferson Parish, the court held that the hospital possessed "sufficient market power in the tying market to coerce purchasers of the tied product." *Id.,* at 291. Since the purchase of the tied product constituted a "not insubstantial amount of interstate commerce," under the Court of Appeals' reading of our decision in *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 11 (1958), the tying arrangement was therefore illegal *"per se."*[9]

9 *9 II

Certain types of contractual arrangements are deemed unreasonable as a matter of law.[10] The character of the restraint produced by such an arrangement is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found.[11] A price-fixing agreement between competitors is the classic example of such an arrangement. *Arizona* v. *Maricopa County Medical Society,* 457 U. S. 332, 343-348 (1982). It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *"per se."*[12] The rule was
10 first enunciated in *International Salt Co.* v. *United States,* 332 U. S. 392, 396 (1947),[13] and has been endorsed *10 by this Court many times since.[14] The rule also reflects congressional policies underlying the antitrust laws. In enacting § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14, Congress expressed great concern about the anti-competitive character of tying arrangements. See H. R. Rep. No. 627, 63d Cong., 2d Sess., 10-13 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., 6-9
11 (1914).[15] While this case *11 does not arise under the Clayton Act, the congressional finding made therein concerning the competitive consequences of tying is illuminating, and must be respected.[16]

It is clear, however, that not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package
12 imposes no unreasonable restraint on either market, particularly *12 if competing suppliers are free to sell either the entire

package or its several parts.[17] For example, we have written that "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." *Northern Pacific R. Co.* v. *United States,* 356 U. S., at 7.[18] Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively — conduct that is entirely consistent with the Sherman Act. See *Fortner Enterprises* v. *United States Steel Corp.,* 394 U. S. 495, 517-518 (1969) (*Fortner I*) (WHITE, J., dissenting); *id.,* at 524-525 (Fortas, J., dissenting).

Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

> "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. . . . By conditioning his sale of one
> 13 commodity on *13 the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the `tied' product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the `tied' product would convince freely choosing buyers to select it over others anyway." *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 605 (1953).[19]

14 Accordingly, we have condemned tying arrangements when the seller has some special ability — usually called "market *14 power" — to force a purchaser to do something that he would not do in a competitive market. See *United States Steel Corp.* v. *Fortner Enterprises,* 429 U. S. 610, 620 (1977) *(Fortner II); Fortner I,* 394 U. S., at 503-504; *United States* v. *Loew's Inc.,* 371 U. S. 38, 45, 48, n. 5 (1962); *Northern Pacific R. Co.* v. *United States,* 356 U. S., at 6-7.[20] When "forcing" occurs, our cases have found the tying arrangement to be unlawful.

Thus, the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.[21] This impairment could either harm existing competitors or create barriers
15 to entry of new competitors in the market for the tied product, *Fortner I,* 394 U. S., at 509,[22] and can increase *15 the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie, *Fortner II,* 429 U. S., at 617.[23] And from the standpoint of the consumer — whose interests the statute was especially intended to serve — the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package.[24] In sum, to permit restraint of competition on the merits through tying arrangements would be, as we observed in *Fortner II,* to condone "the existence of power that a free market would not tolerate." 429 U. S., at 617 (footnote omitted).

Per se condemnation — condemnation without inquiry into actual market conditions — is only appropriate if the existence of
16 forcing is probable.[25] Thus, application of the *per se* rule *16 focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. See *Fortner I,* 394 U. S., at 501-502; *Northern Pacific R. Co.* v. *United States,* 356 U. S., at 6-7; *Times-Picayune,* 345 U. S., at 608-610; *International Salt,* 332 U. S., at 396. Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Once this threshold is surmounted, *per se* prohibition is appropriate if anticompetitive forcing is likely. For example, if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy

the product elsewhere gives the seller market power. *United States* v. *Loew's Inc.,* 371 U. S., at 45-47. Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market. Thus, the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful. See *United States*
17 v. *Paramount Pictures, Inc.,* 334 U. S. 131, 156-159 (1948); *International Salt,* 332 *17 U. S., at 395-396; *International Business Machines Corp.* v. *United States,* 298 U. S. 131 (1936).

The same strict rule is appropriate in other situations in which the existence of market power is probable. When the seller's share of the market is high, see *Times-Picayune Publishing Co.* v. *United States,* 345 U. S., at 611-613, or when the seller offers a unique product that competitors are not able to offer, see *Fortner I,* 394 U. S., at 504-506, and n. 2, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate. Thus, in *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1 (1958), we held that the railroad's control over vast tracts of western real estate, although not itself unlawful, gave the railroad a unique kind of bargaining power that enabled it to tie the sales of that land to exclusive, long-term commitments that fenced out
18 competition in the transportation market over a protracted period.[26] When, however, the *18 seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market. See *Fortner I,* 394 U. S., at 499-500; *Times-Picayune Publishing Co.* v. *United States,* 345 U. S., at 614-615.

In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case our analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services. In making that analysis, we must consider whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement.

III

The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations.[27] At East Jefferson Hospital the package includes the services of the anesthesiologist.[28]
19 Petitioners argue that the package does not involve a tying arrangement *19 at all — that they are merely providing a functionally integrated package of services.[29] Therefore, petitioners contend that it is inappropriate to apply principles concerning tying arrangements to this case.

Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.[30] In *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594 (1953), the Court held that a tying arrangement was not present because the
20 arrangement did not link two distinct markets for products that were distinguishable in the eyes of buyers.[31] In *20 *Fortner I,* the Court concluded that a sale involving two independent transactions, separately priced and purchased from the buyer's
21 perspective, was a tying arrangement.[32] These *21 cases make it clear that a tying arrangement cannot exist unless two separate product markets have been linked.

The requirement that two distinguishable product markets be involved follows from the underlying rationale of the rule against tying. The definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule.[33] The answer to the question whether petitioners have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying — that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item.[34] Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of
22 anesthesiological services separate from hospital services *22 to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.[35]

Unquestionably, the anesthesiological component of the package offered by the hospital could be provided separately and could be selected either by the individual patient or by one of the patient's doctors if the hospital did not insist on including

anesthesiological services in the package it offers to its customers. As a matter of actual practice, anesthesiological services are billed separately from the hospital services petitioners provide. There was ample and uncontroverted testimony that patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia, and that the choice of an individual anesthesiologist separate from the choice of a hospital is particularly frequent in respondent's
23 specialty, obstetric anesthesiology.[36] The District *23 Court found that "[t]he provision of anesthesia services is a medical service separate from the other services provided by the hospital." 513 F. Supp., at 540.[37] The Court of Appeals agreed with this finding, and went on to observe: "[A]n anesthesiologist is normally selected by the surgeon, rather than the patient, based on familiarity gained through a working relationship. Obviously, the surgeons who practice at East Jefferson Hospital do not gain familiarity with any anesthesiologists other than Roux and Associates." 686 F. 2d, at 291.[38] The record amply supports the conclusion that consumers differentiate between anesthesiological services and the other hospital services provided by petitioners.[39]

24 *24 Thus, the hospital's requirement that its patients obtain necessary anesthesiological services from Roux combined the purchase of two distinguishable services in a single transaction.[40] Nevertheless, the fact that this case involves a required
25 *25 purchase of two services that would otherwise be purchased separately does not make the Roux contract illegal. As noted above, there is nothing inherently anticompetitive about packaged sales. Only if patients are forced to purchase Roux's services as a result of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of Roux.[41] The fact that petitioners' patients are required to purchase two separate items is only the beginning of the appropriate inquiry.[42]

26 *26 IV

The question remains whether this arrangement involves the use of market power to force patients to buy services they would not otherwise purchase. Respondent's only basis for invoking the *per se* rule against tying and thereby avoiding analysis of actual market conditions is by relying on the preference of persons residing in Jefferson Parish to go to East Jefferson, the closest hospital. A preference of this kind, however, is not necessarily probative of significant market power.

Seventy percent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson. 513 F. Supp., at 539.
27 Thus East Jefferson's "dominance" over persons residing in Jefferson Parish is far from overwhelming.[43] The *27 fact that a substantial majority of the parish's residents elect not to enter East Jefferson means that the geographic data do not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions. The Court of Appeals acknowledged as much; it recognized that East Jefferson's market share alone was insufficient as a basis to infer market power, and buttressed its conclusion by relying on "market imperfections"[44] that permit petitioners to charge noncompetitive prices for hospital services: the prevalence of third-party payment for health care costs reduces price competition, and a lack of adequate information renders consumers unable to evaluate the quality of the medical care provided by competing hospitals. 686 F. 2d, at 290.[45] While these factors may generate "market power" in some abstract sense,[46] they do not generate the kind of market power that justifies condemnation of tying.

Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not
28 otherwise be made. A lack of price or quality *28 competition does not create this type of forcing. If consumers lack price consciousness, that fact will not force them to take an anesthesiologist whose services they do not want — their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement — such an arrangement cannot be said to have foreclosed a choice that would have otherwise been made "on the merits."

Thus, neither of the "market imperfections" relied upon by the Court of Appeals forces consumers to take anesthesiological services they would not select in the absence of a tie. It is safe to assume that every patient undergoing a surgical operation needs the services of an anesthesiologist; at least this record contains no evidence that the hospital "forced" any such
29 services on unwilling patients.[47] The record therefore *29 does not provide a basis for applying the *per se* rule against tying to this arrangement.

V

In order to prevail in the absence of *per se* liability, respondent has the burden of proving that the Roux contract violated the Sherman Act because it unreasonably restrained competition. That burden necessarily involves an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists. This competition takes place in a market that has not been defined. The market is not necessarily the same as the market in which hospitals compete in offering services to patients; it may encompass competition among anesthesiologists for exclusive contracts such as the Roux contract and might be statewide or merely local.[48] There is, however, insufficient evidence in this record to provide a basis for finding
30 that the Roux contract, as it actually operates in the market, has unreasonably restrained competition. *30 The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist.[49] The evidence indicates that some surgeons and patients preferred respondent's services to those of Roux, but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.[50]

In sum, all that the record establishes is that the choice of anesthesiologists at East Jefferson has been limited to one of the four doctors who are associated with Roux and therefore have staff privileges.[51] Even if Roux did not have an exclusive contract, the range of alternatives open to the patient would be severely limited by the nature of the transaction and the hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff
31 privileges. If respondent is admitted to the staff of East Jefferson, the range of choice will be enlarged from *31 four to five doctors, but the most significant restraints on the patient's freedom to select a specific anesthesiologist will nevertheless remain.[52] Without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws, and no such showing has been made.

VI

Petitioners' closed policy may raise questions of medical ethics,[53] and may have inconvenienced some patients who would prefer to have their anesthesia administered by someone other than a member of Roux & Associates, but it does not have the obviously unreasonable impact on purchasers that has characterized the tying arrangements that this Court has branded unlawful. There is no evidence that the price, the quality, or the supply or demand for either the "tying product" or the "tied product" involved in this case has been adversely affected by the exclusive contract between Roux and the hospital. It may well be true that the contract made it necessary for Dr. Hyde and others to practice elsewhere, rather than at East Jefferson. But there has been no showing that the market as a whole has been affected at all by the contract. Indeed,
32A as we previously noted, the record tells us very little about the market for the services of anesthesiologists. *32A Yet that is the market in which the exclusive contract has had its principal impact. There is simply no showing here of the kind of restraint on competition that is prohibited by the Sherman Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.[54]

It is so ordered.

32B *32B JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

As the opinion for the Court demonstrates, we have long held that tying arrangements are subject to evaluation for *per se* illegality under § 1 of the Sherman Act. Whatever merit the policy arguments against this longstanding construction of the Act might have, Congress, presumably aware of our decisions, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation and leave the task of modifying the statute's reach to Congress. See *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 769 (1984) (BRENNAN, J., concurring). I see no reason to depart from that principle in this case and therefore join the opinion and judgment of the Court.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

East Jefferson Hospital, a public hospital governed by petitioners, requires patients to use the anesthesiological services provided by Roux & Associates, as they are the only doctors authorized to administer anesthesia to patients in the hospital.

33 The Court of Appeals found that this arrangement was a tie-in illegal under the Sherman Act. 686 F. 2d 286 *33 (CA5 1982). I concur in the Court's decision to reverse but write separately to explain why I believe the hospital-Roux contract, whether treated as effecting a tie between services provided to patients, or as an exclusive dealing arrangement between the hospital and certain anesthesiologists, is properly analyzed under the rule of reason.

I

Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as the *tying* product, sugar as the *tied* product. In this case the allegation is that East Jefferson Hospital has unlawfully tied the sale of general hospital services and operating room facilities (the tying service) to the sale of anesthesiologists' services (the tied services). The Court has on occasion applied a *per se* rule of illegality in actions alleging tying in violation of § 1 of the Sherman Act. *International Salt Co.* v. *United States,* 332 U. S. 392 (1947).

Under the usual logic of the *per se* rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect. See, *e. g., Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5 (1958). In deciding whether an economic restraint should be declared illegal *per se,* "[t]he probability that anticompetitive consequences will result from a practice and the severity of those consequences [is] balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T. V., Inc.* v. *GTE Sylvania Inc.,* 433 U. S. 36, 50, n. 16 (1977). See also *Arizona* v. *Maricopa County Medical*
34 *Society,* 457 U. S. 332, 351 (1982). Only when there is very little loss to society from banning a restraint *34 altogether is an inquiry into its costs in the individual case considered to be unnecessary.

Some of our earlier cases did indeed declare that tying arrangements serve "hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 305-306 (1949) (dictum). However, this declaration was not taken literally even by the cases that purported to rely upon it. In practice, a tie has been illegal only if the seller is shown to have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. . . ." *Northern Pacific R. Co.,* 356 U. S., at 6. Without "control or dominance over the tying product," the seller could not use the tying product as "an effectual weapon to pressure buyers into taking the tied item," so that any restraint of trade would be "insignificant." *Ibid.* The Court has never been willing to say of tying arrangements, as it has of price fixing, division of markets, and other agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect.

The *"per se"* doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement.[1] As a result, tying doctrine incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial. Moreover, the *per se* label in the
35 tying context has generated more confusion *35 than coherent law because it appears to invite lower courts to omit the analysis of economic circumstances of the tie that has always been a necessary element of tying analysis.

The time has therefore come to abandon the *"per se"* label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever.[2] This change will rationalize rather than abandon tie-in doctrine as it is already applied.

II

Our prior opinions indicate that the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied-product market, see *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 605 (1953), or that abet the harmful exercise of market power that the seller possesses in the tying product market.[3] Under the rule of reason tying arrangements should be disapproved only in such instances.

Market power in the *tying* product may be acquired legitimately (*e. g.,* through the grant of a patent) or illegitimately (*e. g.,*
36 as a result of unlawful monopolization). In either event, exploitation of consumers in the market for the tying *36 product is a possibility that exists and that may be regulated under § 2 of the Sherman Act without reference to any tying arrangements that the seller may have developed. The existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the *tying* product. A seller with a monopoly on flour, for example, cannot increase the profit it can extract from flour consumers simply by forcing them to buy sugar along with their flour. Counterintuitive though that assertion may seem, it is easily demonstrated and widely accepted. See, *e. g.,* R. Bork, The Antitrust Paradox 372-374 (1978); P. Areeda, Antitrust Analysis 735 (3d ed. 1981).

Tying may be economically harmful primarily in the rare cases where power in the market for the tying product is used to
37 create *additional* market power in the market for the *tied* product.[4] The antitrust law is properly concerned with *37 tying when, for example, the flour monopolist threatens to use its market power to acquire additional power in the sugar market, perhaps by driving out competing sellers of sugar, or by making it more difficult for new sellers to enter the sugar market. But such extension of market power is unlikely, or poses no threat of economic harm, unless the two markets in question and the nature of the two products tied satisfy three threshold criteria.[5]

First, the seller must have power in the tying-product market.[6] Absent such power tying cannot conceivably have any
38 adverse impact in the tied-product market, and can be only procompetitive in the tying-product market.[7] If the *38 seller of flour has no market power over flour, it will gain none by insisting that its buyers take some sugar as well. See *United States Steel Corp.* v. *Fortner Enterprises, Inc.,* 429 U. S. 610, 620 (1977) *(Fortner II); Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U. S. 495, 503-504 (1969) *(Fortner I); United States* v. *Loew's Inc.,* 371 U. S. 38, 45, 48, n. 5 (1962); *Northern Pacific R. Co.* v. *United States,* 356 U. S., at 6-7.

Second, there must be a substantial threat that the tying seller will acquire market power in the tied-product market. No such threat exists if the tied-product market is occupied by many stable sellers who are not likely to be driven out by the tying, or if entry barriers in the tied-product market are low. If, for example, there is an active and vibrant market for sugar — one with numerous sellers and buyers who do not deal in flour — the flour monopolist's tying of sugar to flour need not be declared unlawful. Cf. *Fortner II, supra,* at 617-618, and n. 8; *Fortner I, supra,* at 498-499; *Times-Picayune Publishing Co.* v. *United States,* 345 U. S., at 611; *Standard Oil Co. of California* v. *United States,* 337 U. S., at 305-306; *International Salt Co.*
39 v. *United States,* 332 *39 U. S., at 396. If, on the other hand, the tying arrangement is likely to erect significant barriers to entry into the tied-product market, the tie remains suspect. *Atlantic Refining Co.* v. *FTC,* 381 U. S. 357, 371 (1965).

Third, there must be a coherent economic basis for treating the tying and tied products as distinct. All but the simplest products can be broken down into two or more components that are "tied together" in the final sale. Unless it is to be illegal to sell cars with engines or cameras with lenses, this analysis must be guided by some limiting principle. For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.*[8] When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together. If sugar is useless to consumers except when used with flour, the flour seller's market power is projected into the sugar market whether or not the two products are actually sold together; the flour seller can exploit what market power it has over flour with or without the tie.[9] The flour seller will therefore have little incentive to monopolize the sugar market unless it can produce and distribute sugar more cheaply than other sugar sellers. And in this unusual case, where flour is monopolized
40 and sugar is useful only when *40 used with flour, consumers will suffer no further economic injury by the monopolization of the sugar market.

Even when the tied product does have a use separate from the tying product, it makes little sense to label a package as two products without also considering the economic justifications for the sale of the package as a unit. When the economic advantages of joint packaging are substantial the package is not appropriately viewed as two products, and that should be the end of the tying inquiry. The lower courts largely have adopted this approach.[10] See, *e. g., Foster* v. *Maryland State Savings and Loan Assn.,* 191 U. S. App. D. C. 226, 228-231, 590 F. 2d 928, 930-933 (1978), cert. denied, 439 U. S. 1071 (1979); *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F. 2d 1307, 1330 (CA5 1976); *Kugler* v. *AAMCO Automatic Transmissions, Inc.,* 460 F. 2d 1214 (CA8 1972); *ILC Peripherals Leasing Corp.* v. *International Business*
41 *Machines Corp.,* 448 F. Supp. 228, 230 *41 (ND Cal. 1978); *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 563 (ED Pa. 1960), aff'd *per curiam,* 365 U. S. 567 (1961).

These three conditions — market power in the tying product, a substantial threat of market power in the tied product, and a coherent economic basis for treating the products as distinct — are only threshold requirements. Under the rule of reason a tie-in may prove acceptable even when all three are met. Tie-ins may entail economic benefits as well as economic harms, and if the threshold requirements are met these benefits should enter the rule-of-reason balance.

> "[Tie-ins] may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 330 (1962) . . . . They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction. . . . [Citing] *Pick Mfg. Co.* v. *General Motors Corp.,* 80 F. 2d 641 (C. A. 7th Cir. 1935), aff'd, 299 U. S. 3 (1936). And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution." *Fortner I,* 394 U. S., at 514, n. 9 (WHITE, J., dissenting).

The ultimate decision whether a tie-in is illegal under the antitrust laws should depend upon the demonstrated economic effects of the challenged agreement. It may, for example, be entirely innocuous that the seller exploits its control over the tying product to "force" the buyer to purchase the tied product. For when the seller exerts market power only in the tying-
42 product market, it makes no difference to him or his customers whether he exploits that power by raising *42 the price of the tying product or by "forcing" customers to buy a tied product. See Markovits, Tie-Ins, Reciprocity and the Leverage Theory, 76 Yale L. J. 1397, 1397-1398 (1967); Burstein, A Theory of Full-Line Forcing, 55 Nw. U. L. Rev. 62, 62-63 (1960). On the other hand, tying may make the provision of packages of goods and services more efficient. A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.

III

Application of these criteria to the case at hand is straightforward.

Although the issue is in doubt, we may assume that the hospital does have market power in the provision of hospital services in its area. The District Court found to the contrary, 513 F. Supp. 532, 541 (ED La. 1981), but the Court of Appeals determined that the hospital does possess market power in an appropriately defined market. While appellate courts should normally defer to the district courts' findings on such fact-bound questions,[11] I shall assume for the purposes of this discussion that the Court of Appeals' determination that the hospital does have some power in the provision of hospital services in its local market is accepted.

Second, in light of the hospital's presumed market power, we may also assume that there is a substantial threat that East Jefferson will acquire market power over the provision of anesthesiological services in its market. By tying the sale of anesthesia to the sale of other hospital services the hospital can drive out other sellers of those services who might otherwise operate in the local market. The hospital may thus gain local market power in the provision of anesthesiology: anesthesiological services offered in the hospital's market, narrowly defined, will be purchased only from Roux, under the hospital's auspices.

43 *43 But the third threshold condition for giving closer scrutiny to a tying arrangement is not satisfied here: there is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services,[12] so the hospital can acquire no *additional* market power by selling the two services together. Accordingly, the link between the hospital's services and anesthesia administered by Roux will affect neither the amount of anesthesia provided nor the combined price of anesthesia and surgery for those who choose to become the hospital's patients. In these circumstances, anesthesia and surgical services should probably not be characterized as distinct products for tying purposes.

Even if they are, the tying should not be considered a violation of § 1 of the Sherman Act because tying here cannot increase the seller's already absolute power over the volume of production of the tied product, which is an inevitable consequence of the fact that very few patients will choose to undergo surgery without receiving anesthesia. The hospital-Roux contract therefore has little potential to harm the patients. On the other side of the balance, the District Court found, and the Court of Appeals did not dispute, that the tie-in conferred significant benefits upon the hospital and the patients that it served.

The tie-in improves patient care and permits more efficient hospital operation in a number of ways. From the viewpoint of hospital management, the tie-in ensures 24-hour anesthesiology coverage, aids in standardization of procedures and efficient use of equipment, facilitates flexible scheduling of operations, and permits the hospital more effectively to monitor the quality of anesthesiological services. Further, the tying arrangement is advantageous to patients because, as the District
44 Court found, the closed anesthesiology department *44 places upon the hospital, rather than the individual patient, responsibility to select the physician who is to provide anesthesiological services. The hospital also assumes the responsibility that the anesthesiologist will be available, will be acceptable to the surgeon, and will provide suitable care to the patient. In assuming these responsibilities — responsibilities that a seriously ill patient frequently may be unable to discharge — the hospital provides a valuable service to its patients. And there is no indication that patients were dissatisfied with the quality of anesthesiology that was provided at the hospital or that patients wished to enjoy the services of anesthesiologists other than those that the hospital employed. Given this evidence of the advantages and effectiveness of the closed anesthesiology department, it is not surprising that, as the District Court found, such arrangements are accepted practice in the majority of hospitals of New Orleans and in the health care industry generally. Such an arrangement, which has little anticompetitive effect and achieves substantial benefits in the provision of care to patients, is hardly one that the antitrust law should condemn.[13] This conclusion reaffirms our threshold determination that the joint provision of hospital services and anesthesiology should not be viewed as involving a tie between distinct products, and therefore should require no additional scrutiny under the antitrust law.

IV

Whether or not the hospital-Roux contract is characterized as a tie between distinct products, the contract unquestionably does constitute exclusive dealing. Exclusive-dealing arrangements are independently subject to scrutiny under § 1 of the
45 Sherman Act, and are also analyzed under the rule of *45 reason. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U. S. 320, 333-335 (1961).

The hospital-Roux arrangement could conceivably have an adverse effect on horizontal competition among anesthesiologists, or among hospitals. Dr. Hyde, who competes with the Roux anesthesiologists, and other hospitals in the area, who compete with East Jefferson, may have grounds to complain that the exclusive contract stifles horizontal competition and therefore has an adverse, albeit indirect, impact on consumer welfare even if it is not a tie.

Exclusive-dealing arrangements may, in some circumstances, create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition. Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply. In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question — the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. *Standard Oil Co. of California* v. *United States,* 337 U. S. 293 (1949). When the sellers of services are numerous and mobile, and the number of buyers is large, exclusive-dealing arrangements of narrow scope pose no threat of adverse economic consequences. To the contrary, they may be substantially procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships.

At issue here is an exclusive-dealing arrangement between a firm of four anesthesiologists and one relatively small hospital.
46 *46 There is no suggestion that East Jefferson Hospital is likely to create a "bottleneck" in the availability of anesthesiologists that might deprive other hospitals of access to needed anesthesiological services, or that the Roux associates have unreasonably narrowed the range of choices available to other anesthesiologists in search of a hospital or patients that will buy their services. Cf. *Associated Press* v. *United States,* 326 U. S. 1 (1945). A firm of four anesthesiologists represents only a very small fraction of the total number of anesthesiologists whose services are available for hire by other hospitals, and East Jefferson is one among numerous hospitals buying such services. Even without engaging in a detailed analysis of the size of the relevant markets we may readily conclude that there is no likelihood that the exclusive-dealing arrangement challenged here will either unreasonably enhance the hospital's market position relative to other hospitals, or unreasonably permit Roux to acquire power relative to other anesthesiologists. Accordingly, this exclusive-dealing arrangement must be sustained under the rule of reason.

V

For these reasons I conclude that the hospital-Roux contract does not violate § 1 of the Sherman Act. Since anesthesia is a service useful to consumers only when purchased in conjunction with hospital services, the arrangement is not properly characterized as a tie between distinct products. It threatens no additional economic harm to consumers beyond that already made possible by any market power that the hospital may possess. The fact that anesthesia is used only together with other hospital services is sufficient, standing alone, to insulate from attack the hospital's decision to tie the two types of service.

47 Whether or not this case involves tying of distinct products, the hospital-Roux contract is subject to scrutiny under the rule of reason as an exclusive-dealing arrangement. Plainly, however, the arrangement forecloses only a small *47 fraction of the markets in which anesthesiologists may sell their services, and a still smaller fraction of the market in which hospitals may secure anesthesiological services. The contract therefore survives scrutiny under the rule of reason.

The judgment of the Court of Appeals for the Fifth Circuit should be reversed, and the case should be remanded for any further proceedings on respondent's remaining claims. See *ante,* at 5, n. 2.

[*] Briefs of *amici curiae* urging reversal were filed for the American Hospital Association by *Richard L. Epstein, Robert W. McCann,* and *John J. Miles;* for the College of American Pathologists by *Jack R. Bierig;* and for the National Association of Private Psychiatric Hospitals by *Joel I. Klein.*

[1] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 26 Stat. 209, as amended, 15 U. S. C. § 1. Respondent has standing to enforce § 1 by virtue of § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15.

[2] In addition to seeking relief under the Sherman Act, respondent's complaint alleged violations of 42 U. S. C. § 1983 and state law. The District Court rejected these claims. The Court of Appeals passed only on the Sherman Act claim.

[3] The contract required all of the physicians employed by Roux to confine their practice of anesthesiology to East Jefferson.

[4] Originally Roux agreed to provide at least two full-time anesthesiologists acceptable to the hospital's credentials committee. Roux agreed to furnish additional anesthesiologists as necessary. The contract also provided that Roux would designate one of its qualified anesthesiologists to serve as the head of the hospital's department of anesthesia.

The fees for anesthesiological services are billed separately to the patients by the hospital. They cover the hospital's costs and the professional services provided by Roux. After a deduction of eight percent to provide a reserve for uncollectible accounts, the fees are divided equally between Roux and the hospital.

[5] "Roux testified that he requested the omission of the exclusive language in his 1976 contract because he believes a surgeon or patient is entitled to the services of the anesthesiologist of his choice. He admitted that he and others in his group did work outside East Jefferson following the 1976 contract but felt he was not in violation of the contract in light of the changes made in it." 513 F. Supp. 532, 537 (ED La. 1981).

[6] Approximately 875 operations are performed at the hospital each month; as many as 12 or 13 operating rooms may be in use at one time.

[7] The District Court found:

"The impact on commerce resulting from the East Jefferson contract is minimal. The contract is restricted in effect to one hospital in an area containing at least twenty others providing the same surgical services. It would be a different situation if Dr. Roux had exclusive contracts in several hospitals in the relevant market. As pointed out by plaintiff, the majority of surgeons have privileges at more than one hospital in the area. They have the option of admitting their patients to another hospital where they can select the anesthesiologist of their choice. Similarly a patient can go to another hospital if he is not satisfied with the physicians available at East Jefferson." *Id.,* at 541.

[8] While the Court of Appeals did discuss the impact of the contract upon patients, it did not discuss its impact upon anesthesiologists. The District Court had referred to evidence that in the entire State of Louisiana there are 156 anesthesiologists and 345 hospitals with operating rooms. The record does not tell us how many of the hospitals in the New Orleans metropolitan area have "open" anesthesiology departments and how many have closed departments. Respondent, for example, practices with two other anesthesiologists at a hospital which has an open department; he previously practiced for several years in a different New Orleans hospital and, prior to that, had practiced in Florida. The record does not tell us whether there is a shortage or a surplus of anesthesiologists in any part of the country, or whether they are thriving or starving.

[9] The Court of Appeals rejected as "clearly erroneous" the District Court's finding that the exclusive contract was justified by quality considerations. See 686 F. 2d, at 292.

[10] "For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with nonmembers of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*." *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522-523 (1948) (footnotes omitted).

[11] See, *e. g.,* *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49-50 (1977).

[12] The District Court intimated that the principles of *per se* liability might not apply to cases involving the medical profession. 513 F. Supp., at 543-544. The Court of Appeals rejected this approach. 686 F. 2d, at 292-294. In this Court, petitioners "assume" that the same principles apply to the provision of professional services as apply to other trades or businesses. Brief for Petitioners 4, n. 2. See generally *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978).

[13] The roots of the doctrine date at least to *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502 (1917), a case holding that the sale of a patented film projector could not be conditioned on its use only with the patentee's films, since this would have the effect of extending the scope of the patent monopoly. See also *Henry* v. *Dick Co.*, 224 U. S. 1, 70-73 (1912) (White, C. J., dissenting).

[14] See *United States Steel Corp.* v. *Fortner Enterprises*, 429 U. S. 610, 619-621 (1977); *Fortner Enterprises* v. *United States Steel Corp.*, 394 U. S. 495, 498-499 (1969); *White Motor Co.* v. *United States*, 372 U. S. 253, 262 (1963); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962); *United States* v. *Loew's Inc.*, 371 U. S. 38 (1962); *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958); *Black* v. *Magnolia Liquor Co.*, 355 U. S. 24, 25 (1957); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 608-609 (1953); *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305-306 (1949).

[15] See also 51 Cong. Rec. 9072 (1914) (remarks of Rep. Webb); *id.,* at 9084 (remarks of Rep. Madden); *id.,* at 9090 (remarks of Rep. Mitchell); *id.,* at 9160-9164 (remarks of Rep. Floyd); *id.,* at 9184-9185 (remarks of Rep. Helvering); *id.,* at 9409 (remarks of Rep. Gardner); *id.,* at 9410 (remarks of Rep. Mitchell); *id.,* at 9553-9554 (remarks of Rep. Barkley); *id.,* at 14091-14097 (remarks of Sen. Reed); *id.,* at 14094 (remarks of Sen. Walsh); *id.,* at 14209 (remarks of Sen. Shields); *id.,* at 14226 (remarks of Sen. Reed); *id.,* at 14268 (remarks of Sen. Reed); *id.,* at 14599 (remarks of Sen. White); *id.,* at 15991 (remarks of Sen. Martine); *id.,* at 16146 (remarks of Sen. Walsh); Spivack, The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response, 52 Antitrust L. J. 651, 664-665 (1983). For example, the House Report on the Clayton Act stated:

"The public is compelled to pay a higher price and local customers are put to the inconvenience of securing many commodities in other communities or through mail-order houses that can not be procured at their local stores. The price is raised as an inducement. This is the local effect. Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or `tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe-manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If a manufacturer who is using machines of the Shoe Machinery Co. were to purchase and place a machine manufacturered by any independent company in his establishment, the Shoe Machinery Co. could under its contracts withdraw all their machinery from the establishment of the shoe manufacturer and thereby wreck the business of the manufacturer. The General Film Co., by the same method practiced by the Shoe Machinery Co. under the lease system, has practically destroyed all competition and acquired a virtual monopoly of all films manufactured and sold in the United States. When we consider contracts of sales made under this system, the result to the consumer, the general public, and the local dealer and his business is even worse than under the lease system." H. R. Rep. No. 627, 63d Cong., 2d Sess., 12-13 (1914).

Similarly, Representative Mitchell said: "[M]onopoly has been built up by these `tying' contracts so that in order to get one machine one must take all of the essential machines, or practically all. Independent companies who have sought to enter the field have found that the markets have been preempted . . . . The manufacturers do not want to break their contracts with these giant monopolies, because, if they should attempt to install machinery, their business might be jeopardized and all of the machinery now leased by these giant monopolies would be removed from their places of business. No situation cries more urgently for relief than does this situation, and this bill seeks to prevent exclusive `tying' contracts that have brought about a monopoly, alike injurious to the small dealers, to the manufacturers, and grossly unfair to those who seek to enter the field of competition and to the millions of consumers." 51 Cong. Rec. 9090 (1914).

[16] See generally, *e. g.,* *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264, 276-277 (1981); *New Orleans* v. *Dukes*, 427 U. S. 297, 303-304 (1976) *(per curiam)*.

[17] "Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 6, n. 4.

[18] Thus, we have held that a seller who ties the sale of houses to the provision of credit simply as a way of effectively competing in a competitive market does not violate the antitrust laws. "The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses." *United States Steel Corp.* v. *Fortner Enterprises*, 429 U. S., at 622 (footnote omitted).

[19] Accord, *Fortner I*, 394 U. S., at 508-509; *Atlantic Refining Co.* v. *FTC*, 381 U. S. 357, 369-371 (1965); *United States* v. *Loew's Inc.*, 371 U. S., at 44-45; *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 6. For example, JUSTICE WHITE has written:

"There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line." *Fortner I*, 394 U. S., at 512-514 (dissenting opinion) (footnotes omitted).

[20] This type of market power has sometimes been referred to as "leverage." Professors Areeda and Turner provide a definition that suits present purposes. " `Leverage' is loosely defined here as a supplier's power to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product." 5 P. Areeda & D. Turner, Antitrust Law ¶ 1134a, p. 202 (1980).

[21] See Report of the Attorney General's National Committee to Study the Antitrust Laws 145 (1955); Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B. U. L. Rev. 661, 666-668 (1982); Slawson, A Stronger, Simpler Tie-In Doctrine, 25 Antitrust Bull. 671, 676-684 (1980); Turner, The Validity of Tying Arrangements under the Antitrust Laws, 72 Harv. L. Rev. 50, 60-62 (1958).

[22] See 3 Areeda & Turner, *supra* n. 20, ¶ 733e (1978); C. Kaysen & D. Turner, Antitrust Policy 157 (1959); L. Sullivan, Law of Antitrust § 156 (1977); O. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 111 (1975); Pearson, Tying Arrangements and Antitrust Policy, 60 Nw. U. L. Rev. 626, 637-638 (1965).

[23] Sales of the tied item can be used to measure demand for the tying item; purchasers with greater needs for the tied item make larger purchases and in effect must pay a higher price to obtain the tying item. See P. Areeda, Antitrust Analysis ¶ 533 (2d ed. 1974); R. Posner, Antitrust Law 173-180 (1976); Sullivan, *supra* n. 22, § 156; Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19 (1957); Burstein, A Theory of Full-Line Forcing, 55 Nw. U. L. Rev. 62 (1960); Dam, Fortner Enterprises v. United States Steel: "Neither a Borrower, Nor a Lender Be," 1969 S. Ct. Rev. 1, 15-16; Ferguson, Tying Arrangements and Reciprocity: An Economic Analysis, 30 Law & Contemp. Prob. 552, 554-558 (1965); Markovits, Tie-Ins, Reciprocity, and the Leverage Theory, 76 Yale L. J. 1397 (1967); Pearson, *supra* n. 22, at 647-653; Sidak, Debunking Predatory Innovation, 83 Colum. L. Rev. 1121, 1127-1131 (1983); Stigler, United States v. Loew's Inc.: A Note on Block-Booking, 1963 S. Ct. Rev. 152.

[24] Especially where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, and hence it may impede competition on the merits. See Craswell, *supra* n. 21, at 675-679.

[25] The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct. See, *e. g., Arizona* v. *Maricopa County Medical Society,* 457 U. S. 332, 350-351 (1982).

[26] "As pointed out before, the defendant was initially granted large acre-ages by Congress in the several Northwestern States through which its lines now run. This land was strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities. Not only the testimony of various witnesses but common sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential to their business activities. In disposing of its holdings the defendant entered into contracts of sale or lease covering at least several million acres of land which included `preferential routing' clauses. The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The `preferential routing' clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers, the defendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted. In fact any such price reduction in return for rail shipments would have quite plainly constituted an unlawful rebate to the shipper. So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition." 356 U. S., at 7-8 (footnote omitted).

[27] The physical facilities include the operating room, the recovery room, and the hospital room where the patient stays before and after the operation. The services include those provided by staff physicians, such as radiologists or pathologists, and interns, nurses, dietitians, pharmacists, and laboratory technicians.

[28] It is essential to differentiate between the Roux contract and the legality of the contract between the hospital and its patients. The Roux contract is nothing more than an arrangement whereby Roux supplies all of the hospital's needs for anesthesiological services. That contract raises only an exclusive-dealing question, see n. 51, *infra.* The issue here is whether the hospital's insistence that its patients purchase anesthesiological services from Roux creates a tying arrangement.

[29] See generally Dolan & Ralston, Hospital Admitting Privileges and the Sherman Act, 18 Hous. L. Rev. 707, 756-758 (1981); Kissam, Webber, Bigus, & Holzgraefe, Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 Calif. L. Rev. 595, 666-667 (1982).

[30] The fact that anesthesiological services are functionally linked to the other services provided by the hospital is not in itself sufficient to remove the Roux contract from the realm of tying arrangements. We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices. See *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661 (1944) (heating system and stoker switch); *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488 (1942) (salt machine and salt); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947) (same); *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938) (process patent and material used in the patented process); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936) (tabulators and tabulating punch cards); *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27 (1931) (ice cream transportation package and coolant); *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923) (gasoline and underground tanks and pumps); *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451 (1922) (shoe machinery and supplies, maintenance, and peripheral machinery); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 558-560 (ED Pa. 1960) (components of television antennas), aff'd, 365 U. S. 567 (1961) *(per curiam)*. In fact, in some situations the functional link between the two items may enable the seller to maximize its monopoly return on the tying item as a means of charging a higher rent or purchase price to a larger user of the tying item. See n. 23, *supra.*

[31] "The District Court determined that the Times-Picayune and the States were separate and distinct newspapers, though published under single ownership and control. But that readers consciously distinguished between these two publications does not necessarily imply that advertisers bought separate and distinct products when insertions were placed in the Times-Picayune and the States. So to conclude here would involve speculation that advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning from evening readers in New Orleans. Although advertising space in the Times-Picayune, as the sole morning daily, was doubtless essential to blanket coverage of the local newspaper readership, nothing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential. We must assume, therefore, that the readership `bought' by advertisers in the Times-Picayune was the selfsame `product' sold by the States and, for that matter, the Item.

"The factual departure from the `tying' cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant `tying' product, resulting in economic harm to competition in the `tied' market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant `tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as `tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same." 345 U. S., at 613-614 (footnote omitted).

[32] "There is, at the outset of every tie-in case, including the familiar cases involving physical goods, the problem of determining whether two separate products are in fact involved. In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. It will be time enough to pass on the issue of credit sales when a case involving it actually arises. Sales such as that are a far cry from the arrangement involved here, where the credit is provided by one corporation on condition that a product be purchased from a separate corporation, and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased. Whatever the standards for determining exactly when a transaction involves only a `single product,' we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product." 394 U. S., at 507 (footnote omitted).

[33] Professor Dam has pointed out that the *per se* rule against tying can be coherent only if tying is defined by reference to the economic effect of the arrangement.

"[T]he definitional question is hard to separate from the question when tie-ins are harmful. Yet the decisions, in adopting the per se rule, have attempted to flee from that economic question by ruling that tying arrangements are presumptively harmful, at least whenever certain nominal threshold standards on power and foreclosure are met. The weakness of the per se methodology is that it places crucial importance on the definition of the practice. Once an arrangement falls within the defined limits, no justification will be heard. But a per se rule gives no economic standards for defining the practice. To treat the definitional question as an abstract inquiry into whether one or two products is involved is thus to compound the weakness of the per se approach." Dam, *supra* n. 23, at 19.

[34] Of course, the Sherman Act does not prohibit "tying"; it prohibits "contract[s]. . . in restraint of trade." Thus, in a sense the question whether this case involves "tying" is beside the point. The legality of petitioners' conduct depends on its competitive consequences, not on whether it can be labeled "tying." If the competitive consequences of this arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label.

[35] This approach is consistent with that taken by a number of lower courts. See *Moore* v. *Jas. H. Matthews & Co.*, 550 F. 2d 1207, 1214-1215 (CA9 1977); *Siegel* v. *Chicken Delight, Inc.*, 448 F. 2d 43, 48-49 (CA9 1971), cert. denied, 405 U. S. 955 (1972); *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F. 2d 248, 253 (CA4 1971); *Susser* v. *Carvel Corp.*, 332 F. 2d 505, 514 (CA2 1964), cert. dism'd, 381 U. S. 125 (1965); *United States* v. *Mercedes-Benz of North America, Inc.*, 517 F. Supp. 1369, 1379-1381 (ND Cal. 1981); *In re Data General Corp. Antitrust Litigation*, 490 F. Supp. 1089, 1104-1110 (ND Cal. 1980); *Jones* v. *247 East Chestnut Properties*, 1975-2 Trade Cases ¶ 60,491, pp. 67,162-67,163 (ND Ill. 1974); *N. W. Controls, Inc.* v. *Outboard Marine Corp.*, 333 F. Supp. 493, 501-504 (Del. 1971); *Teleflex Industrial Products, Inc.* v. *Brunswick Corp.*, 293 F. Supp. 107, 109, and n. 6 (ED Pa. 1968). See generally Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963 (1974); Wheeler, Some Observations on Tie-ins, the Single-Product Defense, Exclusive Dealing and Regulated Industries, 60 Calif. L. Rev. 1557, 1558-1567, 1572-1573 (1972); Note, Product

Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws, 46 S. Cal. L. Rev. 160 (1972). See also *Fortner I*, 394 U. S., at 525 (Fortas, J., dissenting); Note, Tying Arrangements and the Single Product Issue, 31 Ohio St. L. J. 861 (1970).

[36] Testimony that patients and their physicians frequently do differentiate between hospital services and anesthesiological services, and request specific anesthesiologists, was provided by Dr. Roux, Tr. 17, 20 (May 15, 1980, afternoon session), Dr. Hyde, *id.,* at 68-69, 72-74 (May 16, 1980), and other anesthesiologists as well, see *id.,* at 64, 87-88 (May 15, 1980, afternoon session) (testimony of Dr. Charles Eckert); *id.,* at 25-30, 33-34 (May 16, 1980) (testimony of Dr. John Adriani). There was no testimony that patients or their surgeons do not differentiate between anesthesiological services and hospital services when making purchasing decisions. As a statistical matter, only 27 percent of anesthesiologists have financial relationships with hospitals. American Medical Association, Socioeconomic Characteristics of Medical Practice: 1983, p. 12 (1983). In this respect anesthesiologists may differ from radiologists, pathologists, and other types of hospital-based physicians (HBPs). "In some respects anesthesiologists are more akin to office-based MDs (particularly surgeons) than other HBPs. Anesthesiologists' outputs are more discrete, and these HBPs are predominantly fee-for-service practitioners who directly provide services to patients." Steinwald, Hospital-Based Physicians: Current Issues and Descriptive Evidence, Health Care Financing Rev. 63, 69 (Summer 1980). See also *United States* v. *American Society of Anesthesiologists, Inc.*, 473 F. Supp. 147, 150 (SDNY 1979) ("By 1957 the salaried anesthesiologist had become the exception. Anesthesiologists began to establish independent practices and were able to obtain hospital privileges upon the same terms and conditions as other clinicians").

[37] Accordingly, in its conclusions of law the District Court treated the case as involving a tying arrangement. 513 F. Supp., at 542.

[38] Petitioners do not challenge these findings of the District Court and the Court of Appeals.

[39] One of the most frequently cited statements on this subject was made by Judge Van Dusen in *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (ED Pa. 1960), aff'd, 365 U. S. 567 (1961) *(per curiam)*. While this statement was specifically made with respect to § 3 of the Clayton Act, 15 U. S. C. § 14, its analysis is also applicable to § 1 of the Sherman Act, since with respect to the definition of tying the standards used by the two statutes are the same. See *Times-Picayune*, 345 U. S., at 608-609.

"There are several facts presented in this record which tend to show that a community television antenna system cannot properly be characterized as a single product. Others who entered the community antenna field offered all of the equipment necessary for a complete system, but none of them sold their gear exclusively as a single package as did Jerrold. The record also establishes that the number of pieces in each system varied considerably so that hardly any two versions of the alleged product were the same. Furthermore, the customer was charged for each item of equipment and not a lump sum for the total system. Finally, while Jerrold had cable and antennas to sell which were manufactured by other concerns, it only required that the electronic equipment in the system be bought from it." 187 F. Supp., at 559.

The record here shows that other hospitals often permit anesthesiological services to be purchased separately, that anesthesiologists are not fungible in that the services provided by each are not precisely the same, that anesthesiological services are billed separately, and that the hospital required purchases from Roux even though other anesthesiologists were available and Roux had no objection to their receiving staff privileges at East Jefferson. Therefore, the *Jerrold* analysis indicates that there was a tying arrangement here. *Jerrold* also indicates that tying may be permissible when necessary to enable a new business to break into the market. See *id.,* at 555-558. Assuming this defense exists, and assuming it justified the 1971 Roux contract in order to give Roux an incentive to go to work at a new hospital with an uncertain future, that justification is inapplicable to the 1976 contract, since by then Roux was willing to continue to service the hospital without a tying arrangement.

[40] This is not to say that § 1 of the Sherman Act gives a purchaser the right to buy a product that the seller does not wish to offer for sale. A grocer may decide to carry four brands of cookies and no more. If the customer wants a fifth brand, he may go elsewhere but he cannot sue the grocer even if there is no other in town. However, in such a case the customer is free to purchase no cookies at all, while buying other needed food. If the grocer required the customer to buy an unwanted brand of cookies in order to buy other items which the customer needs and cannot readily obtain elsewhere, then a tying question arises. Cf. *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 7 (grocer selling flour can require customers to also buy sugar only "if its competitors were ready and able to sell flour by itself"). Here, the question is whether patients are forced to use an unwanted anesthesiologist in order to obtain needed hospital services.

[41] An examination of the reason or reasons why petitioners denied respondent staff privileges will not provide the answer to the question whether the package of services they offered to their patients is an illegal tying arrangement. As a matter of antitrust law, petitioners may give their anesthesiology business to Roux because he is the best doctor available, because he is willing to work long hours, or because he is the son-in-law of the hospital administrator without violating the *per se* rule against tying. Without evidence that petitioners are using market power to force Roux upon patients there is no basis to view the arrangement as unreasonably restraining competition whatever the reasons for its creation. Conversely, with such evidence, the *per se* rule against tying may apply. Thus, we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care.

[42] Petitioners argue and the District Court found that the exclusive contract had what it characterized as procompetitive justifications in that an exclusive contract ensures 24-hour anesthesiology coverage, enables flexible scheduling, and facilitates work routine, professional standards, and maintenance of equipment. The Court of Appeals held these findings to be clearly erroneous since the exclusive contract was not necessary to achieve these ends. Roux was willing to provide 24-hour coverage even without an exclusive contract and the credentials committee of the hospital could impose standards for staff privileges that would ensure staff would comply with the demands of scheduling, maintenance, and professional standards. 686 F. 2d, at 292. In the past, we have refused to tolerate manifestly anticompetitive conduct simply because the health care industry is involved. See *Arizona* v. *Maricopa Medical Society*, 457 U. S., at 348-351; *National Gerimedical Hospital* v. *Blue Cross*, 452 U. S. 378 (1981); *American Medical Assn.* v. *United States*, 317 U. S. 519, 528-529 (1943).

Petitioners seek no special solicitude. See n. 12, *supra.* We have also uniformly rejected similar "goodwill" defenses for tying arrangements, finding that the use of contractual quality specifications are generally sufficient to protect quality without the use of a tying arrangement. See *Standard Oil Co. of California* v. *United States*, 337 U. S., at 305-306; *International Salt Co.* v. *United States*, 332 U. S., at 397-398; *International Business Machines Corp.* v. *United States*, 298 U. S., at 138-140. See generally Comment, Tying Arrangements under the Antitrust Laws: The "Integrity of the Product" Defense, 62 Mich. L. Rev. 1413 (1964). Since the District Court made no finding as to why contractual quality specifications would not protect the hospital, there is no basis for departing from our prior cases here.

[43] In fact its position in this market is not dissimilar from the market share at issue in *Times-Picayune,* which the Court found insufficient as a basis for inferring market power. See 345 U. S., at 611-613. Moreover, in other antitrust contexts this Court has found that market shares comparable to that present here do not create an unacceptable likelihood of anticompetitive conduct. See *United States* v. *Connecticut National Bank*, 418 U. S. 656 (1974); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

[44] The Court of Appeals acknowledged that absent these market imperfections, there was no basis for applying the *per se* rule against tying. "The contract at issue here involved only one hospital out of at least twenty in the area. Under the analysis applied to a truly competitive market, appellant has failed to prove an illegal tying arrangement." 686 F. 2d, at 290.

[45] Congress has found these market imperfections to exist. See *National Gerimedical Hospital* v. *Blue Cross*, 452 U. S., at 388, n. 13, 391-393, and n. 18; 42 U. S. C. §§ 300k, 300k-2(b); H. R. Conf. Rep. No. 96-420, pp. 57-58 (1979); S. Rep. No. 96-96, pp. 52-53 (1979).

[46] As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market. See *Fortner II*, 429 U. S., at 620; *Fortner I*, 394 U. S., at 503-504.

[47] Nor is there an indication in the record that petitioners' practices have increased the social costs of their market power. Since patients' anesthesiological needs are fixed by medical judgment, respondent does not argue that the tying arrangement facilitates price discrimination. Where variable-quantity purchasing is unavailable as a means to enable price discrimination, commentators have seen less justification for condemning tying. See Dam, *supra* n. 23, at 15-17; Turner, *supra* n. 21, at 67-72. While tying arrangements like the one at issue here are unlikely to be used to facilitate price discrimination, they could have the similar effect of enabling hospitals "to evade price control in the tying product through clandestine transfer of the profit to the tied product. . . ." *Fortner I*, 394 U. S., at 513 (WHITE, J., dissenting). Insurance companies are the principal source of price restraint in the hospital industry; they place some limitations on the ability of hospitals to exploit their market power. Through this arrangement, petitioners may be able to evade that restraint by obtaining a portion of the anesthesiologists' fees and therefore realize a greater return than they could in the absence of the arrangement. This could also have an adverse effect on the anesthesiology market since it is possible that only less able anesthesiologists would be willing to give up part of their fees in return for the security of an exclusive contract. However, there are no findings of either the District Court or the Court of Appeals which indicate that this type of exploitation of market power has occurred here. The Court of Appeals found only that Roux's use of nurse anesthetists increased its and the hospital's profits, but there was no finding that nurse anesthetists might not be used with equal frequency absent the exclusive contract. Indeed, the District Court found that nurse anesthetists are utilized in all hospitals in the area. 513 F. Supp., at 537, 543. Moreover, there is nothing in the record which details whether this arrangement has enhanced the value of East Jefferson's market power or harmed quality competition in the anesthesiology market.

[48] While there was some rather impressionistic testimony that the prevalence of exclusive contracts tended to discourage young doctors from entering the market, the evidence was equivocal and neither the District Court nor the Court of Appeals made any findings concerning the contract's effect on entry barriers. Respondent does not press the point before this Court. It is possible that under some circumstances an exclusive contract could raise entry barriers since anesthesiologists could not compete for the contract without raising the capital necessary to run a hospitalwide operation. However, since the hospital has provided most of the capital for the exclusive contractor in this case, that problem does not appear to be present.

[49] While it is true that purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, so that competition may be impeded, see n. 24, *supra,* this depends on an empirical demonstration concerning the effect of the arrangement on price or quality, and the record reveals little if anything about the effect of this arrangement on the market for anesthesiological services.

[50] If, as is likely, it is the patient's doctor and not the patient who selects an anesthesiologist, the doctor can simply take the patient elsewhere if he is dissatisfied with Roux. The District Court found that most doctors in the area have staff privileges at more than one hospital. 513 F. Supp., at 541.

[51] The effect of the contract, of course, has been to remove the East Jefferson Hospital from the market open to Roux's competitors. Like any exclusive-requirements contract, this contract could be unlawful if it foreclosed so much of the market from penetration by Roux's competitors as to unreasonably restrain competition in the affected market, the market for anesthesiological services. See generally *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961); *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949). However, respondent has not attempted to make this showing.

[52] The record simply tells us little if anything about the effect of this arrangement on price or quality of anesthesiological services. As to price, the arrangement did not lead to an increase in the price charged to the patient. 686 F. 2d, at 291. As to quality, the record indicates little more than that there have never been any complaints about the quality of Roux's services, and no contention that his services are in any respect inferior to those of respondent. Moreover, the self-interest of the hospital, as well as the ethical and professional norms under which it operates, presumably protect the quality of anesthesiological services. See Joint Commission on Accreditation of Hospitals, Accreditation Manual for Hospitals 3-10, 151-154 (1983).

[53] See App. A to Brief for American Society of Anesthesiologists, Inc., as *Amicus Curiae.*

[54] The claims raised by respondent but not passed upon by the Court of Appeals remain open on remand. See n. 2, *supra.*

[1] This inquiry has been required in analyzing both the prima facie case and affirmative defenses. Most notably, *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 559-560 (ED Pa. 1960), aff'd *per curiam,* 365 U. S. 567 (1961), upheld a requirement that buyers of television systems purchase the complete system, as well as installation and repair service, on the grounds that the tie assured that the systems would operate and thereby protected the seller's business reputation.

[2] Tying law is particularly anomalous in this respect because arrangements largely indistinguishable from tie-ins are generally analyzed under the rule of reason. For example, the *"per se"* analysis of tie-ins subjects restrictions on a franchisee's freedom to purchase supplies to a more searching scrutiny than restrictions on his freedom to sell his products. Compare, *e. g., Siegel* v. *Chicken Delight, Inc.*, 448 F. 2d 43 (CA9 1971), cert. denied, 405 U. S. 955 (1972), with *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977). And exclusive contracts that, like tieins, require the buyer to purchase a product from one seller are subject only to the rule of reason. See *infra,* at 44-45.

[3] See n. 4, *infra.*

[4] Tying might be undesirable in two other instances, but the hospital-Roux arrangement involves neither one.

In a regulated industry a firm with market power may be unable to extract a supercompetitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 513 (1969) (WHITE, J., dissenting).

Tying may also help the seller engage in price discrimination by "metering" the buyer's use of the tying product. Cf. *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947). Price discrimination may be independently unlawful, see 15 U. S. C. § 13. Price discrimination may, however, *decrease* rather than increase the economic costs of a seller's market power. See, *e. g.,* R. Bork, The Antitrust Paradox 398 (1978); P. Areeda, Antitrust Analysis 608-610 (3d ed. 1981); O. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 11-13 (1975). *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 617 (1977) *(Fortner II),* did not hold that price discrimination in the form of a tie-in is always economically harmful; that case indicated only that price discrimination may indicate market power in the tying-product market. But there is no need in this case to address the problem of price discrimination facilitated by tying. The discussion herein is aimed only at tying arrangements as to which no price discrimination is alleged.

[5] Wholly apart from market characteristics, a prerequisite to application of the Sherman Act is an effect on interstate commerce. See, *e. g., McLain* v. *Real Estate Board of New Orleans,* 444 U. S. 232, 246 (1980); *Burke* v. *Ford,* 389 U. S. 320, 322 (1967). It is not disputed that such an impact is present here.

[6] The Court has failed in the past to define how much market power is necessary, but in the context of this case it is inappropriate to attempt to resolve that question. In *International Salt Co.* v. *United States, supra,* the Court assumed that a patent conferred market power and therefore sufficiently established "the tendency of the arrangement to accomplishment of monopoly." *Id.,* at 396. In its next tying case, *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953), the Court distinguished *International Salt* in part by finding that there was no market "dominance," 345 U. S., at 610-613, after a careful consideration of the relevant market. Then, in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 6-8, 11 (1958), the Court required only a minimal showing of market power. More recently, in *Fortner II, supra,* the Court conducted a more extensive analysis of whether the tie was actually an exercise of market power, considering such factors as the size and profitability of the firm seeking to impose the tie, the character of the tying product, and the effects of the tie — the price charged for the products, the number of customers affected, the functional relation between the tied and tying product.

[7] A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product. See generally Landes & Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937 (1981).

Nor does any presumption of market power find support in our prior cases. Although *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948), considered the legality of "block-booking" of motion pictures, which ties the purchase of rights to copyrighted motion pictures to purchase of other motion pictures of the same copyright holder, the Court did not analyze the arrangement with the schema of the tying cases. Rather, the Court borrowed the patent law principle of "patent misuse," which prevents the holder of a patent from using the patent to require his customers to purchase unpatented products. *Id.,* at 156-159. See, *e. g., Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 665 (1944). The "patent misuse" doctrine may have influenced the Court's willingness to strike down the arrangement at issue in *International Salt* as well, although the Court did not cite the doctrine in that case.

[8] Whether the tying product is one that consumers might wish to purchase without the tied product should be irrelevant. Once it is conceded that the seller has market power over the tying product it follows that the seller can sell the tying product on noncompetitive terms. The injury to consumers does not depend on whether the seller chooses to charge a supercompetitive price, or charges a competitive price but insists that consumers also buy a product that they do not want.

[9] Cf. Areeda, *supra* n. 4, at 735; Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963, 1010 (1974); Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 21-23 (1957).

[10] The examination of the economic advantages of tying may properly be conducted as part of the rule-of-reason analysis, rather than at the threshold of the tying inquiry. This approach is consistent with this Court's occasional references to the problem. The Court has not heretofore had occasion to set forth any general criteria for determining when two apparently separate products are components of a single product for tying analysis. In *Times-Picayune Publishing Co.,* the Court held that advertising space in a morning newspaper was the same product as advertising space in the evening newspaper — access to readership of the respective newspapers — because the subscribers had no reason to distinguish among the readers of the two papers. 345 U. S., at 613-616. In *Fortner I,* the Court, reversing the grant of a motion for summary judgment, rejected the contention that credit could never be separate from the product for whose purchase credit was extended. 394 U. S., at 506-507. The Court disclaimed any determination of "the standards for determining exactly when a transaction involves only a single product." *Id.,* at 507. These cases indicate that consideration of whether a buyer might prefer to purchase one component without the other is one of the factors in tying analysis and, more generally, that economic analysis rather than mere conventional separability into different markets should determine whether one or two products are involved in the alleged tie.

[11] See Fed. Rule Civ. Proc. 52(a); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.,* 456 U. S. 844, 855-858 (1982).

[12] While the record appears to be devoid of factual findings on this point the assumption is a safe one, and certainly one that finds no contradiction in the record.

[13] The Court of Appeals disregarded the benefits of the tie because it found that there were less restrictive means of achieving them. In the absence of an adequate basis to expect any harm to competition from the tie-in, this objection is simply irrelevant.

381 U.S. 657 (1965)

UNITED MINE WORKERS OF AMERICA
v.
PENNINGTON ET AL.

No. 48.

Supreme Court of United States.

Argued January 27, 1965.
Decided June 7, 1965.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

658 *658 *Harrison Combs* argued the cause for petitioner. With him on the briefs were *E. H. Rayson, R. R. Kramer* and *M. E. Boiarsky.*

John A. Rowntree argued the cause and filed briefs for respondents.

659 *Theodore J. St. Antoine* argued the cause for the American Federation of Labor and Congress of Industrial *659 Organizations, as *amicus curiae,* urging reversal. With him on the brief were *J. Albert Woll, Robert C. Mayer* and *Thomas E. Harris.*

Guy Farmer filed a brief for the Bituminous Coal Operators' Association, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

This action began as a suit by the trustees of the United Mine Workers of America Welfare and Retirement Fund against the respondents, individually and as owners of Phillips Brothers Coal Company, a partnership, seeking to recover some $55,000 in royalty payments alleged to be due and payable under the trust provisions of the National Bituminous Coal Wage Agreement of 1950, as amended, September 29, 1952, executed by Phillips and United Mine Workers of America on or about October 1, 1953, and re-executed with amendments on or about September 8, 1955, and October 22, 1956. Phillips filed an answer and a cross claim against UMW, alleging in both that the trustees, the UMW and certain large coal operators had conspired to restrain and to monopolize interstate commerce in violation of §§ 1 and 2 of the Sherman Antitrust Act, as amended, 26 Stat. 209, 15 U. S. C. §§ 1, 2 (1958 ed.). Actual damages in the amount of $100,000 were claimed for the period beginning February 14, 1954, and ending December 31, 1958.[1]

The allegations of the cross claim were essentially as follows: Prior to the 1950 Wage Agreement between the operators and the union, severe controversy had existed in the industry, particularly over wages, the welfare fund and the union's
660 efforts to control the working time of *660 its members. Since 1950, however, relative peace has existed in the industry, all as the result of the 1950 Wage Agreement and its amendments and the additional understandings entered into between UMW and the large operators. Allegedly the parties considered overproduction to be the critical problem of the coal industry. The agreed solution was to be the elimination of the smaller companies, the larger companies thereby controlling the market. More specifically, the union abandoned its efforts to control the working time of the miners, agreed not to oppose the rapid mechanization of the mines which would substantially reduce mine employment, agreed to help finance such mechanization and agreed to impose the terms of the 1950 agreement on all operators without regard to their ability to pay. The benefit to the union was to be increased wages as productivity increased with mechanization, these increases to be demanded of the smaller companies whether mechanized or not. Royalty payments into the welfare fund were to be increased also, and the union was to have effective control over the fund's use. The union and large companies agreed upon other steps to exclude the marketing, production, and sale of nonunion coal. Thus the companies agreed not to lease coal lands to nonunion operators, and in 1958 agreed not to sell or buy coal from such companies. The companies and the union jointly and successfully approached the Secretary of Labor to obtain establishment under the Walsh-Healey Act, as amended, 49 Stat. 2036. 41 U. S. C. § 35 *et seq.* (1958 ed.). of a minimum wage for employees of contractors selling coal to the TVA, such minimum wage being much higher than in other industries and making it difficult for small companies to compete in the TVA term contract market. At a later time, at a meeting attended by both union and company
661 representatives, the TVA was urged to curtail its spot market purchases, a substantial portion of which *661 were exempt

from the Walsh-Healey order. Thereafter four of the larger companies waged a destructive and collusive price-cutting campaign in the TVA spot market for coal, two of the companies, West Kentucky Coal Co. and its subsidiary Nashville Coal Co., being those in which the union had large investments and over which it was in position to exercise control.

The complaint survived motions to dismiss and after a five-week trial before a jury, a verdict was returned in favor of Phillips and against the trustees and the union, the damages against the union being fixed in the amount of $90,000, to be trebled under 15 U. S. C. § 15 (1958 ed.). The trial court set aside the verdict against the trustees but overruled the union's motion for judgment notwithstanding the verdict or in the alternative for a new trial. The Court of Appeals affirmed. 325 F. 2d 804. It ruled that the union was not exempt from liability under the Sherman Act on the facts of this case, considered the instructions adequate and found the evidence generally sufficient to support the verdict. We granted certiorari. 377 U. S. 929. We reverse and remand the case for proceedings consistent with this opinion.

I.

We first consider UMW's contention that the trial court erred in denying its motion for a directed verdict and for judgment notwithstanding the verdict, since a determination in UMW's favor on this issue would finally resolve the controversy. The question presented by this phase of the case is whether in the circumstances of this case the union is exempt from liability under the antitrust laws. We think the answer is clearly in the negative and that the union's motions were correctly denied.

The antitrust laws do not bar the existence and operation of labor unions as such. Moreover, § 20 of the Clayton Act, 38
662 Stat. 738, and § 4 of the Norris-LaGuardia *662 Act, 47 Stat. 70, permit a union, acting alone to engage in the conduct therein specified without violating the Sherman Act. *United States* v. *Hutcheson,* 312 U. S. 219; *United States* v. *International Hod Carriers Council,* 313 U. S. 539, affirming *per curiam,* 37 F. Supp. 191 (D. C. N. D. Ill. 1941); *United States* v. *American Federation of Musicians,* 318 U. S. 741, affirming *per curiam,* 47 F. Supp. 304 (D. C. N. D. Ill. 1942).

But neither § 20 nor § 4 expressly deals with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws. Thus *Hutcheson* itself stated:

> "So long as a union acts in its self-interest *and does not combine with non-labor groups,* the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 312 U. S., at 232. (Emphasis added.)

And in *Allen Bradley Co.* v. *Union,* U. S. 797, this Court made explicit what had been merely a qualifying expression in *Hutcheson* and held that "when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts." *Id.,* at 809. See also *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 398-400; *United States* v. *Employing Plasterers Assn.,* 347 U. S. 186, 190. Subsequent cases have applied the *Allen Bradley* doctrine to such combinations without regard to whether they found expression in a collective
663 bargaining agreement, *Brother-hood* *663 *of Carpenters* v. *United States, supra;* see *Teamsters Union* v. *Oliver,* 358 U. S. 283, 296, and even though the mechanism for effectuating the purpose of the combination was an agreement on wages, see *Adams Dairy Co.* v. *St. Louis Dairy Co.,* 260 F. 2d 46 (C. A. 8th Cir. 1958), or on hours of work, *Philadelphia Record Co.* v. *Manufacturing Photo-Engravers Assn.,* 155 F. 2d 799 (C. A. 3d Cir. 1946).

If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement. Cf. *Allen Bradley Co.* v. *Union,* 325 U. S. 797; *United States* v. *Borden Co.,* 308 U. S. 188, 203-205; *Lumber Prods. Assn.* v. *United States,* 144 F. 2d 546, 548 (C. A. 9th Cir. 1944), aff'd on this issue *sub nom. Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 398-400; *Las Vegas Merchant Plumbers Assn.* v. *United States,* 210 F. 2d 732 (C. A. 9th Cir. 1954), cert. denied, 348 U. S. 817; *Local 175, IBEW* v. *United States,* 219 F. 2d 431 (C. A. 6th Cir. 1955), cert. denied, 349 U. S. 917. In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come.

Likewise, if as is alleged in this case, the union became a party to a collusive bidding arrangement designed to drive Phillips and others from the TVA spot market, we think any claim to exemption from antitrust liability would be frivolous at best. For this reason alone the motions of the unions were properly denied.

664 *664 A major part of Phillips' case, however, was that the union entered into a conspiracy with the large operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators. The UMW urges that since such an agreement concerned wage standards, it is exempt from the antitrust laws.

It is true that wages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87, 94-96. The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 503-504; see *Adams Dairy Co.* v. *St. Louis Dairy Co.,* 260 F. 2d 46 (C. A. 8th Cir. 1958). We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act
665 scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless *665 of the subject or the form and content of the agreement. Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting "the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation," *Fibreboard Paper Prods. Corp.* v. *Labor Board,* 379 U. S. 203, 211. But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws. *Teamsters Union* v. *Oliver,* 358 U. S. 283, 296; *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 399-400.

We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior.[2] But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One
666 group of employers may not conspire to eliminate competitors from *666 the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

We do not find anything in the national labor policy that conflicts with this conclusion. This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 503. But there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

So far as the employer is concerned it has long been the Board's view that an employer may not condition the signing of a collective bargaining agreement on the union's organization of a majority of the industry. *American Range Lines, Inc.,* 13 N. L. R. B. 139, 147 (1939); *Samuel Youlin,* 22 N. L. R. B. 879, 885 (1940); *Newton Chevrolet, Inc.,* 37 N. L. R. B. 334, 341 (1941); see *Labor Board* v. *George P. Pilling & Son Co.,* 119 F. 2d 32, 38 (C. A. 3d Cir. 1941). In such cases the obvious interest of the employer is to ensure that acceptance of the union's wage demands will not adversely affect his competitive
667 position. In *American Range Lines, Inc., supra,* the *667 Board rejected that employer interest as a justification for the

demand. "[A]n employer cannot lawfully deny his employees the right to bargain collectively through their designated representative in an appropriate unit because he envisions competitive disadvantages accruing from such bargaining." 13 N. L. R. B., at 147. Such an employer condition, if upheld, would clearly reduce the extent of collective bargaining. Thus, in *Newton Chevrolet Inc., supra,* where it was held a refusal to bargain for the employer to insist on a provision that the agreed contract terms would not become effective until five competitors had signed substantially similar contracts, the Board stated that "[t]here is nothing in the Act to justify the imposition of a duty upon an exclusive bargaining representative to secure an agreement from a majority of an employer's competitors as a condition precedent to the negotiation of an agreement with the employer. To permit individual employers to refuse to bargain collectively until some or all of their competitors had done so clearly would lead to frustration of the fundamental purpose of the Act to encourage the practice of collective bargaining." 37 N. L. R. B., at 341. Permitting insistence on an agreement by the union to attempt to impose a similar contract on other employers would likewise seem to impose a restraining influence on the extent of collective bargaining, for the union could avoid an impasse only by surrendering its freedom to act in its own interest *vis-a-vis* other employers, something it will be unwilling to do in many instances. Once again, the employer's interest is a competitive interest rather than an interest in regulating its own labor relations, and the effect on the union of such an agreement would be to limit the free exercise of the employees' right to engage in concerted activities according to their own views of their self-interest. In sum, we cannot conclude that the national labor policy provides any support for such agreements.

668 *668 On the other hand, the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit. One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry. And if the conspiracy presently under attack were declared exempt it would hardly be possible to deny exemption to such avowedly discriminatory schemes.

From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to
669 antitrust policy. See, *e. g., Associated* *669 *Press* v. *United States,* 326 U. S. 1, 19; *Fashion Griginators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457, 465; *Anderson* v. *Shipowners Assn.,* 272 U. S. 359, 364-365.

Thus the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws.

II.

The UMW next contends that the trial court erroneously denied its motion for a new trial based on claimed errors in the admission of evidence.

In *Eastern R. Conf.* v. *Noerr Motors,* 365 U. S. 127, the Court rejected an attempt to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials. The Sherman Act, it was held, was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign was aimed. Furthermore, the legality of the conduct "was not at all affected by any anticompetitive purpose it may have had," *id.,* at 140—even though the "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business," *id.,* at 138. Nothing could be clearer from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved.

We agree with the UMW that both the Court of Appeals and the trial court failed to take proper account of the *Noerr* case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered *Noerr* as applying only to conduct "unaccompanied by a
670 purpose or intent to further a conspiracy to violate a statute. It is *670 the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal." 325 F. 2d, at 817. *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose.

The instructions of the trial court to the jury exhibit a similar infirmity. The jury was instructed that the approach to the Secretary of Labor was legal unless part of a conspiracy to drive small operators out of business and that the approach to the TVA was not a violation of the antitrust laws "unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business." If, therefore, the jury determined the requisite anticompetitive purpose to be present, it was free to find an illegal conspiracy based solely on the Walsh-Healey and TVA episodes, or in any event to attribute illegality to these acts as part of a general plan to eliminate Phillips and other operators similarly situated. Neither finding, however, is permitted by *Noerr* for the reasons stated in that case. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.[3]

671 *671 There is another reason for remanding this case for further proceedings in the lower courts. It is clear under *Noerr* that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations.[4] See also *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 358; *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha R. Co.,* 151 U. S. 1, 16-21; *Okefenokee Rural Elec. Mem. Corp.* v. *Florida*
672 *P. & L. Co.,* 214 F. 2d 413, 418 (C. A. 5th Cir. 1954). The trial court, however, admitted evidence *672 concerning the Walsh-Healey episodes for "whatever bearing it may have on the overall picture" and told the jury in its final instructions to include in the verdict all damages resulting directly from any act which was found to be part of the conspiracy. The effect this may have had on the jury is reflected by the statement of the Court of Appeals that the jury could reasonably conclude "that the wage determination for the coal industry under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially and adversely affected the operations of Phillips in the important TVA market . . . ," 325 F. 2d, at 815, and that "[t]his minimum wage determination prevented Phillips from bidding on the TVA term market . . . ." *id.,* at 814.[5]

The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

[For opinion of MR. JUSTICE GOLDBERG dissenting from the opinion but concurring in the reversal, see *post,* p. 697.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE CLARK agree, concurring.

As we read the opinion of the Court, it reaffirms the principles of *Allen Bradley Co.* v. *Union,* 325 U. S. 797, and tells the trial judge:

First. On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement
673 whereby employers and the union agreed on a *673 wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.

Second. An industry-wide agreement containing those features is prima facie evidence of a violation.[*]

In *Allen Bradley Co.* v. *Union, supra,* the union was promoting closed shops in the New York City area. It got contractors to purchase equipment only from local manufacturers who had closed-shop agreements with the union; and it got manufacturers to confine their New York City sales to contractors employing the union's members. Agencies were set up to boycott recalcitrant local contractors and manufacturers and bar from the area equipment manufactured outside its boundaries. As we said:

"The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and
674 the New York electrical equipment *674 prices scared, to the decided financial profit of local contractors and manufacturers." 325 U. S., at 800.

I repeat what we said in *Allen Bradley Co.* v. *Union, supra,* at 811:

"The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the [Sherman] Act."

Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced. Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system. If the allegations in this case are to be believed, organized labor joined hands with organized business to drive marginal operators out of existence. According to those allegations the union used its control over West Kentucky Coal Co. and Nashville Coal Co. to dump coal at such low prices that respondents, who were small operators, had to abandon their business. According to those allegations there was a boycott by the union and the major
675 companies against small companies who needed major companies' coal land on which to operate. According *675 to those allegations high wage and welfare terms of employment were imposed on the small, marginal companies by the union and the major companies with the knowledge and intent that the small ones would be driven out of business.

The only architect of our economic system is Congress. We are right in adhering to its philosophy of the free enterprise system as expressed in the antitrust laws and as enforced by *Allen Bradley Co.* v. *Union, supra,* until the Congress delegates to big business and big labor the power to remold our economy in the manner charged here.

[1] The parties stipulated that the damages period would include the four-year limitation period, 15 U. S. C. § 15b (1958 ed.), preceding the filing of Phillips' cross claim and extend up to December 31, 1958, the date on which Phillips terminated its business.

[2] Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.

[3] It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 46-47; *United States* v. *Reading Co.,* 253 U. S. 26, 43-44." *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 705; see also *Heike* v. *United States*, 227 U. S. 131, 145; *American Medical Assn.* v. *United States*, 76 U. S. App. D. C. 70, 87-89, 130 F. 2d 233, 250-252 (1942), aff'd, 317 U. S. 519 (certiorari limited to other issues).

[4] By contrast, in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U. S. 690, we held that the acts of a wartime purchasing agent appointed by the Canadian Government could be proved as part of the conspiracy and as an element in computing damages. The purchasing agent, however, was not a public official but the wholly owned subsidiary of an American corporation alleged to be a principal actor in the conspiracy. The acts complained of had been performed at the direction of the purchasing agent's American parent and there was "no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from [the plaintiff] be stopped." 370 U. S., at 706. That case is wholly dissimilar to both *Noerr* and the present case.

[5] This latter conclusion regarding the term market would seem doubly erroneous as Phillips had virtually conceded, in the course of offering evidence respecting bids of the alleged conspirators on the term market, that it was claiming no damages from its exclusion from the term market, a market it never had any immediate prospect of entering. The trial court ruled that the proffered testimony was inadmissible on the damages phase of the case.

[*] "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck* v. *United States,* 253 F. 212, 213, aff'd, 249 U. S. 47; *Levey* v. *United States,* 92 F. 2d 688, 691. Acceptance by

competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600; *Lawlor* v. *Loewe*, 235 U. S. 522, 534; *American Column Co.* v. *United States*, 257 U. S. 377; *United States* v. *American Linseed Oil Co.*, 262 U. S. 371." *Interstate Circuit* v. *United States*, 306 U. S. 208, 227.

138 Conn. 357 (1951)

THE NEPTUNE PARK ASSOCIATION ET AL.
v.
BEATRICE STEINBERG ET AL.

Supreme Court of Connecticut.

Argued October 4, 1951.
Decided November 20, 1951.

BROWN, C. J., JENNINGS, BALDWIN, INGLIS and O'SULLIVAN, JS.

358 *358 *Francis F. McGuire,* with whom were *Morgan K. McGuire,* and, on the brief, *Joseph E. Moukawsher,* for the appellants (plaintiffs).

Irving S. Ribicoff, with whom were *Frank A. Kelly, Jr.,* and, on the brief, *Morris Lubchansky,* for the appellees (defendants).

INGLIS, J.

The question involved in this appeal is whether the use being made of the defendants' real estate is violative either of a restrictive covenant contained in their deed or of the zoning regulations applying to the area in which their property is located.

The following facts were properly found by the trial court: The defendants are owners as tenants in common of a building lot, with a fourteen-room house thereon, at 33 Mott Avenue in New London. The lot is within a real estate development laid out in 1907. The portion of the development in which the lot is situated is known as Neptune Park. The development was designed for residential purposes in accordance with a general plan, and all the building lots therein were made subject to certain restrictions. Among the restrictions to which the property now owned by the defendants was made, and now is, subject are these: "There shall not be erected upon the premises herein conveyed any building or structure other than a
359 dwelling house ...; no public hotel, public bathing house or club house, shop, store, saloon or other place of *359 business shall be erected or maintained on the lot herein conveyed." The zoning regulations of New London place the lot in zone A-1. They state that one of the purposes of their adoption was that "of preventing the overcrowding of land and avoiding undue concentration of population." New London Bldg. Zone Ordinance, § 2. They provide: "In an `A' Residence Zone [including A-1 zones] no dwelling shall be erected, altered or used except as a one-family detached dwelling." Id. § 3. "`A one-family detached dwelling' is a house accommodating but a single family...." Id. § 1 (v). "A `family' as used in this ordinance shall be deemed any number of individuals living and cooking together as a single housekeeping unit." Id. § 1 (u).

The named plaintiff is a specially chartered corporation with power to enforce the restrictive covenants and zoning regulations which obtain in the area where the defendants' property is located. The two other plaintiffs own real estate in the immediate neighborhood. The defendants are four sisters, each of whom is married. Among them they have eight children. They all live in Springfield, Massachusetts, and there each sister and her family occupy a dwelling separate from the others. They and their families, however, have been accustomed to spend their summer vacations together as one family.

The house now owned by the defendants was erected in 1914 and has ever since been occupied as a dwelling house. It was acquired by the defendants in September, 1948, and they started to occupy it in June, 1949. While they were in occupancy, the custom was for the defendants Jacobson and Steinberg and their husbands and the husbands of the other two defendants to spend weekends there, while the defendants Greenberg and Cheffeitz and all eight children were there
360 continuously. Mrs. Cheffeitz, owing to poor *360 health, was not active in the management of the household. That duty devolved upon Mrs. Greenberg, who planned and prepared the meals, did most of the housework and for the most part acted as head of the household. The defendants made no structural changes in the house. In particular, it was not altered to make separate quarters for any members of the group. At the suggestion of the postman, name plates were put up on the outside of the door designating the names of each of the defendants, but there is only one mail slot and one doorbell. Within the house there is only one kitchen, one sink, and one stove, and only one icebox is in use for the whole group. The defendants and members of their families live and cook together as a single housekeeping unit. They do not occupy separate quarters within the house, and the lodging, cooking and eating facilities are common to all. No business is carried

on in the premises. It is not used as a boarding or lodging house. The trial court concluded that the use made of the premises by the defendants does not violate either the restrictive covenant or the zoning regulations and rendered judgment for the defendants.

The contention of the plaintiffs with reference to the restrictive covenant is that it is to be construed as permitting the erection of only one single-family dwelling house on the lot and it, therefore, precludes the use of the dwelling house which is erected thereon by four families. On the question whether the words "a dwelling house" in such a covenant are to be interpreted as meaning a single-family house as distinguished from a duplex or apartment house, there is a sharp conflict in the authorities. Note, 14 A. L. R.2d 1376, 1381. It is not a question, however, the determination of which is essential to a decision of this case. The house now standing on the defendants' property is in structure and design a single-family dwelling.

361 *361 "Restrictive covenants, being in derogation of the common-law right to use land for all lawful purposes, are to be narrowly construed and are not to be extended by implication. If their language is of doubtful meaning, it will be construed against rather than in favor of the covenant." *Rossini* v. *Freeman,* 136 Conn. 321, 323, 71 A.2d 98; *Hooker* v. *Alexander,* 129 Conn. 433, 436, 29 A.2d 308. The covenant providing that no structure except a dwelling house shall be erected on the premises is clearly directed at the form and design of the permitted structure. That particular covenant is not concerned with the use to which the structure is to be put after it is erected. If it had been intended to control the use of the structure, it could easily have so stated. It could at least have provided that any structure on the premises should be maintained as a dwelling house, as was true of the covenant before the court in *Hooker* v. *Alexander,* supra, the case relied upon by the plaintiffs. Also see *Baker* v. *Lunde,* 96 Conn. 530, 540, 114 A. 673. That it was the intent of the parties to make this covenant apply only to the nature of the structure to be erected on the land and not to limit the use of it to occupancy by a single family is made abundantly clear by the fact that there is another covenant in the deed which does control the use of the property. We refer to the covenant that "no public hotel, public bathing house or club house, shop, store, saloon or other place of business shall be erected or maintained on the lot herein conveyed." This covenant does prohibit maintenance of the structures named as well as their erection. It prohibits uses which might otherwise be made of buildings which structurally were in the form of dwelling houses. If it had been the intent of the parties to prohibit the use of any dwelling
362 house erected within the development by more than one family, they would naturally have so *362 specified in this covenant in connection with the prohibition of hotels.

In Webster's New International Dictionary (2d Ed.) a dwelling house is defined as "A house, or sometimes part of a house, occupied as a residence, in distinction from a store, office, or other building." The words "a dwelling house" in the covenant in question refer to a building erected in such a form that it is designed to be occupied as a dwelling as distinguished from a place of business. The structure erected on the defendants' property is no more than that. It is not violative of the restrictive covenant.

As regards the effect of the New London building zone ordinance, the claim of the plaintiffs is that it restricts the use of the defendants' property to a one-family dwelling; that a family is a group of persons living together as a unit with one head and that, therefore, the defendants are violating the ordinance in that their property is occupied by four separate families. The weakness of that argument lies in the definition of family which it adopts. It is true that "The word `family' is one of elastic meaning and is used in a great variety of significations." *Piccinim* v. *Connecticut Light & Power Co.,* 93 Conn. 423, 425, 106 A. 330; see *Hall* v. *Meriden Trust & Safe Deposit Co.,* 103 Conn. 226, 236, 130 A. 157; *Hart* v. *Goldsmith,* 51 Conn. 479, 480; *Cheshire* v. *Burlington,* 31 Conn. 326, 329. The zoning ordinance involved in this case, however, defines the word "family" as it is used therein. When any piece of legislation defines the terms as they are used in it, such definition is exclusive of all others. *Young* v. *Roodner,* 123 Conn. 68, 72, 192 A. 710; *Lenox Realty Co.* v. *Hackett,* 122 Conn. 143, 150, 187 A. 895; *Geer* v. *Rockwell,* 65 Conn. 316, 323, 32 A. 924; *Linsley* v. *Brown,* 13 Conn. 192, 195; *Fox* v. *Standard Oil Co.,*
363 *363 294 U. S. 87, 95, 55 S. Ct. 333, 79 L. Ed. 780; 50 Am. Jur. 254, § 262.

The definition of "family" stated in the ordinance is "any number of individuals living and cooking together as a single housekeeping unit." The test, therefore, of whether any house is being used as a single-family dwelling house is whether it is being occupied by only one housekeeping unit, not whether it is being occupied by one family unit as that term might be otherwise defined. To set up such a test is not at variance with the stated general purpose of the ordinance to prevent overcrowding. The housekeeping unit test is as good as any other to accomplish that purpose.

It is clear from the finding that the occupancy of the defendants' house is by a single housekeeping unit. Accordingly, under the zoning ordinance the house is being used as a single-family dwelling and such use is not in violation of the ordinance.

There is no error.

In this opinion the other judges concurred.

18 Conn. App. 531 (1989)

NEW HAVEN TOBACCO COMPANY, INC.
v.
FRANK P. PERRELLI

(6575)

Appellate Court of Connecticut.

Argued March 9, 1989.
Decision released June 6, 1989.

DUPONT, C. J., STOUGHTON and NORCOTT, JS.

532 *532 *Randall B. Chapnick,* for the appellant (plaintiff).

Paul M. Sabetta, for the appellee (defendant).

DUPONT, C. J.

The plaintiff appeals from the judgment of the trial court invalidating as unreasonable a restrictive covenant contained in an employment contract signed by the plaintiff and the defendant. We find error.

The following facts are undisputed. In December, 1980, the plaintiff, a wholesale tobacco business, and the defendant entered into an employment contract that contained the following covenant: "Because of the importance and value of the information disclosed to the Employee, as part of the consideration for his employment, the Employee agrees that he will not directly or indirectly sell products similar to those of the Employer to any of the customers that he has dealt with or has discovered and become aware of while in the employ of the Employer for a period of twenty-four months from the termination of his employment."

The defendant voluntarily terminated his employment relationship with the plaintiff in November, 1981. Shortly thereafter, the defendant opened his own wholesale tobacco business and sold "products similar to those of the Employer" to certain customers of the plaintiff within the twenty-four month period of the restrictive covenant.

The plaintiff subsequently brought an action against the defendant seeking money damages and injunctive relief.[1] The trial
533 court, *Hadden, J.,* denied the plaintiff's *533 application for a temporary injunction. The plaintiff appealed to the Supreme Court, which dismissed the appeal suo motu, on the ground that an appeal taken from the denial of a temporary injunction is not taken from a final judgment.

The Supreme Court remanded the case to the trial court and, after trial, the court, *Reynolds, J.,* rendered judgment for the defendant on the ground that the covenant interfered with the public interest. The plaintiff appealed the decision to this court, claiming that the trial court erred as a matter of law in holding that the covenant was unenforceable. Because the trial court invalidated the covenant on the ground that it restricted the public interest, without determining whether the restriction was reasonable, we found error and remanded the case to the trial court for evaluation of the covenant under the criteria set forth in *Scott* v. *General Iron & Welding Co.,* 171 Conn. 132, 368 A.2d 111 (1976). *New Haven Tobacco Co.* v. *Perrelli,* 11 Conn. App. 636, 528 A.2d 865 (1987).

On remand, the trial court again invalidated the covenant concluding that it was unreasonable because it lacked a geographic limitation and because it unduly interfered with the public interest. The plaintiff has again appealed, claiming that the trial court erred in invalidating the covenant.

A covenant that restricts the activities of an employee following the termination of his employment is valid and enforceable if the restraint is reasonable. *Scott* v. *General Iron & Welding Co.,* supra, 137. There are five criteria by which the reasonableness of a restrictive covenant must be evaluated: (1) the length of time the restriction is to be in effect; (2) the geographic area covered by the restriction; (3) the degree of protection afforded to the party in whose favor the covenant is
534 made; (4) the restrictions on the employee's ability to *534 pursue his occupation; and (5) the extent of interference with the

public's interests. Id., 137-38. The five prong test of *Scott* is disjunctive, rather than conjunctive; a finding of unreasonableness in any one of the criteria is enough to render the covenant unenforceable. *New Haven Tobacco Co.* v. *Perrelli,* supra, 639 n.2.

In the present case, the trial court concluded that the restrictive covenant was unreasonable with respect to the second and fifth prongs of *Scott,* finding that the covenant lacked any geographic limitation and unduly interfered with the public's interests. The trial court reasoned that because the covenant did not specify the geographic area covered by the restriction, the geographic scope of the covenant was unlimited and thus unreasonable. We disagree.

The application of a restrictive covenant must be confined to a geographic area that is reasonable in view of the particular situation. *Scott* v. *General Iron & Welding Co.,* supra, 138. "A restrictive covenant which protects the employer in areas in which he does not do business or is unlikely to do business is unreasonable with respect to area." Id.

The trial court's conclusion that the lack of an explicit geographic limitation rendered the covenant unreasonable with respect to area misconstrues the nature and operation of the particular covenant at issue. The covenant is not an anticompetitive covenant that restricts an employee from engaging in the same business as the employer in a given geographical area and prohibits the employee from doing business with all consumers of the service located in that area. Instead, the covenant at issue imposes an antisales restriction that prevents the employee from transacting business with only a specified group of consumers, namely, the customers of the former employer.

535 *535 An antisales restriction, as opposed to an anticompetitive restriction, is by its nature limited to a definite geographic area.[2] See *Robert S. Weiss & Associates, Inc.* v. *Wiederlight,* 208 Conn. 525, 531, 546 A.2d 216 (1988). The geographic area affected by an antisales covenant is limited to that area in which the customers of the former employer are located, and the restriction, even within that area, applies only to those customers.

In *Wiederlight,* our Supreme Court specifically rejected the contention that the antisolicitation and antisales restriction at issue in that case was unreasonable as to geographic area because it lacked, as does the present covenant, an explicit geographic limitation. Id., 531-32. In that case, the employer was doing business throughout Fairfield county and in New York.

In the present case, the plaintiff's market, and thus its protected customer list, are local and limited to the greater New Haven area. Thus, although the covenant does not contain an explicit geographic limitation, the covenant is in fact limited to a reasonable geographic area.

536 *536 The trial court also concluded that the restrictive covenant was invalid and unenforceable because the covenant unreasonably interfered with the interests of the public.

In our previous opinion in this case, we set out factors for evaluating whether a restrictive employment covenant unreasonably interferes with the interests of the public. *New Haven Tobacco Co.* v. *Perrelli,* supra, 640-42. In order for such interference to be reasonable, it first must be determined that the employer is seeking to protect a legally recognized interest, and then, that the means used to achieve this end do not unreasonably deprive the public of essential goods and services. Id., 642.

In determining whether a restrictive covenant unreasonably deprives the public of essential goods and services, the reasonableness of the scope and severity of the covenant's effect on the public and the probability of the restriction's creating a monopoly in the area of trade must be examined. Id., 641.

In the present case, the trial court correctly recognized that the interest sought to be protected by the plaintiff, that is, its clientele, is a legally protected interest. An employer possesses a proprietary right to his customers that he is entitled to protect for a reasonable time. *May* v. *Young,* 125 Conn. 1, 7, 2 A.2d 385 (1938). The trial court concluded, however, that the covenant unreasonably interfered with the public interest because the lack of an explicit geographic limitation rendered the covenant unreasonable with respect to its scope and would permit the plaintiff to maintain a monopoly. We disagree.

The trial court reasoned that because the covenant lacked an explicit geographic limitation, an unrestricted section of the
537 population would be prohibited from transacting business with the defendant. As we noted *537 above, however, the covenant is, in fact, geographically limited to that area in which the customers of the plaintiff are located. Moreover, even within that geographic area, the defendant is prohibited from transacting business only with the customers of the plaintiff's

wholesale tobacco business with whom he had dealt or whose identity he had discovered while he was employed by the plaintiff. The fact that the defendant is prohibited from doing business with this limited group of individuals does not support the trial court's conclusion that an unrestricted section of the populace would be affected by the covenant.

The trial court also concluded that the lack of a geographic limitation supported an inference that the plaintiff was trying to maintain a monopoly in the wholesale tobacco business. No evidence was presented concerning the market share of either party. The record contains no support for the conclusion that the plaintiff was attempting to create or maintain a monopoly in the wholesale tobacco business. Because the covenant was reasonably limited as to geographic area, there was no basis from which the trial court could draw an inference, even if such an inference were permissible, that the plaintiff was attempting to maintain a monopoly.

Because the protection of customers is a legally recognized interest and because the covenant is not unreasonable with respect to the scope of its effect on the public interest and there is no evidence to indicate that it would permit the plaintiff to create or maintain a monopoly, we conclude that the covenant does not unreasonably interfere with the public's interests.

In order for a covenant to be valid and enforceable, it must be reasonable with respect to all five criteria set forth in *Scott* v. *General Iron & Welding Co.,* supra. Thus, we also must evaluate the reasonableness of the covenant with respect to the
538 time limitation of the covenant, the *538 restriction imposed on the employee's ability to pursue his occupation and the degree of protection afforded to the employer by the covenant. We conclude that the covenant is also reasonable with respect to these criteria.

The covenant prevents the defendant from transacting business with customers of the plaintiff for a period of two years after leaving the plaintiff's employ. Such a two year restriction is clearly reasonable. See *Robert S. Weiss & Associates, Inc.* v. *Wiederlight,* supra (two year restriction upheld); *Scott* v. *General Iron & Welding Co.,* supra (five year restriction upheld); *May* v. *Young,* supra (two year restriction upheld).

As to the remaining criteria, the protection of an employer's interest in his customers through the use of similar covenants restricting an employee from entry into the employ of or selling to or soliciting an employer's customers, has been held reasonable with respect to both the degree of protection afforded an employer and the restriction placed on an employee's pursuit of his or her occupation. See *Robert S. Weiss & Associates, Inc.* v. *Wiederliaht,* supra; *May* v. *Young,* supra.

Because the restrictive employment covenant at issue is reasonable with respect to the five *Scott* criteria, and thus valid and enforceable, we conclude that the plaintiff is entitled to enforcement of the covenant and that the trial court erred in rendering judgment for the defendant.

There is error, the judgment is set aside and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

[1] The plaintiff subsequently revised its complaint to eliminate the claim for injunctive relief.

[2] The fact that the restrictive employment covenant at issue is an antisales covenant, rather than an antisolicitation covenant, does not automatically render it unenforceable. Although, as we noted in our previous opinion in this case, an antisales covenant, which prohibits an employee from transacting business with customers of the former employer, imposes a greater burden on the public interest than an antisolicitation covenant, which prohibits only the solicitation of such customers, an antisales covenant may be valid if it is reasonable with respect to the five criteria of *Scott* v. *General Iron & Welding Co.,* 171 Conn. 132, 137-38, 368 A.2d 111 (1976). *New Haven Tobacco Co.* v. *Perrelli,* 11 Conn. App. 636, 639-40, 528 A.2d 865 (1987). In *May* v. *Young,* 125 Conn. 1, 2 A.2d 385 (1938), a restrictive covenant was held valid despite the fact that it prevented the employee from entering into the employ of any client of the former employer. Similarly, in *Robert S. Weiss & Associates, Inc.* v. *Wiederlight,* 208 Conn. 525, 546 A.2d 216 (1988), the covenant that was held valid prohibited the employee from soliciting or selling to customers of the plaintiff employer.

872 F.2d 127 (1989)

James William POPE, et al., Plaintiffs-Appellants,
v.
MISSISSIPPI REAL ESTATE COMMISSION, et al., Defendants-Appellees.

No. 88-4301.

United States Court of Appeals, Fifth Circuit.

May 9, 1989.

128 *128 Jim Waide, Tupelo, Miss., for plaintiffs-appellants.

W. Reed Hillen, Tupelo, Miss., for Individual Private Defendants.

John L. Maxey, II, Robert E. Sanders, Jackson, Miss., for Miss. Real Estate Comm.

Elizabeth A. Odom, Aberdeen, Miss., for Joyce Murphy.

Robert D. Butters, John L. McDavid, Jackson, Miss., James H. Ray, Tupelo, Miss., for Monroe County.

John W. Crowell, Columbus, Miss., for Roberts.

Before CLARK, Chief Judge, TIMBERS[*] and RUBIN, Circuit Judges.

PER CURIAM:

James and Mary Pope sued several private and governmental entities claiming that the defendants had excluded them from the real estate market in Monroe County, Mississippi. They raised federal claims under the antitrust statutes and the Constitution and several state law claims. The district court, finding that the Popes had failed to establish the factual prerequisites of their federal claims, granted summary judgment in favor of the defendants and dismissed the Popes' claims with prejudice. The Popes appeal. We affirm.

I. Factual Background

James and Mary Pope operate a real estate agency in Amory, Monroe County, Mississippi. At one time, the Popes were members of the Monroe County Board of Realtors (the board), which operates a multiple listing service (MLS) within the county. In 1981, the Popes withdrew from the board, allegedly because members of the board who disapproved of their business practices changed the board's fee schedule in a way that significantly increased the dues owed by the Popes' agency. The Popes sued the board, its members, and the National Association of Realtors, asserting a myriad of claims under the federal antitrust statutes and under state law for violation of the Mississippi antitrust statutes, interference with business relations, and defamation. The number of claims has been greatly reduced on appeal. The crux of the allegations that now remain against these private defendants is that they boycotted the Popes' agency by refusing it access to the MLS and by refusing to allow the agency to use the term "realtor" unless the Popes again became board members. The term
129 "realtor" is a registered trademark *129 of the National Association of Realtors.

The Popes have also sued the Mississippi Real Estate Commission and its individual members. The Commission is a state governmental agency that regulates real estate brokers. The Popes allege that the Commission violated their rights to free speech, procedural due process, and equal protection when it reprimanded them for some of their advertising practices. The Popes asserted claims under the federal and state antitrust statutes, the Due Process Clause, the Equal Protection Clause, and the first amendment of the United States Constitution, the separation of powers requirement of the Mississippi Constitution, the Mississippi Public Record Statute, and state common law governing torts for interference with business relations and defamation. On appeal, the Popes narrow their attack to the federal constitutional issues.

After the completion of discovery, all defendants moved for summary judgment. The district court, in an extensive opinion reviewing all the evidence before it, determined that the Popes had not established the factual prerequisites of their federal antitrust or constitutional claims. *Pope v. Mississippi Real Estate Comm'n,* 695 F.Supp. 253 (N.D.Miss.1988). The court also held that the Popes had not established the jurisdictional prerequisites to their antitrust claims by establishing an effect upon interstate commerce and market power. Finding no cognizable federal claims, the district court dismissed all pendent state claims. We affirm.

II. Mary Pope's Appeal

The Popes' notice of appeal was styled only "James William Pope, et al." Mary Pope's name did not appear on the notice. Federal Rule of Appellate Procedure 3(c) requires in pertinent part that a notice of appeal "shall specify the party or parties taking the appeal." The Supreme Court has recently held that the failure to name a party on a notice of appeal constitutes a failure of that party to appeal. *Torres v. Oakland Scavenger Co.,* ___ U.S. ___, 108 S.Ct. 2405, 2407-09, 101 L.Ed.2d 285 (1988). More specifically, the Court held that the use of the phrase "et al." fails to provide the required notice to either the opposing parties or the court. *Id.* 108 S.Ct. at 2409.

This appeal, however, is distinguishable from that in *Torres.* The plaintiffs in *Torres* "purported to proceed not only on their own behalf, but also on behalf of all persons similarly situated." *Id.* at 2407. In *Torres,* the phrase "et al.," which translates literally to "and others," could have referred to a large class of unnamed individuals, as well as, or instead of, Torres. There are only two plaintiffs in this case, James and Mary Pope. The Popes' notice of appeal named "James William Pope, et al." It also stated that "Plaintiffs do hereby appeal." "Plaintiffs" can include only James and Mary Pope, and the "et al." can mean only Mary Pope. Therefore, in the limited context of this two party action, we distinguish *Torres.*

III. The Antitrust Causes of Action

The Popes resigned from the Monroe County Board of Realtors in January of 1981 allegedly because the board changed the fee schedule for board membership in a way that significantly and disproportionately increased the dues owed by the Popes' agency. Historically, the board assessed dues on an equal, per member agency basis. This practice, however, technically violated the board's charter. The charter required that dues be assessed according to the number of agents within an agency, so that an agency with a larger number of agents would pay a greater share of the costs of the board. When the Popes' agency grew to the point that it employed half of the county's real estate agents, the board began to enforce the charter provision. The new schedule imposed a fee on each agency, plus an additional, slightly lower fee on each agent employed. As a result, the Popes were asked to pay nearly half of the total dues collected by the board. The
130 Pope agency still received only one vote on board affairs. The Popes refused *130 to pay the higher dues and left the board.

About the time the Popes resigned from the board, a cooperative listing service was formed by the individually-named defendants in this case. The Popes allegedly were never asked to join and in fact never participated in the cooperative listing service. This service was merged with the board in 1984 and became the MLS. The Popes were not permitted to participate in the MLS because they were not board members. The Popes were also precluded from using the term "realtor" to describe their operations because they were not members of the board or the National Association of Realtors.

The board's exclusion of nonmembers from the MLS or from use of the term "realtor" is examined under the rule of reason. *United States v. Realty Multi-List, Inc.,* 629 F.2d 1351, 1361-69 (5th Cir.1980). Multiple listing services are, "above all, an effective response to the pervasive market imperfections in the real estate industry." *Id.* at 1367-68. Membership dues reasonably related to expenses and to recouping the costs of the MLS are reasonable. Because both the MLS and the use of the term "realtors" involve a sharing of the fate of board members, other membership requirements imposing minimal standards of conduct might also be needed to ensure the integrity of the system. *See id.* at 1368-69. Although such requirements can be used improperly to exclude competitors, they are not necessarily anti-competitive. If properly administered, membership requirements serve pro-competitive purposes. The board's activities, therefore, do not fall among the categories of business behavior that are "plainly anti-competitive" and lacking in "any redeeming value" so as to warrant application of the *per se* rule. *See* Broadcast Music, Inc. v. Columbia Broadcasting Co., 441 U.S. 1, 8, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1 (1979) (citations omitted).

In this case, the only membership requirement that is brought under the scrutiny of the antitrust statutes is the membership fee schedule that precipitated the Popes' resignation from the board. Although the Popes assert that the board began to enforce the charter's fee schedule as a means of excluding their agency, they do not argue that any other requirement excludes them from participation on the board or the MLS. The Popes' resignation was voluntary, and they can rejoin the board if they pay their dues. The Popes assert that they were not asked to participate in the cooperative listing service, but that service was not merged with the board until 1984, three years after the Popes' resignation. The Popes' suit against the board, its members, and the National Association of Realtors does not encompass this asserted wrong in 1981. Our inquiry is limited to determining whether the present fee schedule is reasonable.

The Popes do not challenge the amount of fees the board collects. Instead, they challenge the apportionment of the fees among the board members. In *Realty Multi-List,* we stated that a MLS could not collect more dues than was reasonably necessary to run the MLS service. 629 F.2d at 1368-69. To collect more than the cost of the service creates a barrier to the admittance of any new member and is without competitive justification. *Id.* This case, however, raises a different question from that faced in *Realty Multi-List.* The Popes do not argue that the board is collecting more total fees than is reasonably necessary to run the MLS and the other essential operations of the board. They argue that under the current fee schedule if they rejoin the board they will be forced to carry the majority of the board's financial burden. If the fee schedule poses any entry barrier to the MLS, it discourages the entry of large agencies, who will pay a greater share of the costs of the MLS because they employ more real estate agents. Such a fee schedule is not a barrier, however, because it is imposed only upon the firms employing the most agents who presumably will make the greatest use of the MLS and other board services.

The facts recited by James Pope in his affidavit establish the clear reasonableness of the fee apportionment employed by
131 the *131 board. At the time the Popes resigned from the board, they employed nearly half the real estate agents in Monroe County and controlled approximately half the real estate market. Under such circumstances, it is patently reasonable for the Popes to be assessed half the cost of running the MLS. One half of the listings will likely be theirs. In fact, it could well be considered an unreasonable barrier to the entry of a sole agent if that agent was required to shoulder a pro tanto share of the cost of the MLS while one firm alone reaped half the benefits. The reasonableness of the board's fee schedule presents no jury question. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The schedule is reasonable.

The Popes' related contention that their agency will be allowed only one vote on board affairs is equally unavailing. If they choose to reap the benefits of managing a number of sales agents under the umbrella of a single organization, it is reasonable for them to bear the consequences of operating as a single unit for voting purposes.

IV. The Constitutional Claims

The Popes assert that their ability to promote their real estate agency has been unconstitutionally impeded by the Mississippi Real Estate Commission, a state governmental agency, and the regulations the Commission enforces. On several occasions, Mr. Pope and the Popes' agency have been reprimanded or cautioned by the Commission that certain of their advertising practices threatened to violate the regulations applying to real estate agents in Mississippi. The Popes argue that enforcement of these regulations and the threat of future enforcement chill constitutionally protected commercial speech. The Popes also argue that the process by which they were reprimanded by the Commission falls short of due process. They seek monetary and injunctive relief pursuant to 42 U.S.C. § 1983.

In one instance, James Pope was cautioned by the Commission for offering a free vacuum cleaner to a buyer of a home listed with the Popes' agency. The vacuum cleaner was defective, and a complaint was received by the Commission. The Commission issued a letter of reprimand to Mr. Pope concerning the defective gift, which also stated:

> The Commission does, however, wish to employ this means of cautioning you regarding the offering of rebates or gifts to persons other than your principal. Such practices are technically violations of Sections 73-35-21(j), Miss.Code of 1972, and should be avoided in the future.

The referenced code provision prohibits an agent from "paying or receiving any rebate, profit, compensation or commission from any person other than his principals...." Miss.Code Ann. § 73-35-21.

Mr. Pope was also reprimanded for publishing a brochure which contrasted his services with those of other real estate agents in Monroe County. The Commission received four sworn complaints regarding the advertisement that alleged that the comparisons were inaccurate and deceptive. In response, Mr. Pope alleged that "95 percent of the information was strictly accurate...." He does not offer to explain the qualities of the missing five percent. The Commission issued a formal complaint, conducted a hearing in which Pope was represented by counsel, and suspended Mr. Pope's license for six months. The suspension, however, was held in abeyance. The record does not show that any part of it has been enforced.

Mr. Pope was also cautioned by the Commission for drawing legal descriptions of real estate. The Commission argues that, under Mississippi law, such activity constitutes the unlicensed practice of law.

Finally, Mr. Pope was reprimanded for advertising an educational real estate course as one that had been approved by the Mississippi Real Estate Commission. The course was not so approved.

The Popes argue that these Commission enforcement activities and the threat of future enforcement prevents them from using the trademark "realtor" to describe their operations. The Commission admits that use of such a description would
132 violate *132 its regulations because the Popes are not members of the board and, hence, not "realtors." No proceedings concerning the use of this term have ever been instigated against Mr. Pope or the Popes' agency.

Mr. Pope did not challenge any of the rulings or interpretations of the relevant regulations by the Commission. Nor did he seek clarification of those regulations that he claims chill his advertising practices. Any person aggrieved by a ruling of the Commission has an unfettered right under Mississippi law to appeal that ruling to a state court of competent jurisdiction. Miss.Code Ann. § 73-35-25(a). An order or rule of the Commission is not final until after appeal or after the time for appeal has expired. *Id.* at § 73-35-25(c). In addition to this available court review, the Popes stipulated that for "each complaint against plaintiffs received by Mississippi Real Estate Commission, Plaintiff, James W. Pope, Sr., received notice that a complaint was filed." Even assuming that the Commission's cautionary letters and the suspended sanction against Mr. Pope constitute a deprivation of a liberty or property interest, the notice and post-deprivation remedy of appeal are adequate due process to protect Mr. Pope's interests. *See* *Myrick v. City of Dallas,* 810 F.2d 1382, 1388 (5th Cir.1987).

Commercial speech receives first amendment protection only so long as it concerns a lawful activity and is not misleading. *Posadas de Puerto Rico Assoc. v. Tourism Co.,* 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986); *Central Hudson Gas and Elect. Corp. v. Public Service Comm'n,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). Thus, the Popes' brochure that was, in part, misleading and the advertisement for educational courses were not protected speech, and the Commission's suspended sanctions and warning were proper. Likewise unprotected is the drawing of legal descriptions, which under Mississippi law is tantamount to practicing law without a license. Miss.Code Ann. 73-3-55; *Darby v. Mississippi State Bd. of Bar Admissions,* 185 So.2d 684, 686-67 (Miss.1966).

The Popes also have no right to use the term "realtor" to describe their operation. "Realtor" is a registered trademark. Although the Popes assert that the term has come to mean any real estate agent in a generic sense, they produced no summary judgment proof to establish this fact other than the conclusionary allegation of Mr. Pope. This is not sufficient. *Leonard v. Dixie Well Service and Supply, Inc.,* 828 F.2d 291, 295 (5th Cir.1987). Because the Popes do not raise a fact question concerning the common meaning of the trademark "realtor," we need not reach the implications of the Lanham Act, 15 U.S.C. § 1051 et seq.

The prohibition against the giving of gifts requires further analysis. The reprimand issued to Mr. Pope did not damage the Popes' first amendment rights. The vacuum cleaner given as a gift was defective and thus like a deceptive advertisement does not constitute protected speech. Mr. Pope was properly reprimanded for the faulty appliance. However, if the Mississippi statute were to be construed to prohibit all gifts as advertisement by real estate agents it might chill protected speech. The Popes also argue that the prohibition against giving gifts violates substantive due process. We need not reach these constitutional questions, however, because the only reasonable construction of the relevant statute does not go so far.

The statute is designed to prevent a real estate agent from developing a conflict of interest between the agent and his customer. The statute prohibits an agent from "paying or receiving any rebate, profit, compensation or commission from any person other than his principals...." Miss.Code Ann. § 73-35-21. The statute is clear in its purpose when it prohibits the receipt of things of value from those not his principal. The agent's loyalty is due his principal and that must be the exclusive source of his fidelity and remuneration. The only difficulty is in the conjunctive proscription of payments made by an agent to
133 persons other than his principal. A rebate or gift to a potential buyer of a listed home which does not alter the purchase *133 price, or the agent's commission, does not present a conflict of interest, and in fact could serve the seller's interest. The statute proscribes only deceptive practices. The Mississippi legislature obviously enacted this statute to protect the agent's customers and the general public, not to protect brokers by preventing them from being induced to part with a portion of

their commission. We therefore interpret the statute to apply to prevent rebates or commissions paid by third parties to the agent and gifts paid by an agent to another only when the payment creates a conflict of interest to the client's detriment. So interpreted, the statute does not implicate the first amendment.

The Popes produced no proof that indicates that they are prohibited or deterred from advertising their services in a truthful manner. They have thus raised no claim under the first amendment.

V. The Pendent State Claims

Following the dismissal of all federal claims, the district court dismissed the Popes' pendent state law claims. The Popes question this dismissal. As we have previously observed, however, "[i]n the absence of a federal claim, a district court may in its discretion, and generally should, dismiss pendent state law claims." *Slaughter v. Allstate, Inc.,* 803 F.2d 857, 859 (5th Cir.1986).

For the foregoing reasons, the summary judgment dismissing the plaintiff's claims with prejudice is

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, concurring in part and concurring in the result:

I concur in the whole of the court's opinion except its resolution of the Popes' constitutional challenges to Mississippi's statutory prohibition against their giving gifts to customers under Miss.Code Ann. § 73-35-21. I do not agree with the court that the Popes' challenges are sufficiently substantial to require us to construe § 73-35-21 and to imply to the State of Mississippi that this law may be unconstitutional if the State does not accept our construction. Nonetheless, and for the same reason, I concur in the court's result.

[*] Circuit Judge of the Second Circuit, sitting by designation.

234 A.3d 135 (2020)
197 Conn.App. 696

PROCUREMENT, LLC
v.
Gurpreet AHUJA et al.

(AC 41680).

Appellate Court of Connecticut.

Argued November 14, 2019.
Officially Released June 2, 2020.

Procedural History

Action seeking to recover damages for, inter alia, vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Arnold, J.,* granted the plaintiff's motion to substitute Nicholas Ahuja, executor of the estate of Gurpreet Ahuja, for the named defendant; subsequently, the trial court, *Ecker, J.,* granted in part the defendants' motion for summary judgment and rendered judgment thereon; thereafter, the plaintiff withdrew the remaining count of the complaint and appealed to this court. *Affirmed.*

Richard C. Robinson, with whom was Jonathan A. Kaplan, Hartford, for the appellant (plaintiff).

Peter Milano, Branford, for the appellees (substitute defendant et al.).

DiPentima, C. J., and Keller and Harper, Js.

139 *139 KELLER, J.

The plaintiff, Procurement, LLC, brings this action sounding in vexatious litigation, abuse of process, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42a-110g et seq., aiding and abetting, and tortious interference with contractual and business relations, and seeking damages from the defendants Gurpreet Ahuja[1] and Ahuja Holdings, LLC (Holdings), on the ground that they generally sought to impede the plaintiff's development of a mixed use development project. The plaintiff appeals from the judgment of the trial court rendered after the granting of the defendants' motion for summary judgment. On appeal, the plaintiff claims that (1) the trial court erred in concluding as a matter of law that Ahuja's zoning appeals with regard to the plaintiff's proposed development plan were not objectively baseless and, therefore, the sham exception to the *Noerr-Pennington* doctrine was not applicable, and (2) the court misinterpreted the sham exception under the *Noerr-Pennington* doctrine.[2] We affirm the judgment of the trial court.

The following procedural history, as set forth by the trial court in its thorough, well reasoned memorandum of decision, is relevant to this appeal. This appeal and the underlying litigation arose "out of a series of interrelated administrative and judicial proceedings ... involving [the plaintiff's development project]." The plaintiff's development plan involved "the construction of a large childcare center and approximately twenty residential units on High Ridge Road in Stamford." "For ease of reference, the court ... describe[d] the allegedly wrongful activity at issue ... [in] three distinct, though related, administrative and judicial proceedings, each involving [the] defendants' opposition to a particular zoning application made by [the] plaintiff in connection with its High Ridge Road project....

"The initial round of administrative and judicial proceedings arose out of a set of applications submitted by [the plaintiff] to the Stamford Zoning Board (board) in April, 2010. These included an application for special exception approval, and an application for approval of site and architectural plans, each of which related to [the plaintiff's] intention to develop a two-story building consisting of a day care center and nine residential units on the subject property ([collectively referred to as the first application]). The board held hearings on the first application in December, 2010, and voted on January 10, 2011, to deny the application for a special exception. [The plaintiff] timely appealed the denial to the Superior Court.

"Ahuja's formal involvement in the first application did not come until over a year later, on February 22, 2012, when she filed
140 a motion to intervene in the appeal pending *140 in the Superior Court. The motion described her status as a statutorily aggrieved landowner pursuant to General Statutes § 8-8, based on the fact that she owned property within 100 feet of the subject property. Ahuja alleged that her participation as an intervenor had become necessary because there was no longer true adversity between [the] plaintiff ... and [the board] due to the board's recent action on a second, modified zoning application [for a special permit] made by [the plaintiff], which the board had approved while the appeal of the decision in the first application was pending.... Ahuja argued that [the plaintiff] and the board were now essentially on the same side, and would settle the appeal unless the court permitted her to intervene in support of the board's denial of the special exception sought in the first application.

"Ahuja's motion to intervene was denied by the court (*Adams, J.*), on May 30, 2012.... The [court, denying intervention,] weighed the various factors relevant to permissive intervention and determined that a majority of those considerations counseled denial of Ahuja's motion to intervene. The existence of Ahuja's then pending appeal from the board's approval of the second application ... gave [the court] pause, because it was possible that intervention might not lead to more efficient proceedings in light of that appeal... but [the court] ultimately chose to exercise [its] discretion to deny intervention. To ensure that Ahuja's interests would be protected, [the court] ordered the parties to provide three weeks' notice to Ahuja in the event of a settlement [of the plaintiff's appeal], which would allow her to participate in any hearing for judicial approval of the settlement under ... § 8-8(n). There is no suggestion anywhere in the [court's decision denying intervention], express or implied, that Ahuja's motion to intervene was frivolous, vexatious or otherwise objectively unreasonable.

"Ahuja sought appellate review of [the court's] intervention order by filing a timely petition for certification pursuant to ... § 8-8(*o*) and Practice Book § 81-1. Certification was granted by the Appellate Court on October 24, 2012. A game of litigation chess followed. [The plaintiff] (which had opposed Ahuja's motion to intervene) filed a motion in the Superior Court case to implead Ahuja as a party defendant on May 25, 2013. Ahuja (who had sought to intervene) initially objected to [the plaintiff's] motion to implead. The board also objected. [The court, *Berger, J.*] granted the motion to implead on August 23, 2013. Ahuja withdrew [her] appeal in the Appellate Court on October 4, 2013, and the Superior Court case proceeded on the merits. Ahuja's trial brief, filed on October 15, 2013, adopted the board's trial brief in its entirety and added less than two pages of additional argument. [The court] held a merits hearing on December 6, 2013, and issued a decision on February 14, 2014.... [The court] found that the board's decision denying a special exception was not supported by substantial evidence, and therefore sustained [the plaintiff's] appeal in connection with the first application.

"In late July, 2011, after the board's denial of the first application and while the appeal of that denial was pending in the Superior Court, [the plaintiff] filed a second application for a special permit with the board. The second application sought to develop a day care center and twenty-two residential units at the subject property, an increase from the nine units proposed in the first application. A series of five public hearings on the second application were held by the board in the latter part of 2011.... The board voted to approve the second application on December 12, 2011.

141 *141 "Ahuja appealed the board's decision.... The matter was fully briefed and argued in the Superior Court. On January 4, 2013, [the court, *Berger, J.*] issued a memorandum of decision denying the appeal.... Ahuja filed a petition for certification from that decision, which was denied by the Appellate Court on July 24, 2013....

"On September 17, 2014, [the plaintiff] filed [a third] zoning application, which requested modification of certain conditions imposed by the board in its approval of the second application. More particularly, [the plaintiff] sought to increase the number of residential units from seventeen to nineteen units; increase the amount of available parking by three additional spaces; open an entrance exit on Bradley Place without the obligation to install a traffic signal; and change the form of residential ownership from condominiums to apartments. After public hearings, the board approved the third application on November 17, 2014. Ahuja appealed the board's decision to the Superior Court on... December 2, 2014. [The plaintiff] moved to dismiss the appeal on the ground that it was not returned to court within the time required by General Statutes § 52-46a. The motion to dismiss was granted on July 6, 2015. No appeal was taken....

"[The plaintiff] also alleges that [the] defendants engaged in wrongful conduct outside of the immediate context of the [aforementioned] legal proceedings.... These allegations relate to false or otherwise tortious communications that [the plaintiff] claims were made by [the] defendants to various nongovernmental individuals or entities with some role in the overall fate of the project.... According to [the plaintiff], [the] defendants (1) spread false information about the development plans to neighbors, in an effort to mobilize opposition to the project ... (2) [contacted] [the plaintiff's] `lending institutions with the goal of controlling the debt that secured [the plaintiff's] property' ... and (3) contact[ed] or interfere[d] with [the plaintiff's] current or prospective tenant relationships....

"[The underlying] lawsuit was commenced by [the plaintiff] in 2016. The operative complaint contains seven counts, all of which relate in some way to [the] defendants' alleged campaign to impede [the plaintiff's] project by wrongful means.... Four counts of the complaint are brought solely against Ahuja personally—the first count, for common-law vexatious litigation; the second count, for vexatious litigation under General Statutes § 52-568, the third count, for abuse of process, and the fourth count, which alleges that the conduct underlying the first three counts violates [CUTPA]. Two other counts are directed solely at ... Holdings (the fifth count, for aiding and abetting Ahuja's wrongful conduct as alleged in the first four counts; and the sixth count, for a violation of CUTPA). The seventh count alleges tortious interference with contractual and business relations against both defendants.

"[The defendants] ... moved for summary judgment on all counts. The sole basis for their motion [was] the *Noerr-Pennington* doctrine, which, as explained [subsequently], confers immunity from civil liability for `petitioning activity' protected by the first amendment. Broadly speaking, *Noerr-Pennington* immunizes activity undertaken by persons who use the official channels of governmental agencies and courts to advocate their cause, even if that cause consists of nothing more than seeking an outcome adverse to a business competitor and/or favorable to the petitioner's own economic interests. [The plaintiff] ... filed an objection to the motion for summary judgment, and each party ... submitted extensive written memoranda and supporting
142 materials. Oral argument [on *142 the motion for summary judgment] was heard [before the trial court] on November 27, 2017. In mid-March, 2018, at [the] plaintiff's initiative and over [the] defendants' objection, the court allowed the parties to submit supplemental briefs. Argument on the supplemental submission was heard [before the trial court] on March 29, 2018." (Footnotes omitted.)

In its May 3, 2018 memorandum of decision, the court granted the motion for summary judgment in favor of the defendants on counts one through six, and denied the motion with respect to the seventh count.[3] Applying the *Noerr-Pennington* doctrine, the court concluded that Ahuja's zoning appeals were immunized from suit and, further, that Ahuja's petitioning activity did not qualify for the sham exception to the doctrine because the relevant zoning appeals were not objectively baseless. The plaintiff has appealed to this court from the judgment rendered on counts one through six. Additional procedural history will be set forth as necessary.

I

The plaintiff first claims that the court erred in concluding, as a matter of law, that Ahuja's zoning appeals with regard to the plaintiff's proposed development plan were not objectively baseless and, therefore, the sham exception to the *Noerr-Pennington* doctrine was not applicable. We disagree.

"The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In
143 deciding a motion for summary judgment, the trial court must *143 view the evidence in the light most favorable to the nonmoving party.... The courts are in entire agreement that the moving party ... has the burden of showing the absence of any genuine issue as to all the material facts.... When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue.... Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue.... Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary.... On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero,* 327 Conn. 764, 772-73, 176 A.3d 1 (2018).

We begin our analysis by setting forth the background of the *Noerr-Pennington* doctrine generally and, specifically, how it has been applied in Connecticut jurisprudence. In *Zeller* v. *Consolini,* 59 Conn. App. 545, 758 A.2d 376 (2000), this court adopted "the reasoning of a trio of federal antitrust cases, *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d. 642 (1972) [(*California Motor*)], *United Mine Workers* v. *Pennington,* 381 U.S. 657, 85 S.

Ct. 1585, 14 L. Ed. 2d 626 (1965), *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and their progeny, collectively referred to as the *Noerr-Pennington* doctrine.

"In short, the *Noerr-Pennington* doctrine shields from the Sherman [Antitrust] Act [15 U.S.C. § 1 et seq.] a concerted effort to influence public officials regardless of intent or purpose.... The United States Supreme Court has reasoned that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors. *California Motor Transport Co.* v. *Trucking Unlimited,* supra, [404 U.S. at 510-11, 92 S.Ct. 609].

"The *Noerr-Pennington* doctrine has evolved from its antitrust origins to apply to a myriad of situations in which it shields individuals from liability for petitioning a governmental entity for redress. [A]lthough the *Noerr-Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which [seek] to assign liability on the basis of the defendant's exercise of its first amendment rights.... For example, *Noerr-Pennington* has been recognized as a defense to actions brought under the National Labor Relations Act, 29 U.S.C. § 151 et seq.; *Bill Johnson's Restaurants, Inc.* v. *National Labor Relations Board,* 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); state law claims of tortious interference with business relations; *NAACP* v. *Claiborne Hardware Co.,* 458 U.S. 886, 913-15, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982); federal securities laws; *Havoco of America Ltd.* v. *Hollobow,* 702 F.2d 643, 650 (7th Cir. 1983); and wrongful discharge claims....

144 "Although the *Noerr-Pennington* doctrine provides broad coverage to petitioning individuals or groups, its protection *144 is not limitless.... [P]etitioning activity is not protected if such activity is a mere sham or pretense to interfere with no reasonable expectation of obtaining a favorable ruling." (Citations omitted; internal quotation marks omitted.) *Zeller* v. *Consolini,* supra, 59 Conn. App. at 550-52, 758 A.2d 376.

Preliminarily, it is undisputed that the *Noerr-Pennington* doctrine applies to the present case. The plaintiff argues on appeal, however, that the zoning litigation initiated by Ahuja and supported by Holdings was baseless and thus meets the doctrine's sham exception. In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.,* 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d. 611 (1993), the United States Supreme Court outlined a two part definition of "sham" litigation. "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor...." (Emphasis in original; footnote omitted; internal quotation marks omitted.) Id., at 60-61, 113 S. Ct. 1920.

"The existence of probable cause to institute legal proceedings precludes a finding that [a] ... defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings, requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose.... Probable cause to institute civil proceedings requires no more than a reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.... Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense.... Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr*'s sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the [fact finder] to infer the absence of probable cause.... When a court has found that [a] ... defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit.... [T]herefore, a proper probable cause determination irrefutably demonstrates that [a] ... plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., at 62-63, 113 S. Ct. 1920.

"Application of the *Noerr-Pennington* doctrine to ... petitioning activity directed at local governments ... already is well established. E.g., *Columbia* v. *Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 379-84, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) (city council); *Juster Associates* v. *Rutland,* 901 F.2d 266, 270-72 (2d Cir. 1990) (city); *Racetrac Petroleum, Inc.* v. *Prince George's County,* 786 F.2d 202, 203 (4th Cir. 1986) (county zoning board); *Bob Layne Contractor, Inc.* v. *Bartel,* 504

F.2d 1293, 1296 (7th Cir. 1974) (city zoning board and council). Indeed, many of our own trial courts have applied the *Noerr-*
145 *Pennington* *145 doctrine in their decisions. E.g., *Roncari Development Co.* v. *GMG Enterprises, Inc.,* 45 Conn. Supp. 408, 414, 718 A.2d 1025 (1997), citing *Connecticut National Bank* v. *Mase,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 269180 [1991 WL 32151] (January 31, 1991); *Abrams* v. *Knowles,* Superior Court, judicial district of New London at Norwich, Docket No. 95287 [1990 WL 265241] (December 4, 1990) (3 Conn. L. Rptr. 9); *Yale University School of Medicine* v. *Wurtzel,* Superior Court, judicial district of New Haven, Docket No. 275314 [1990 WL 264678] (November 9, 1990) (2 Conn. L. Rptr. 813)." *Zeller* v. *Consolini,* supra, 59 Conn. App. at 552-53, 758 A.2d 376.

In granting the defendants' motion for summary judgment, the court applied the *Noerr-Pennington* doctrine to the defendants' petitioning activity and determined that the activity was immunized from suit. Further, the court determined that the sham exception to the doctrine was inapplicable because Ahuja's zoning appeals were not objectively baseless.[4] Whether the court properly granted summary judgment as to counts one through six essentially comes down to whether the court properly applied the *Noerr-Pennington* doctrine. Accordingly, we will examine the appeals brought by Ahuja with respect to the plaintiff's second and third zoning applications, which were the subject of the causes of action in counts one through six of the plaintiff's complaint.

A

Ahuja's Appeal of the Second Application

Having set forth the *Noerr-Pennington* doctrine and its applicability to Ahuja's petitioning activity in the present case, we now turn to the plaintiff's claims with regard to Ahuja's appeal of the second application. First, the plaintiff claims that the court erred in concluding as a matter of law that Ahuja's appeal of the board's approval of the second application was objectively baseless. Specifically, the plaintiff claims that Ahuja's appeal was objectively baseless in that she alleged that the board acted "illegally, unlawfully, [and] arbitrarily" in granting the plaintiff's second application because the notice for several of the public hearings was inadequate and that the application was materially changed after one of the public hearings.

The following additional procedural history is relevant to this portion of the plaintiff's appeal. In July, 2011, while the plaintiff's appeal from the denial of its first application was pending, the plaintiff filed a second application for a special permit and architectural/site plan approval. In preparation for a public hearing for the second application held on September 26, 2011, the board published notice in the Stamford Advocate on September 14 and 21, 2011. The public hearing was continued to October 6, 2011, and then to October 24, 2011, due to the large number of citizens who wished to speak on the application. The board did not publish additional notice for the continued hearings. The board also published notice in the Stamford Advocate on October 28 and November 4, 2011, for a public hearing on November 10, 2011. Following the board's approval of the plaintiff's second application, Ahuja appealed the board's decision, alleging that the board acted "illegally, unlawfully,
146 [and] arbitrarily." *146 Specifically, Ahuja alleged that "(a) [t]he board lacked jurisdiction to hear and decide the [second] application where notice of the public hearings held on October 6, 2011, and October 24, 2011, was not published in a newspaper having general circulation in the city of Stamford; [and] (b) the board lacked jurisdiction to approve the application since it was materially changed by [the plaintiff] at the last public hearing held on November 10, 2011. The changes made to the application on November 10, 2011, were material and therefore constituted a new application. The board lacked jurisdiction to approve the new application since it did not comport with the notice requirements of General Statutes § 8-3 et seq. and the Stamford Zoning Regs., art. VI, § 20." The court rejected Ahuja's claims and denied the appeal.

1

No Notice Claim

First, we address the portion of the plaintiff's claim relating to Ahuja's appeal of the second application on the basis that adequate notice was not provided for several of the public hearings associated with the second application.

The court, in granting the motion for summary judgment in favor of the defendants, found "that Ahuja's legal claims regarding notice were supported by probable cause." Ahuja's appeal of the second zoning application was based in part on

the assertion that with respect to several of the public hearings associated with the second application, notice was not provided in compliance with the relevant provision of the Stamford Charter (charter). Specifically, Ahuja argued that notice was not provided for the public hearings on October 6 and 24, 2011. The public hearings in question were continued from an initial public hearing held on September 26, 2011, for which adequate notice was provided. In determining that Ahuja's appeal with regard to the notice claim was not objectively baseless, the court most heavily relied on the plain text of the relevant charter provisions which "provided Ahuja with a solid foundation to contend that a new notice was required for every public hearing, `continuation' or otherwise." In particular, the court looked to the language of §§ C6-40-11 and C6-40-12 of the charter. Section C6-40-11, titled "Notice of Public Hearings," provides in relevant part: "Notice of each public hearing held with respect to amendments of the Zoning Regulations and Map or applications for approval of site and architectural plans and/or requested uses shall be given by publishing in an official newspaper the time, place and purpose of such hearing.... Said notice shall be published at least twice, the first not more than fifteen nor less than ten days before such hearing, and the last not less than two days before such hearing...." Section C6-40-12, titled "Hearings," provides that "[i]f more than one public hearing is considered by the Zoning Board to be necessary or advisable, additional hearings may be held upon due notice, as herein above set forth, provided no more than ninety days shall elapse between the first and last hearing on any one petition, unless the petitioner agrees in writing to an extension of such period." The court determined that "Ahuja's argument —that the literal text of § C6-40-12 requires notice of any and all `additional hearing[s]' held in connection with an application —posits a very plausible construction of the charter provision. The text of § C6-40-12 does not limit its application to `new' or `separate' hearings, or otherwise create a category of `continuation' hearings exempt from the notice requirement. The provision's literal terms would seem to include *any* `additional' hearing, and its
147 context *147 would appear to contemplate precisely the situation confronted in connection with the second application, when the first public hearing was insufficient to complete the board's full consideration of the zoning matter at issue." (Emphasis in original.)

In challenging the court's determination that Ahuja's second zoning appeal, which was based in part on a claim that notice was deficient, was not objectively baseless, the plaintiff points both to the plain text of the charter, and to Connecticut case law. First, in looking to the language of the relevant charter provisions, the plaintiff asserts that the drafters contemplated that the continuation of public hearings would be a common phenomenon, and that if they intended for notice to be provided for each continuation, they would have included language to that effect. The omission of such language, according to the plaintiff, is indicative of the drafters' intentions not to require notice for continuations, and that Ahuja, in looking at the plain language of the charter, should have considered that her appeal would not likely succeed.

Second, in support of its argument, the plaintiff relies primarily on two cases; *Roncari Industries, Inc.* v. *Planning & Zoning Commission,* 281 Conn. 66, 912 A.2d 1008 (2007) (*Roncari Industries*), and *Carberry* v. *Zoning Board of Appeals,* Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-00-0176766, 2001 WL 1374753 (October 16, 2001) (30 Conn. L. Rptr. 537). In *Roncari Industries,* a neighbor who owned property that abutted the property at issue, appealed the decision of the town planning and zoning commission, which granted the landowner's application for a special permit. The basis of the plaintiff's appeal was that "the commission failed to satisfy the notice requirements of General Statutes (Rev. to 2001) § 8-3 regarding the public hearing because the notice given for the originally scheduled public hearing was insufficient to apprise the public that the matter was scheduled to be heard on a later date...." (Footnote omitted.) *Roncari Industries, Inc.* v. *Planning & Zoning Commission,* supra, at 70-71, 912 A.2d 1008. The court held that "[§] 8-3 does not require the publication of additional notices when the public hearing is continued or rescheduled; the statute is silent with regard to notice when the hearing is postponed. Similarly, nothing in the town's zoning regulations requires the publication of additional notices when a public hearing is rescheduled or continued." Id., at 73, 912 A.2d 1008.

Similarly, in *Carberry,* the plaintiff claimed that the notice given of a continued hearing was defective because there was no newspaper publication of the fact that the relevant application would be considered on that date. *Carberry* v. *Zoning Board of Appeals,* supra, 30 Conn. L. Rptr. at 537. The relevant notice provision in *Carberry* was that set forth in General Statutes § 8-7d.[5] Id., at 541. The court found that the notice for the continued hearing did not need to comply with the requirements in § 8-7d(a). Id. Specifically, the court stated that "[r]equiring new newspaper publication of notice for a hearing that is
148 continued beyond the original date would place an undue burden on local boards and commissions which as a general *148 practice meet during the evening hours of the work week. There are many conceivable and appropriate reasons for a zoning board of appeals not to complete a hearing on a matter in a single weekday evening. If each continuation of a hearing imposed the necessity of a new newspaper publication schedule, it would severely constrain the scheduling of new dates and slow down the process." Id.

The plaintiff purports in its brief that "[t]here are no material differences" between the present case and *Roncari Industries* and, therefore, that "[t]here is no way a reasonable litigant reading *Roncari Industries* and assessing whether the defendants' `no notice' argument had a reasonable chance of succeeding could rationally conclude that the argument had any such prospect." The plaintiff further contends that the notice provisions in *Roncari Industries* and the present case are "virtually identical." The plaintiff also asserts that the defendants' reading of *Carberry* "could only have enforced the view that the argument was hopeless." Although we agree with the plaintiff that the aforementioned case law did not necessarily support Ahuja's appeal, that fact does not automatically make Ahuja's appeal objectively baseless. The cases relied on by the plaintiff, even if brought to Ahuja's attention, would not make her appeal of the second application objectively baseless because in those cases the courts analyzed notice provisions that were entirely different from the provision in the present case. Specifically, the court in *Roncari Industries* conducted a notice analysis entirely under the purview of General Statutes (Rev. to 2001) § 8-3(a)[6] and the court in *Carberry* focused its analysis on § 8-7d(a), whereas in the present case the relevant notice provisions are §§ C6-40-11 and C6-40-12 of the charter.[7]

In its memorandum of decision granting summary judgment in favor of the defendants, the court noted that "the text of the relevant charter provisions provided Ahuja with a solid foundation to contend that a new notice was required for *every* public hearing, `continuation' or otherwise. Section C6-40-11 of the charter contains the basic requirement that the board give notice of a public hearing to be held on certain types of zoning applications. Section C6-40-12 of the charter provides specifically for the situation where a matter before the board requires more than one hearing: "If more than one public hearing is considered by the Zoning Board to be necessary or advisable, *additional hearings may be held upon due notice, as herein above set forth*.... Ahuja's argument —that the literal text of § C6-40-12 requires notice of any and all `additional hearing[s]' held in connection with an application —posits a very plausible construction of the charter provision. The text of § C6-40-12 does not limit its application to `new' or `separate' hearings, or otherwise create a category of `continuation'
149 hearings exempt from the notice requirement. The *149 provision's literal terms would seem to include *any* `additional' hearing, and its context would appear to contemplate precisely the situation confronted in connection with the second application, when the first public hearing was insufficient to complete the board's full consideration of the zoning matter at issue." (Emphasis in original.)

We conclude that the court's determination, which was grounded in the language of the relevant charter provisions, is legally and logically correct. We agree that a reasonable litigant, reading the notice provisions of §§ C6-40-11 and C6-40-12, could deduce that notice is required for every public hearing, including a continuation. In particular, the charter's use of the word "additional," without specific omission of continuations, could lead a reasonable litigant to believe that any additional hearing, including a continuation, requires notice pursuant to the relevant charter provisions. We disagree with the plaintiff's contention that the notice provisions at issue in *Roncari Industries*[8] and the charter are virtually identical. *Roncari Industries* concerned a provision of the General Statutes, and the present case concerns a notice provision from the charter. Further, General Statutes (Rev. to 2001) § 8-3(a) in *Roncari Industries* does not include the word "additional," which is included in the notice provision of the charter. The similarity between *Roncari Industries* and the present case begins and ends with the fact that both notice provisions are silent with regard to the term "continuation." We conclude, however, that the differences between the two provisions are such that a reasonable litigant relying on the notice provisions in the charter could bring an appeal on the ground of lack of notice for a continued hearing, despite the outcome in *Roncari Industries.*

Further, we conclude that the trial court's determination regarding the notice aspect of the second application is consistent with this court's prior analysis of the *Noerr-Pennington* doctrine. Specifically, in *Zeller* v. *Consolini,* supra, 59 Conn. App. at 553-54, 758 A.2d 376, this court stated that "failure to apply the *Noerr-Pennington* doctrine aggressively may create a chilling effect on the first amendment right to petition in zoning and other matters.... Indeed, such a chilling effect can be a virtual deep freeze when individual citizens not versed in the legal system and without financial resources do not exercise potentially meritorious legal challenges for fear of costly and protracted, retributive litigation from opponents." (Citations omitted; internal quotation marks omitted.) We decline to accept the plaintiff's reasoning that, on the basis of the holdings in *Roncari Industries* and *Carberry,* Ahuja should have known that her notice argument was meritless and, therefore, objectively baseless. As aforementioned, *Roncari Industries* and *Carberry* did not analyze the specific notice provisions at issue in the present case. The type and language of the notice provisions in the cases relied on by the plaintiff and that are at issue in the present case were not identical. To hold Ahuja, and future parties, to the standard suggested by the plaintiff would contradict our holding in *Zeller.* Although we agree with the court that Ahuja's appeal of the second application on the notice issue ultimately was not successful, that is not determinative of whether the appeal was objectively baseless. To the

150 contrary, we agree with the court that a reasonable litigant could have *150 expected to prevail on the basis of Ahuja's notice argument.

Finally, the court concluded that, despite the fact that Ahuja's argument was not successful before the board, "and perhaps it should have lost ... it was by no means groundless." We conclude that the court's finding in this respect is legally and logically correct. Specifically, the trial court's rationale closely adheres to the reasoning in *Zeller* v. *Consolini,* supra, 59 Conn. App. at 545, 758 A.2d 376. In particular, in *Zeller,* this court stated: "The defendants' opposition to the plaintiffs' zoning requests and the defendants' subsequent appeals were legally available to the defendants and followed applicable judicial procedure. Merely because those attempts failed does not in itself make them baseless acts. A failure of the challenged action is only one factor in determining whether an action is a sham.... [W]hen the ... defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." (Citation omitted; internal quotation marks omitted.) Id., at 560, 758 A.2d 376. Similarly, here, we conclude that the outcome of the defendants' appeal of the second application is not determinative of whether that appeal was objectively baseless under the *Noerr-Pennington* doctrine.

We conclude that, with regard to Ahuja's appeal of the second application, the court properly determined that Ahuja's actions were not objectively baseless and were not a sham that would strip away the protection of the *Noerr-Pennington* doctrine and properly found no genuine issue of material fact.

2

Mid-hearing Changes Claim

The second ground raised in Ahuja's appeal of the approval of the plaintiff's second application was that the board lacked jurisdiction to approve the application because it was materially changed by the plaintiff at the last public hearing held on November 10, 2011.

With regard to the mid-hearing changes claim, the plaintiff purports that "the trial court never addressed [Ahuja's] mid-hearing change claim and thus, expressed no view on whether it was objectively baseless or not." The defendants, in their brief, agree that the court did not address the mid-hearing change claim, but stated that the trial court was not required to address that portion of the claim because it had already made a determination that the notice portion of the appeal of the second application was not objectively baseless.

We agree with the defendants for two reasons. First, we look to the language of *Professional Real Estate Investors, Inc.,* the seminal case concerning the sham exception to the *Noerr-Pennington* doctrine. Specifically, the court stated that in order to be a sham, a "*lawsuit* must be objectively baseless...." (Emphasis added.) *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.,* supra, 508 U.S. at 60, 113 S.Ct. 1920. Further, the court stated that "[i]f an objective litigant could conclude that the *suit* is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and ... [a claim] premised on the sham exception must fail." (Emphasis added.) Id. The court's use of the broad terms "lawsuit" and "suit" reflects that it is unnecessary for each claim within an action to survive scrutiny under the sham
151 exception to the *Noerr-Pennington* *151 doctrine provided that the action contains at least one claim that is not a sham.

Second, multiple federal courts have held that an action cannot be classified as a sham so long as at least one claim in the action has objective merit. For instance, in *Trustees of University of Pennsylvania* v. *St. Jude Children's Research Hospital,* 940 F. Supp. 2d 233, 247 (E.D. Pa. 2013), the court stated that "[c]ourts have routinely held that as long as some of the claims in a complaint have a proper basis, the lawsuit is not a sham for *Noerr-Pennington* purposes." (Internal quotation marks omitted). Further, in *Dentsply International, Inc.* v. *New Technology Co.,* United States District Court, Docket No. 96-272 (MMS), 1996 WL 756766 (D. Del. December 19, 1996), the court held that "litigation will not be considered a sham so long as at least one claim in the lawsuit has objective merit." (Internal quotation marks omitted). Similar language was used by the court in *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.,* 914 F.2d 556, 565 (4th Cir. 1990), in which the court held that an action containing one claim with objective merit was "hardly a sham." Finally, in *In re Flonase Antitrust Litigation,* 795 F. Supp. 2d 300, 311-12 (E.D. Pa. 2011), stated that "[p]laintiffs do not need to show a realistic expectation of success on *all* of [the] arguments in each petition and its lawsuit." (Emphasis in original.)

Connecticut courts have yet to address whether, in the context of the *Noerr-Pennington* doctrine, a court may conclude that a party's action was not objectively baseless on the basis of one claim in the action having merit. We agree with the federal courts that have concluded that a party's action cannot be objectively baseless when at least one claim in the action has merit. We are in accordance with the court's reasoning in *Trustees of University of Pennsylvania* v. *St. Jude Children's Research Hospital,* supra, 940 F. Supp. 2d at 247, that such a holding is consistent with the "very narrow scope" of the *Noerr-Pennington* doctrine's sham exception.

As discussed in part I of this opinion, we conclude that, on the basis of the defendants' notice claim, Ahuja's appeal of the second application was not objectively baseless. For this reason, the court properly rendered summary judgment in favor of the defendants with respect to the plaintiff's claim that Ahuja's appeal of the second zoning application met the sham exception to the *Noerr-Pennington* doctrine. Accordingly, we need not reach the second ground on which Ahuja premised her appeal of the second application—that the board lacked jurisdiction to approve the application because the application had been materially changed.

B

Ahuja's Appeal of the Third Application

The plaintiff also claims that the court erred in granting summary judgment in favor of the defendants because Ahuja's appeal of the plaintiff's third zoning application was objectively baseless.

The following procedural history, as set forth by the court in its memorandum of decision, is relevant to this portion of the appeal. "The third application was submitted by [the plaintiff] to modify certain conditions that the board had placed on the development project in its previous decisions. These modifications, among other things, sought to increase the number of units approved to nineteen units; increase the amount of available parking by three additional spaces; open an entrance exit on Bradley Place without the obligation to install a traffic signal; and change the form of ownership from condominiums to
152 apartments.... [T]here was some amount of neighborhood opposition to the third application. *152 The thrust of this opposition was that the conditions attached by the board to its prior approval of the project in December, 2011 (as part of the second application) was based on a compromise reached by [the plaintiff] with opponents of the project; the neighbors claimed that [the plaintiff's] third application reneged on important components of that prior agreement by seeking modifications that would, among other things, increase the number of residential units from seventeen to nineteen and change the residential ownership from condominium to rental units....

"In a four to one split decision, the board voted to approve the third application on November 17, 2014, effective November 21, 2014. It appears ... that the majority failed to provide any reasons for its approval.... [D]uring the board's brief deliberations, Stamford's associate planner read aloud to the board from the text of condition [No.] 2 to the board's prior approval of the special exception.... Condition [No.] 2 stated that the project's \`residential development shall be limited to a total of seventeen units to be in condominium form of ownership.' The meeting minutes reflected that the board members were polled, and the majority indicated that they were \`okay with adding the two additional units.' The board did not explain why the modification was \`okay.'

"Ahuja appealed the board's decision to the Superior Court by complaint dated December 2, 2014, with a return date January 6, 2015. The appeal claimed, among other things, that there was not \`substantial evidence' in the record to support the board's approval of the special exception under § 19-3.2 of the Stamford Zoning Regulations." Specifically, in her appeal, Ahuja claimed that "[i]n approving the [third] application, the board acted illegally, unlawfully, arbitrarily, upon unlawful procedures, in excess of its authority, and in abuse of its discretion, in one or more of the following respects: (a) The board lacked jurisdiction to hear and decide the [third] application where notice of the public hearing held on November 10, 2014 was not provided to abutters within the meaning of [General Statutes] § 8-8(a)(1), [and] (b) the board lacked jurisdiction to approve the [third] application, as there was no traffic impact study submitted with the [third] application that is a prerequisite for the ... board to act upon an application pursuant to the Stamford zoning regulations." "[The plaintiff] moved to dismiss the appeal on the ground that it was not returned to court within the time required by General Statutes § 52-46a. The motion to dismiss was granted on July 6, 2015. No appeal was taken from that disposition."

Preliminarily, the court noted that, because the appeal was dismissed on procedural grounds, it did not have insight into how a reviewing court would have ruled on Ahuja's appeal of the third application. Regardless, the court stated that its

"review of the underlying record leads to the firm conviction that a court considering the merits reasonably might have concluded that substantial evidence did not support the board's decision to grant the special exception sought in the third application. It is unlikely, but a reversal might have been obtained based on a court's view of the evidence in light of the five relevant categories to be taken into account under § 19-3.2 of the Stamford zoning regulations. More likely is the possibility that a Superior Court would have been particularly concerned that the board originally saw fit, in December, 2011, to place express conditions on its approval of the special exception by allowing a maximum of seventeen residential units but, then,
153 in 2014, changed that limitation to permit the developer to increase the number of units *153 to nineteen without justifying the modification, and without explaining what circumstances leading to the original limitation had changed."

As the court alluded to in its discussion of the third application, a court reviewing the decision of a zoning board does so under the "substantial evidence" analysis. "The evidence supporting the decision of a zoning board must be substantial.... This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred.... [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.... The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely consistent with effective administration.... The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the decision of the board." (Citations omitted; internal quotation marks omitted.) *Martland* v. *Zoning Commission,* 114 Conn. App. 655, 663, 971 A.2d 53 (2009).

In its brief, the plaintiff argues that its third application did not seek a special exception and, therefore, the trial court's determination is "based on a flawed analysis." Rather, the plaintiff states that, prior to the third application, it had received two special exceptions; one via the decision on the first application and a second via the decision on the second application. The plaintiff claims that, as a result of these two special exceptions, it had already satisfied the zoning regulations special exception requirements and it was therefore entitled to approval in each instance.

The defendants argue that the court was correct in its determination that Ahuja's appeal of the third application was not objectively baseless because "[a]ny reasonable litigant in [Ahuja's] position would conclude the modifications sought were conditions that contradicted what was previously agreed upon in prior applications and approvals." As aforementioned, the third application specifically attempted to increase the number of residential units in the second floor of one of the buildings, to increase the number of available parking spots by three spaces, to change the residential use of the units from condominiums to apartments, and to open an entrance exit on Bradley Place without the obligation of a traffic signal. In support of its argument, the defendants also point to the fact that seventeen members of the public voiced their opposition to the third application at a public hearing. Finally, the defendants argue that the appeal of the third application was not objectively baseless because "the plaintiff failed to provide a traffic impact study in support of the third application, despite the study being requested by the city traffic engineer.... Stamford Zoning Regulations § 7.2C requires the applicant to submit a traffic impact study when requested by the city traffic engineer." Therefore, the defendants purport that "[a]ny reasonable litigant in [Ahuja's] position would conclude the plaintiff's failure to submit a required traffic study made the third application defective and incomplete."

154 *154 The plaintiff correctly asserts that the court did not address each of the modifications individually in determining that Ahuja had probable cause to appeal the third application. Under our plenary review, we turn first to the defendants' argument that the appeal was not objectively baseless because the plaintiff did not provide a traffic impact study, as required by Stamford zoning regulations. Preliminarily, the Connecticut Practice Series states that "[f]or a special permit to be granted, it must appear from the record before the agency that the application met all conditions imposed by the regulations." R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 33.4, p. 278. Alternatively, "[a] special permit can only be denied for failure to meet specific standards in the regulation...." Id. The relevant regulation in this case was § 7.2C15 of the Stamford Zoning Regulations, which provides in relevant part that "[a] traffic impact and access study shall be submitted, prepared by a State of Connecticut Registered Professional Engineer qualified to prepare such studies, where ... considered necessary in the judgment of the City Traffic Engineer." Here, before the trial court on the motion for summary judgment as Exhibit CC was a letter from a city traffic engineer, requesting a traffic impact study from the plaintiff for the intersection where a traffic light was proposed to be installed. The plaintiff counters that the third application was not incomplete by means of the missing traffic impact study because one of the relevant roads

in the intersection was a state road and, therefore, only the Department of Transportation (department) had the power to authorize the installation of traffic lights.

On the basis of the parties' arguments, we conclude that the court correctly determined that Ahuja's appeal of the third application was not objectively baseless. The plaintiff's failure to submit a traffic impact study resulted in its noncompliance with the Stamford zoning regulations. We agree with the defendants' argument that a reasonable litigant in Ahuja's position would conclude that the plaintiff's noncompliance resulted in an incomplete application and, thus, provided a proper basis for an appeal to the board. See *Two Yale & Towne, LLC* v. *Zoning Board of Appeals,* Superior Court, judicial district of Hartford, Docket No. CV-13-6046438-S, 2014 WL 4494318 (July 24, 2014) (court dismissed appeal on basis of incomplete application that was noncompliant with zoning regulations); *Cohen* v. *Zoning Board of Appeals,* Superior Court, judicial district of Fairfield, Docket No. CV-12-6026111-S, 2012 WL 5860391 (October 31, 2012) (court sustained appeal on basis of incomplete application that was noncompliant with town zoning regulations).

The plaintiff counters by referring to its submissions in its objection to the motion for summary judgment, arguing that shortly before the board's approval of the third application, the plaintiff testified at a public hearing regarding the traffic light. Specifically, the plaintiff testified before the board that one of the roads in question was a state road and, therefore, that only the department had the power to authorize the installation of a traffic light. The plaintiff also testified that it sought the department's authorization for a traffic light, but that the department rejected the request on the basis of a study of traffic counts in the area. During this testimony, a chairman of the board asked the plaintiff whether it had documentation confirming the department's denial of the request. The plaintiff did not definitively provide an answer as to whether documentation existed, but the record does not contain any written notice confirming the fact to which the plaintiff testified. 155 Further, the record *155 does not suggest that the city traffic engineer rescinded the requirement that the plaintiff provide a traffic impact study. Therefore, our review of the record leads to the conclusion that, on the basis of the plaintiff's failure to submit a traffic impact study, a reasonable litigant could have determined that the plaintiff's third application was noncompliant with the Stamford zoning regulations and, therefore, there was not substantial evidence supporting the approval of the application. Accordingly, we conclude that the trial court properly granted summary judgment in favor of the defendants because the appeal of the third application was not objectively baseless.

Finally, we conclude that we need not reach the issue of whether Ahuja's appeal was objectively baseless on the basis of the ground alleged therein related to modifications of the application, in addition to the omission of the traffic impact study. In coming to this conclusion, we refer to the aforementioned principle in part I A 2 of this opinion that an action cannot be a sham under the *Noerr-Pennington* doctrine so long as at least one claim within the action has merit. See *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.,* supra, 914 F.2d at 556; *Trustees of University of Pennsylvania* v. *St. Jude Children's Research Hospital,* supra, 940 F. Supp. 2d at 233; *In re Flonase Antitrust Litigation,* supra, 795 F. Supp. 2d at 311-12; *Dentsply International, Inc.* v. *New Technology Co.,* supra, United States District Court, Docket No. 96-272 (MMS). Because we conclude that a reasonable litigant could appeal the approval of the third application solely on the basis of the missing traffic impact study, we conclude that Ahuja's appeal of the approval of the third application was not objectively baseless. Therefore, the defendants met their burden to show that no genuine issue of material fact existed.

II

The plaintiff next claims that the court misinterpreted the sham exception under the *Noerr-Pennington* doctrine. Specifically, the plaintiff asserts that "objectively baseless" is not the proper standard for sham exception applicability. The plaintiff argues that because the challenged petitioning activity consists of several legal proceedings rather than a single proceeding, and that the defendants also engaged in significant, allegedly ill motivated and false communications to nongovernmental individuals and entities, the court also should have taken into account the defendants' subjective motivations and intentions. We disagree.

The plaintiff proposes that this court should develop a new sham exception analysis under the *Noerr-Pennington* doctrine that takes into account both the objective reasonableness of petitioning activity as well as the subjective intent of the party engaging in the petitioning activity. The plaintiff did not ask the trial court to fashion a new sham exception analysis or to apply such an analysis to the facts at hand. Rather, the plaintiff unequivocally asserted to the trial court in its "Response to Defendants' Motion for Summary Judgment" that "the correct test to apply to this matter is the pattern test from *California Motor Transport* [*Co.*] v. *Trucking Unlimited,* [supra, 404 U.S. at 508, 92 S.Ct. 609]."[9]

Regardless of the plaintiff's request to this court to fashion a new sham exception analysis, we conclude that the trial court
156 applied the correct analysis from *Professional* *156 *Real Estate Investors, Inc.* As aforementioned, in *Professional Real Estate Investors, Inc.,* the United States Supreme Court outlined a two part analysis under which to analyze whether petitioning activity under the *Noerr-Pennington* doctrine should be classified as a sham and, therefore, unprotected. In setting forth the sham exception analysis, the court emphasized that "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.,* supra, 508 U.S. at 60, 113 S.Ct. 1920. About twenty years before the court's holding in *Professional Real Estate Investors, Inc.,* the court had analyzed the sham exception in *California Motor Transport Co.* v. *Trucking Unlimited,* supra, 404 U.S. at 508, 92 S.Ct. 609. In *California Motor,* the court explained that sham litigation occurs where "a pattern of baseless, repetitive claims ... emerge[s] which leads the factfinder to conclude that the administrative and judicial processes have been abused." Id., at 513, 92 S. Ct. 609.

Following *California Motor,* a line of circuit court cases held that, although the *Professional Real Estate Investors, Inc.* test is well suited for a sham exception analysis involving one underlying proceeding, it is not conducive to an analysis involving a series of legal proceedings and, therefore, the *California Motor* sham exception analysis should apply in scenarios involving the latter. For example, in *Hanover 3201 Realty, LLC* v. *Village Supermarkets, Inc.,* 806 F.3d 162, 180-81 (3d Cir. 2015), the United States Court of Appeals for the Third Circuit held that "when a party alleges a series of legal proceedings, we conclude that the sham exception analysis from *California Motor* should govern. This inquiry asks whether a series of petitions were filed with or without regard to merit and for the purpose of using the governmental process (as opposed to the outcome of that process) to harm a market rival and restrain trade. In deciding whether there was such a policy of filing petitions with or without regard to merit, a court should perform a holistic review that may include looking at the defendant's filing success ... as circumstantial evidence of the defendant's subjective motivations.... Courts should also consider other evidence of bad-faith as well as the magnitude and nature of the collateral harm imposed on plaintiffs by defendants' petitioning activity...." (Citations omitted; internal quotation marks omitted.) Similarly, the United States Court of Appeals for the Second Circuit noted that, when applying the sham exception analysis from *California Motor,* the relevant issue is "whether the legal challenges are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." (Internal quotation marks omitted.) *Primetime 24 Joint Venture* v. *National Broadcasting, Co.,* 219 F.3d 92, 101 (2d Cir. 2000); see also *Waugh Chapel South, LLC* v. *United Food & Commercial Workers Union Local 27,* 728 F.3d 354 (4th Cir. 2013); *USS-POSCO Industries* v. *Contra Costa County Building & Construction Trades Council, AFL-CIO,* 31 F.3d 800 (9th Cir. 1994).

Here, the court concluded that the test set forth in *Professional Real Estate Investors, Inc.* was the correct standard to apply to the sham exception to the *Noerr-Pennington* doctrine. The court stated that the plaintiff's request that the court apply the *California Motor* analysis "is based largely on a line of cases interpreting the United States Supreme Court precedent to limit the scope of *Professional Real Estate Investors, Inc.* to circumstances not present [in the present case]. [The plaintiff] relies
157 on the Supreme Court decision in *157 *California Motor* ... a case decided more than twenty years before *Professional Real Estate Investors* [*Inc.*], but understood by some federal courts to provide an alternative `sham' analysis in cases involving `multiple' acts of petitioning activity— which includes the present case, according to [the plaintiff].[10] [The plaintiff] insists that because the sham exception described analysis in *California Motor* requires inquiry into [the] defendants' subjective motivations and intentions, this case cannot be resolved by summary judgment.... The *California Motor* analysis advanced by [the] plaintiff applies a more `holisitic' inquiry than the two part test applicable under *Professional Real Estate Investors* [*Inc.*] to petitioning activity involving single underlying proceedings." (Footnote added.) The court rejected the plaintiff's argument and instead applied the two part analysis articulated in *Professional Real Estate Investors, Inc.*

On the basis of our plenary review of the record, we conclude that the court applied the correct analysis for the sham exception. The cases relied on by the plaintiff suggest that in order for a court to apply the more holistic *California Motor* analysis, the petitioning activity must consist of a "pattern" or "series" of legal proceedings. Particularly, many of the courts that have applied the *California Motor* analysis rather than the two part test set forth in *Professional Real Estate Investors, Inc.* have done so in cases that have concerned quantities of proceedings that far outnumber those in the present case. See, e.g., *Waugh Chapel South, LLC* v. *United Food & Commercial Workers Union Local 27,* supra, 728 F.3d at 354 (court applied *California Motor* sham exception analysis in case involving fourteen underlying proceedings); *USS-POSCO Industries* v. *Contra Costa County Building & Construction Trades Council, AFL-CIO,* supra, 31 F.3d at 800 (court relied on *California Motor* analysis when petitioning activity included twenty-nine lawsuits).

Further, in its memorandum of decision, the court aptly pointed to a number of cases in which courts have applied the *Professional Real Estate Investor, Inc.* analysis to cases involving more than one underlying proceeding. In particular, the court referred to *ERBE Elektromedizin GmbH* v. *Canady Technology, LLC,* 629 F.3d 1278, 1291-92 (Fed. Cir. 2010) (court declined to apply holistic analysis to three underlying lawsuits); *Amarel* v. *Connell,* 102 F.3d 1494, 1519-20 (9th Cir. 1997) (court held that two underlying lawsuits did not trigger *California Motor* analysis); *Polaris Industries, Inc.* v. *Arctic Cat, Inc.,* United States District Court, Docket No. 15-4475 (JRT/FLN), 2017 WL 1180426 (D. Minn. March 29, 2017) (court held that three cases did not amount to series of legal proceedings requiring application of *California Motor* sham analysis); and *In re Flonase Antitrust Litigation,* supra, 795 F. Supp. 2d at 300 (court declined to apply *California Motor* test to five underlying petitions). Similarly, in *Zeller* v. *Consolini,* supra, 59 Conn. App. at 545, 758 A.2d 376, this court applied the two part analysis from *Professional Real Estate Investors, Inc.,* to a case with three underlying proceedings.

158 *158 The present case involved only three zoning appeals. The plaintiff has not demonstrated, therefore, that the approach set forth in *California Motor* should have been applied. We agree with the trial court that a court has never applied the *California Motor* sham exception analysis in a case involving so few proceedings.[11] We, therefore, agree that the trial court properly applied the two part analysis from *Professional Real Estate Investors, Inc.,* in rendering summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] Gurpreet Ahuja died on December 28, 2016, several months after the commencement of this action, and the executor of her estate has been substituted as a defendant.

[2] See *Zeller* v. *Consolini,* 59 Conn. App. 545, 758 A.2d 376 (2000), for a discussion of this doctrine.

[3] The seventh count, alleging tortious interference with business expectations, was subsequently withdrawn and is not at issue in this appeal. Likewise, the court found that "[t]here are limited allegations incorporated in the first six counts regarding what [the] plaintiff labels `nonpetitioning activity' ... but the court is under the impression that those allegations are intended to establish [the] defendants' motive and intentions underlying the petitioning activity. Only the seventh count seeks damages allegedly caused by the nonpetitioning activity." On appeal, the plaintiff does not raise a claim of error with respect to this aspect of the court's decision. The plaintiff's only reference to the nonpetitioning activity as it relates to counts one through six is in a footnote in its brief. Therein, the plaintiff states, in a conclusory fashion, that its counts of abuse of process and violation of CUTPA were pleaded on the basis of the defendants' nonpetitioning activity, and that both counts were "perfectly viable without any requirement that the underlying claim be objectively baseless." The plaintiff does not separately brief these issues within the body of its brief nor offer sufficient authority in support of its proposition. Therefore, we conclude that this portion of the plaintiff's argument is not sufficiently briefed in accordance with our briefing requirements and we consider these claims abandoned. See *Clelford* v. *Bristol,* 150 Conn. App. 229, 233, 90 A.3d 998 (2014) ("It is well settled that [w]e are not required to review claims that are inadequately briefed.... We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly.... [F]or this court judiciously and efficiently to consider claims of error raised on appeal... the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed.... The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited.... [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.)).

[4] The trial court determined that Ahuja's appeal of the plaintiff's first application was immunized under the *Noerr-Pennington* doctrine, and was not objectively baseless and, therefore, not subject to the doctrine's sham exception. In its appellate brief, the plaintiff has not set forth a claim of error with respect to the court's ruling regarding Ahuja's appeal of the first application and, therefore, we decline to review it on appeal.

[5] The portion of § 8-7d that was relevant in *Carberry* provides: "Notice of the hearing shall be published in a newspaper having a general circulation in such municipality where the land that is the subject of the hearing is located at least twice, at intervals of not less than two days, the first not more than fifteen days or less than ten days and the last not less than two days before the date set for the hearing." General Statutes § 8-7d(a). The court did not address the specific language of the statute in coming to its conclusion.

[6] At the time of the public hearing in *Roncari Industries,* § 8-3(a) required that "[n]otice of the time and place of such [public] hearing shall be published in the form of a legal advertisement appearing in a newspaper having a substantial circulation in such municipality at least twice at intervals of not less than two days, the first not more than fifteen days nor less than ten days and the last not less than two days, before such hearing...." General Statutes (Rev. to 2001) § 8-3(a).

[7] As noted in Judge Berger's January 4, 2013 memorandum of decision, "[u]nlike most zoning commissions ... planning and zoning in Stamford [is] governed by 26 Spec. Laws 1228, No. 619, hereinafter referred to as the Stamford Charter (1953), rather than by the General Statutes."

[8] The plaintiff asserts, and we agree, that the court did not refer to *Roncari Industries* in its memorandum of decision. The court did, however, refer to Judge Berger's decision, which contained analyses of both *Roncari Industries* and *Carberry.*

[9] The sham exception analysis set forth by *California Motor Transport Co.* v. *Trucking Unlimited,* supra, 404 U.S. at 508, 92 S.Ct. 609, is discussed subsequently in this opinion.

[10] The plaintiff also urges that in holistically assessing the defendants' subjective motivations, we should also consider their allegedly false, nonpetitioning activities directed to nongovernmental agencies to foster opposition to the plaintiff's proposed development. The plaintiff does not offer any authority in support of this argument. As previously noted, the court, in finding that none of the defendants' litigation was baseless, did not need to consider the defendants' subjective motivations, which is the second part of the test set forth in *Professional Real Estate Investors, Inc.*

[11] To our knowledge, the *California Motor* sham exception analysis was applied once in the context of an action involving four proceedings. See *Hanover 3201 Realty, LLC* v. *Village Supermarkets, Inc.*, supra, 806 F.3d at 162. The court, however, provided little reasoning for such application. The court noted "we do not set a minimum number requirement for the applicability of *California Motor* or find that four sham petitions will always support the use of *California Motor."* Id., at 181. The plaintiff's reliance on this case does not persuade this court to abandon the two part analysis set forth in *Professional Real Estate Investors, Inc.*

508 U.S. 49 (1993)

PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL.
v.
COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

No. 91-1043.

United States Supreme Court.

Argued November 2, 1992.
Decided May 3, 1993.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

50 *50 Thomas, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Blackmun, Scalia, Kennedy, and
51 Souter, JJ., joined. *51 Souter, J., filed a concurring opinion, *post,* p. 66. Stevens, J., filed an opinion concurring in the judgment, in which O'Connor, J.,joined, *post,* p. 67.

Patrick J. Coyne argued the cause for petitioners. With him on the briefs was *James R. Loftis III.*

Andrew J. Pincus argued the cause for respondents. With him on the brief were *Richard J. Favretto, Roy T. Englert, Jr.,* and *Stephen A. Kroft.*[*]

Justice Thomas, delivered the opinion of the Court.

This case requires us to define the "sham" exception to the doctrine of antitrust immunity first identified in ***Eastern Railroad Presidents Conference*** v. ***Noerr Motor Freight, Inc.***, 365 U. S. 127 (1961), as that doctrine applies in the litigation context. Under the sham exception, activity "ostensibly directed toward influencing governmental action" does not qualify for *Noerr* immunity if it "is a mere sham to cover. . . an attempt to interfere directly with the business relationships of a competitor." *Id.,* at 144. We hold that litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless. The Court of Appeals for the Ninth Circuit refused to characterize as sham a lawsuit that the antitrust defendant admittedly had probable cause to institute. We affirm.

I

Petitioners Professional Real Estate Investors, Inc., and Kenneth F. Irwin (collectively, PRE) operated La Mancha Private Club and Villas, a resort hotel in Palm Springs, California. Having installed videodisc players in the resort's hotel rooms and
52 assembled a library of more than 200 motion picture titles, PRE rented videodiscs to guests for in-room *52 viewing. PRE also sought to develop a market for the sale of videodisc players to other hotels wishing to offer in-room viewing of prerecorded material. Respondents, Columbia Pictures Industries, Inc., and seven other major motion picture studios (collectively, Columbia), held copyrights to the motion pictures recorded on the videodiscs that PRE purchased. Columbia also licensed the transmission of copyrighted motion pictures to hotel rooms through a wired cable system called Spectradyne. PRE therefore competed with Columbia not only for the viewing market at La Mancha but also for the broader market for in-room entertainment services in hotels.

In 1983, Columbia sued PRE for alleged copyright infringement through the rental of videodiscs for viewing in hotel rooms. PRE counterclaimed, charging Columbia with violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1-2,[1] and various state-law infractions. In particular, PRE alleged that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.

The parties filed cross-motions for summary judgment on Columbia's copyright claim and postponed further discovery on PRE's antitrust counterclaims. Columbia did not dispute that PRE could freely sell or lease lawfully purchased videodiscs under the Copyright Act's "first sale" doctrine, see 17 U. S. C. § 109(a), and PRE conceded that the playing of videodiscs constituted "performance" of motion pictures, see 17 U. S. C. § 101 (1988 ed. and Supp. III). As a result, summary
53 judgment depended solely on whether rental of videodiscs for in-room viewing infringed Columbia's exclusive right to *53

"perform the copyrighted work[s] publicly." § 106(4). Ruling that such rental did not constitute public performance, the District Court entered summary judgment for PRE. 228 USPQ 743 (CD Cal. 1986). The Court of Appeals affirmed on the grounds that a hotel room was not a "public place" and that PRE did not "transmit or otherwise communicate" Columbia's motion pictures. 866 F. 2d 278 (CA9 1989). See 17 U. S. C. § 101 (1988 ed. and Supp. III).

On remand, Columbia sought summary judgment on PRE's antitrust claims, arguing that the original copyright infringement action was no sham and was therefore entitled to immunity under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra.* Reasoning that the infringement action "was clearly a legitimate effort and therefore not a sham," 1990-1 Trade Cases ¶ 68,971, p. 63,242 (CD Cal. 1990), the District Court granted the motion:

> "It was clear from the manner in which the case was presented that [Columbia was] seeking and expecting a favorable judgment. Although I decided against [Columbia], the case was far from easy to resolve, and it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well. I find that there was probable cause for bringing the action, regardless of whether the issue was considered a question of fact or of law." *Id.,* at 63,243.

The court then denied PRE's request for further discovery on Columbia's intent in bringing the copyright action and dismissed PRE's state-law counterclaims without prejudice.

The Court of Appeals affirmed. 944 F. 2d 1525 (CA9 1991). After rejecting PRE's other allegations of anticompetitive
54 conduct, see *id.,* at 1528-1529,[2] the court focused on *54 PRE's contention that the copyright action was indeed sham and that Columbia could not claim *Noerr* immunity. The Court of Appeals characterized "sham" litigation as one of two types of "abuse of . . . judicial processes": either "`misrepresentations . . . in the adjudicatory process' " or the pursuit of "`a pattern of baseless, repetitive claims' " instituted "`without probable cause, and regardless of the merits.' " 944 F. 2d, at 1529 (quoting *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 513, 512 (1972)). PRE neither "allege[d] that the [copyright] lawsuit involved misrepresentations" nor "challenge[d] the district court's finding that the infringement action was brought with probable cause, i. e., that the suit was not baseless." 944 F. 2d, at 1530. Rather, PRE opposed summary judgment solely by arguing that "the copyright infringement lawsuit [was] a sham because [Columbia] did not honestly believe that the infringement claim was meritorious." *Ibid.*

The Court of Appeals rejected PRE's contention that "subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Ibid.* Instead, the court reasoned that the existence of probable cause "preclude[d] the application of the sham exception as a matter of law" because "a suit brought with probable cause does not fall within the sham exception to the *Noerr -Pennington* doctrine." *Id.,* at 1531, 1532. Finally, the court observed that PRE's failure to show that "the copyright infringement action was baseless" rendered irrelevant any "evidence of [Columbia's] subjective intent." *Id.,* at 1533. It accordingly rejected PRE's request for further discovery on Columbia's intent.

55 *55 The Courts of Appeals have defined "sham" in inconsistent and contradictory ways.[3] We once observed that "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.,* 486 U. S. 492, 508, n. 10 (1988). The array of definitions adopted by lower courts demonstrates that this observation was prescient.

II

56 PRE contends that "the Ninth Circuit erred in holding that an antitrust plaintiff must, as a threshold prerequisite *56. . . , establish that a sham lawsuit is baseless as a matter of law." Brief for Petitioners 14. It invites us to adopt an approach under which either "indifference to . . . outcome," *ibid.,* or failure to prove that a petition for redress of grievances "would . . . have been brought but for [a] predatory motive," Tr. of Oral Arg. 10, would expose a defendant to antitrust liability under the sham exception. We decline PRE's invitation.

Those who petition government for redress are generally immune from antitrust liability. We first recognized in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961), that "the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.,* at 136. Accord, *Mine Workers* v. *Pennington,* 381 U. S. 657, 669 (1965). In light of the government's "power to act in [its] representative capacity" and "to take actions . . . that operate to restrain trade," we reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes." *Noerr,* 365 U. S., at 137. Nor did we "impute to Congress an intent to invade" the First Amendment right to petition. *Id.,* at 138.

Noerr, however, withheld immunity from "sham" activities because "application of the Sherman Act would be justified" when petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Id.,* at 144. In *Noerr* itself, we found that a publicity campaign by railroads seeking legislation harmful to truckers was no sham in that the "effort to influence legislation" was "not only genuine but also highly successful." *Ibid.*

57 In *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972), we elaborated on *Noerr* in two relevant *57 respects. First, we extended *Noerr* to "the approach of citizens . . . to administrative agencies . . . and to courts." 404 U. S., at 510. Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers "sought to bar . . . competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" by "institut[ing] . . . proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." *Id.,* at 512 (internal quotation marks omitted). We left unresolved the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.[4]

Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness. *Noerr* rejected the contention that an attempt "to influence the passage and enforcement of laws" might lose immunity merely because the lobbyists' "sole purpose . . . was to destroy [their] competitors." 365 U. S., at 138. Nor were we persuaded by a showing that a publicity campaign "was intended to and did in fact injure [competitors] in their relationships with the public and with their customers," since such "direct injury" was merely "an incidental effect of the. . . campaign to
58 influence governmental action." *Id.,* at 143. *58 We reasoned that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Id.,* at 139. In short, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington,* 381 U. S., at 670.

Nothing in *California Motor Transport* retreated from these principles. Indeed, we recognized that recourse to agencies and courts should not be condemned as sham until a reviewing court has "discern[ed] and draw[n]" the "difficult line" separating objectively reasonable claims from "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused." 404 U. S., at 513. Our recognition of a sham in that case signifies that the institution of legal proceedings "without probable cause" will give rise to a sham if such activity effectively "bar[s] . . . competitors from meaningful access to adjudicatory tribunals and so . . . usurp[s] th[e] decisionmaking process." *Id.,* at 512.

Since *California Motor Transport,* we have consistently assumed that the sham exception contains an indispensable objective component. We have described a sham as "evidenced by repetitive lawsuits carrying the hallmark of *insubstantial* claims." *Otter Tail Power Co.* v. *United States,* 410 U. S. 366, 380 (1973) (emphasis added). We regard as sham "private action that is not genuinely aimed at procuring favorable government action," as opposed to "a valid effort to influence government action." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.,* 486 U. S., at 500, n. 4. And we have explicitly observed that a successful "effort to influence governmental action . . . certainly cannot be characterized as a sham." *Id.,* at 502. See also *Vendo Co.* v. *Lektro-Vend Corp.,* 433 U. S. 623, 645 (1977) (Blackmun, J., concurring in result) (describing a
59 successful lawsuit as a "genuine attemp[t] to use the . . . adjudicative process legitimately" *59 rather than "`a pattern of baseless, repetitive claims' "). Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. See, *e. g., FTC* v. *Superior Court Trial Lawyers Assn.,* 493 U. S. 411, 424 (1990); *NAACP* v. *Claiborne Hardware Co.,* 458 U. S. 886, 913-914 (1982). Cf. *Vendo, supra,* at 635-636, n. 6, 639, n. 9 (plurality opinion of Rehnquist, J.); *id.,* at 644, n., 645 (Blackmun, J., concurring in result). Indeed, by analogy to *Noerr* `s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U. S. 731, 743-744 (1983). Our decisions therefore establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental

action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Noerr,* 365 U. S., at 140, quoted in *Pennington, supra,* at 669.

Our most recent applications of *Noerr* immunity further demonstrate that neither *Noerr* immunity nor its sham exception turns on subjective intent alone. In *Allied Tube, supra,* at 503, and *FTC* v. *Trial Lawyers, supra,* at 424, 427, and n. 11, we refused to let antitrust defendants immunize otherwise unlawful restraints of trade by pleading a subjective intent to seek favorable legislation or to influence governmental action. Cf. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.,* 468 U. S. 85, 101, n. 23 (1984) ("[G]ood motives will not validate an otherwise anticompetitive practice"). In *Columbia* v. *Omni Outdoor Advertising, Inc.,* 499 U. S. 365 (1991), we similarly held that challenges to allegedly sham petitioning activity must be resolved according to objective criteria. We dispelled the notion that an antitrust plaintiff could
60 prove a sham merely by showing that its competitor's "purposes were to delay [the *60 plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate . . . administrative and legislative fora." *Id.,* at 381 (internal quotation marks omitted). We reasoned that such inimical intent "may render the manner of lobbying improper or even unlawful, but does not necessarily render it a `sham.' " *Ibid.* Accord, *id.,* at 398 (Stevens, J., dissenting).

In sum, fidelity to precedent compels us to reject a purely subjective definition of "sham." The sham exception so construed would undermine, if not vitiate, *Noerr.* And despite whatever "superficial certainty" it might provide, a subjective standard would utterly fail to supply "real `intelligible guidance.' " *Allied Tube, supra,* at 508, n. 10.

III

We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and an antitrust claim premised on the sham exception must fail.[5] Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless
61 lawsuit conceals "an attempt to interfere *61 *directly* with the business relationships of a competitor," *Noerr, supra,* at 144 (emphasis added), through the "use [of] the governmental *process* —as opposed to the *outcome* of that process—as an anticompetitive weapon," *Omni,* 499 U. S., at 380 (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Of course, even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham." See *Omni, supra,* at 382; *Allied Tube,* 486 U. S., at 500, n. 4; *Noerr, supra,* at 144; *Vendo Co.* v. *Lektro-Vend Corp., supra,* at 645 (Blackmun, J., concurring in result). The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may *reasonably* be resolved in favor of either party." *Anderson* v. *Liberty Lobby, Inc.,* 477 U. S. 242, 250 (1986) (emphasis added). On the other hand, "genuine" also means "sincerely and honestly felt or experienced." Webster's Dictionary, *supra,* at 948. To be sham, therefore, litigation must fail to be "genuine" in both senses of the word.[6]

62 *62 **IV**

We conclude that the Court of Appeals properly affirmed summary judgment for Columbia on PRE's antitrust counterclaim. Under the objective prong of the sham exception, the Court of Appeals correctly held that sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief. See 944 F. 2d, at 1529.

The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings,[7] requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil

lawsuit and that the defendant pressed the action for an improper, malicious purpose. *Stewart* v. *Sonneborn,* 98 U. S. 187, 194 (1879); *Wyatt* v. *Cole,* 504 U. S. 158, 176 (1992) (Rehnquist, C. J., dissenting); T. Cooley, Law of Torts *181. Cf. *Wheeler* v. *Nesbitt,* 24 How. 544, 549-550 (1861) (related tort for malicious prosecution of criminal charges). Probable
63 cause to institute civil proceedings requires no more than a "reasonabl[e] belie[f] that there is a chance that [a] claim *63 may be held valid upon adjudication" (internal quotation marks omitted). *Hubbard* v. *Beatty & Hyde, Inc.,* 343 Mass. 258, 262, 178 N. E. 2d 485, 488 (1961); Restatement (Second) of Torts § 675, Comment *e,* pp. 454-455 (1977). Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. See *Crescent City Live Stock Co.* v. *Butchers' Union SlaughterHouse Co.,* 120 U. S. 141, 149 (1887); *Wheeler, supra,* at 551; *Liberty Loan Corp. of Gadsden* v.*Mizell,* 410 So. 2d 45, 48 (Ala. 1982). Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr* `s sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause. *Stewart, supra,* at 194; *Wheeler, supra,* at 551; 2 C. Addison, Law of Torts § 1, ¶ 853, pp. 67-68 (1876); T. Cooley, *supra,* at *184. When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Under our decision today, therefore, a proper probable-cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.

The District Court and the Court of Appeals correctly found that Columbia had probable cause to sue PRE for copyright infringement. Where, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law. *Crescent, supra,* at 149; *Stewart, supra,* at 194; *Nelson* v. *Miller,* 227 Kan. 271, 277, 607 P. 2d 438, 444 (1980); *Stone* v. *Crocker,* 41 Mass. 81, 84-85 (1831); J. Bishop, Commentaries on NonContract Law § 240, p. 96 (1889). See also *Director General of Railroads* v. *Kastenbaum,* 263 U. S. 25, 28 (1923) ("The question is
64 not whether [the defendant] thought the facts to *64 constitute probable cause, but whether the court thinks they did"). Columbia enjoyed the "exclusive righ[t] . . . to perform [its] copyrighted" motion pictures "publicly." 17 U. S. C. § 106(4). Regardless of whether it intended any monopolistic or predatory use, Columbia acquired this statutory right for motion pictures as "original" audiovisual "works of authorship fixed" in a "tangible medium of expression." § 102(a)(6). Indeed, to condition a copyright upon a demonstrated lack of anticompetitive intent would upset the notion of copyright as a "limited grant" of "monopoly privileges" intended simultaneously "to motivate the creative activity of authors" and "to give the public appropriate access to their work product." *Sony Corp. of America* v. *Universal City Studios, Inc.,* 464 U. S. 417, 429 (1984).

When the District Court entered summary judgment for PRE on Columbia's copyright claim in 1986, it was by no means clear whether PRE's videodisc rental activities intruded on Columbia's copyrights. At that time, the Third Circuit and a District Court within the Third Circuit had held that the rental of video cassettes for viewing in on-site, private screening rooms infringed on the copyright owner's right of public performance. *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.,* 749 F. 2d 154 (1984); *Columbia Pictures Industries, Inc.* v. *Aveco, Inc.,* 612 F. Supp. 315 (MD Pa. 1985), aff'd, 800 F. 2d 59 (1986). Although the District Court and the Ninth Circuit distinguished these decisions by reasoning that hotel rooms offered a degree of privacy more akin to the home than to a video rental store, see 228 USPQ, at 746; 866 F. 2d, at 280-281, copyright scholars criticized both the reasoning and the outcome of the Ninth Circuit's decision, see 1 P. Goldstein, Copyright: Principles, Law and Practice § 5.7.2.2, pp. 616-619 (1989); 2 M. Nimmer & D. Nimmer, Nimmer on Copyright § 8.14[C][3], pp. 8-168 to 8-173 (1992). The Seventh Circuit expressly "decline[d] to follow" the Ninth Circuit and adopted
65 instead the Third Circuit's definition of a "public place." *Video* *65 *Views, Inc.* v. *Studio 21, Ltd.,* 925 F. 2d 1010, 1020, cert. denied, 502 U. S. 861 (1991). In light of the unsettled condition of the law, Columbia plainly had probable cause to sue.

Any reasonable copyright owner in Columbia's position could have believed that it had some chance of winning an infringement suit against PRE. Even though it did not survive PRE's motion for summary judgment, Columbia's copyright action was arguably "warranted by existing law" or at the very least was based on an objectively "good faith argument for the extension, modification, or reversal of existing law." Fed. Rule Civ. Proc. 11. By the time the Ninth Circuit had reviewed all claims in this litigation, it became apparent that Columbia might have won its copyright suit in either the Third or the Seventh Circuit. Even in the absence of supporting authority, Columbia would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success. A court could reasonably conclude that Columbia's infringement action was an objectively plausible effort to enforce rights. Accordingly, we conclude that PRE failed to establish the objective prong of *Noerr* `s sham exception.

Finally, the Court of Appeals properly refused PRE's request for further discovery on the economic circumstances of the underlying copyright litigation. As we have held, PRE could not pierce Columbia's *Noerr* immunity without proof that Columbia's infringement action was objectively baseless or frivolous. Thus, the District Court had no occasion to inquire whether Columbia was indifferent to the outcome on the merits of the copyright suit, whether any damages for infringement would be too low to justify Columbia's investment in the suit, or whether Columbia had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process. Contra, *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.,* 694
66 F. 2d 466, 472 (CA7 1982), cert. denied, 461 U. S. 958 (1983). Such matters concern Columbia's *66 economic motivations in bringing suit, which were rendered irrelevant by the objective legal reasonableness of the litigation. The existence of probable cause eliminated any "genuine issue as to any material fact," Fed. Rule Civ. Proc. 56(c), and summary judgment properly issued.

We affirm the judgment of the Court of Appeals.

So ordered.

Justice Souter, concurring.

The Court holds today that a person cannot incur antitrust liability merely by bringing a lawsuit as long as the suit is not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Ante,* at 60. The Court assumes that the District Court and the Court of Appeals were finding this very test satisfied when they concluded that Columbia's suit against PRE for copyright infringement was supported by "probable cause," a standard which, as the Court explains it in this case, requires a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication." *Ante,* at 62-63 (internal quotation marks omitted). I agree that this term, so defined, is rightly read as expressing the same test that the Court announces today; the expectation of a reasonable litigant can be dubbed a "reasonable belief," and realistic expectation of success on the merits can be paraphrased as "a chance of being held valid upon adjudication."

Having established this identity of meaning, however, the Court proceeds to discuss the particular facts of this case, not in terms of its own formulation of objective baselessness, but in terms of "probable cause." Up to a point, this is understandable; the Court of Appeals used the term "probable cause" to represent objective reasonableness, and it seems natural to use the same term when reviewing that court's conclusions. Yet as the Court acknowledges, *ante,* at 63, since
67 there is no dispute over the facts underlying the suit *67 at issue here, the question whether that suit was objectively baseless is purely one of law, which we are obliged to consider *de novo.* There is therefore no need to frame the question in the Court of Appeals's terms. Accordingly, I would prefer to put the question in our own terms, and to conclude simply that, on the undisputed facts and the law as it stood when Columbia filed its suit, a reasonable litigant could realistically have expected success on the merits.

My preference stems from a concern that other courts could read today's opinion as transplanting every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal antitrust law. I do not understand the Court to mean anything of the sort, however, any more than I understand its citation of Rule 11 of the Federal Rules of Civil Procedure, see *ante,* at 65, to signal the importation of every jot and tittle of the law of attorney sanctions. Rather, I take the Court's use of the term "probable cause" merely as shorthand for a reasonable litigant's realistic expectation of success on the merits, and on that understanding, I join the Court's opinion.

Justice Stevens, with whom Justice O'Connor joins, concurring in the judgment.

While I agree with the Court's disposition of this case and with its holding that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent," *ante,* at 57, I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court's opinion. Specifically, I disagree with the Court's equation of "objectively baseless" with the answer to the question whether any "reasonable litigant could realistically expect success on the merits."[1] There
68 might well be lawsuits that fit the latter definition *68 but can be shown to be objectively *unreasonable,* and thus shams. It might not be objectively reasonable to bring a lawsuit just because some form of success on the merits— no matter how insignificant—could be expected.[2] With that possibility in mind, the Court should avoid an unnecessarily broad holding that it might regret when confronted with a more complicated case.

As the Court recently explained, a "sham" is the use of "the governmental *process* —as opposed to the *outcome* of that process—as an anticompetitive weapon." *Columbia* v. *Omni Outdoor Advertising, Inc.,* 499 U. S. 365, 380 (1991). The

distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court's decision whether a particular filing, or series of filings, is a sham. The label "sham" is appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to governmental agencies. It might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to
69 achieve that result without the benefit of collateral injuries *69 imposed on its competitor by the legal process alone. Litigation filed or pursued for such collateral purposes is fundamentally different from a case in which the relief sought in the litigation itself would give the plaintiff a competitive advantage or, perhaps, exclude a potential competitor from entering a market with a product that either infringes the plaintiff's patent or copyright or violates an exclusive franchise granted by a governmental body.

The case before us today is in the latter, obviously legitimate, category. There was no unethical or other improper use of the judicial system; instead, respondents invoked the federal court's jurisdiction to determine whether they could lawfully restrain competition with petitioners. The relief they sought in their original action, if granted, would have had the anticompetitive consequences authorized by federal copyright law. Given that the original copyright infringement action was objectively reasonable—and the District Court, the Court of Appeals, and this Court all agree that it was—neither the respondents' own measure of their chances of success nor an alleged goal of harming petitioners provides a sufficient basis for treating it as a sham. We may presume that every litigant intends harm to his adversary; moreover, uncertainty about the possible resolution of unsettled questions of law is characteristic of the adversary process. Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek a competitive advantage in a doubtful case. Thus, the Court's disposition of this case is unquestionably correct.

I am persuaded, however, that all, or virtually all, of the Courts of Appeals that have reviewed similar claims (involving a single action seeking to enforce a property right) would have reached the same conclusion. To an unnecessary degree, therefore, the Court has set up a straw man to justify its elaboration of a two-part test describing all potential shams. Of the
70 10 cases cited by the Court as evidence of *70 widespread confusion about the scope of the "sham" exception to the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961), and *Mine Workers* v. *Pennington,* 381 U. S. 657 (1965), see *ante,* at 55, n. 3, 5 share three important characteristics with this case: The alleged injury to competition was defined by the prayer for relief in the antitrust defendant's original action; there was no unethical conduct or collateral harm "external to the litigation or to the result reached in the litigation";[3] and there had been no series of repetitive claims. Each of those courts concluded, as this Court does today, that allegations of subjective anticompetitive motivation do not make an otherwise reasonable lawsuit a sham.[4]

In each of the five other cases cited by the Court, the plaintiff alleged antitrust violations more extensive than the filing of a single anticompetitive lawsuit. In three of those cases the core of the alleged antitrust violation lay in the act of petitioning
71 the government for relief: One involved the repetitive filing of baseless administrative claims,[5] another involved *71 extensive evidence of anticompetitive motivation behind the lawsuit that followed an elaborate and unsuccessful lobbying effort,[6] and in the third a collateral lawsuit was only one of the many ways in which the antitrust defendant had allegedly
72 tried to put the plaintiff out of business.[7] In each *72 of these cases the court showed appropriate deference to our opinions in *Noerr* and *Pennington,* in which we held that the act of petitioning the government (usually in the form of lobbying) deserves especially broad protection from antitrust liability. The Court can point to nothing in these three opinions that would require a different result here. The two remaining cases—in which the Courts of Appeals did state that a successful lawsuit could be a sham—did not involve lobbying, but did contain much broader and more complicated allegations than petitioners presented below.[8] Like the three opinions described above, these decisions should not be expected to offer guidance, nor be blamed for spawning confusion, in a case alleging that the filing of a single lawsuit violated the Sherman Act.

Even in this Court, more complicated cases, in which, for example, the alleged competitive injury has involved something
73 more than the threat of an adverse outcome in a single *73 lawsuit, have produced less definite rules. Repetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972). In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive. Moreover, a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market and to interfere with a

potential competitor's financing without any interest in the outcome of the lawsuit itself, see *Otter Tail Power Co.* v. *United States,* 410 U. S. 366, 379, n. 9 (1973); *Westmac, Inc.* v. *Smith,* 797 F. 2d 313, 322 (CA6 1986) (Merritt, C. J., dissenting). It is in more complex cases that courts have required a more sophisticated analysis—one going beyond a mere evaluation of the merits of a single claim.

In one such case Judge Posner made the following observations about the subtle distinction between suing a competitor to get damages and filing a lawsuit only in the hope that the expense and burden of defending it will make the defendant abandon its competitive behavior:

> "But we are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law. Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it could hope to get if it did win, were too small compared to
> 74 what it would have to spend on the litigation—except that it wanted to *74 use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and that this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms. In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome. See *City of Gaines- ville* v. *Florida Power & Light Co.,* 488 F. Supp. 1258, 1265-66 (S.D. Fla. 1980).
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> "Some students of antitrust law would regard all of our examples of anticompetitive litigation as fanciful, and in all the evidentiary problems of disentangling real from professed motives would be acute. Concern with the evidentiary problems may explain why some courts hold that a single lawsuit cannot provide a basis for an antitrust claim (see Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U. Chi. L. Rev. 80, 109-10 (1977))—an issue we need not face here since three improper lawsuits are alleged, and it can make no difference that they were not all against Grip-Pak. Still, we think it is premature to hold that litigation, unless malicious in the tort sense, can never be actionable under the antitrust laws. The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, see, e. g., *Products Liability Ins. Agency, Inc.* v. *Crum & Forster Ins. Cos.,* 682 F. 2d 660, 663-64 (7th
> 75 Cir. 1982), it becomes a matter of antitrust concern. This is *75 not to say that litigation is actionable under the antitrust laws merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating. The difficulty of determining the true purpose is great but no more so than in many other areas of antitrust law." *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.,* 694 F. 2d 466, 472 (1982).

It is important to remember that the distinction between "sham" litigation and genuine litigation is not always, or only, the difference between lawful and unlawful conduct; objectively reasonable lawsuits may still break the law. For example, a manufacturer's successful action enforcing resale price maintenance agreements,[9] restrictive provisions in a license to use a patent or a trademark,[10] or an equipment lease,[11] may evidence, or even constitute, violations of the antitrust laws. On the other hand, just because a sham lawsuit has grievously harmed a competitor does not necessarily mean that it has violated the Sherman Act. See *Spectrum Sports, Inc.* v. *McQuillan,* 506 U. S. 447, 455-459 (1993). The rare plaintiff who successfully proves a sham must still satisfy the exacting elements of an antitrust demand. See *ante,* at 61.

In sum, in this case I agree with the Court's explanation of why respondents' copyright infringement action was not
76 "objectively baseless," and why allegations of improper subjective *76 motivation do not make such a lawsuit a "sham." I

would not, however, use this easy case as a vehicle for announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process. Accordingly, I concur in the Court's judgment but not in its opinion.

[*] *Solicitor General Starr, Acting Assistant Attorney General James, Deputy Solicitor General Wallace, Michael R. Dreeben, Catherine G. O'Sullivan,* and *James M. Spears* filed a brief for the United States as *amicus curiae* urging affirmance.

[1] Section 1 of the Sherman Act prohibits "[e]very contract, combination. . . , or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C.§ 1. Section 2 punishes "[e]very person who shall monopolize, or attempt to monopolize,or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

[2] The Court of Appeals held that Columbia's alleged refusal to grant copyright licenses was not "separate and distinct" from the prosecution of its infringement suit.944 F. 2d, at 1528.The court also held that PRE had failed to establish how it could have suffered antitrust injury from Columbia's other allegedly anticompetitive acts. *Id.,* at 1529. Thus, whatever antitrust injury Columbia inflicted must have stemmed from the attempted enforcement of copyrights, and we do not consider whether Columbia could have made a valid claim of immunity for anticompetitive conduct independent of petitioning activity. Cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U. S. 690, 707-708 (1962).

[3] Several Courts of Appeals demand that an alleged sham be proved legally unreasonable. See *McGuire Oil Co.* v. *Mapco, Inc.,* 958 F. 2d 1552, 1560, and n. 12 (CA11 1992); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.,* 700 F. 2d 785, 809-812 (CA2 1983), cert. denied, 464 U. S. 1073 (1984); *Hydro-Tech Corp.* v. *Sundstrand Corp.,* 673 F. 2d 1171, 1177 (CA10 1982); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Assn.,* 214 U. S. App. D. C. 76, 85, 89, 663 F. 2d 253, 262, 266 (1981), cert. denied, 455 U. S. 928 (1982). Still other courts have held that successful litigation by definition cannot be sham. See, *e. g., Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.,* 914 F. 2d 556, 564-565 (CA4 1990), cert. denied, 499 U. S. 947 (1991); *South Dakota* v. *Kansas City Southern Industries, Inc.,* 880 F. 2d 40, 54 (CA8 1989), cert. denied *sub nom. South Dakota* v. *Kansas City Southern R. Co.,* 493 U. S. 1023 (1990); *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.,* 749 F. 2d 154, 161 (CA3 1984).

Other Courts of Appeals would regard some meritorious litigation as sham. The Sixth Circuit treats "genuine [legal] substance" as raising merely "a *rebuttable* presumption" of immunity. *Westmac, Inc.* v. *Smith,* 797 F. 2d 313, 318 (1986) (emphasis added), cert. denied, 479 U. S. 1035 (1987). The Seventh Circuit denies immunity for the pursuit of valid claims if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.,* 694 F. 2d 466, 472 (1982), cert. denied, 461 U. S. 958 (1983). Finally, in the Fifth Circuit, "success on the merits does not . . . preclude" proof of a sham if the litigation was not "significantly motivated by a genuine desire for judicial relief." *In re Burlington Northern, Inc.,* 822 F. 2d 518, 528 (1987), cert. denied *sub nom. Union Pacific R. Co.* v. *Energy Transportation Systems, Inc.,* 484 U. S. 1007 (1988).

[4] *California Motor Transport* did refer to the antitrust defendants' "purpose to deprive .. . competitors of meaningful access to the . . . courts." 404 U. S., at 512. See also *id.,* at 515 (noting a "purpose to eliminate . . . a competitor by denying him free and meaningful access to the agencies and courts");*id.,* at 518 (Stewart, J.,concurring in judgment) (agreeing that the antitrust laws could punish acts intended "to discourage and ultimately to prevent [a competitor] from invoking" administrative and judicial process). That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.

[5] A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding" that an ultimately unsuccessful "action must have been unreasonable or without foundation." *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412, 421-422 (1978). Accord, *Hughes* v. *Rowe,* 449 U. S. 5, 14-15 (1980) *(per curiam).* The court must remember that "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Christiansburg, supra,* at 422.

[6] In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport,* 404 U. S., at 512-513. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. Cf. Fed. Rule Civ. Proc. 60(b)(3) (allowing a federal court to "relieve a party . . . from a final judgment" for "fraud . . . , misrepresentation, or other misconduct of an adverse party"); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U. S. 172, 176-177 (1965); *id.,* at 179-180 (Harlan, J., concurring).

[7] This tort is frequently called "malicious prosecution," which (strictly speaking) governs the malicious pursuit of *criminal* proceedings without probable cause. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 120, p. 892 (5th ed. 1984). The threshold for showing probable cause is no higher in the civil context than in the criminal. See Restatement (Second) of Torts § 674, Comment *e,* pp. 454-455 (1977).

[1] *Ante,* at 60. See also *ante,* at 62: "[S]ham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief "; *ante,* at 60: "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr* . .. ." But see *ante,* at 62: "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." And see *ante,* at 65: "Columbia's copyright action was arguably `warranted by existing law' " under the standards of Federal Rule of Civil Procedure 11. These varied restatements of the Court's new test make it unclear whether it is willing to affirm the Court of Appeals by any of these standards individually, or by all of them together.

[2] The Court's recent decision in *Farrar* v. *Hobby,* 506 U. S. 103 (1992) makes me wonder whether "10 years of litigation and two trips to the Court of Appeals" to recover "one dollar from one defendant," *id.,* at 116 (O'Connor, J., concurring), would qualify as a reasonable expectation of "favorable relief" under today's opinion.

[3] *Omni Resource Development Corp.* v. *Conoco, Inc.,* 739 F. 2d 1412, 1414 (CA9 1984) (Kennedy, J.).

[4] See *McGuire Oil Co.* v. *Mapco, Inc.,* 958 F. 2d 1552 (CA11 1992) (unsuccessful action to enjoin alleged violations of Alabama's Motor Fuel Marketing Act not a sham); *Hydro-Tech Corp.* v. *Sundstrand Corp.,* 673 F. 2d 1171 (CA10 1982) (unsuccessful action alleging misappropriation of trade secrets not a sham); *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.,* 914 F. 2d 556 (CA4 1990) (successful action imposing constructive trust on profits derived from breach of nondisclosure agreement not a sham); *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.,* 749 F. 2d 154 (CA3 1984) (successful copyright infringement not a sham); *South Dakota* v. *Kansas City Southern Industries, Inc.,* 880 F. 2d 40 (CA8 1989) (successful action to enjoin breach of contract not a sham; the court was careful to point out, however, that success does not "categorically preclude a finding of sham." *Id.* , at 54, n. 30).

[5] *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.,* 700 F. 2d 785 (CA2 1983), cert. denied, 464 U. S. 1073 (1984). The Second Circuit found that AT&T's continued filing of administrative tariffs long after those claims had become objectively unreasonable supported a jury's sham finding. AT&T's anticompetitive actions were in fact so far removed from the act of petitioning the government for relief that Chief Judge Oakes and Judge Meskill also held, in reliance on *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U. S. 690 (1962), and *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579 (1976) (plurality opinion), that tariff filings with the Federal Communications Commission were acts of private commercial activity in the marketplace rather than requests for governmental action, and thus were not even arguably protected by the *Noerr-Pennington* doctrine. *Litton Systems,* 700 F. 2d, at 806-809.

[6] *Westmac, Inc.* v. *Smith,* 797 F. 2d 313 (CA6 1986), cert. denied, 479 U. S. 1035 (1987). Although the Sixth Circuit did hold that the genuine substance of an anticompetitive lawsuit creates a rebuttable presumption of objective reasonableness, given the facts of that case —in which the antitrust plaintiff had presented strong evidence that the defendants' lawsuit, which followed a long and unsuccessful lobbying effort, had been motivated solely for the anticompetitive harm the judicial process would inflict on it—that modest reservation was probably wise. Evidence of anticompetitive animus in *Westmac* was in fact so great that Chief Judge Merritt thought that the plaintiff *had* successfully rebutted the presumptive reasonableness of defendants' lawsuit. The delay from the defendants' combined lobbying and litigation attack had allegedly sent the plaintiff into bankruptcy, and memos from one defendant to its attorney had stated, "`If this [lobbying activity] doesn't succeed, start a lawsuit— bonds won't sell,' " 797 F. 2d, at 318, and (in a statement repeated to a codefendant), "`if nothing else, we'll delay sale of the bonds,' " *id.,* at 322 (Merritt, C. J., dissenting) (emphasis omitted). In any event, the Sixth Circuit rule—to the extent that it would apply in a case as simple as this one—would result in the same conclusion we reach here.

[7] *Federal Prescription Service, Inc.* v. *American Pharmaceutical Assn.,* 214 U. S. App. D. C. 76, 663 F. 2d 253 (1981), cert. denied, 455 U. S. 928 (1982). In that case, the antitrust plaintiff alleged a 2-decade long conspiracy to lobby, boycott, and sue it (in state licensing boards, state legislatures, the marketplace, and both state and federal courts) out of existence. In spite of those allegations, the Court of Appeals found that the defendant's actions, which primarily consisted in lobbying for the abolition of plaintiff's mail-order prescription business, were immune under *Noerr-Pennington.*

[8] In *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.,* 694 F. 2d 466 (1982) (Posner, J.), cert. denied, 461 U. S. 958 (1983), the antitrust defendant's alleged violations of several provisions of the Sherman and Clayton Acts included much more than the filing of a single lawsuit; they encompassed a broad scheme of monopolizing the entire relevant market by: purchasing patents; threatening to file many other, patently groundless lawsuits; acquiring a competitor; dividing markets; and filing a fraudulent patent application. In *In re Burlington Northern, Inc.,* 822 F. 2d 518 (CA5 1987), cert. denied, 484 U. S. 1007 (1988), the plaintiffs alleged, and produced evidence to support their theory, that the defendant had filed suit solely to cause them a delay of crippling expense, and the defendants had either brought or unsuccessfully defended a succession of related lawsuits involving plaintiff's right to compete. In both of these cases the Courts of Appeals ably attempted to balance strict enforcement of the antitrust laws with possible abuses of the judicial process. That they permitted some reliance on subjective motivation—as even we have done in cases alleging abuse of judicial process, see *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 513-518 (1972)—is neither surprising nor relevant in a case involving no such allegations.

[9] *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U. S. 373 (1911); *Schwegmann Brothers* v. *Calvert Distillers Corp.,* 341 U. S. 384 (1951).

[10] *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593 (1951); *Farbenfabriken Bayer A. G.* v. *Sterling Drug, Inc.,* 307 F. 2d 207 (CA3 1962).

[11] *International Salt Co.* v.*United States,* 332 U. S. 392 (1947); *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451 (1922).

635 F.3d 815 (2011)

REALCOMP II, LTD., Petitioner,
v.
FEDERAL TRADE COMMISSION, Respondent.

No. 09-4596.

United States Court of Appeals, Sixth Circuit.

Argued: January 20, 2011.
Decided and Filed: April 6, 2011.

819 *819 ARGUED: Scott L. Mandel, Foster Swift Collins & Smith PC, Lansing, Michigan, for Petitioner. Imad D. Abyad, Federal Trade Commission, Washington, D.C., for Respondent. ON BRIEF: Scott L. Mandel, Liza C. Moore, Foster Swift Collins & Smith PC, Lansing, Michigan, for Petitioner. Imad D. Abyad, John F. Daly, Federal Trade Commission, Washington, D.C., for Respondent.

Before: SILER, MOORE, and GRIFFIN, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Realcomp II, Ltd. ("Realcomp") is an association of local real-estate boards and associations located in southeastern Michigan, with a membership composed of local real-estate agents and brokers. Realcomp's primary service to its member brokers is its operation of the Realcomp Multiple Listing Service ("Realcomp MLS"), a database of property listings that can be viewed and searched by Realcomp members. Pursuant to its website policy, Realcomp prohibited information about exclusive agency and other nontraditional listings on Realcomp's MLS from being distributed to public real-estate advertising websites through its MLS feeds.

Reversing and vacating the Initial Decision of the Chief Administrative Law Judge ("ALJ"), the Federal Trade Commission ("Commission") ruled that Realcomp violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by adopting anticompetitive policies — including the website policy — that limited the public distribution and display of limited-service property listings based on the nature of the listing contract. Realcomp petitions for review of the Commission's opinion and order with respect to only the website policy.

Under a full rule-of-reason analysis, we conclude that substantial evidence supports the Commission's findings that: 1) Realcomp's website policy gave rise to potential genuine adverse effects on competition due to Realcomp's substantial market power and the website policy's anticompetitive nature; 2) the website policy in fact caused actual anticompetitive effects; and 3) Realcomp's proffered procompetitive justifications were insufficient to overcome a prima facie case of adverse impact. These findings establish that Realcomp's website policy unreasonably restrained competition in the market for the provision of residential real-estate-brokerage services in southeastern Michigan and the Realcomp MLS area. Therefore, we DENY Realcomp's petition for review.

I. FACTS AND PROCEDURE

A. Realcomp and the Real-Estate Market

Realcomp is an association of local real-estate boards and associations located in southeastern Michigan, with a
820 membership composed of real-estate agents and brokers.[1] *820 Realcomp is affiliated with the National Association of Realtors ("NAR"), and its bylaws require it to abide by NAR's rules. Realcomp's approximately 14,000 member brokers compete with one another to provide residential real-estate-brokerage service to home buyers and sellers. Any licensed

real-estate broker who is a member of a Realcomp shareholder board, including brokers who offer discount services, may become a Realcomp member. Every Realcomp member, including those who offer alternative business models, pays the same quarterly membership fees.

Realcomp's primary service to its member brokers is its operation of the Realcomp MLS, the largest MLS in Michigan. An MLS is "a database of information about properties for sale (exclusive of FSBO [For Sale By Owner] properties) that can be viewed and searched by all other local brokers who practice in the area and participate in the MLS." Pet'r App. Vol. II at 68 (Initial Decision ("Dec.") ¶ 14). By disseminating detailed listings, the Realcomp MLS facilitates the sharing of information among brokers representing buyers and brokers representing sellers. Real-estate listings on Realcomp's MLS, which include property details and offers of compensation, can be viewed by Realcomp members through Realcomp's online system, but not by the general public without the access of a member broker.

The Realcomp MLS also disseminates listing information to selected public websites that can be searched by members of the public. Thus, in addition to access to and advertisement on the MLS database itself, the Realcomp MLS offers its members internet advertising on the approved websites to which Realcomp provides information. Approved websites include MoveInMichigan.com, Realcomp IDX participant websites, and Realtor.com. To disseminate listings, Realcomp provides an IDX (Internet Data Exchange) feed each day which can be loaded onto websites of member brokers and which assembles selected MLS listing data from all brokers who have requested that their listings be distributed. Through Realcomp's IDX feed, brokers are able to display listing information from the Realcomp database on their individual websites so that consumers can search available properties on those websites.

The Commission contends that technological developments like the MLS data feed are enabling consumers to self-supply certain services and are exerting competitive pressure on the traditional model for brokerage services. Under the traditional model, home sales involving the use of real-estate brokers incorporate both a listing broker, who works with home sellers, and a cooperating broker, who works with home buyers. Although representing one party in a particular transaction, brokers do not often specialize as either a cooperating or listing broker and may represent either buyers or sellers. The agreement between a listing broker and home seller, called a listing agreement, specifies the duration of the contract, the types of services to be provided by the listing broker, the compensation to be paid to the listing broker, and the offer of compensation to be paid to any cooperating broker who secures the home purchaser. A listing broker is compensated either by a flat fee paid up-front at the time of the listing agreement or by commission based on the selling price of the home, or by some
821 combination of the two. The home seller *821 also compensates the cooperating broker, either directly or through payment to the listing broker.

There are two common types of listing agreements governing the bundle of services provided by and compensation paid to residential real-estate brokers: Exclusive Right to Sell ("ERTS") and Exclusive Agency ("EA") agreements. Under an ERTS listing agreement, the listing broker is appointed as the seller's exclusive agent for a specified period of time to sell the property on the owner's stated terms, and is provided the same compensation when the property is sold even if the owner or another broker, and not the ERTS listing agent, secures the property's sale. A cooperating broker, in contrast, typically is not paid directly by either the home seller or the home buyer, but instead is compensated indirectly by the home seller through the listing broker, who makes an offer of compensation carved from the listing broker's own compensation to any cooperating broker who finds the buyer that ultimately purchases the home. A common ERTS compensation structure includes a 6% commission to the listing broker and an offer of compensation of 3% by the listing broker to the cooperating broker. There are also flat-fee ERTS listings that provide higher fees to the listing agent than do flat-fee EA agreements.

Under an EA listing agreement, the listing broker acts as the exclusive agent of the home seller, but is paid less or no additional compensation if the property is sold without further assistance from the listing broker. Cooperating brokers are paid directly by the seller. EA contracts may offer a la carte, or unbundled, brokerage services, with a compensation structure characterized by an up-front fee to the listing broker rather than a commission, and a 3% offer of compensation from the seller directly to any cooperating broker.

In a commission-based ERTS transaction, if the home is sold to an unrepresented buyer, the listing broker retains the compensation that otherwise would have been paid to the cooperating broker, and the cost to the home seller remains the same. Under an EA agreement, in contrast, if the home is sold to an unrepresented buyer, the compensation to the listing broker remains the same, and the compensation that would have been paid to the cooperating broker is retained by the home seller. ERTS agreements typically govern a traditional package of full brokerage services, while EA agreements and flat-fee ERTS agreements are conducive to providing discounted, limited brokerage services. The traditional set of services provided by a listing broker to the home seller include showing and marketing the property, presenting and evaluating offers to the seller, and negotiating counteroffers. Full-service listing brokers in Realcomp's area typically charge commission rates around 6% and are compensated through commission-based ERTS contracts.

The discount, limited-service brokerage model exemplified by EA listings offers a lower-cost alternative to the traditional full-service model. A listing broker in a limited-service listing may provide any, but not all, of the services provided under a traditional brokerage model, according to the preferences of the home seller as consumer. As described by the ALJ, unbundled brokerage services "meet a consumer demand for lower cost brokerage services where consumers are willing to carry out some of the home selling tasks themselves that otherwise would be performed by real estate professionals." Pet'r
822 App. Vol. II at 75 (Dec. ¶ 73) (internal quotation marks omitted). Home sellers may "purchase a *822 subset of the full range brokerage services (such as listing in an MLS), while self-supplying other services" such as "show[ing] the property, hold[ing] open houses, negotiat[ing] with buyers, or clos[ing] the transaction ... without broker assistance." *Id.* (Dec. ¶ 72).

The expansion of the market share of limited-service brokers since 2003 has been attributed in part to the role of the internet in making it easier for brokers to market directly to home buyers and in enabling consumers to self-supply services. The development of the internet and MLS databases, the increase in the number of broker websites, and data feeds provided from the local MLS to public websites have enhanced the ability of brokers to share real-estate information and of members of the public to access it. As a result, the traditional brokerage model faces competitive pressure arising from the technological developments that enable consumers to self-supply certain services and from limited-service brokers who discount their fees in response to these developments.

B. Complaint Against Realcomp

On October 10, 2006, complaint counsel for the Commission issued an administrative complaint against Realcomp, alleging that Realcomp's policies unreasonably restrained competition among brokers in the market for the provision of residential real-estate-brokerage services in southeastern Michigan or the Realcomp Service Area, and constituted unfair methods of competition in violation of Section 5 of the FTC Act. Specifically, the Commission alleged that Realcomp's website policy and search-function policy injured consumers by explicitly limiting the publication and marketing of nontraditional listings, thereby eliminating certain forms of competition without cognizable and plausible efficiency justifications. The Commission argued that Realcomp had adopted restrictive policies in order to restrain the competition from limited-service brokers.

According to complaint counsel, pursuant to Realcomp's website policy, Realcomp prohibited information about EA listings and other nontraditional listings[2] on Realcomp's MLS from being distributed to public real-estate advertising websites through the MLS feeds. Adopted in 2001, the website policy was first enforced in 2004 when Realcomp incorporated the requirement that members designate a listing type for all listings. The policy violated an NAR rule forbidding member MLSs from excluding EA listings from their IDX feeds. But the Realcomp board voted against adopting the NAR IDX policy and retained its data-feed exclusions.

Pursuant to the search-function policy, adopted in 2003 and eliminated in 2007, EA and other nontraditional listings were excluded from the default search setting in the Realcomp MLS. As a result of the default settings on the MLS, a broker wanting to display EA listings in her search results had to select specifically to search all listings or the EA listings, or change permanently the search default by saving changes to her settings.

In addition to requiring members to disclose each listing's type, Realcomp implemented a minimum-service requirement which mandated that, in order for a listing to be labeled ERTS — and consequently included in data feeds to public websites and in the default search settings in the Realcomp MLS — brokers were required to provide full-service brokerage services
823 in connection with the listing. The minimum-service *823 requirement was adopted in 2004 and eliminated in 2007.

The Commission's Chief ALJ held hearings over eight days in June 2007 evaluating these policies and summarized his findings in his Initial Decision, issued on December 10, 2007. The ALJ dismissed the Commission's complaint upon finding that the Commission's complaint counsel did not demonstrate that Realcomp's policies unreasonably restrained or substantially reduced competition in violation of Section 5 of the FTC Act. Applying a traditional rule-of-reason analysis, the ALJ concluded that, although the website policy was likely anticompetitive in nature, and although Realcomp possessed substantial market power in the relevant markets, the Commission's complaint counsel failed to show significant anticompetitive effects of the policies. In addition, the ALJ found that the website policy addressed a free-rider problem and a bidding-disadvantage problem whereby EA home sellers compete with Realcomp cooperating brokers for home buyers.

The Commission unanimously reversed, concluding that the Realcomp policies unreasonably restrained competition, first on the grounds that the policies were inherently suspect and therefore presumptively unlawful. The Commission also concluded that the ALJ erred when it credited Realcomp's proffered procompetitive justifications. Alternatively, under a full rule-of-reason analysis, the Commission further found that Realcomp's substantial market power, combined with the likely anticompetitive tendencies of its policies, rendered the policies unreasonable due to their likely anticompetitive effects. The Commission also found that direct evidence established actual anticompetitive effects. The Commission then entered its cease-and-desist order, prohibiting Realcomp from "adopting or enforcing any policy, rule, practice or agreement ... that denies, restricts or interferes with the ability of Realcomp Members to enter into Exclusive Agency Listings or Other Lawful Listing agreements with the sellers of properties." Pet'r App. Vol. I at 4 (Final Order at 4).

Realcomp petitioned for review, claiming that a traditional rule-of-reason approach is required to evaluate Realcomp's restrictions and that there was no substantial evidence that Realcomp's website policy had anticompetitive effects. Realcomp repealed the search-function policy and the minimum-services requirement after the Commission's complaint and does not challenge paragraph five of Part II of the order, which incorporated repeal of the search-function policy.

II. ANALYSIS

A. Standard of Review

When we review a decision of the Federal Trade Commission, the legal issues are "for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as `unfair.'" *FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 454, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986). The Commission's findings of fact are conclusive if supported by substantial evidence. *Barnett Pontiac-Datsun, Inc. v. FTC (In re Detroit Auto Dealers Ass'n),* 955 F.2d 457, 469 (6th Cir.1992); *see* 15 U.S.C. § 45(c). When we review the Commission's findings, we may not "make [our] own appraisal of the testimony, picking and choosing for [ourselves] among uncertain and conflicting inferences." *Ind. Fed'n,* 476 U.S. at 454, 106 S.Ct. 2009 (quoting *FTC v. Algoma Lumber Co.,* 291 U.S. 67, 73, 54 S.Ct. 315, 78 L.Ed. 655 (1934)). Rather, under the substantial-evidence standard,
824 we uphold the *824 Commission's findings "if ... supported by `such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951)); *see also In re Detroit Auto Dealers Ass'n,* 955 F.2d at 469.

That the Commission overruled the ALJ does not alter the standard of review. The statute governing our review, 15 U.S.C. § 45(c), provides that "[t]he findings of the *Commission* as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c) (emphasis added); *see Arkansas v. Oklahoma,* 503 U.S. 91, 113, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) ("A court reviewing an agency's adjudicative action should accept the *agency's* factual findings if those findings are supported by substantial evidence on the record as a whole.") (emphasis in original). Although "[t]he findings of the examiner" — in this case, the ALJ — "are to be considered" by a reviewing court, "[t]he `substantial evidence' standard is not modified in any way when the [agency] and its examiner disagree." *Universal Camera Corp.,* 340 U.S. at 496, 71 S.Ct. 456.[3] Thus, because "we defer to the inferences that the [agency] derives from the evidence, not to those of the ALJ," *Varnadore v. Sec'y of Labor,* 141 F.3d 625, 630 (6th Cir.1998) (internal quotation marks omitted), the relevant inquiry is whether substantial evidence supported the Commission's conclusion that the website policy constitutes an unreasonable restraint of trade.

B. Restraint of Trade

Because "[t]he FTC Act's prohibition of unfair competition and deceptive acts or practices ... overlaps the scope of § 1 of the Sherman Act ... aimed at prohibiting restraint of trade," we rely upon Sherman Act jurisprudence in determining whether the challenged policies violated Section 5 of the FTC Act. *Cal. Dental Ass'n v. FTC,* 526 U.S. 756, 762 n. 3, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999); *see Ind. Fed'n,* 476 U.S. at 454-55, 106 S.Ct. 2009 (noting that the same analysis applies to both violations of Section 1 of the Sherman Act and Section 5 of the FTC Act). To determine whether Realcomp's actions

constitute a violation, we assess: (1) whether there was a contract, combination, or conspiracy — or, more simply, an agreement; and, if so, (2) whether the contract, combination, or conspiracy "unreasonably restrained trade in the relevant market." *See Worldwide Basketball & Sport Tours, Inc. v. NCAA,* 388 F.3d 955, 959 (6th Cir. 2004) (internal quotation marks omitted) (identifying elements of a violation of Section 1 of the Sherman Act); *Bailey's, Inc. v. Windsor America, Inc.,* 948 F.2d 1018, 1027 & n. 4 (6th Cir.1991) (same). With respect to the first element, Realcomp is a combination of its members with respect to the challenged policies: Realcomp is owned by seven associations of competing real-estate brokers, is governed by members of those associations, and claims a membership of brokers competing in the market for real-estate-
825 brokerage services. The website policy constitutes an agreement *825 governing the Realcomp MLS among the Realcomp members. Realcomp is, therefore, a contract, combination, or conspiracy.

With respect to the second element, in evaluating whether Realcomp unreasonably restrained trade, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be `*per se*' unreasonable, or because it violates what has come to be known as the `Rule of Reason.'" *Ind. Fed'n,* 476 U.S. at 457-58, 106 S.Ct. 2009. Under per se analysis, "certain agreements or practices are so `plainly anticompetitive,'... and so often `lack ... any redeeming virtue,' ... that they are conclusively presumed illegal without further examination." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,* 441 U.S. 1, 8, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (internal citations omitted). "A court need not then inquire whether the restraint's authors actually possess the power to inflict public injury ..., nor will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect." *United States v. Realty Multi-List, Inc.,* 629 F.2d 1351, 1362 (5th Cir.1980) (internal citations omitted).

When restraints are not per se unlawful, and their net impact on competition not obvious, the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market. *Ind. Fed'n,* 476 U.S. at 461, 106 S.Ct. 2009. A full rule-of-reason inquiry "may extend to a `plenary market examination,'" *Continental Airlines, Inc. v. United Airlines, Inc.,* 277 F.3d 499, 509 (4th Cir.2002) (quoting *Cal. Dental Ass'n,* 526 U.S. at 779, 119 S.Ct. 1604), which may include the analysis of "`the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,'" *id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978)), "as well as the availability of reasonable, less restrictive alternatives," *id.* If Realcomp's challenged policies are shown to have an anticompetitive effect, or if Realcomp is shown to have market power and to have adopted policies *likely* to have an anticompetitive effect, then the burden shifts to Realcomp to provide procompetitive justifications for the policies. *See infra* Part II.C.; *see also Worldwide Basketball,* 388 F.3d at 959.

An abbreviated or quick-look analysis, however, does not require "elaborate industry analysis," and applies when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n,* 526 U.S. at 770, 119 S.Ct. 1604 (internal quotation marks omitted); *see Gordon v. Lewistown Hosp.,* 423 F.3d 184, 209-10 (3d Cir. 2005) (quick-look analysis applies when "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an alleged restraint). Thus, when a restraint is not "conclusively presumed illegal," *Broadcast Music, Inc.,* 441 U.S. at 8, 99 S.Ct. 1551, but "the likelihood of anticompetitive effects is ... obvious," the proponent of the restraint must provide "some competitive justification" for it, "even in the absence of a detailed market analysis" showing market power or market effects, *Cal. Dental Ass'n,* 526 U.S. at 769-71, 119 S.Ct. 1604 (internal quotation marks omitted). Under a quick-look analysis, once a restraint is deemed facially anticompetitive, the burden shifts to its proponent for justification on procompetitive grounds. *Gordon,* 423 F.3d at 210.

826 *826 Despite these different methods, "no categorical line" separates those "restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." *Cal. Dental Ass'n,* 526 U.S. at 780-81, 119 S.Ct. 1604. Rather, the Supreme Court has emphasized that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same — whether or not the challenged restraint enhances competition." *Id.* at 779-80, 119 S.Ct. 1604 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 104, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984)). Accordingly, the Court has moved "away from ... reliance upon fixed categories and toward a continuum," *Polygram Holding, Inc. v. FTC,* 416 F.3d 29, 35 (D.C.Cir. 2005), within which "the extent of the inquiry is tailored to the suspect conduct in each particular case," *id.* at 34; *see also* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1507 (3d ed. 2010) [hereinafter AREEDA] ("[T]he quality of proof required should vary with the circumstances."). Therefore, we must make "an enquiry meet for the case, looking to the circumstances, details,

and logic of a restraint." *Cal. Dental Ass'n,* 526 U.S. at 781, 119 S.Ct. 1604. In all cases, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA,* 468 U.S. at 104, 104 S.Ct. 2948.

The FTC as a party and the Commission in its decision below both assert that the Realcomp website policy is "inherently suspect" and therefore subject to an abbreviated or quick-look review.[4] Because the Commission found that the website policy was inherently suspect, the Commission concluded that anticompetitive effects could be inferred without proof of Realcomp's market power or a demonstration of actual adverse impact. But, notwithstanding its initial quick-look analysis, the Commission alternatively invalidated the challenged restraints under a more searching inquiry, which included an assessment of Realcomp's market power and the actual, as well as likely, anticompetitive effects of its policies. Realcomp objects that the website policy should not be treated as inherently suspect, and that under any test, the website policy is not an unreasonable restraint of trade.

We uphold the Commission on the basis of the more extended rule-of-reason analysis without reaching the question of whether to apply quick-look analysis. "The object" in determining whether to apply an abbreviated quick-look analysis "is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Cal.
827 *Dental Ass'n,* 526 U.S. at 781, 119 S.Ct. 1604.[5] Courts have found potential *827 antitrust violations when MLS rules deny MLS membership to some brokers, *see, e.g., Realty Multi-List, Inc.,* 629 F.2d at 1388-89, and when dealers have excluded discount brokers altogether from a venue, *see, e.g., Denny's Marina, Inc. v. Renfro Prods., Inc.,* 8 F.3d 1217, 1220-22 (7th Cir.1993). Here, in comparison, the challenged restraint is an internal rule within an MLS regarding its distribution of certain types of real-estate listings to the public. We need not and do not decide whether this policy is sufficiently analogous to practices already deemed by courts to be anticompetitive for it to qualify as a facially anticompetitive restraint. *See Cal. Dental Ass'n,* 526 U.S. at 775 n. 12, 119 S.Ct. 1604 ("[T]here must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where ... the circumstances of the restriction are somewhat complex, assumption alone will not do."). The Commission also based its holding on market analysis and evidence of anticompetitive effects, and we deny the petition for review on that basis.

C. Rule of Reason

Applying the rule of reason, we first look to see "whether [the] FTC has demonstrated `actual detrimental effects' or `the potential for genuine adverse effects on competition.'" *In re Detroit Auto Dealers Ass'n,* 955 F.2d at 469 (quoting *Ind. Fed'n,* 476 U.S. at 460, 106 S.Ct. 2009). Market power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, Realcomp must offer procompetitive justifications. Realcomp contends that, to the contrary, "the requirement for proof of market power can be obviated by evidence of actual anticompetitive effects, not the other way around," and so Realcomp urges that actual anticompetitive effects must be proven. Pet'r Br. at 25.

The Supreme Court in *Indiana Federation* explained that "an inquiry into market power ... is ... a surrogate for detrimental effects." *Ind. Fed'n,* 476 U.S. at 461, 106 S.Ct. 2009 (internal quotation marks omitted). If adverse effects are clear, inquiry into market power is unnecessary. *Id.* And the reverse is also true; joint ventures may be judged based on "an inquiry into market power and market structure designed to assess the combination's actual effect." *Copperweld Corp. v. Independence
828 Tube Corp.,* 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984).[6] *828 "[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the *potential* for genuine adverse effects on competition," and this is so precisely because actual anticompetitive effects may be difficult to demonstrate. *Ind. Fed'n,* 476 U.S. at 460, 106 S.Ct. 2009 (emphasis added).

Although the policy at issue in *Indiana Federation* was initially afforded abbreviated treatment, *id.* at 459-60, 106 S.Ct. 2009, the Supreme Court also analyzed the restriction as if it were not sufficiently "naked" automatically to necessitate "some countervailing procompetitive virtue," *id.,* and explained what must be shown to establish the illegality of less obviously anticompetitive restraints, *id.* at 460-64, 106 S.Ct. 2009. Notably, *Indiana Federation* did *not* require proof of an anticompetitive effect — specifically, in that case, that the policy at issue resulted in the provision of more costly services than consumers otherwise would have chosen — because:

> [a] concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in ... the purchase of higher priced services[] than would occur in its absence.

Id. at 461-62, 106 S.Ct. 2009. Similarly, here, the website policy is alleged to be an "effort to withhold (or make more costly) information desired by consumers" that would result in "the purchase of higher priced [brokerage] services, than would occur in its absence." *Id.* Thus, we next assess whether Realcomp's website policy resulted in "`actual detrimental effects' or `the *potential* for genuine adverse effects on competition.'" *In re Detroit Auto Dealers Ass'n,* 955 F.2d at 469 (quoting *Ind. Fed'n,* 476 U.S. at 460, 106 S.Ct. 2009) (emphasis added).[7] Under either inquiry, substantial evidence supports the Commission's findings.

1. Potential Adverse Effects

a. Market Power

The Commission adopted the ALJ's findings that Realcomp possessed substantial market power in the relevant markets, and Realcomp does not dispute those findings. The ALJ defined the relevant product market as real-estate-brokerage services and found that, for most home sellers and buyers, no reasonable substitutes for such services exist because of the significant advantages of using a real-estate broker to sell a home. Because of the local nature of real-estate markets, the ALJ found that counties in southeastern Michigan define the geographic scope of competition for real-estate-brokerage services. Because of the lack of substitutes for brokerage services, the ALJ found that a broker monopolist could profitably increase commissions significantly above competitive levels.

Defining the relevant input market as the supply of multiple listing services to real-estate brokers, the ALJ found that an
829 MLS like Realcomp exhibits network effects, meaning that the value of the MLS *829 increases as the number of other users of the service increases. The value of an MLS to home sellers (or their representatives) increases with the number of home buyers (or their representatives) using the site, and, similarly, the value to home buyers increases as more home sellers list their properties on the MLS. "Brokers without full access to an MLS would ... be at a significant competitive disadvantage," Pet'r App. Vol. II at 101 (Dec. ¶ 313), "listing services with fewer users are not economically viable substitutes," *id.* (Dec. ¶ 310), and barriers to entry make it "improbable" for a rival MLS successfully to enter the market, *id.* at 104 (Dec. ¶ 333). Because the value of an MLS depends on the number of users, the ALJ observed that "market share is a good indicator of market power," and found that Realcomp possessed a large market share in each relevant county. *Id.* at 103 (Dec. ¶ 329). In light of Realcomp MLS's market share, network effects, and barriers to entry, the ALJ concluded that Realcomp possessed substantial market power in the relevant markets.

Adopting these findings, the Commission agreed that "Realcomp possessed substantial market power in two relevant markets in Southeastern Michigan: the market for residential real estate brokerage services and the market for multiple listing services, which is a vital input into the brokerage services market." Pet'r App. Vol. I at 42 (Comm'n Op. at 36). Given the extensive and undisputed market analysis undertaken by the ALJ and adopted by the Commission, substantial evidence supports the Commission's findings that Realcomp possessed substantial market power.

b. Anticompetitive Nature

Because Realcomp possesses substantial market power, we next evaluate the anticompetitive tendencies of the Realcomp website policy. Realcomp does not regulate rates of commission, offers of compensation, or other price terms; thus, we examine the effect of Realcomp's restrictions on consumer choice, specifically, the reduction in competitive brokerage options available to home sellers. The relevant output to be measured, therefore, is the share of non-ERTS listings in the Realcomp MLS, the exposure of these listings to consumers, and the relationship of these outcomes to the Realcomp website policy.

In establishing that Realcomp's policies "narrow consumer choice" and "hinder the competitive process," the Commission made the following relevant findings:

> (1) because of its database of listings, the Realcomp MLS is the most effective tool for the sale of residential real estate in Southeastern Michigan; (2) brokers offering limited service and brokers offering traditional, full-service brokers' services compete with one another for new listings; (3) limited service brokers' services potentially cost less than the services of brokers offering only full-service listings (they not only unbundle the services offered but also unbundle the commission structure); (4) limited service brokers' listings consequently exert `price pressure' on full-service brokers' listings; (5) Realcomp's Website Policy, coupled with its Minimum Service Requirement, severely restricted consumers' access to limited service listings because, as a result of those policies, the listings were not available on the most popular websites.

Id. at 48 (Comm'n Op. at 42). These findings are supported by the evidence before the ALJ and the Commission that the website policy created barriers to the dissemination of discount listings to public websites — the entry point for many
830 consumers in their online real-estate searches. *830 This evidence showed that EA listings can be posted on some public websites, despite Realcomp's policies, but only by dual-listing with another MLS that does not impose similar restrictions. Moreover, such dual-listing raises costs for offering and advertising such discount services, and limited-service brokers testified that Realcomp's policies placed them at a competitive disadvantage. In addition, two of the top four public websites used by consumers in the relevant market can be accessed only through the Realcomp MLS; therefore, due to the website policy, EA listings cannot be placed on these websites. Consumers using these websites are not informed that the websites display only ERTS listings. Realcomp's website policy thus limited access to internet marketing and imposed additional costs on the marketing of discount listings.

Furthermore, the ALJ and Commission both found that limited-service listings exert price pressure on the full-service brokerage model; and brokers testified that discounted online and limited-service models have led to customers asking agents to reduce their commissions. Evidence that the website policy limited exposure of discount listings thus reveals "a concerted refusal to deal with [EA listings] on substantially equal terms" and establishes that the website policy is likely to protect its full-service brokers from competitive pricing pressure. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 295 n. 6, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985). Combining these findings with Realcomp's substantial market power, the Commission reasonably concluded that Realcomp's website policy is likely to be anticompetitive.

The ALJ observed that the Realcomp MLS alone reached about 80% of home buyers, and brokers could place EA listings on Realtor.com and reach approximately 90% of home buyers. The ALJ concluded that, consequently, the website policy prevented EA listings from reaching "only a relatively small additional percentage of home buyers" — the 10% who perused home listings on the inaccessible websites. Pet'r App. Vol. II at 162 (Dec. at 101). To the contrary, however, by reducing by 10% the number of home buyers that are exposed to discount listings, the website policy may very well constitute an unreasonable restraint. Restricting the online dissemination of home listings is especially pernicious because of the emerging competitive impact of the internet and of discounted brokerage services on the residential real-estate market. As the D.C. Circuit observed, "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power." *United States v. Microsoft Corp.,* 253 F.3d 34, 79 (D.C.Cir.2001). The D.C. Circuit was analyzing a monopolization claim under Section 2 of the Sherman Act, rather than a horizontal restraint under Section 1. *Id.* at 80. Substantial evidence shows, though, that "the exclusion of nascent threats" such as discount brokerage services and consumer access to online listings "is reasonably capable of contributing significantly" to anticompetitive effects.

As discussed in Part II.B., *supra,* courts have found potential antitrust violations when MLS rules deny MLS membership to some brokers, *see, e.g., Realty Multi-List, Inc.,* 629 F.2d at 1388-89, and when dealers have excluded discount brokers altogether from a venue, *see, e.g., Denny's Marina, Inc.,* 8 F.3d at 1220-22. At issue here is a different sort of restriction than membership exclusion — internal rules within an MLS regarding its distribution of certain types of real-estate listings to
831 the public. There is no rule of complete *831 exclusion from the MLS, and evidence shows that brokers are allowed to and do place limited-service listings on the Realcomp MLS.

Nonetheless, similar to excluding discount brokers from the MLS altogether, the website policy limits exposure of discount listings. "[L]istings [are] not ... distributed as widely as possible" due to the website policy, "resulting in inefficient sales prices," which is the same kind of economic harm caused by MLS exclusions. *Thompson v. Metropolitan Multi-List, Inc.,* 934 F.2d 1566, 1580 (11th Cir.1991); *cf. Ind. Fed'n,* 476 U.S. at 461-62, 106 S.Ct. 2009 (holding that proof of higher prices is not required in the context of "[a] concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified"); *Polygram Holding, Inc.,* 416 F.3d at 37 ("[A]greements restraining autonomy in pricing and advertising impede the `ordinary give and take of the market place.'"). In particular, the website policy — like exclusions found to be anticompetitive — "reduces the competition among brokers and could result in less competition for brokerage fees." *Thompson,* 934 F.2d at 1580; *see* *Cantor v. Multiple Listing Service of Dutchess Cnty., Inc.,* 568 F.Supp. 424, 430 (S.D.N.Y.1983) (MLS rules "restrict[ed] [brokers'] ability to advertise their services" in order to prevent brokers from "obtain[ing] any competitive advantage"); *see also* *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 389, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) ("[P]rice advertising surely relates to price.") (internal quotation marks omitted).

It is undisputed that the website policy restricted the public dissemination of Realcomp real-estate listings tending to offer consumers limited-brokerage services at reduced costs. The Commission concluded that "[the] finding of market power, coupled with [the] ... determination that the tendency of the challenged policies was to suppress competition, provide `indirect' evidence that those policies have or likely will have anticompetitive effects." Pet'r App. Vol. 1 at 41 (Comm'n Op. at 35). Evaluating the website policy, the ALJ also notably found that "the nature of the restraint is such that it is likely to be anticompetitive." Pet'r App. Vol. II at 158 (Dec. at 97).[8] Given the significance of the Realcomp MLS to the advertising of real-estate listings, and given the role of the internet in providing consumers with the ability to self-provide certain real-estate services, substantial evidence supports the Commission's conclusion that Realcomp's website policy is likely to have an adverse impact on competition by restricting consumer access to discount listings.

2. Actual Adverse Effects

The Commission also examined direct evidence of competitive effects and concluded that Realcomp's policies adversely affected competition. We conclude that the Commission's findings of actual adverse effects are supported by "relevant evidence that a reasonable mind might accept as adequate to support [its] conclusion." *In re Detroit Auto Dealers Ass'n,* 955 F.2d at 469. Evidence described in Part II.C.1, *supra,* demonstrates that the website policy in fact limited access to internet marketing and imposed financial and administrative costs on brokers seeking to dual-list with other MLSs. Three
832 quantitative analyses conducted by the Commission's economic expert, Dr. Darrell *832 Williams, corroborated other record evidence showing substantial consumer harm — specifically, a reduction of the share of discount listings in the southeastern Michigan real-estate market.

A time-series analysis conducted by Dr. Williams established that the share of EA listings declined by 50% after the introduction of the Realcomp restrictions. The analysis compared the share of EA listings in the Realcomp MLS before and after the challenged policies went into effect and showed that, from May 2004 to October 2006, the monthly average share of EA listings fell from about 1.5% of total listings to about 0.75%. As the Commission noted, although the study showed a reduction in only 0.75 absolute percentage points, the share of EA listings had dropped by half, revealing that "non-traditional arrangements [were] losing their toehold in the market." Pet'r App. Vol. I at 51 (Comm'n Op. at 45).[9]

While the time-series analysis documented the drop in EA listings, it could not rule out the influence of other economic factors that might have caused the decline. The conclusion that the drop was at least in part caused by Realcomp's restrictive policies was supported by other evidence. A benchmark study conducted by Dr. Williams compared the share of EA listings in the local MLSs of Metropolitan Statistical Areas (MSAs) without restrictions (labeled Control MSAs) to that of MSAs with restrictions (labeled Restriction MSAs).[10] Control MSAs were selected based on a combination of economic and demographic factors that rendered the MSAs statistically similar to Detroit. The benchmark study revealed relatively low shares of EA listings in all the Restriction MSAs — averaging only 1.4% of MLS listings — despite differences among the MSAs with respect to other variables such as population size.

Dr. Williams also found that the weighted average share of EA listings in Control MSAs was higher than in Restriction MSAs — 5.6% compared to 1.4% — and that Realcomp's MLS had a significantly smaller share of EA listings than each of the
833 MLSs without similar restrictions.[11] *833 For the period from 2002 to 2006, Dayton, the MSA most statistically similar to Detroit, was also the Control MSA with the lowest share of EA listings, at 1.24%. Over that same period, the share of EA listings on Realcomp's MLS, by comparison, was 1.01%. However, even Dayton's low share of EA listings is 22.7% greater than the share of EA listings on Realcomp.[12] These findings support Dr. Williams's conclusion that restrictive policies like Realcomp's Website Policy lead to a reduction in the share of EA listings.

Attributing the decline in EA shares to a buyers' market, the ALJ credited testimony that "in a declining or distressed market, where both the value of a home and the seller's equity are declining, more home sellers would choose full service ERTS listings over EA listings because they want the professional marketing services of a full service broker." Pet'r App. Vol. II at 164 (Dec. at 103). Indeed, the ALJ found that, between 2003 and 2005, EA listings grew from 2% to 15% of listings nationally, but between 2005 and 2006, fell from 15% to 8%. However, the ALJ also heard testimony that demand for the services of limited-service brokers increases in a softening housing market because the reduced cost appeals to home sellers without equity in their homes. Furthermore, as the Commission noted, prior to November 2006, NAR permitted members to adopt restrictive policies like Realcomp's, suggesting that such policies could have interfered with the prevalence of EA listings in MLSs nationwide. This evidence is sufficient to provide substantial evidence for the Commission's inferences.

Dr. Williams also conducted ten statistical-regression analyses to evaluate the effects of different factors, including Realcomp's policies, on the share of EA listings. Dr. Williams concluded that Realcomp's policies are associated with a reduction in the share of EA listings of between 5.47 and 6.15 percentage points, leading him to predict that the percentage of EA listings in Realcomp would be higher, and the percentage of ERTS listings would be lower, in the absence of Realcomp's policies. The ALJ found Dr. Williams's analyses "instructive, though not conclusive," and accepted the testimony of Realcomp's expert, Dr. Eisenstadt, that Dr. Williams failed to include relevant variables in his regressions. Pet'r App. Vol. II at 171 (Dec. at 110). Dr. Eisenstadt testified that, when certain variables were measured at both the MSA and the local level, the effect of the Realcomp policies on the share of EA listings was not statistically different from zero. The Commission, however, concluded that MSA-level variables were properly excluded from Dr. Williams's analysis because they were already captured by similar county and zip-code-level data.

The Commission's conclusion is strongly supported by the fact that, in his response to Dr. Eisenstadt's report, Dr. Williams incorporated county and zip-code-level measures of the variables suggested by Dr. Eisenstadt — and still found that the restrictions were associated with a statistically significant decrease in non-ERTS contracts. Applying these variables to Dr. Eisenstadt's sample, which excluded MLSs with restrictions other than Realcomp, Dr. Williams found that Realcomp's
834 restrictions are associated with a statistically significant 5.2% decrease in the share of non-ERTS *834 contracts. The remaining difference was that Dr. Williams excluded MSA-level measures of Dr. Eisenstadt's suggested variables when those variables were already measured at the county and zipcode levels. For example, Dr. Williams incorporated county-level median household income, but excluded MSA-level median household income. In other words, Dr. Williams excluded duplicative variables. In statistical terms, the MSA-level variables were excluded on the grounds that they were highly collinear with other explanatory variables and would render unreliable the results of the analysis.[13] Dr. Williams — and the Commission evaluating his work — thus explored the implications of including MSA-level data into the analysis, and concluded that the MSA-level data was already captured at the county level.[14]

Dr. Williams's time-series, benchmark, and statistical-regression analyses thus provide substantial evidence in support of the Commission's findings of anticompetitive effects. And, even if the evidence of actual effects is inconclusive, the Commission also demonstrated the adverse potential of Realcomp's website policy by establishing Realcomp's market power and the anticompetitive tendencies of the website policy.[15]

3. Procompetitive Justifications

Realcomp might still prevail, despite evidence of actual or likely anticompetitive effects, by demonstrating "some countervailing procompetitive virtue — such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services." *Ind. Fed'n,* 476 U.S. at 459, 106 S.Ct. 2009. Giving "some deference" to the Commission's conclusion, *In re Detroit Auto Dealers,* 955 F.2d at 469, we conclude that the Commission properly rejected Realcomp's proffered justifications as not "legitimate, plausible, substantial and reasonable." *Id.* at 470.

835 *835 The ALJ concluded that, without the website restrictions, home sellers with EA agreements "would free ride on the Realcomp members who invest and participate in the MLS through the payment of dues and who otherwise undertake to support the cooperative endeavor of the MLS." Pet'r App. Vol. II at 182 (Dec. at 121). However, as the Commission found, the circumstances of this case do not establish free-riding. EA home sellers making use of the Realcomp MLS still must employ a listing broker who is a paying Realcomp member. Realcomp charges equal membership fees to all users.

Therefore, Realcomp's services to EA home sellers are compensated through payments of the EA seller to her listing broker, who in turn pays Realcomp for the benefit of participation in the MLS.

Realcomp also erroneously argues that the EA home seller free-rides specifically on Realcomp cooperating agents because the EA home seller may act as her own cooperating broker. By not employing a cooperating broker, the argument goes, the EA home seller compensates Realcomp only through her payment to the listing broker, which does not cover all of Realcomp's costs. These costs are shared by cooperating brokers who pay dues to Realcomp in order to benefit from the business generated by the MLS. Thus, Realcomp asserts, cooperating brokers "subsidize the cost that property owners would otherwise incur to procure buyers who do not use cooperating brokers." Pet'r Br. at 52.

Cooperating brokers are compensated, however, for whatever services they do provide to the EA home seller, and the EA home seller receives no free services. If an EA home seller does choose to transact with a cooperating buyer, which the EA home seller does in 80% of EA listing transactions, compensation is provided for the cooperating broker by the terms of the EA listing contract, of which the cooperating broker is aware before the sale.

Moreover, the free-riding justification fails because a home seller may contract with an unrepresented buyer regardless of the type of listing contract, and under either EA or ERTS listing agreements, there is no compensation provided to cooperating brokers when the home seller chooses not to employ their services. ERTS listings include no requirement for the involvement of cooperating brokers, and, like EA listing agreements, flat-fee ERTS listings do not incorporate a cooperating broker's commission into the listing broker's compensation. Although there may be incentives for an EA home seller to transact with an unrepresented buyer in order to avoid additional payment to a cooperating broker, listing brokers in ERTS transactions also benefit from selecting an unrepresented buyer and retaining the commission that would otherwise be divided. Thus, Realcomp has not demonstrated a connection between the website policy and the prevention of free-riding.[16]

The website policy also purportedly eliminates a "bidding disadvantage" faced by a buyer represented by a cooperating broker when bidding against an unrepresented buyer in an EA transaction. Pet'r Br. at 56. But rather than enhance
836 competition, such a policy insulates cooperating *836 brokers' commissions from competitive pricing pressure. As the Commission found, the bidding-disadvantage justification "reinforces the conclusion that [the policies] have an anti-competitive effect" by deliberately protecting established commissions and preventing the reduction in the cost of selling a home. Pet'r App. Vol. I at 39 (Comm'n Op. at 33). Even if there are financial incentives for a home seller to contract with an unrepresented buyer over a cooperating broker, Realcomp offers no meritorious procompetitive justification for protecting cooperating brokers from pressure to lower costs.[17] And, as with the free-riding justification, Realcomp fails to demonstrate how EA listings give rise to a greater "bidding disadvantage" than do ERTS listings given that a listing broker in an ERTS agreement presumably prefers to retain the cooperating broker's commission for herself by transacting with an unrepresented buyer.

III. CONCLUSION

Under a full rule-of-reason analysis, we conclude that substantial evidence supports the Commission's findings that: 1) Realcomp's website policy gave rise to potential genuine adverse effects on competition due to Realcomp's substantial market power and the website policy's anticompetitive nature; 2) the website policy in fact caused actual anticompetitive effects; and 3) Realcomp's proffered procompetitive justifications were insufficient to overcome a prima facie case of adverse impact. These findings establish that Realcomp's website policy unreasonably restrained competition in the market for the provision of residential real-estate-brokerage services in southeastern Michigan and the Realcomp MLS area. Therefore, we DENY Realcomp's petition for review.

[1] For simplicity, we refer to the agents and brokers who make up Realcomp's membership as "brokers."

[2] The rules prohibit distribution to real-estate internet advertising sites of "Exclusive Agency, Limited Service and MLS Entry Only Listings." Pet'r App. Vol. II at 107 (Dec. ¶ 358).

[3] We have stated that "[w]hen the Commission overrules the ALJ and substitutes its own findings, we should carefully scrutinize the Commission's determinations of fact, and therefore its conclusions based upon those facts." *In re Detroit Auto Dealers Ass'n*, 955 F.2d at 469. The Supreme Court has explained, however, that consideration of the examiner's findings is only one of many "other factors which in sum determine whether evidence is `substantial,'" *Universal Camera*, 340 U.S. at 497, 71 S.Ct. 456; thus, a court "need not limit its reexamination of the case to the effect" of those findings beyond "the relevance that they reasonably command," *id.*

[4] The Commission applied the "inherently suspect" or "quick-look" analytical framework upheld by the D.C. Circuit in *Polygram Holding, Inc. v. FTC,* 416 F.3d 29 (D.C.Cir. 2005). In *Polygram,* the D.C. Circuit held that the challenged practices bore a "close family resemblance" to other practices "that already stand[] convicted in the court of consumer welfare." *Id.* at 37. The court found unlawful "[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture [which] looks suspiciously like a naked price fixing agreement between competitors." *Id.*

[5] In *Detroit Auto Dealers,* we expressed reservations about applying the "inherently suspect" framework to an agreement among car dealers to limit showroom hours because the impact on competition was not "immediately apparent," and we examined actual and potential adverse effects on competition. *In re Detroit Auto Dealers Ass'n,* 955 F.2d at 469-70. However, "in deference to the Commission, we [did] not ... hold the analogy [to inherently suspect practices] erroneous." *Id.* at 471-72; *see also Worldwide Basketball,* 388 F.3d at 961 (declining to apply quick-look analysis "where the contours of the market... are [not] sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition"). We note that *Detroit Auto Dealers* preceded in time the Supreme Court's decision in *California Dental* and the D.C. Circuit's *Polygram* decision endorsing the quicklook analysis.

[6] Other circuits have permitted an inference of adverse effects based on a showing of market power and anticompetitive tendencies. *See, e.g., Craftsmen Limousine, Inc. v. Ford Motor Co.,* 491 F.3d 380, 388 (8th Cir.2007) (holding that plaintiff may prove "detrimental effects on competition by making an inquiry into market power and market structure designed to assess the [restraint]'s actual effect." (internal quotation marks omitted)); *Tops Markets, Inc. v. Quality Markets, Inc.,* 142 F.3d 90, 97 (2d Cir.1998) ("A plaintiff seeking to use market power as a proxy for adverse effect must show market power, plus some other ground for believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market.").

[7] *See* 7 AREEDA ¶ 1511 (Supp. 2010) ("The proof of actual market effects that the ALJ insisted on would certainly be appropriate in a private Sherman Act proceeding under which proof of private harm were required.... But in the presence of market power and the absence of a convincing justification the FTC's treatment of highly suspicious restraints is warranted.").

[8] Despite this initial finding of anticompetitive tendencies, the ALJ ultimately credited Realcomp's procompetitive justifications and found insufficient the Commission's direct econometric evidence to establish an unreasonable restraint of trade.

[9] A decline in the share of EA listings would have real implications for consumers who would otherwise purchase those listings. Assuming an average home sale price of $200,000, and assuming that EA listings save home sellers half of the typical 6% commission, an EA listing would save an individual home seller, on average, $6,000.

[10] The Control MSAs were Charlotte, North Carolina; Dayton, Ohio; Denver, Colorado; Memphis, Tennessee; Toledo, Ohio; and Wichita, Kansas. The Restriction MSAs were Green Bay/Appleton, Wisconsin; Boulder, Colorado; and Williamsburg, Virginia.

[11] The ALJ faulted Dr. Williams for his selection of Control MSAs, noting that Midwestern Rust Belt cities omitted from the study were intuitively more similar to Detroit than the chosen MSAs, and therefore were instructive points of comparison. Increasing the sample size would have strengthened Dr. Williams's findings. However, the ALJ pointed to no evidence that comparisons to Rust Belt cities would have yielded different results. Furthermore, the Control MSAs were chosen based on a ranking of variables plausibly relevant to choice of home listing contracts (namely, home price change over 1 and 5 years, median single-family home price, education levels as measured by percentage of high school and bachelor degrees, median income, population size, and population density).

The ALJ also theorized that if Dr. Williams had correctly identified factors that determine the share of EA contracts and then had chosen MSAs similar to one another, the EA shares of the Control MSAs would be very similar, but instead varied between 1.24% and 14%. But, as the Commission noted, the values of the economic and demographic variables used as selection criteria could vary across MSAs in the control sample, even if related to the use of EA listings, and even if they rendered the selected MSAs more similar to Detroit than other cities. That the shares of EA listings in the Control MSAs were different from one another does not mean that the MSAs were inappropriate for comparison.

[12] Given that the difference in absolute terms between these shares is less than 1%, the ALJ found the difference insignificant.

[13] In statistical terms, the MSA-level variables were omitted to avoid the problem of multicollinearity. Regression analysis measures the effects of different factors, called independent or explanatory variables, on a particular outcome, called the dependent variable. The more that independent variables are correlated with one another — such as when two measures capture the same information — the less unique information they will each contribute to the prediction of the dependent variable. When predictors become more correlated, the estimate of individual regression coefficients becomes more unreliable and, thus, the effects of the individual independent variables become difficult to measure accurately. *See* JACOB COHEN ET AL., APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES 419-420 (3d ed. 2003). Dr. Eisenstadt himself admitted that, while not completely duplicative, the MSA-level and county-level data were highly correlated.

[14] Realcomp may be correct that the measure of a variable like median household income is to some extent relevant at both the local and MSA-wide level, and that these measures convey different information relevant to decisions about how a home seller will approach the sale. If important independent variables are omitted from the analysis, their effects on the dependent variable may be attributed to independent variables that are included, and as a result, the causal relationship between included independent variables and the dependent variable may be biased. *See id.* at 143, 426. But, as discussed *supra,* including these variables introduced significant problems of multicollinearity, and substantial evidence supports the Commission's interpretation of Dr. Williams's statistical analysis.

[15] In this appeal, Realcomp is specifically challenging the Commission's order on the basis of its conclusions with respect to the website policy. As the ALJ noted, Dr. Williams did not disentangle the effects of the search-function policy, website policy, and minimum-services requirement, all of which were at issue when complaint counsel filed the complaint.

[16] The Commission's analysis is persuasive on this point, noting that EA listings disadvantage not the cooperating brokers, but rather "the listing broker who signs an EA contract for less compensation than an ERTS contract would have provided, and the listing broker who insists upon an ERTS contract and loses a listing as a result.... In other words, these two categories of listing brokers are not losing money through free-riding; they are losing money through competition." Pet'r App. Vol. I at 37 (Comm'n Op. at 31).

[17] The ALJ also noted that the website policy reflects the greater value of ERTS over EA contracts to the MLS because cooperating brokers often must deal directly with EA home sellers rather than listing brokers when engaging in EA contracts, and, as a result, may be required to provide transactional services that would otherwise be performed by full-service listing brokers. We agree with the Commission, however, that Realcomp has failed to carry its burden of demonstrating how meeting the preferences of cooperating brokers ultimately benefits consumers, why the price for EA listings does not incorporate these costs, or how this policy in particular offers efficiency benefits. It is also worth noting that, despite Realcomp's assertions of the website policy's necessity, the NAR has ruled that MLSs may no longer exclude EA listings from their IDX feeds.

450 F.3d 312 (2006)

Jay REIFERT, Plaintiff-Appellant,
v.
SOUTH CENTRAL WISCONSIN MLS CORPORATION, Realtors Association of South Central Wisconsin, Inc., Robert L. Courter, Susan Matthews, David Stark, Robert Weber, Thomas Bunbury, Maurice W. Hill, Peter Sveum, Marshall Zwygart, and David McGrath, Defendants-Appellees.

No. 05-3601.

United States Court of Appeals, Seventh Circuit.

Argued February 17, 2006.
Decided June 12, 2006.

314 *313 *314 David Barry (argued), Barry & Associates, San Francisco, CA, for Plaintiff-Appellant.

Brady C. Williamson, Godfrey & Kahn, Milwaukee, WI, Jack R. Bierig (argued), Sidley Austin Brown & Wood, Chicago, IL, for Defendants-Appellees.

Before FLAUM, Chief Judge, and KANNE and WOOD, Circuit Judges.

FLAUM, Chief Judge.

Plaintiff-Appellant Jay Reifert claims that the defendants violated the Sherman Act by tying access to a real estate multi-listing service ("MLS") to membership in a Realtors Association. The district court granted summary judgment for all defendants in this case, finding no competition in the tied market and therefore, no anti-trust violation.

For the following reasons, we now affirm the judgment of the district court.

I. Background

Realtors Association of South Central Wisconsin, Inc. ("RASCW") is a real estate trade association. Its members are real estate agents and appraisers in and around Madison, Wisconsin. RASCW offers a variety of products and services to its members, including lobbying, social functions, courses, referral programs, contract forms, conventions, publications, and legal information.

RASCW is associated with the Wisconsin Realtors Association and the National Association of Realtors ("NAR"). When a person pays membership dues to an association affiliated with NAR, that person becomes a member of NAR. Normally,
315 *315 Realtors Association[1] memberships are packaged as a group including local, state, and NAR memberships.

RASCW owns 100% of the stock in the South Central Wisconsin MLS Corp. ("SCWMLS"). The MLS or multiple listing service is a computerized database of homes and properties listed for sale by SCWMLS participants in south-central Wisconsin. Access to this multiple listing service is a necessity for real estate agents and appraisers in this area. Virtually all active residential real estate agents in the region subscribe to SCWMLS. Users are charged a quarterly fee to gain access to the full database and must be a member of a Realtors Association affiliated with NAR. The Realtors Association membership requirement has existed for more than fifty years. Generally, any licensed real estate professional who agrees to abide by the NAR Code of Ethics and pays the applicable fees is admitted.

Article 16 of NAR's Code of Ethics contains a "non-solicitation" rule. This article and the related standards of practice prohibit members from inducing sellers to breach listing contracts, advising sellers of superior services or prices during the time they are under contract with another Realtor, and using "information received through a Multiple Listing Service . . . to target clients of other Realtors®."

A member-elected board of directors sets dues for RASCW. Fees for SCWMLS are also set by members elected to a board of directors. Both organizations set their fees solely to cover operational costs, with no profit-making intent. Annual dues to join the NAR, Wisconsin Association of Realtors, and RASCW are approximately $449 a year.

The plaintiff, Jay Reifert, brings three claims against SCWMLS, RASCW, and the directors of SCWMLS. First, he alleges that SCWMLS unlawfully ties its services to RASCW. Second, Reifert alleges that by conditioning access to MLS service on membership in RASCW, an unlawful group boycott has occurred. Finally, Reifert alleges that Article 16 of the NAR Code of Ethics violates the Section I of the Sherman Act, 15 U.S.C. § 1, by prohibiting competition.

Reifert, is a residential real estate broker, exclusively representing buyers of real estate in south central Wisconsin. Reifert has been a member of RASCW (or its predecessor) and a participant in SCWMLS (or its predecessor) since 1988. Reifert belongs to the National Association of Exclusive Buyer's Agents ("NAEBA") and has no desire to maintain membership in RASCW or the state and national Association of Realtors. Reifert objects to the fees he is forced to pay for unwanted services and the Code of Ethics he must follow to maintain his membership in RASCW and NAR.

Reifert claims that during the four years at issue in this action, he has paid dues in excess of $2000 for an unwanted RASCW membership to maintain his SCWMLS access. During the relevant four-year period, there have been approximately 2,079 annual and 5,600 total SCWMLS participants.

To support an antitrust action, a plaintiff must demonstrate that the defendant's actions have restrained competition. Section I of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade
316 or commerce among the several *316 States . . . is declared to be illegal." 15 U.S.C. § 1. The Supreme Court has long recognized that Congress intended to outlaw only "unreasonable restraints," not all contracts in restraint of trade. *See* *State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (citations omitted). The Clayton Act allows for private suits by individuals injured by violations of antitrust laws. *See* 15 U.S.C. §§ 15, 26.

On August 25, 2005, the district court granted summary judgment to the defendants and denied summary judgment to the plaintiff. A tying arrangement violates federal antitrust statutes if it has a substantial effect on interstate commerce. The district court found that "there is insufficient evidence for a fact finder to find that a tie between the defendant's multiple listing service and Realtor membership has had an effect on interstate commerce as that element has been defined by the Supreme Court."

As to Reifert's group boycott claim, the district court again found that the plaintiff had failed to prove any anticompetitive effects resulting from the tying of Realtors Association memberships to MLS services. Accordingly, the district court granted summary judgment to the defendants.

II. Discussion

We review a district court's grant of summary judgment de novo, taking all facts in the light most favorable to the non-moving party. *See, e.g.,* *McCoy v. Harrison,* 341 F.3d 600, 604 (7th Cir.2003) (citations omitted). An award of summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A. Tying Claim

Reifert claims that the defendants have engaged in an unlawful tying arrangement by limiting SCWMLS access to members of a Relators Association. Thus, the alleged "tying product" is SCWMLS and the alleged "tied product" is membership in a Realtors Association.

In determining whether a violation of Section I of the Sherman Act, 15 U.S.C. § 1, has occurred as a result of a tie between two products or services, this Court requires the plaintiff to prove four elements. *See* *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.,* 758 F.2d 203, 208 (7th Cir.1985) (citing imposition of the "economic interest requirement . . . by courts in the Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits").

> In order to establish the per se illegality of a tying arrangement, a plaintiff must show that: (1) the tying arrangement is between two distinct products or services, (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product, and (3) a not insubstantial amount of interstate commerce is affected. [*N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 5-6,

> 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)]; *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1212 (9th Cir.1977). In addition, this circuit has held that an illegal tying arrangement will not be found where the alleged tying company has absolutely no economic interest in the sales of the tied seller, whose products are favored by the tie-in. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,* 585 F.2d 821, 835 (7th Cir.1978), *cert. denied,* 440
> 317 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979); *Warner Mgmt. Consultants, Inc. v. Data* *317 *Gen. Corp.,* 545 F.Supp. 956, 967 (N.D.Ill.1982).

Id. at 207-08.

Following this precedent, the district court correctly required Reifert to prove the following four elements of a tying violation: (1) a tie exists between two separate products; (2) the tying seller (SCWMLS) has sufficient economic power in the tying product market to restrain free competition in the tied product market (Realtors Association memberships); (3) the tie affects a not-insubstantial amount of interstate commerce in the tied product (Realtors Association memberships); and (4) the tying seller (SCWMLS) has some economic interest in the sales of the tied product (Realtors Association memberships). *Id.* at 207.[2]

There is no question that Reifert has satisfied the requirements for the first two elements. First, access to the multi-listing service cannot be obtained without purchasing the tied product, a Realtors Association membership. Second, SCWMLS has sufficient market power to restrain free competition in the tied product market.

SCWMLS is a unique product. Nearly every available home in the relevant geographic area is listed on the service. The near-perfect market information created by SCWMLS is the result of a requirement that members place all listings in the MLS within five days. The MLS allows individuals with access to search and filter properties based upon detailed criteria including compensation offered to buyers' agents, detailed property information, neighborhood information, prior sales history, offers made on the property, days on the market, and the sale price of comparable homes. The features and information available through SCWMLS are not available through any other service. In addition, the MLS service targets a different audience — real estate agents and appraisers — than free listing services or newspapers. In short, it is impossible to perform the tasks of a real estate agent or appraiser in the relevant geographic area without using SCWMLS. Thus, it possesses sufficient market power to restrain competition.

The third element of the *Sandburg* test states that a tying arrangement violates antitrust law only if "a substantial volume of
318 commerce is foreclosed" because of the tie. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 16, 104 S.Ct. *318 1551, 80 L.Ed.2d 2 (1984). This element can be broken into two sub-questions: (1) Is there at least one competitor in the tied product market other than the favored seller; and (2) Is the quantity of interstate commerce affected not-insubstantial?

The district court found no competition in the allegedly tied market for Realtors Association memberships. Where there is no competition in the tied market, there can be no antitrust violation. Forcing a buyer to purchase a product he otherwise would not have purchased is insufficient to establish the foreclosure of competition. *Id.* ("[W]hen a purchaser is `forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.").

Despite Reifert's desire to avoid purchasing a Realtors Association membership, without evidence of competitors in the market for services offered by the Realtors Association, there can be no foreclosure of competition. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,* 585 F.2d 821, 835 (7th Cir.1978); 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1723a (2d ed. 2004) ("When there are no rival sellers of the tied product to be foreclosed, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not foreclose anyone."). The district court correctly found that despite the "laundry list of entities" submitted by the plaintiff, there were no competitors in the tied product market.

Products and services are in the same market when they are good substitutes for one another. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States,* 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

This Court requires that a plaintiff prove that products are good substitutes using economic evidence; a conclusory assumption of competition where products or services appear to be similar is insufficient. *See Menasha Corp. v. News Am.*

Mktg. In-Store, Inc., 354 F.3d 661, 664 (7th Cir. 2004). Actual data and a reasonable analysis are necessary to demonstrate that a product or service is a good substitute for another. "Economics, like the other social sciences, has its share of counterintuitive findings, so observing things that to the untutored eye seem to be substitutes need not mean that they *are* good substitutes." *Id.*

Other federal courts have held that conditioning access to a multi-listing service on membership in a Realtors Association is not indicative of an unlawful tying arrangement. *See Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors,* 850 F.2d 803 (1st Cir.1988); *O'Riordan v. Long Island Bd. of Realtors, Inc.,* 707 F.Supp. 111 (E.D.N.Y.1988); *Buyer's Corner Realty, Inc. v. No. Ky. Ass'n of Realtors,* 410 F.Supp.2d 574 (E.D.Ky.2006). One federal court has held that a tied real estate association group faced competition and therefore created an unlawful tie; as explained below, however, we find that case distinguishable. *See Thompson v. Metro. Multi-List, Inc.,* 934 F.2d 1566 (11th Cir.1991).

Reifert argues that by comparing participation in Realtors Associations in areas where MLS services are "open" to individuals who have not joined a Realtors Association with so called "closed" areas that require membership in a Realtors
319 Association, he can demonstrate that agents have been forced to purchase Realtors Association *319 memberships. This comparison is unreliable, however, because it fails to speak to the central question of whether a competitor exists in this particular "closed" market and does not account for other possible explanations for the observed differences. Forcing individuals in Reifert's position to purchase a product they do not want is not a violation of antitrust law. *See Jefferson Parish Hosp. Dist. No. 2,* 466 U.S. at 16, 104 S.Ct. 1551.

Even without an economic analysis, it is apparent that RASCW lacks competition. Each of the twelve organizations cited by Reifert fails to qualify as a competitor to the national or local Realtors Association:

1. Appraisal Institute (AI)covers only appraisers

2. Asian Real Estate Agent Association (AREAA) — serves a distinct ethnic community

3. Chinese American Real Estate Professionals Association (CAREPA) — serves a distinct ethnic community

4. Chinese Real Estate Association of America (CREAA) — serves a distinct ethnic community

5. Colorado Association of Exclusive Buyer Agents (CAEBA) — covers only exclusive buyer agents

6. Massachusetts Association of Buyer Agents (MABA) — covers only exclusive buyer agents

7. National Association of Exclusive Buyer Agents (NAEBA) — covers only exclusive buyer agents

8. National Association of Independent Fee Appraisers (NAIFA) — covers only appraisers

9. National Association of Hispanic Real Estate Professionals (NAHREP) — serves a distinct ethnic community

10. National Association of Independent Real Estate Brokers (NAIREB) — serves only independent brokers

11. National Association of Real Estate Appraisers (NAREA) — covers only appraisers

12. National Association of Real Estate Brokers (NAREB) — primarily devoted to the needs of minority brokers

The district court relied heavily upon the First Circuit's decision in *Wells Real Estate.* We believe that decision effectively captured the central flaw in Reifert's argument.

> [The plaintiff] has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board but for the power exerted by the lure of the defendants' MLS. There is no evidence that a substantial volume of "commerce" in board membership was foreclosed by the tie-in. The tying claim must fail absent any proof of anti-competitive effects in the market for the tied product.

Wells Real Estate, Inc., 850 F.2d at 815 (footnotes omitted).

While the organizations the plaintiff named may provide important services, they simply do not compete with RASCW or any other Realtors Association. These niche associations lack cross-price elasticity with the national and local Realtors Associations, and have dissimilar purposes. These organizations are unlikely substitutes for a Realtors Association in Wisconsin.

Instead of providing the district court with the required economic analysis, Reifert employs a 30-year old decision from this
320 Court, *Beatrice Foods Co. v. FTC,* 540 *320 F.2d 303, 308 (7th Cir.1976), to frame his discussion of competition. *Beatrice Foods Co.* relied upon the Supreme Court's decision in *Brown Shoe Co.,* 370 U.S. at 325, 82 S.Ct. 1502, and set forth several "practical indicia" to determine a market's boundaries. "These indicia are (1) the industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors." *Beatrice Foods Co.,* 540 F.2d at 308. While the "practical indicia" named in *Brown Shoe* and *Beatrice Foods Co.* are important considerations in defining a market, they were never intended to exclude economic analysis altogether. Both opinions recognized the importance of economic analysis, including cross-price elasticity of demand. *See* *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *see also* *Beatrice Foods Co.,* 540 F.2d at 308.

This Court has emphasized the use of economic analysis in the law. To demonstrate competition in an antitrust case, the plaintiff must provide an economic analysis of the relevant market. *See, e.g.,* *Menasha,* 354 F.3d 661 (requiring economic evidence to prove the existence of a distinct market). Lacking any economic evidence, Reifert has failed to show that the tying arrangement has foreclosed any portion of the market for real estate services.

The facts of the instant case stand in contrast to the situation analyzed by the Eleventh Circuit in *Thompson.* The defendants in *Thompson* operated an MLS system and tied MLS access to membership in a Realtors Association. The Plaintiff, Empire Real Estate Board, was "founded in 1939 as an African American professional association because, at that time, the Realtors [Association] excluded African Americans from membership." *Thompson,* 934 F.2d at 1570. The plaintiffs proved that as a result of the tie and the prohibitive cost of joining two groups, 400 brokers either did not join or quit the Empire Real Estate Board. *Thompson* held that where a competitor offering similar services loses four hundred members because of a tie between an association of real estate agents and an MLS service, there has been a substantial effect on interstate commerce. *Id.* at 1578. In our case, however, the plaintiff has not presented an organization equivalent to Empire Real Estate Board. *Thompson* presented a valid competitor; neither *Wells* nor the instant case does. Thus, *Thompson* demonstrated a substantial effect on interstate commerce, while Reifert has not.

Having found no competitors, there are many issues raised in the parties' briefs that we need not reach. We need not decide whether the quantity of interstate commerce affected is "not-insubstantial," nor must we address whether SCWMLS has a sufficient economic interest in the sales of the tied product to satisfy the fourth element of an unlawful tying arrangement.

B. Group Boycott Claim

Reifert also asks this Court to consider the district court's grant of summary judgment to the defendants on his group boycott claim. A group boycott traditionally occurs when a particular group or individual is prohibited from joining an organization. "Where there are no exclusionary conditions attached to Realtor board membership, and there is no
321 contention that the cost is prohibitively high, it is difficult to see any affront to competition." *321 *Pomanowski v. Monmouth County Bd. of Realtors,* 89 N.J. 306, 446 A.2d 83, 92 (N.J.1982). In the instant case, no licensed real estate agent was denied access to SCWMLS because of an anti-competitive measure.

To prove a group boycott, a plaintiff must establish that the membership requirement has had an adverse impact upon competition in the market for the tied product. As stated above, Reifert has failed to demonstrate the existence of a competitive market for Realtors Association memberships. Thus, there is no need to balance the pro-competitive effects of the Realtors Association membership requirement against its anti-competitive effects. *See* *Buyer's Corner Realty, Inc.,* 410 F.Supp.2d at 583-84 (citing *O'Riordan,* 707 F.Supp. at 116).

C. Anti-Competitive Effects of the Code of Ethics

Reifert claims that Article 16 of the Code of Ethics of the National Association of Realtors is anti-competitive and violates Section I of the Sherman Act, 15 U.S.C. § 1. Article 16 prohibits members of the National Association of Realtors from interfering with the exclusive agreements other members have established with clients.

Reifert's allegations concerning the anti-competitive effects of Article 16, however, are overly broad. As the National Association of Realtors, Code of Ethics Standard of Practice 16-2 states, "Article 16 does not preclude Realtors® from making general announcements to prospects describing their services[.]" Rather, the Article's purpose is to prevent the targeted solicitation of individuals who have exclusively listed their property with another agent and to prevent agents from improperly using multiple listing services as a data bank of potential customers.

We must review a challenge to Article 16 under the rule of reason to determine whether the agreement contributes to competition and productivity. *See* *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 695, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). Under the rule of reason, Reifert had the burden to demonstrate that Article 16's net effect was anti-competitive. *See* *Bi-Rite Oil Co. v. Ind. Farm Bureau Co-op. Ass'n, Inc.,* 908 F.2d 200, 203 (7th Cir.1990).

The balance between pro- and anti-competitive effects weighs heavily in favor of Article 16. Even in "open" MLS areas such as Massachusetts and Alaska, where individuals who have not joined a Realtors Association may access an MLS service, users must agree not to solicit the exclusive listings of other MLS users during the term of the listing. If agents were reluctant to post their listings, for fear that other agents would steal their clients, the market would become less transparent and less efficient. Article 16 aids competition and fulfills the purposes of the Sherman Act by providing a more transparent marketplace.

III. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

WOOD, Circuit Judge, concurring in the judgment.

Although I agree without reservation with the majority's conclusion that the district court correctly granted summary judgment for the defendants in this case, I am concerned that some aspects of its opinion are in tension with the governing Supreme Court doctrine on tying arrangements. For the reasons I explain briefly here, I would take a more cautious
322 approach, *322 and leave further developments in tying law to the high court.

In *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958), the Supreme Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 5-6, 78 S.Ct. 514. As the Court later made clear in *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), however, "every refusal to sell two products separately can not be said to restrain competition." *Id.* at 11, 104 S.Ct. 1551. The trick is to distinguish between tying arrangements that are invalid and those that are innocuous, from a competitive standpoint. In *Jefferson Parish,* the Court explained the difference as follows:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Id. at 12, 104 S.Ct. 1551. Going on, over the objection of Justice O'Connor (who concurred in the judgment because of this point), the majority had this to say about the analytical approach toward tying arrangements:

> *Per se* condemnation — condemnation without inquiry into actual market conditions — is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences.

Id. at 15-16, 104 S.Ct. 1551. The Court went on to describe the circumstances under which that probability would exist: first, there must be a substantial potential for impact on competition, which would be shown if a substantial volume of commerce is foreclosed by the arrangement; second, anticompetitive forcing must be likely, which is the case when it is probable that the seller has market power. *Id.* at 16-17, 104 S.Ct. 1551. If the seller does not have "either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product," then the *per se* rule cannot be used and the arrangement must be assessed under a full rule of reason. *Id.* at 18, 104 S.Ct. 1551.

Despite Justice O'Connor's forceful opinion concurring in the judgment, in which she argued that the time had come to jettison the *per se* rule in tying cases, see *id.* at 35, 104 S.Ct. 1551, and despite the opportunity it had as recently as March 2006 to take that step, see *Illinois Tool Works Inc. v. Independent Ink, Inc.,* ___ U.S. ___, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006), the Court has refused to do so. *Illinois Tool Works* held only that the fact that a tying product is patented does not support a presumption that the seller has market power over that product. See 126 S.Ct. at 1291. It concluded that "tying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish* rather than under the *per se* rule applied in *Morton Salt* and *Loew's,*" both cases involving intellectual property (patents in *Morton Salt,* copyrights in *Loew's*). In my view, *Illinois Tool Works* thus stands only for the proposition
323 that a plaintiff must prove that a holder of intellectual property has "either the degree or *323 the kind of market power that enables him to force customers" to purchase the tied product. If a plaintiff can do so, then the framework established by *Jefferson Parish* continues to apply.

In the case before us, we must decide whether Reifert has produced enough evidence to survive summary judgment with respect to the allegation that the defendant Realtors Associations have tied the multi-listing service (MLS, the tying product) to membership in the Realtors Association of South Central Wisconsin, Inc. (RASCW, the tied product). The district court concluded that Reifert had not come forward with the requisite evidence. I agree. The D.C. Circuit offered a useful summary of the elements of a tying case in *United States v. Microsoft Corp.,* 253 F.3d 34 (D.C.Cir.2001):

> There are four elements to a *per se* tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.

Id. at 85. Here, I am willing to say that Reifert has brought forth enough evidence to permit a trier of fact to rule in his favor on the first three of those elements. His proof fails, however, on the fourth.

The key point is not the measurement of how much commerce in the tied product market was affected. It is the fact that Reifert offered no evidence to show that there was any foreclosure in the tied product market. As far as we can tell from this record, no one refrained from joining any other organization because of the cost of membership in the Realtor Associations (RASCW and the others) before us. This is what distinguishes our case from the Eleventh Circuit's opinion in *Thompson v. Metro. Multi-List, Inc.,* 934 F.2d 1566 (11th Cir.1991). In that case, the court explicitly rested its decision on foreclosure, to which it referred as the "coercion element," explaining that "plaintiffs need to show that [defendant] Metro not only has [ ] market power but also has wielded this market power to force brokers to alter their choice of professional associations." *Id.* at 1577. It then reported that the evidence in the record showed "that 400 of Empire's prospective and current members did not join Empire or quit Empire because of the prohibitive cost." *Id.* at 1578. This is precisely the type of showing that Reifert failed to make.

Analytically, the majority may well be right that the rule of reason approach it sees in *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.,* 758 F.2d 203 (7th Cir.1985), would be a more sensible way to approach all tying cases. But it is not for this court to anticipate the Supreme Court's overruling of its earlier decisions, even if the passage of time and the impact of later cases that create doctrinal tensions are evident to all. Just as we did in *Khan v. State Oil Co.,* 93 F.3d 1358 (7th Cir.1996), overruled by *State Oil Co. v. Khan,* 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997), we should limit ourselves to pointing out the problems we see and then attempting to apply the law as it stands as best we can. In the present case, unlike *State Oil,* faithful application of the existing law leads to the same outcome as the more ambitious approach the majority has chosen. For that reason, I am happy to concur in the outcome that the majority reaches, but I must respectfully decline to join its opinion.

[1] "Realtors Associations" are organizations affiliated with the National Association of Realtors and have agreed to abide by the NAR Code of Ethics. RASCW is an example of a local Realtors Association.

[2] We agree with our concurring colleague that a cautious approach is always appropriate when anticipating future Supreme Court actions. In 1985, our Circuit began to incorporate the rule of reason in our tying analysis. At that time, we stated that, "According to the Supreme Court, a plaintiff's failure to state a *per se* illegal antitrust claim does not necessarily prove fatal to his case if he can state a claim under the rule of reason." *Carl Sandburg Vill. Condo. Ass'n No.* 1, 758 F.2d 203, 210 (7th Cir.1985) (citing *Fortner Enter., Inc. v. United States Steel Corp.,* 394 U.S. 495, 499-500, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Warner Mgmt. Consultants, Inc. v. Data Gen. Corp.,* 545 F.Supp. 956,

966 (N.D.Ill.1982)); *see also* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 35, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) (O'Connor, J., concurring) ("The time has therefore come to abandon the `*per se'* label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."). In a related area, the Supreme Court recently adopted Justice O'Connor's reasoning in *Jefferson Parish Hosp. Dist. No. 2* and held that tying arrangements involving patents should be evaluated based upon their market power "rather than under the per se rule." *Ill. Tool Works, Inc. v. Indep. Ink, Inc.,* ___ U.S. ___, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006). Although the *per se* analysis of the *Jefferson Parish Hosp. Dist. No. 2* majority has not been expressly overruled, in the intervening twenty-one years since *Carl Sandburg Vill. Condo. Ass'n No. 1,* the Supreme Court has not found occasion to disagree with this Circuit's approach.

229 A.3d 708 (2020)
335 Conn. 174

The RESERVE REALTY, LLC, et al.
v.
WINDEMERE RESERVE, LLC, et al.
The Reserve Realty, LLC, et al.
v.
BLT Reserve, LLC, et al.

(SC 19979), (SC 19982), (SC 19981).

Supreme Court of Connecticut.

Argued September 18, 2018.
Officially released March 24, 2020.[*]

Procedural History

Action, in the first case, to recover damages for, inter alia, breach of contract, and for other relief, and actions in the second and third cases to foreclose broker's liens on certain of the defendants' real property, brought to the Superior Court in the judicial district of Danbury, where, in the first case, the court, *Doherty, J.,* granted the plaintiffs' motion to add Century 21 Scalzo Realty, Inc., as a defendant; thereafter, in the first case, the plaintiffs withdrew the action as to the defendant Century 21 Scalzo Realty, Inc., and, in the second case, the plaintiffs withdrew the action as to the defendant The Reserve Master Association, Inc.; subsequently, the first case was tried to the court, *Truglia, J.*; judgment for the named defendant et al., from which the plaintiffs appealed to the Appellate Court; thereafter, in the second and third cases, the court, *Truglia, J.,* rendered judgments discharging the broker's liens in accordance with the parties' stipulations, and separate appeals were filed with the Appellate Court; subsequently, the Appellate Court, *Alvord, Sheldon* and *Schaller, Js.,* affirmed the judgments of the trial court, and the plaintiffs, on the granting of certification, filed separate appeals with this court. *Reversed*; *further proceedings.*

709 *709 Daniel E. Casagrande, with whom was Lisa M. Rivas, for the appellants (plaintiffs).

Christopher Rooney, with whom was Brian A. Daley, for the appellees (named defendant et al.).

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

ROBINSON, C. J.

These certified appeals invite us to revisit *State v. Hossan-Maxwell, Inc.,* 181 Conn. 655, 662-63, 436 A.2d 284 (1980), in which this court held that real estate "list-back" agreements—tying arrangements that commit the purchaser of a parcel of real property to use the services of a particular broker when leasing or reselling the property[1] —are per se illegal under state antitrust law. Specifically, we must decide whether, in light of recent antitrust scholarship and developments in federal tying law, *Hossan-Maxwell, Inc.,* should be overruled. We answer that question in the affirmative. Accordingly, we reverse
710 *710 the judgments of the Appellate Court, which, like the trial court, correctly determined that it was required to apply *Hossan-Maxwell, Inc.,* to the present case.

These appeals arise out of a breach of contract action involving the sale and development of 546 acres of the former Union Carbide Corporation (Union Carbide) corporate campus in Danbury (the Reserve). The primary brokers involved in the transactions were Jeanette Haddad (Haddad), a prominent local real estate agent who died in 2013, and Paul P. Scalzo.[2] The plaintiffs are Haddad's husband, Theodore Haddad, Sr., as executor of his wife's estate, and The Reserve Realty, LLC (Reserve Realty), a limited liability company organized by Haddad and Scalzo to market and sell the Reserve as it became subdivided. The defendants, BLT Reserve, LLC (BLT), and Windemere Reserve, LLC (Windemere), are limited liability companies, the principals and owners of which include Carl R. Kuehner, Jr., and Paul J. Kuehner, whose family is longtime friends and business associates of the Haddad family. In this action, the plaintiffs sought to recover real estate brokerage fees in connection with the sale and/or lease of units in an apartment complex constructed on the Reserve and leased by BLT, and of commercial office space to be constructed on the Reserve by Windemere. After a trial to the court, judgments were rendered in favor of the defendants. The Appellate Court affirmed, agreeing with the trial court that the defendants' antitrust special defense barred the plaintiffs' claims. ***Reserve Realty, LLC v. Windemere Reserve, LLC,*** 174 Conn. App. 130, 132, 165 A.3d 162 (2017).

I

The relevant facts, as found by the trial court or that are undisputed, and complete procedural history are set forth in detail in the opinion of the Appellate Court. See id., at 132-38, 165 A.3d 162. In brief, following its acquisition by the Dow Chemical Company (Dow Chemical) in 1999, Union Carbide made known that it would entertain offers to sell the Reserve to interested buyers. Garland Warren, then a Union Carbide employee, initially was responsible for overseeing the sale of the parcel.

In early 2002, a group of real estate developers, later known as Woodland Group II, LLC (Woodland), engaged the services of Haddad and Scalzo to represent them in negotiations to purchase the Reserve. Woodland appears to have chosen Haddad and Scalzo in part because Warren had since left Dow Chemical and been employed by Scalzo.

As part of the broker-client relationship, Haddad, Scalzo, and Woodland executed an "Exclusive Right to Sell—Listing Agreement" (Woodland agreement). The Woodland agreement gave Haddad and Scalzo the exclusive right to sell and/or lease property in the Reserve. The agreement also contained the following provision: "[Woodland] shall make aware to the new purchaser of any part, or of individual lots, or of land, that this [a]greement shall apply to that new purchaser and [Haddad and Scalzo]."

711 *711 Woodland succeeded in purchasing the Reserve, and the plaintiffs received a commission for facilitating that sale. Woodland subsequently proposed a master plan for the entire 546 acre parcel, which the Danbury Zoning Commission approved in November, 2002. Woodland then continued to use the services of Haddad and Scalzo to market the property to potential buyers.

Efforts to develop the property foundered, however, when Windemere, which was in the process of developing a neighboring parcel of land, appealed Woodland's zoning approval for the Reserve, effectively blocking development of the land. To resolve the zoning dispute, Woodland agreed to sell one portion of the Reserve (parcel 13) to BLT for residential development (a luxury apartment complex, Abbey Woods, had been built at the time of trial), and another portion (parcel 15) to Windemere for commercial development (which had yet to be built at the time of trial).

Consistent with the requirements of the Woodland agreement, and after several rounds of negotiations with Woodland, the defendants reluctantly agreed to include list-back provisions in their purchase and sale agreements for parcels 13 and 15. Specifically, BLT agreed to enter into a listing agreement with Haddad and Scalzo, pursuant to which the brokers would receive a 3 percent commission on the subsequent sale or lease of parcel 13, either as a whole or as individual units. For its part, Windemere agreed to pay Haddad and Scalzo $1 million for their efforts in leasing the office space that Windemere planned to build on parcel 15. That fee was to be paid in ten annual increments of $100,000, beginning when the first certificate of occupancy was issued.[3] After months of additional negotiations, Woodland and the defendants finalized and memorialized those list-back agreements in July, 2003.[4]

Although Haddad and Scalzo made good faith efforts to market parcels 13 and 15, the real estate market softened in the wake of the 2007-2008 financial crisis, and those efforts were unsuccessful. BLT ultimately proceeded to build a luxury apartment complex on its parcel, units of which it marketed through its own on-site leasing agent instead of through the services of Haddad and Scalzo.

712 The plaintiffs responded by filing the present action, alleging breach of contract *712 and anticipatory breach, and seeking, inter alia, specific performance of the listing agreements. In response, the defendants raised a number of special defenses, three of which were at issue in the plaintiffs' appeal to the Appellate Court. Specifically, the defendants argued that the list-back provisions in their purchase and sale agreements were not enforceable by the plaintiffs because those provisions (1) were illegal tying arrangements, (2) did not satisfy the requirements of General Statutes § 20-325a,[5] and (3) were personal and specific to Haddad, who died prior to the trial. ***Reserve Realty, LLC v. Windemere Reserve, LLC,*** supra, 174 Conn. App.

at 138, 165 A.3d 162. Following a bench trial, the trial court ruled for the defendants on all three of these special defenses and rendered judgments accordingly. The Appellate Court affirmed the judgments on the basis of the antitrust defense and, therefore, declined to address the plaintiffs' claims that the trial court reached the incorrect conclusion on the remaining special defenses.[6] Id.

II

The dispositive question in these appeals is whether we should reconsider our tying jurisprudence and overrule *Hossan-Maxwell, Inc.* In part II A of this opinion, we set forth certain well established background principles on which we understand the parties to be in agreement. In part II B and C, we address the legal questions that remain the subject of dispute between the parties.

A

The defendants' first special defense alleges that the list-back provisions in the parties' purchase and sale agreements violate the Sherman Act, 15 U.S.C. § 1 et seq., and are, therefore, unenforceable. See *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 76, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982) (claim that agreement "was void and unenforceable as violative of §§ 1 and 2 of the Sherman Act"); see also *Hanks v. Powder Ridge Restaurant Corp.,* 276 Conn. 314, 326, 885 A.2d 734 (2005) ("contracts that violate public policy are unenforceable" (internal quotation marks omitted)). The section of the Sherman Act at issue provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal...." 15 U.S.C. § 1 (2018). Although this provision, on its face, prohibits *any* contract in restraint of trade, the United States Supreme Court has added a judicial gloss requiring a contractual restraint to be unreasonable before it will be deemed illegal under the Sherman Act.
713 [7] See, e.g., *Board of Trade v.* *713 *United States,* 246 U.S. 231, 238-41, 38 S. Ct. 242, 62 L. Ed. 683 (1918); *Elida, Inc. v. Harmor Realty Corp.,* 177 Conn. 218, 225, 413 A.2d 1226 (1979); see also *Bridgeport Harbour Place I, LLC v. Ganim,* 303 Conn. 205, 214, 32 A.3d 296 (2011) ("an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality" (emphasis omitted; internal quotation marks omitted)).

The United States Supreme Court generally has reviewed alleged Sherman Act violations under one of two standards. "If a restraint alleged is among that small class of actions that courts have deemed to have... predictable and pernicious anticompetitive effect, and ... limited potential for procompetitive benefit, it will be unreasonable per se.... Most antitrust claims, however ... are analyzed under a rule of reason analysis [that] seeks to determine if the alleged restraint is unreasonable because its anticompetitive effects outweigh its procompetitive effects." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim,* supra, 303 Conn. at 214-15, 32 A.3d 296.

Treating some practices as illegal per se allows courts to recognize and efficiently resolve disputes concerning practices that have little or no positive economic value and are highly likely to be anticompetitive, without the need for parties to engage in costly and complex litigation centering around competing expert testimony. See 9 P. Areeda & H. Hovenkamp, Antitrust Law (3d Ed. 2011) ¶ 1720a, pp. 260-61. On the other hand, presumptively applying a rule of reason to most alleged antitrust violations (1) respects the freedom of competitors and consumers to structure their economic relations as they see fit, (2) recognizes that courts generally are ill-equipped to identify those business practices that deviate from the procompetitive norm and may be too quick to choose economic winners and losers rather than allowing the marketplace to sort things out, and (3) requires proof that a challenged business practice actually imposes an unreasonable restraint on trade before exposing a defendant to potential antitrust liability. See 7 P. Areeda & H. Hovenkamp, Antitrust Law (3d Ed. 2010) ¶ 1500, pp. 379-82; 9 P. Areeda & H. Hovenkamp, supra, ¶ 1710c, pp. 110-13.

In addition to the Sherman Act, the defendants allege that the list-back provisions in their agreements also violate the Connecticut Antitrust Act, General Statutes § 35-24 et seq. The primary allegation is that the list-back provisions violate
714 General Statutes § 35-26,[8] the state analogue of 15 U.S.C. § 1.[9] It is well established that *714 the state antitrust act was patterned after federal antitrust law. *Bridgeport Harbour Place I, LLC v. Ganim,* supra, 303 Conn. at 213 n.6, 32 A.3d 296. Indeed, General Statutes § 35-44b provides that, in construing the antitrust act, "the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes." For this reason, "we follow federal precedent when

we interpret the [Connecticut Antitrust Act] unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently...." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim,* supra, at 213 n.6, 32 A.3d 296; see also *Westport Taxi Service, Inc. v. Westport Transit District,* 235 Conn. 1, 15-16, 664 A.2d 719 (1995). Insofar as neither party contends that § 35-26 should be interpreted differently from its federal counterpart, we limit our analysis herein to the issue of whether the listing agreements violate 15 U.S.C. § 1.

The defendants allege that the agreements at issue in the present case are illegal tying arrangements. "A tying arrangement is an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchase a different (tied) product, or at least agree that he will not purchase that product from any other supplier." *State v. Hossan-Maxwell, Inc.,* supra, 181 Conn. at 659, 436 A.2d 284. In its early antitrust cases, the United States Supreme Court took a dim view of tying arrangements because it assumed that (1) tying confers little, if any, economic benefit or value, and (2) tying allows a monopolist in the tying product to improperly extend or leverage its monopoly position so as to monopolize or obtain an unfair advantage in the market for the complementary, tied product (the dual monopoly profit theory). See *Illinois Tool Works, Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 35, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006). Because tying was viewed as being almost invariably anticompetitive, the Supreme Court initially classified tying among those trade practices deemed per se unlawful. See, e.g., *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277 (1953).

The issue of the legality of broker list-back agreements under federal and state antitrust law first arose in the late 1970s and early 1980s. Consistent with the United States Supreme Court's then prevailing views on tying arrangements, both this court and our sister courts[10] held such arrangements to be per se illegal and, therefore, generally refused to enforce contracts predicated on such an agreement.

We addressed this issue in *Hossan-Maxwell, Inc.* A brief review of the facts of that case is instructive. In 1966, James F. Hartnett recorded a declaration of covenants and restrictions on certain parcels of residential *715 land in New Milford. *State v. Hossan-Maxwell, Inc.,* supra, 181 Conn. at 657, 436 A.2d 284. That declaration required that a grantee of any of the sixty-four building lots who decided to sell or lease the property through any commissioned broker give exclusive sales and leasing rights to Hartnett for a period of three months. Id., at 658, 436 A.2d 284. These exclusive rights were intended to run with the land and to bind not only the immediate grantee but all subsequent purchasers. Id. Apparently, Hartnett intended to charge a 6 percent commission for his services, which was consistent with the prevailing market rate. Id., at 663, 665 n.7, 436 A.2d 284.

In affirming the trial court's judgment declaring the restrictive covenants unenforceable, this court applied not a true per se rule but, rather, the "quasi-per se" rule that the United States Supreme Court articulated in *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958) (*Northern Pacific*). See *State v. Hossan-Maxwell, Inc.,* supra, 181 Conn. at 660-67, 436 A.2d 284. Under the *Northern Pacific* rule, a tying arrangement violates 15 U.S.C. § 1, without the need to demonstrate any anticompetitive effects—that is, without the need for a full rule of reason analysis—if the following conditions are met: (1) the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and (2) a "not insubstantial amount of interstate commerce is affected," meaning that more than a de minimis volume of business is foreclosed to competitors by the tie. See id., at 661-63, 436 A.2d 284.

With respect to the first prong of the *Northern Pacific* rule, economic power for antitrust purposes ordinarily must be demonstrated by proving that a seller has a substantial or dominant position (market power) in a defined product and geographic market. See, e.g., *Smugglers Notch Homeowners' Assn., Inc. v. Smugglers' Notch Management Co., Ltd.,* 414 Fed. Appx. 372, 375 (2d Cir. 2011); see also footnote 14 of this opinion. Several United States Supreme Court cases decided prior to *Hossan-Maxwell, Inc.,* however, held that economic power also can be established merely by demonstrating that the tying product at issue is protected as intellectual property or is a unique or especially desirable item, the assumption being that that uniqueness of the tying product can be leveraged to compel an eager buyer to accept the tied product.[11] See, e.g., *International Salt Co. v. United States,* 332 U.S. 392, 395-96, 68 S. Ct. 12, 92 L. Ed. 20 (1947); *International Business Machines Corp. v. United States,* 298 U.S. 131, 135-37, 56 S. Ct. 701, 80 L. Ed. 1085 (1936); see also *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 17, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) ("when the seller offers a unique product that competitors are not able to offer ... [this] [c]ourt has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate" (citation omitted)). In *State v. Hossan-Maxwell, Inc.,* supra, 181 Conn. at 665, 436 A.2d 284, this court read

716 *Northern* *716 *Pacific* to mean that land—or at least residential land—also is always unique. Accordingly, a landowner who ties the sale of their land to the purchase of another product or service necessarily has market power for purposes of a court's evaluation of an antitrust challenge. See id.

This court also concluded in *Hossan-Maxwell, Inc.,* that the second prong of the *Northern Pacific* rule was satisfied because, under what the court described as its "very liberal interpretation" of *Northern Pacific,* the estimated $21,000 in annual real estate commissions implicated by the declaration constituted a not insubstantial volume of business that was foreclosed to other brokers. (Internal quotation marks omitted.) Id., at 664, 436 A.2d 284.

In the four decades since this court held in *Hossan-Maxwell, Inc.,* that any real estate list-back agreement affecting more than a de minimis volume of commerce is per se illegal, neither this court nor, to our knowledge, any federal appellate court has had the opportunity to consider the ongoing vitality of that rule. Although, in addressing this question, we must defer to the trial court's factual findings, our interpretation of federal and state antitrust laws is plenary. See, e.g., *Miller's Pond Co., LLC v. New London,* 273 Conn. 786, 798, 873 A.2d 965 (2005); *Westport Taxi Service, Inc. v. Westport Transit District,* supra, 235 Conn. at 14-15, 664 A.2d 719.

B

We turn now to the primary issue presented by the present appeals, namely, whether the reasoning and result of this court's decision in *Hossan-Maxwell, Inc.,* remain consistent with the current views of the United States Supreme Court and the lower federal courts with respect to tying arrangements. The plaintiffs posit that *Hossan-Maxwell, Inc.,* has been vitiated by modern antitrust case law or, at the very least, that we should adopt a more nuanced approach to tying arrangements such as that espoused by Justice O'Connor in her concurring opinion in *Jefferson Parish Hospital District No. 2 v. Hyde,* supra, 466 U.S. at 33-42, 104 S.Ct. 1551. The defendants respond that *Hossan-Maxwell, Inc.,* remains fully consistent with controlling United States Supreme Court precedent and, therefore, should not be overruled. Because we conclude that the trajectory of federal antitrust law, as informed by recent antitrust scholarship, clearly is diverging from the traditional per se treatment of tying arrangements, we agree with the plaintiffs that the trial court should not have found the list-back agreements at issue in this case unenforceable without first engaging in a full market analysis.

1

Before we review the evolution of the United States Supreme Court's tying jurisprudence, it will be instructive briefly to review some of the developments in antitrust scholarship that precipitated that evolution. Tying was among the first areas in which modern antitrust theory—often associated with the so-called "law and economics" or "Chicago school" of thought—diverged from courts' traditional approach to competition problems. Beginning in the 1970s, antitrust scholars began to challenge the two pillars that had supported courts' per se treatment of tying arrangements, namely, the dual monopoly profit theory and the axiom that tying typically confers no economic benefit or value. Scholars theorized—and purported to
717 demonstrate—that, far from being inherently anticompetitive, most tying agreements *717 are actually procompetitive.[12] See, e.g., D. Carlton & M. Waldman, "Robert Bork's Contributions to Antitrust Perspectives on Tying Behavior," 57 J.L. & Econ. S121, S121-22 (2014); R. Posner, "The Chicago School of Antitrust Analysis," 127 U. Pa. L. Rev. 925, 925-26 (1979). They also established that, in most instances, control over a tying product does not allow a monopolist to garner additional profits by cornering the market for a tied product. See, e.g., *Scheiber v. Dolby Laboratories, Inc.,* 293 F.3d 1014, 1020 (7th Cir. 2002) ("as [modern] cases and a tidal wave of legal and economic scholarship point out, the idea that you can use tying to lever your way to a second ... monopoly is economic nonsense"), cert. denied, 537 U.S. 1109, 123 S. Ct. 853, 154 L. Ed. 2d 781 (2003).

At a more fundamental level, recent scholarship has highlighted the difficulty in distinguishing between a packaged sale that is a tie—and, thus, presumptively illegal under traditional antitrust jurisprudence—and a product or service *bundle,* which is presumptively legal and consumer friendly. As one author has explained, "[t]he most robust statement one can make about tying is that it is ubiquitous. Consider the following examples: shoes are sold in pairs; hotels sometimes offer breakfast, lunch or dinner tied with the room; there is no such a thing as an unbundled car; and no self-respecting French restaurant would allow its patrons to drink a bottle of wine not coming from its cellar." C. Ahlborn et al., "The Antitrust Economics of Tying: A Farewell to Per Se Illegality," 49 Antitrust Bull. 287, 287 (2004); see also K. Hylton & M. Salinger, "Tying Law and

Policy: A Decision-Theoretic Approach," 69 Antitrust L.J. 469, 526 (2001) ("tying is so pervasive even in competitive markets that there is ample evidence that procompetitive tying is a common occurrence").

Finally, antitrust scholars have cautioned against the use of tying law to resolve "contract dispute[s] in which one side got the benefit of the bargain and then sought to have the contract declared a violation of the Sherman Act." K. Hylton & M. Salinger, "Reply to Grimes: Illusory Distinctions and Schisms in Tying Law," 70 Antitrust L.J. 231, 239 (2002); see also *Hemlock Semiconductor Operations, LLC v. SolarWorld Industries Sachsen GmbH,* 867 F.3d 692, 701 (6th Cir. 2017) ("illegality defenses based on antitrust law are disfavored, especially when allowing the defense would let the buyer escape from its side of a bargain after having received a benefit" (internal quotation marks omitted)). See footnote 3 of this opinion.

2

In the four decades since this court decided *Hossan-Maxwell, Inc.,* the foregoing scholarship has prompted the United States Supreme Court to rethink its approach to tying claims. In *Jefferson Parish Hospital District No. 2 v. Hyde,* supra, 466 U.S. at 32-33, 104 S.Ct. 1551, Justice O'Connor authored a concurring opinion, joined by three other members of the court,
718 in which she argued that the tying arrangements at issue—patients obtaining surgery at the defendant hospital were *718 required to use a designated anesthesiology practice—should be evaluated under the rule of reason. More generally, the concurrence, citing to recent antitrust scholarship, argued that "[t]he time has... come to abandon the `per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."[13] Id., at 35, 104 S.Ct. 1551 (O'Connor, J., concurring in the judgment). Although a majority of the court continued to apply the *Northern Pacific* quasi-per se rule to tying claims in its next tying case; see *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); the dissent, penned by Justice Scalia and joined by Justices O'Connor and Thomas, again recognized the "intense criticism of the [court's] tying doctrine in academic circles...." Id., at 487, 112 S.Ct. 2072.

Finally, in *Illinois Tool Works, Inc.,* a majority of the Supreme Court for the first time expressly repudiated the court's traditional disapproval of tying agreements. Justice Stevens, writing for a unanimous court, undertook "a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements... informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws." (Citation omitted.) *Illinois Tool Works Inc. v. Independent Ink, Inc.,* supra, 547 U.S. at 33, 126 S.Ct. 1281. The court observed that, "[o]ver the years ... [its] strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the [c]ourt has required a showing of market power in the tying product." Id., at 35, 126 S.Ct. 1281. Justice Stevens further explained that, whereas the court traditionally had been of the view that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition," that view had evolved with the recognition that "tying arrangements may well be procompetitive...." (Internal quotation marks omitted.) Id., at 35-36, 126 S.Ct. 1281.

Having thus framed the issue, the court in *Illinois Tool Works, Inc.,* proceeded to expressly overrule one "vestige of [its] historical distrust of tying arrangements...." Id., at 38, 126 S.Ct. 1281. As we discussed, in previous decisions, the United States Supreme Court had indicated that the first prong of the *Northern Pacific* rule—possession of economic power in the tying product—can be established not only by proving that a seller holds a dominant position in a defined market for the tying product, but also by demonstrating that the tying product is presumed to be uniquely desirable. In *Northern Pacific* itself, the court suggested that the unique configuration and choice location of the defendant's land was sufficient to confer economic power. *Northern Pacific Railway Co. v. United States,* supra, 356 U.S. at 7, 78 S.Ct. 514; see also id., at 16-20, 78 S.Ct. 514 (Harlan, J., dissenting). In prior decisions, the court had likewise held that the monopoly conferred by a patent
719 presumptively confers market power for purposes *719 of a tying claim. See, e.g., *International Salt Co. v. United States,* supra, 332 U.S. at 395-96, 68 S.Ct. 12; *International Business Machines Corp. v. United States,* supra, 298 U.S. at 136-37, 56 S.Ct. 701. Indeed, it was in the context of intellectual property that the Supreme Court initially held that tying arrangements are per se illegal. See *Illinois Tool Works, Inc. v. Independent Ink, Inc.,* supra, 547 U.S. at 33, 126 S.Ct. 1281.

In *Illinois Tool Works, Inc.,* the issue was whether the court should depart from its long established rule that a patent holder presumptively exerts market power over the patented product for purposes of a tying allegation. Id., at 31, 126 S.Ct. 1281. Overruling several of its prior tying decisions; see id., at 38-40, 126 S.Ct. 1281; the court held that "the mere fact that a tying product is patented does not support... a presumption [of market power]." Id., at 31, 126 S.Ct. 1281. The court emphasized that its new approach, which requires proof that the seller holds market power in the relevant market, is consistent with "the vast majority of academic literature on the subject." Id., at 43-44 and n.4, 126 S.Ct. 1281.

3

The parties to the present case disagree as to the scope of the Supreme Court's decision in *Illinois Tool Works, Inc.* The defendants contend that its holding was limited to patented products, whereas the plaintiffs contend that the court intended to depart more fundamentally from its prior view that the uniqueness of a tying product can presumptively establish economic power for purposes of *Northern Pacific.* The narrow reading advocated by the defendants is consistent with the fact that only the question of patents was before the court in *Illinois Tool Works, Inc.,* and that the court, in overruling its prior patent tying cases, relied on various factors that are specific to the patent context: recent congressional amendments to the patent misuse statutes, new guidance from the federal agencies charged with the enforcement of the antitrust laws, and the views of antitrust scholars regarding the overlap of intellectual property and antitrust law. Id., at 41-45, 126 S.Ct. 1281.

The plaintiffs' broader reading of *Illinois Tool Works, Inc.,* however, finds support in the manner in which the Supreme Court framed its holding, which appeared to extend beyond the patent context. "Many tying arrangements," the court wrote, "even those involving patents and requirements ties, are fully consistent with a free, competitive market.... Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion and therefore hold that, *in all cases involving a tying arrangement,* the plaintiff must prove that the defendant has market power in the tying product." (Citations omitted; emphasis added.) Id., at 45-46, 126 S.Ct. 1281. The fact that the Supreme Court's restrictive tying jurisprudence originated in the patent context also suggests that that court's recent change of direction with respect to the tying of patented products evinces a broader rethinking of tying generally. Indeed, it would be odd if the Supreme Court were to conclude that holding a patent—a legal monopoly—over a product is not sufficient to confer economic power but that mere ownership of a parcel of land, without more, is sufficient.

Our impression that the plaintiffs have the better of this argument is reinforced by the fact that most of the lower federal
720 courts and our sister state courts that have considered the question have *720 adopted the broader reading of *Illinois Tool Works, Inc.,* and interpreted the decision to mean that the uniqueness of a tying product no longer gives rise to a presumption of economic power. Market power in a defined product and geographic market must be established to satisfy the first prong of *Northern Pacific,* even with respect to unique, nonpatented tying products such as land.[14]

In *Michigan Division-Monument Builders of North America v. Michigan Cemetery Assn.,* 458 F. Supp. 2d 474, 476-77 (E.D. Mich. 2006), aff'd, 524 F.3d 726 (6th Cir. 2008), the plaintiffs, a class of independent monument dealers, alleged that the defendant cemeteries violated the Sherman Act by requiring that consumers who wished to buy a burial plot also to purchase monuments and related services from the cemetery. They alleged that this tying scheme was per se illegal because the uniqueness of burial land meant that each cemetery constituted a distinct product and geographic market. Id., at 477. The federal District Court, granting the defendants' motion to dismiss the tying claims, concluded that the alleged relevant geographic market—each individual cemetery—failed as a matter of law. Id., at 480-85. The court reached that conclusion because, in its view, "the reasoning in [*Illinois Tool Works, Inc.*] makes it clear that presumptions, whether based on the uniqueness of a patent or the uniqueness of land, cannot support a valid antitrust claim." Id., at 484.

The United States Court of Appeals for the Sixth Circuit affirmed, opining that, under *Illinois Tool Works, Inc.,* "[t]he idea that all land is unique ... is insufficient to support a finding of market power." *Michigan Division-Monument Builders of North America v. Michigan Cemetery Assn.,* supra, 524 F.3d at 732. The Court of Appeals distinguished the holding of *Northern Pacific,* concluding that, in that case, the Supreme Court had affirmed a finding of economic power not because commercial land in general is unique but, rather, because there was other evidence showing that the specific location of the land lent the seller a competitive advantage that others could not achieve. Id., at 733. Specifically, the land at issue in *Northern Pacific* was strategically located in checkerboard fashion within economic distance of key transportation facilities and, therefore, was essential to the business activities of those who purchased or leased it. Id., at 732-33; see *Northern Pacific Railway Co. v. United States,* supra, 356 U.S. at 7, 78 S.Ct. 514.

In so holding, the Sixth Circuit joined several other appellate courts to have rejected—even prior to *Illinois Tool Works, Inc.* —the theory that the uniqueness of land, standing alone, is sufficient to create economic power for purposes of the first
721 prong of the *Northern Pacific* rule. See, *721 e.g., *Smugglers Notch Homeowners' Assn., Inc.* v. *Smugglers' Notch Management Co., Ltd.,* supra, 414 Fed. Appx. at 376 (rejecting "unique geographic qualities of ski areas" as basis for finding of market power (internal quotation marks omitted)); *Baxley-DeLamar Monuments, Inc. v. American Cemetery Assn.,* 938 F.2d 846, 851 (8th Cir. 1991) ("[A]ll land is unique, but the mere fact that the tying product is real estate does not

convey market power.... In numerous other tying cases involving real estate as the tying product, courts have held that the real estate must have some particular strategic or competitive importance in order to carry market power." (Citations omitted.)); *McCormick* v. *Bradley,* 870 P.2d 599, 604-605 (Colo. App. 1993) (criticizing and declining to follow *Hossan-Maxwell, Inc.*), cert. denied, Colorado Supreme Court, Docket No. 93SC773 (April 11, 1994); *Vande Guchte* v. *Kort,* 13 Neb. App. 875, 887, 703 N.W.2d 611 (2005) ("we do not accept the notion that the `uniqueness' of land by itself establishes economic power").

More generally, other federal courts have read *Illinois Tool Works, Inc.,* to broadly hold that market power in a defined product and geographic market *always* must be established to proceed under the quasi-per se rule in *Northern Pacific.* See, e.g., *Auraria Student Housing at the Regency, LLC* v. *Campus Village Apartments, LLC,* 843 F.3d 1225, 1246 (10th Cir. 2016); *Batson* v. *Live Nation Entertainment, Inc.,* 746 F.3d 827, 831-32 (7th Cir. 2014); *Sheridan* v. *Marathon Petroleum Co., LLC,* 530 F.3d 590, 593-94 (7th Cir. 2008); *Compliance Marketing, Inc. v. Drugtest, Inc.,* Docket No. 09-CV-01241-JLK, 2010 WL 1416823, *7 (D. Colo. April 7, 2010); *Mediacom Communications Corp.* v. *Sinclair Broadcast Group, Inc.,* 460 F. Supp. 2d 1012, 1027 (S.D. Iowa 2006). It seems clear, then, that a per se ban on list-back agreements, as applied in *Hossan-Maxwell, Inc.,* is inconsistent with federal antitrust law as it has evolved over the past several decades.[15]

C

We next consider three arguments offered by the defendants that have not been fully addressed by the preceding discussion. First, the defendants contend that their antitrust special defense invokes not only the Sherman Act and its state analogues but also General Statutes § 35-29, the Connecticut analogue of § 3 of the Clayton Act, 15 U.S.C. § 14. The point matters, they contend, because, in *Hossan-Maxwell, Inc.,* this court, following what appeared at that time to be the guidance
722 of the United States Supreme Court in *Times-Picayune Publishing Co.* v. *United* *722 *States,* supra, 345 U.S. at 594, 73 S.Ct. 872, concluded that tying claims brought under the Clayton Act or its state analogue need to satisfy only one prong of the rule set forth in *Northern Pacific.* See *State v. Hossan-Maxwell, Inc.,* supra, 181 Conn. at 662, 436 A.2d 284. That is, a tie could be deemed illegal per se merely on the basis of the fact that it foreclosed a not insubstantial volume of trade in the tied product, even if the seller lacked economic power in the tying product market. If that were the case, then the analysis in part II B of this opinion, which addresses only the first prong of the *Northern Pacific* rule, would likely be moot, insofar as the plaintiffs do not dispute that a substantial volume of trade is at issue.

Although that reading of *Times-Picayune Publishing Co.* was still considered plausible at the time that *Hossan-Maxwell, Inc.,* was decided, since then, the federal courts and antitrust scholars almost universally have concluded that the standard for tying claims brought under the Clayton Act is no different from the standard for those brought under the Sherman Act. See, e.g., *Sheridan* v. *Marathon Petroleum Co., LLC,* supra, 530 F.3d at 592 ("[t]hough some old cases say otherwise, the standards for adjudicating tying under the two statutes are now recognized to be the same"); *De Jesus* v. *Sears, Roebuck & Co.,* 87 F.3d 65, 70 (2d Cir.) ("[W]e have required allegations and proof of five specific elements before finding a tie illegal.... These elements are common to claims asserted under either the Sherman or Clayton Acts." (Citation omitted; internal quotation marks omitted.)), cert. denied, 519 U.S. 1007, 117 S. Ct. 509, 136 L. Ed. 2d 399 (1996); *In re Data General Corp. Antitrust Litigation,* 490 F. Supp. 1089, 1100 (N.D. Cal. 1980) ("It was traditionally understood that a tying arrangement would run afoul of [the] Clayton [Act] if it satisfied ... either ... of the elements required under the Sherman Act.... Recently, however, the neat distinction between tying arrangements that violate [the] Sherman [Act] and those that violate [the] Clayton [Act] has faded beyond recognition." (Citation omitted.)); 2 P. Areeda & H. Hovenkamp, Antitrust Law, (3d Ed. 2007) ¶ 301c, pp. 9-11 and n.28 (referring to *Times-Picayune Publishing Co.* as "one obsolete exception" to prevailing view); H. Hovenkamp, "Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy," 33 Hastings L.J. 325, 334 (1981) ("[s]ince *Times-Picayune* [*Publishing Co.*] was decided, [the] distinction between the [Sherman Act and the Clayton Act] has increasingly been disregarded"). Accordingly, we need not resolve the parties' dispute as to whether the defendants adequately pleaded a violation of § 35-29, insofar as the same legal standard applies to tying claims under both federal acts and their state counterparts.

Second, the defendants contend that other courts that have considered the issue have agreed with *Hossan-Maxwell, Inc.,* that any list-back agreement that forecloses a not insubstantial volume of broker commissions is per se illegal. That appears to have been the consensus view in the late 1970s and early 1980s. See footnote 10 of this opinion and accompanying text.
723 Although we have identified some contrary authority even from that time period,[16] the *723 important point is that all of the cases on which the defendants rely were decided more or less contemporaneously with *Hossan-Maxwell, Inc.,* and well

before the evolution in federal tying law that we discussed in part II B of this opinion. The fact that those cases were decided consistently with *Hossan-Maxwell, Inc.,* is, therefore, of little moment.

Third, the defendants emphasize that, regardless of whether *federal* antitrust law treats land as conferring economic power for purposes of the *Northern Pacific* rule, this court concluded in *Hossan-Maxwell, Inc.,* that land is inherently unique as a matter of Connecticut common law. They contend, therefore, that the logic of that decision remains sound regardless of whether federal law has taken a different direction.

It is true that, in *Hossan-Maxwell, Inc.,* our conclusion that the first prong of the *Northern Pacific* rule was satisfied rested in part on the fact that, "[i]n Connecticut, the uniqueness and special characteristics of a particular plot of land have long been recognized. *Anderson* v. *Yaworski,* 120 Conn. 390, 395, 399, 181 A. 205 [1935]." *State* v. *Hossan-Maxwell, Inc.,* supra, 181 Conn. at 665, 436 A.2d 284. We agree with the plaintiffs, however, that this court's reliance on that principle, and on *Anderson,* was misplaced.

In *Anderson,* this court simply reiterated the well established principle that contracts for the sale of real estate usually may be specifically enforced because each parcel of land has its own particular characteristics such that a buyer may not consider an equivalently priced parcel to be an adequate substitute. *Anderson* v. *Yaworski,* supra, 120 Conn. at 395, 181 A. 205. But the fact that a parcel of land is deemed to be unique for purposes of property and contract law has little, if anything, to do with whether it is unique for purposes of antitrust law. Antitrust law is concerned with whether a seller has economic power—the ability to sell a product at a supracompetitive price—which usually is possible only when a seller controls a substantial share of a defined market for a product for which there are no adequate substitutes. See, e.g., *Sheridan* v. *Marathon Petroleum Co., LLC,* supra, 530 F.3d at 594; *American Council of Certified Podiatric Physicians & Surgeons* v. *American Board of Podiatric Surgery, Inc.,* 185 F.3d 606, 622 (6th Cir. 1999); *Queen City Pizza, Inc.* v. *Domino's Pizza, Inc.,* 124 F.3d 430, 436-37 (3d Cir. 1997), cert. denied sub nom. *Baughans, Inc.* v. *Domino's Pizza, Inc.,* 523 U.S. 1059, 118 S. Ct. 1385, 140 L. Ed. 2d 645 (1998).

In theory, a parcel of land could be sufficiently unique to allow the owner to charge a supracompetitive price. This appears to have been the case in *Northern Pacific,* in which the land at issue afforded unique access to essential transportation facilities.[17] *Northern Pacific Railway Co.* v. *United States,* supra, 356 U.S. at 7, 78 S.Ct. 514. But the fact that each house,
724 for example, is unique in various *724 ways does not permit the owner to charge a supracompetitive price when it comes time to sell. Indeed, *Anderson* itself implicitly recognized this concept by noting that the *market value* of a parcel of land may not reflect its *emotional value* in the mind of the purchaser. *Anderson* v. *Yaworski,* supra, 120 Conn. at 395-96, 181 A. 205. At no point does *Anderson* suggest that a property's "peculiar and special" emotional value; (internal quotation marks omitted) id., at 396, 181 A. 205; somehow translates into an above market economic value.

Indeed, many products and services are unique. Land, used cars, purebred dogs, and private piano lessons are examples. But the fact that these things are not wholly fungible does not mean that every seller wields economic power for antitrust purposes. In a sense, the breeder has a tiny monopoly on Fido. There is no other dog in the world quite like him, and his eventual owner may come to think of him as priceless. Still, if the market price for a purebred German shepherd puppy in Hartford is $1200, and if other breeders have other German shepherd puppies for sale at that price, then there is no reason to expect that Fido's breeder will be able to exercise economic power and charge significantly more for him simply because of his inherent uniqueness. By extension, if Fido's breeder began requiring that each puppy buyer also purchase a leash from him, there would be little concern that the sale of Fido might unreasonably restrain competition in the leash market. For similar reasons, we repudiate *Hossan-Maxwell, Inc.,* to the extent that it stands for the proposition that the uniqueness of a parcel of land, standing alone, confers market power for purposes of *Northern Pacific.*

D

To reiterate, in light of what we perceive to be the clear trajectory of federal tying law, as informed by modern antitrust scholarship, we overrule *Hossan-Maxwell, Inc.,* to the extent that it held that real estate list-back agreements affecting a not insubstantial volume of commerce are per se illegal. We hold instead that challenges to list-back agreements, like most other forms of tying agreements, are subject to the five element test adopted by the United States Court of Appeals for the Second Circuit in applying *Northern Pacific* and its progeny: "To state a valid tying claim ... a [party] must allege facts plausibly showing that: [1] the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product); [2] the seller uses actual coercion to force buyers to purchase the tied product; [3] the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product; [4] the tie-in has anticompetitive effects in the tied market; and [5] a not insubstantial amount of ... commerce is involved in the tied market." *Kaufman* v. *Time Warner,* 836 F.3d 137, 141 (2d Cir. 2016); accord *Yentsch* v. *Texaco, Inc.,* 630 F.2d 46, 56-57 (2d Cir. 1980). The leading treatise on the subject recognizes this as the prevailing test for tying claims. See 9 P. Areeda & H. Hovenkamp, supra, ¶ 1702, pp. 33-34 and n.1. We further emphasize that the third element of the test, economic power, typically must be established by proving that the defendant wields market power in a defined product and geographic market. *Kaufman* v. *Time Warner,* supra, at 143. "[T]he best way to plead market power is to allege facts that, if proven, establish directly that the price of the tied package is higher than the price of components sold in competitive markets." (Internal quotation marks omitted.) Id.

725 *725 **III**

Finally, having clarified the standards that govern antitrust challenges to real estate list-back agreements, we consider whether the trial court's judgments can be affirmed, under the proper legal standard, on the basis of the trial court's express and implicit factual findings. For the reasons that follow, we conclude that they cannot.

A

First, and most important, the defendants did not plead the existence of any particular product or geographic market with respect to either the tying product (land of some sort) or the tied product (real estate broker services of some sort). Nor was any expert testimony introduced that would allow the trial court (1) to define those markets with any sort of precision for purposes of assessing economic power, (2) to quantify Woodland's power over the relevant property market, or (3) to assess the plaintiffs' share or foreclosure of the relevant broker service market.

The trial court did not make any relevant findings in this respect. It simply stated that, under *Hossan-Maxwell, Inc.,* the uniqueness of residential property is sufficient evidence of economic power to satisfy the first prong of *Northern Pacific* and, thus, that Woodland, as the sole owner of the Reserve parcels, had sufficient economic power to restrain competition in the market for the tied product, which it identified as real estate listing broker's services in the greater Danbury area. The trial court did not explain how it reached the conclusion that the relevant tied product market was limited to the greater Danbury area rather than some larger geographic area, or explain why the relevant market was taken to be listing broker's services rather than a broader market, such as broker's services writ large, or a narrower one, such as the services of listing brokers specializing in large commercial and multifamily residential projects. The court also did not make any findings to support its apparent determination that the Reserve constituted the entire tying product market, such as that the Reserve was uniquely desirable and economically necessary because of its flexible zoning or other distinct characteristics.[18]

The Appellate Court, in affirming the trial court's judgments, implied that, in its view, the relevant tying product market consisted of "large area[s] of undeveloped land ... in the densely populated Northeast"; the court opined that the Reserve was a rare example thereof. *Reserve Realty, LLC* v. *Windemere Reserve, LLC,* supra, 174 Conn. App. at 145, 165 A.3d 162. It is unclear on what basis the Appellate Court reached these conclusions. Although there was some evidence in the record suggesting that there were few locations in Fairfield County suitable for building a 450,000 to 1.5 million square foot
726 project, and also that flexible space with the sort of *726 zoning approvals that the Reserve had obtained was very desirable, there is no indication that either (1) the trial court credited that evidence, or (2) the evidence bore out the Appellate Court's apparent belief that large tracts of undeveloped land represent the relevant product market or that the northeastern United States (however that term might be defined) represents the relevant geographic area. Specifically, there is no evidence in the record by which the Appellate Court could have applied the governing test and determined whether a small but significant and nontransitory increase in price with respect to the Reserve, or portions thereof, could be sustained or would lead customers to look elsewhere for substitute property. See footnote 14 of this opinion.

For their part, the defendants have taken the seemingly contradictory positions that either (1) the Reserve constitutes its own unique, singular product and geographic market, or (2) the relevant property market is national in scope. The fact that the defendants and the courts below were able to articulate four different, facially plausible but incommensurate geographic market definitions—the Reserve itself, the greater Danbury area, the Northeast, and the entire United States—highlights why expert economic testimony is necessary to resolve the issue of whether Woodland held sufficient power in a defined geographic market for land of some particular sort that it could foreclose competition and coerce buyers into accepting supracompetitive prices in some particular product market.

B

The second reason that the judgments cannot be sustained is that, to establish the third and fourth elements of a tying claim —economic power and anticompetitive effect—a buyer typically must be able to establish that the combined price for the tying product plus the tied product exceeded the market price. *Kaufman* v. *Time Warner,* supra, 836 F.3d at 143; 9 P. Areeda & H. Hovenkamp, supra, ¶ 1702, p. 36. The trial court made no findings to that effect, and we doubt that the current record would support such findings. At trial, a representative of Woodland offered undisputed testimony that, as a result of the need to resolve the plaintiffs' administrative appeal, Woodland agreed to a purchase price for parcels 13 and 15 that was significantly lower than what the parties ordinarily would have negotiated at arm's length. He further testified that, following a series of significant price reductions, the land sold for a mere fraction of the appraised value. There is no reason to believe, then, that the list-back agreements, on balance, had an anticompetitive effect on pricing.

We note in this regard that the fact that the defendants may have felt "forced" to accept the plaintiffs' broker services in order to acquire portions of the Reserve, while relevant to the second (coercion) prong of the Second Circuit test, says little to nothing about whether Woodland and the plaintiffs were able to exert market power or suppress competition. There are at least two reasons for this. First, the fact that a few individual buyers were sufficiently interested in a purchase to be willing to accept unwanted strings attached does not imply that, as a general matter, the sellers held market power. See, e.g., *McCormick* v. *Bradley,* supra, 870 P.2d at 604-605; see also *Grappone, Inc.* v. *Subaru of New England, Inc.,* 858 F.2d 792, 796-97 (1st Cir. 1988) ("`[M]arket power' ... means significant market power—more than the mere ability to raise price only slightly, or only on occasion, or only to a few of a seller's many customers.... Of course, virtually every seller ... has some
727 *727 customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose." (Citations omitted; emphasis omitted.)); 9 P. Arreeda & H. Hovenkamp, Antitrust Law, supra, ¶ 1718a, p. 244 (fact that tying arrangement interferes with customer choice generally is irrelevant to antitrust analysis).

Second, the record in the present case supports various, possible explanations as to why the defendants were reluctantly willing to accept Woodland's condition that they agree to use the plaintiffs' broker services. It may be, as the defendants contend, that obtaining flexible zoning permits for the Reserve gave Woodland market power because the property became uniquely desirable and, in essence, a market of one. It also may be the case, though, that Woodland offered the defendants a very favorable, below market price for the land, either because Woodland was desperate to terminate the defendants' zoning appeal that was blocking development of the Reserve or because the brokerage requirement itself lowered the value of the property. If the defendants were only "forced" to accept the brokerage provision insofar as that was necessary for them to get a sweetheart deal on the land, and they could have secured comparable land elsewhere at a higher, market price, then competition policy need not be overly concerned that two sophisticated parties, engaged in a unique negotiation, ultimately agreed to include the tie as one of many negotiated provisions.[19] At the very least, expert testimony was necessary to shed light on the fair market value of the property and the availability of any comparable properties. See *Grappone, Inc. v. Subaru of New England, Inc.*, supra, 858 F.2d at 798 (citing *United States Steel Corp.* v. *Fortner Enterprises, Inc.,* 429 U.S. 610, 618 n.10, 620 n.13, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977), for proposition that, "to show market power, [the] plaintiff must show that an appreciable number of buyers accepted the tie *in the absence of other explanations for* [*their*] *willingness... to purchase the package*" (emphasis altered; internal quotation marks omitted)).

C

Third, competition policy generally is not offended when only minor foreclosure of competition in the tied market is possible. See 9 P. Areeda & H. Hovenkamp, supra, ¶ 1704a pp. 54-55; id., ¶ 1709a, pp. 88-89. In the present case, even if the tied product market at issue were to be defined narrowly, such as to include only listing broker services for large commercial and multi-family residential properties in Danbury, it seems unlikely on this record either that the listing agreements could have
728 permitted the plaintiffs to monopolize that *728 market or that prevailing brokerage fees would rise as a result.[20]

The land at issue accounts for a very small share—approximately 2 percent—of the total acreage of Danbury, which the trial court assumed to be the relevant geographic market.[21] Common experience suggests that the broker market features relatively low barriers to entry (new brokers easily can enter the market) and limited economies of scale (smaller brokerage companies and even individuals can effectively compete with larger firms because there is limited overhead, etc.). The listing agreements locked in a relatively low commission rate that may even have been below the market rate. Moreover, the agreements appear to apply only to the initial sale of each portion of the property, which represents a new addition to the town's building stock, so there is no long-term foreclosure (unlike in *Hossan-Maxwell, Inc.*) and no foreclosure of the existing building stock. Finally, the defendants testified that it was their ordinary practice to use their own in-house sales personnel, rather than other independent brokers, to market developments of this sort, and, in any event, prospective buyers were not precluded from using their own buyers' brokers, who could obtain a share of the commissions. In short, it seems highly unlikely that these agreements could permit the plaintiffs to corner the market for commercial broker services in Danbury, to the extent that that is the relevant market, or increase the average cost of broker commissions in that market. For all of these reasons, we conclude that, in light of our clarification of the legal standard governing antitrust challenges to tying arrangements, the trial court incorrectly determined that the defendants prevailed on their antitrust special defense.

The judgments of the Appellate Court are reversed and the cases are remanded to that court with direction to consider the plaintiffs' remaining claims.

In this opinion the other justices concurred.

[*] March 24, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] Such agreements may apply only to the initial sale/lease of the property, to all subsequent sales/leases that occur within a specified time frame, or in perpetuity.

[2] Haddad operated under the business name "Jeanette Haddad, Broker," and Scalzo operated through his real estate franchise, Century 21 Scalzo Realty, Inc. (Scalzo Realty). For simplicity, we do not distinguish between those individuals and their corporate entities in this opinion, referring to them, respectively, as "Haddad" and "Scalzo." We note that, subsequent to the filing of their action, Scalzo Realty was added as a necessary party but thereafter was defaulted for failure to plead. Subsequently, the plaintiffs withdrew their action as to Scalzo Realty.

[3] It is not entirely clear that the agreements governing parcel 15 are true list-back agreements. Although they include a reference to exclusive listing of that property, those agreements could plausibly be read to mean that the plaintiffs earned the $1 million commission on the completion of the sale of that parcel by Woodland to Windemere, on the basis of the plaintiffs' role in facilitating that sale, and that payment was simply to be delayed until Windemere was able to develop the property. The trial court, for example, having found the parties' various purchase and listing agreements to be ambiguous, concluded that one possible interpretation of the agreements was that the plaintiffs had earned a commission with respect to parcel 15 prior to having performed any services for Windemere. Should these cases ultimately return to the trial court, it will fall to that court to determine whether those agreements are list-back agreements, the enforcement of which potentially implicates antitrust considerations or, rather, merely consideration for the plaintiffs' prior services. Compare, e.g., *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 81-82, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982) (illegality defense should be entertained in those circumstances in which its rejection would be to enforce conduct forbidden by antitrust law), with *Kelly v. Kosuga,* 358 U.S. 516, 521, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959) (rejecting illegality defense when judgment would not have enforced allegedly illegal aspect of contract).

[4] The precise terms of the various contract documents vary, and are ambiguous, in ways that are not directly relevant to the legal issues now before us but that likely will need to be addressed on remand.

[5] Among other things, § 20-325a places certain restrictions on the ability of a real estate broker to bring an action to recover commissions arising out of a real estate transaction.

[6] In order for the plaintiffs to prevail, all three of these defenses must fail on appeal.

[7] More broadly, this provision of the Sherman Act, which is only a few sentences long, is understood effectively to delegate to the courts the authority to determine what constitutes an unreasonable restraint of trade and, therefore, an antitrust violation. See *In re Cox Enterprises, Inc.,* 871 F.3d 1093, 1097 (10th Cir. 2017). As a result, although antitrust actions and defenses technically are statutory, judicial decisions interpreting and applying the Sherman Act tend to analyze antitrust issues more like common-law questions, with public policy and economic concerns at the forefront, rather than according to traditional methods of statutory construction. See R. Posner, "The Meaning of Judicial Self-Restraint," 59 Ind. L.J. 1, 5-6 (1983); see also 2 P. Areeda & H. Hovenkamp, Antitrust Law (3d Ed. 2007) ¶ 301a, pp. 6-7.

We further note that, to the extent that the trial court read General Statutes § 35-26 literally to prohibit any "contract, combination, or conspiracy in restraint of any part of trade or commerce"; see footnote 8 of this opinion; that court's reading was incorrect. Every commercial contract, by definition, constitutes a restraint of trade. *Procaps S.A. v. Patheon, Inc.,* 845 F.3d 1072, 1081 (11th Cir. 2016). If a dog breeder contracts to sell three puppies to a family, commerce in those three puppies is restrained, insofar as no other customer may purchase them. The antitrust laws proscribe only those contracts that *unreasonably* restrain trade. See, e.g., id.; *Tremont Public Advisors, LLC v. Connecticut Resources Recovery Authority,* 333 Conn. 672, 695, 217 A.3d 953 (2019).

[8] General Statutes § 35-26 provides: "Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful."

[9] The parties disagree as to whether the defendants' antitrust special defense also can be understood to allege a violation of General Statutes § 35-29, the state analogue of § 3 of the Clayton Act, 15 U.S.C. § 14. Because we conclude that tying arrangements are evaluated under the same legal standard under both the Sherman Act and the Clayton Act, we need not resolve this dispute. See part III C of this opinion. Moreover, although the defendants correctly note that § 35-29 is broader in scope than § 3 of the Clayton Act—insofar as the former statute, unlike the latter, (1) applies to anticompetitive conduct in the provision of services as well as commodities, and (2) is not limited to interstate commerce—the defendants do not contend that anything in the text or history of § 35-29 warrants the application of a different legal *standard.*

[10] See, e.g., *Miller v. Granados,* 529 F.2d 393, 396-97 (5th Cir. 1976); *MacManus v. A. E. Realty Partners,* 146 Cal. App. 3d 275, 288, 194 Cal. Rptr. 567 (1983); *King City Realty, Inc. v. Sunpace Corp.,* 291 Or. 573, 581, 633 P.2d 784 (1981); see also *In re Real Estate Litigation,* 95 Wash. 2d 297, 301-304, 622 P.2d 1185 (1980) (addressing jurisdictional issues).

[11] Although courts sometimes use the terms "economic power" and "market power" interchangeably, in this opinion, for clarity, we use the term "economic power" in the more general sense to encompass all of the various factors that courts have indicated may satisfy the first prong of *Northern Pacific.* These include not only market power (a substantial or dominant share of a defined, distinct market), but also uniqueness, special desirability, a legal monopoly such as a patent, and anything else that might permit a seller to force a buyer to agree to acquire an unwanted tied product.

[12] A tying arrangement, such as requiring that consumers purchase laces in tandem with a new pair of shoes or commit to buying a vendor's paper when purchasing its photocopy machines, might, for example, result in increased efficiencies, satisfy consumer preferences for bundled sales, protect a seller's good will, or facilitate economically desirable forms of price discrimination. See, e.g., 9 P. Areeda & H. Hovenkamp, supra, ¶ 1703g, pp. 51-54; id., ¶ 1720, pp. 259-61; D. Carlton & M. Waldman, "Robert Bork's Contributions to Antitrust Perspectives on Tying Behavior," 57 J.L. & Econ. S121-26 (2014).

[13] Justice O'Connor's concurring opinion went so far as to argue that tying arrangements should be deemed presumptively *legal,* unless (1) the seller has market power in the tying product market, (2) there is "a substantial threat that the tying seller will acquire market power in the [tied product] market," and (3) the tied product is one that some consumers might wish to purchase separately without also purchasing the tying product. *Jefferson Parish Hospital District No. 2 v. Hyde,* supra, 466 U.S. at 37-39, 104 S.Ct. 1551. If all three conditions are met, then the antitrust claims would be evaluated under a rule of reason analysis. Id.

[14] We note that defining a relevant product and geographic market for purposes of the federal antitrust laws is a highly technical process that typically requires expert testimony. See, e.g., *McWane, Inc. v. Federal Trade Commission,* 783 F.3d 814, 829 (11th Cir. 2015), cert. denied, ___ U.S. ___, 136 S. Ct. 1452, 194 L. Ed. 2d 550 (2016); *Hynix Semiconductor, Inc. v. Rambus, Inc.,* Docket No. CV-00-20905 RMW, 2008 WL 73689, *10 n.13 (N.D. Cal. January 5, 2008). The most common test of a proposed market definition asks whether there is sufficient cross-elasticity of demand that a small but significant and non-transitory price increase will lead customers to look elsewhere—both productwise and geographically—for substitutes. See, e.g., *DSM Desotech, Inc. v. 3D Systems Corp.,* 749 F.3d 1332, 1339-40 (2014); *Theme Promotions, Inc. v. News America Marketing FSI,* 546 F.3d 991, 1002 (2008). Only once the relevant product and geographic markets have been carefully defined can the trier of fact assess the relevant antitrust variables, whether it be market share, economic power, market concentration, barriers to entry, or the like.

[15] Indeed, given the recent evolution of the tying doctrine in the federal courts, it is fair to ask whether the *Northern Pacific* rule, in its present form, should continue to be considered a per se prohibition on tying in any sense. See, e.g., 9 P. Areeda & H. Hovenkamp, supra, ¶ 1728c, pp. 375-76 (explaining that most lower courts now allow defendants to raise defense that tying arrangement is affirmatively justified by fact that it confers benefits not available by alternative means); E. Elhauge, "Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory," 123 Harv. L. Rev. 397, 425-26 (2009) ("It ... now seems likely that a tie can be justified by evidence that the tie is the least restrictive way to achieve efficiencies large enough to offset the anticompetitive effects. Accordingly, today it is more accurate to read Supreme Court precedent on tying as embracing a rule of reason, where anticompetitive effects must be shown or inferred and procompetitive justifications are admissible."); see also *United States* v. *Microsoft Corp.,* 253 F.3d 34, 84 (D.C. Cir.) (rule of reason, rather than per se analysis, governs legality of tying arrangements involving platform software products), cert. denied, 534 U.S. 952, 122 S. Ct. 350, 151 L. Ed. 2d 264 (2001).

[16] See, e.g., *Fran Welch Real Estate Sales, Inc.* v. *Seabrook Island Co.,* 621 F. Supp. 128, 137-38 (D.S.C. 1985) (summary judgment on real estate list-back claim deemed inappropriate when (1) relevant market had not been defined, and (2) six month exclusive listing agreement was likely too short to unreasonably restrain competition), aff'd, 809 F.2d 1030 (4th Cir. 1987); *Outdoor Resorts of America, Inc.* v. *Outdoor Resorts at Nettles Island, Inc.,* 379 So. 2d 471, 471-72 (Fla. App.) (rule of reason governed claim that purchase of recreational vehicle lot was tied to developer's exclusive right to rent lots at 50 percent commission when not in use), cert. denied, 388 So. 2d 1116 (Fla. 1980); see also *Vande Guchte* v. *Kort,* supra, 13 Neb. App. at 887, 703 N.W.2d 611 (holding that builder tie-in contract, which conditioned sale of lot on use of specific builder, was not per se illegal).

[17] In some sense, then, *Northern Pacific* can be understood as an application of the essential facilities doctrine, which applies in antitrust cases in which a monopolist controls access to uniquely necessary infrastructure, such as a railroad or a port. See, e.g., *MCI Communications Corp.* v. *American Telephone & Telegraph Co.,* 708 F.2d 1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983).

[18] For these same reasons, the trial court's conclusions that the listing agreements violated General Statutes § 35-27, which prohibits attempted monopolization, and General Statutes § 35-28, which prohibits price fixing arrangements, also cannot be sustained. At the same time, the fact that the necessary market analyses were not performed means that we need not address the plaintiffs' other claims, such as that the Appellate Court incorrectly concluded that the defendants were coerced into agreeing to the list-back provisions and that the Reserve market was foreclosed to other commercial brokers.

We note that there was testimony at trial that three such "floating zone" properties were available in Danbury alone, which would seem to militate against the plaintiffs' theory that the Reserve was uniquely desirable. The trial court neither credited nor declined to credit that testimony.

[19] Although the trial court rejected the latter theory in its memorandum of decision, it did so not as the result of any contrary factual findings but, rather, because the court was of the view that, because any leverage that the defendants were able to assert by virtue of their administrative appeal was legal, it was irrelevant to the antitrust analysis. As we have explained, the court was mistaken in that regard.

Notably, the defendants conceded at trial that they proceeded to purchase the land, despite the list-back requirements, because it made good economic sense to do so and they believed that the deal was likely to be profitable. For their part, representatives of Woodland testified that they had procompetitive reasons for agreeing to adopt the list-back provisions in the first place, notably, the enhanced efficiency and quality control stemming from having a single team of brokers coordinate marketing for the Reserve, as well as the ability to negotiate *below market* commission rates.

[20] Of course, should a retrial ultimately be necessary, the parties will have the opportunity to make a record, and the trial court to make findings, about all of these factual issues. In this part of the opinion, we merely explain why, on the present record, we cannot impute to the trial court the findings necessary to sustain the judgment.

[21] The Reserve, taken as a whole, spans 546 acres. We may take judicial notice of the fact that this represents two percent of the 42 square mile area of the city of Danbury. See Connecticut Economic Resource Center, Danbury, Connecticut: CERC Town Profile 2019 (January 16, 2020) p. 1, available at http://s3-us-west-2. amazonaws.com/cerc-pdfs/2019/danbury2019.pdf (last visited March 23, 2020).

171 Conn. 132 (1976)

ROY T. SCOTT
v.
GENERAL IRON AND WELDING COMPANY, INC.

Supreme Court of Connecticut.

Argued January 8, 1976.
Decision released June 1, 1976.

HOUSE, C. J., LOISELLE, BOGDANSKI, LONGO and BARBER, JS.

133 *133 *William F. Gallagher,* with whom, on the brief, was *Joseph M. Delaney,* for the appellant (plaintiff).

Alfred L. Fordiani, Jr., for the appellee (defendant).

LONGO, J.

The plaintiff in this case brought an action for a declaratory judgment determining the validity of a restrictive covenant in an
134 employment *134 contract between the plaintiff and the defendant, his former employer. The court declared that the covenant was valid and enforceable and the plaintiff has appealed to this court from that judgment. In his assignment of errors, the plaintiff claims that one paragraph of the finding contains facts which were found without evidence. Because the defendant has included in its brief an appendix showing evidence on which the finding of these facts can be based, the paragraph will not be stricken from the finding. See Practice Book §§ 645, 721; *Hames* v. *Hames,* 163 Conn. 588, 591, 316 A.2d 379. Many assignments of error have been expressly abandoned by the plaintiff in his brief; the remaining claims of error are considered in the opinion.

The facts of this case, which appear in the finding and are not subject to correction, may be summarized as follows: The defendant, General Iron and Welding Company, Inc., has been located in Meriden for many years and is in the business of fabricating and welding metals. In 1958 or 1959, when the plaintiff, Roy T. Scott, entered the defendant's employ as an apprentice welder, he had no previous training or experience in the field. In the course of his employment by the defendant, the plaintiff advanced in status and in 1968 became manager of the defendant corporation. As such, he dealt directly with the defendant's customers. In 1971, the vice president of the defendant corporation met with the plaintiff to discuss his future with the corporation. They discussed the future benefits and opportunities which would accrue if the plaintiff were to assume the title of chief engineer, including access to design and engineering knowledge, freedom to handle the affairs of
135 the corporation, and access to the defendant's customer list. As a result *135 of the discussion, an agreement was submitted to the plaintiff for his approval. The plaintiff had conferred with his attorney, and, after certain changes were made, the plaintiff signed the revised agreement on April 6, 1971. At the time the agreement was signed the defendant had in excess of one thousand customers which had been acquired over a period of years and some eight of which were major customers. These customers were located throughout Connecticut and the defendant did business from time to time in not less than twenty-five nor more than seventy-five Connecticut towns. As of April 6, 1971, all of the customer lists became available to the plaintiff and he was introduced to the customers and called upon them himself to solicit business for the defendant. Shortly thereafter, a salary dispute between the plaintiff and defendant developed and could not be resolved; as a result, the plaintiff gave up his management position and continued to work for the defendant in a lesser capacity. On March 24, 1972, the plaintiff voluntarily left the defendant's employ. At the time of the trial, the plaintiff was employed by the Kiely Manufacturing Company as a welder, and he desired to participate in the management of that business.

The agreement between the plaintiff and defendant which was signed on April 6, 1971, contains the covenant which is the subject of this dispute. The agreement, in its essential provisions, prohibited the plaintiff from disclosing confidential information not generally known in the industry and acquired by him concerning the defendant's products, processes and services, research, inventions, manufacturing, purchasing, accounting, engineering, marketing, merchandising and selling;
136 and from disclosing the list of the defendant's customers to any *136 person or other entity. The agreement also was expressly intended to protect the confidential information and operations of the C. & S. Ball Bearing Machinery and Equipment Corporation of America, with which the defendant would be working closely; and all covenants in the agreement

were to pertain to both the defendant and C. & S. The following paragraphs contained in the agreement are the gravamen of this action: "3. The Employee further agrees that for a period of five years after the termination of his employment with the Corporation he will not, within the State of Connecticut, directly or indirectly, own, manage, operate, control, act as agent for, participate in or be connected in any manner with the ownership, management, operation, or control of any business similar to the type of business conducted by the Corporation at the time of the termination of his employment. 4. It is agreed between the parties hereto, that this Agreement may be voided by their mutual consent in writing. It is understood that this Agreement is in no way intended to restrict the Employee, upon termination of his employment with the Corporation, from continuing to earn a living, as an employee, in his trade or specialty."[1]

The finding of the trial court that the agreement was supported by adequate consideration is uncontested by the plaintiff. The plaintiff argues on this appeal that the court erred in concluding that the agreement was valid and binding, and in
137 overruling his claims that the restrictive covenant in paragraph *137 three was unreasonably restrictive as to area and time and that it was in restraint of trade.

In order to be valid and binding, a covenant which restricts the activities of an employee following the termination of his employment must be partial and restricted in its operation "in respect either to time or place, ... and must be reasonable—that is, it should afford only a fair protection to the interest of the party in whose favor it is made and must not be so large in its operation as to interfere with the interests of the public. *Cook* v. *Johnson,* 47 Conn. 175, 176; *May* v. *Young,* 125 Conn. 1, 5, 2 Atl. (2d) 385; *Samuel Stores, Inc.* v. *Abrams,* 94 Conn. 248, 253, 108 Atl. 541, 9 A.L.R. 1450." *Torrington Creamery, Inc.* v. *Davenport,* 126 Conn. 515, 519-20, 12 A.2d 780; see *Oregon Steam Navigation Co.* v. *Winsor,* 87 U.S. (20 Wall.) 64, 66-67. The interests of the employee himself must also be protected, and a restrictive covenant is unenforceable if by its terms the employee is precluded from pursuing his occupation and thus prevented from supporting himself and his family. See *May* v. *Young,* supra. Having stated these principles, which reflect the conflict of interests of the employer, the employee, and the public, we turn to a consideration of the claims made by the plaintiff employee in this case.

Under paragraph three of the agreement, upon the termination of his employment, the plaintiff employee was prohibited from participating in the management of a business of the type conducted by the defendant "within the State of Connecticut." Neither party to this action has cited any decision of this court which considers the validity of a state-wide
138 restriction. In other jurisdictions, however, statewide restrictions have been upheld as a valid *138 protection of an employer's business. See *Barb-Lee Mobile Frame Co.* v. *Hoot,* 416 Pa. 222, 206 A.2d 59; *Oxman* v. *Profitt,* 241 S.C. 28, 126 S.E.2d 852; *Dyar Sales & Machinery Co.* v. *Bleiler,* 106 Vt. 425, 175 A. 27. The general rule is that the application of a restrictive covenant will be confined to a geographical area which is reasonable in view of the particular situation. See 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 543. A restrictive covenant which protects the employer in areas in which he does not do business or is unlikely to do business is unreasonable with respect to area. See *Dyar Sales & Machinery Co.* v. *Bleiler,* supra; 54 Am. Jur. 2d, supra, § 544.

It was the finding of the court that the defendant did business in twenty-five to seventy-five Connecticut towns, and that its customers numbered more than one thousand and were located throughout the state. Although that finding has been attacked by the plaintiff, it is in its essential aspects[2] fully supported by the testimony of one of the defendant's officers, which is set out in narrative form in the defendant's brief and appears verbatim in that of the plaintiff. That the plaintiff himself offered conflicting testimony is not determinative. The weight to be given testimony and the credibility of witnesses are matters to be determined by the trier. See *Slavitt* v. *Ives,* 163 Conn. 198, 212, 303 A.2d 13; *Birnbaum* v. *Ives,* 163 Conn.
139 12, 21, 301 A.2d 262. We find that the conclusion that a statewide restriction was reasonably necessary in this case to *139 protect the interests of the defendant employer is supported by the finding, which is in turn supported by the evidence. The trial court did not err in overruling the claim of the plaintiff that the statewide restriction was unreasonable in area.

In his brief, the plaintiff made the additional argument that the trial court erred in requiring him to bear the burden of proof of his claim that the restriction was unreasonable as to area. This court is not required to consider that argument because the plaintiff has not specifically assigned as error the ruling of the trial court on the issue of burden of proof. See Practice Book § 652; *Weyls* v. *Zoning Board of Appeals,* 161 Conn. 516, 521, 290 A.2d 350; *Cecio Bros., Inc.* v. *Feldmann,* 161 Conn. 265, 276, 287 A.2d 374. In this case, however, both parties have briefed the issue and we will consider it. As the finding is silent on this point, we turn to the memorandum of decision; see *Ruggles* v. *Town Plan & Zoning Commission,* 154 Conn. 711, 712, 226 A.2d 108; which reveals that the court did in fact impose the burden of proof upon the plaintiff. It is the well-established rule that "[t]he mere fact that a party sees fit to institute an action for a declaratory judgment in no way operates to alter or shift the ordinary rules as to the burden of proof by choosing the procedure of such an action. *Keithan* v.

Massachusetts Bonding & Ins. Co., 159 Conn. 128, 267 A.2d 660; *Hardware Mutual Casualty Co.* v. *Premo,* 153 Conn. 465, 471-72, 217 A.2d 698." *Lublin* v. *Brown,* 168 Conn. 212, 226, 362 A.2d 769. Therefore, we find that the trial court did not err in requiring the plaintiff to bear the burden of proof. See *Hally* v. *Hospital of St. Raphael,* 162 Conn. 352, 358, 294 A.2d 305; *Nikitiuk* v. *Pishtey,* 153 Conn. 545, 553, 219 A.2d 225.

140 *140 Under paragraph three of the agreement, the plaintiff was also prohibited from participating in the management of a business similar to that of the defendant for five years following termination of his employment with the defendant. The plaintiff's knowledge of the defendant's customer list was a potential threat to the defendant's business, and the defendant was entitled to protect that and other confidential information for a reasonable period of time. See *May* v. *Young,* 125 Conn. 1, 6-7, 2 A.2d 385. In this case, the court could reasonably and logically conclude that a five-year restriction is reasonable, as the finding reveals that it had taken years of effort for the defendant to acquire its customers. The time restriction also protects the interests of the plaintiff, for it serves to limit the time during which he can be prohibited from participating in the metals business at a managerial level. The trial court did not err in overruling the plaintiff's claim that this restriction was unreasonable as to time.

The plaintiff's interests are also protected by paragraph four of the agreement. Under the terms of that paragraph, the plaintiff is not prohibited from participating in the metals business "as an employee." At the time of trial, the plaintiff was employed as a welder and was earning $200 per week. Thus, the plaintiff is not being deprived of the opportunity to earn a livelihood for himself and his family or of employment at his trade. The plaintiff claims that the provisions of paragraph four conflict with those of paragraph three and are, therefore, illusory. We do not agree. The agreement clearly manifests an intention to allow the plaintiff to seek and accept employment in his trade as a welder.

141 *141 In determining whether a restrictive covenant of employment is in restraint of trade, "[t]he test of its validity is the reasonableness of the restraint it imposes." *Mattis* v. *Lally,* 138 Conn. 51, 54, 82 A.2d 155, and the citations contained therein. This agreement meets the criteria set out in *Torrington Creamery, Inc.* v. *Davenport,* 126 Conn. 515, 519-20, 12 A.2d 780. It does not indefinitely restrict the plaintiff's right to future employment in a management position. In the interim, the plaintiff is free to work as a welder and the interest of the public in securing the benefit of his labor and skill is thereby protected. The facts of this case support the conclusion that the protection afforded the defendant by the restrictive covenant is reasonable. Therefore, the trial court did not err in overruling the plaintiff's claim that the agreement was in restraint of trade.

We hold that the trial court did not err in concluding that the agreement between the parties was valid and binding.

There is no error.

In this opinion the other judges concurred.

[1] During oral argument, attention was called to the erroneous inclusion of the words "be employed by" in the text of paragraph three of the agreement as it appears in the finding. We have quoted the text of that paragraph exactly as it is set out in the agreement, which was introduced into evidence before the trial court by the plaintiff.

[2] The witness did testify that the defendant conducted business in not more than eighty towns, although the figure which appears in the finding is seventy-five. As the number found is the lesser of the two, there is no prejudice to the plaintiff.

181 Conn. 655 (1980)

STATE OF CONNECTICUT
v.
HOSSAN-MAXWELL, INC., ET AL.

Supreme Court of Connecticut.

Argued May 7, 1980.
Decision released August 5, 1980.

COTTER, C. J., BOGDANSKI, PETERS, HEALEY and PARSKEY, JS.

656 *656 *Richard Hanna,* for the appellant (named defendant).

Steven M. Rutstein, assistant attorney general, with whom were *Robert* M. *Langer,* assistant attorney general, and, on the brief, *Carl R. Ajello,* attorney general, for the appellee (plaintiff).

COTTER, C. J.

The issue presented in this appeal concerns the applicability of the Connecticut Anti-Trust Act; General Statutes §§ 35-24
657 through 35-45; to restrictive covenants included in the sale of sixty-four *657 subdivision housing lots. The state brought suit
alleging that the restrictive covenants at issue were in restraint of trade in violation of General Statutes §§ 35-26, 35-28 (d) and 35-29 because they illegally tied real estate brokerage services to the sale, resale or lease of the subdivision lots. In the first count of the complaint, the state alleged that the exclusive sales and leasing rights conferred by the covenant constituted a combination or conspiracy to boycott all other licensed real estate brokers in violation of General Statutes §§ 35-26 and 35-28 (d). In a second count the state alleged that the defendants' arrangement was an attempt to monopolize the market for real estate brokerage services in violation of General Statutes § 35-27. The trial court granted the state's motion for summary judgment as to the first count against the defendants James F. Hartnett, Bren Construction Co., Inc., Jansen Realty, Inc. and Hossan-Maxwell, Inc. It is from that judgment in favor of the plaintiff on the first count that only the defendant Hossan-Maxwell, Inc., appeals.

The material facts are not in dispute.[1] On July 15, 1966, James F. Hartnett recorded a "Declaration of Covenants and
658 Restrictions" upon certain parcels of land in New Milford known as Dean *658 Heights. Paragraphs 19 and 20 of that
declaration require a grantee of any of the sixty-four lots who decides to sell or lease the property through any person to whom a commission would be payable to give exclusive sales and leasing rights to Hartnett for a period of three months.[2] By the express terms of the declaration of covenants, the exclusive rights were intended to run with the land and to bind the immediate grantee and all subsequent purchasers.[3]

On May 14, 1973, Hartnett conveyed all right, title and interest in the declaration of covenants to Bren Construction Co., Inc. Seven days later, Bren assigned certain of its rights to Jansen Realty, Inc. On November 4, 1974, Jansen and Bren jointly
659 *659 assigned to Hossan-Maxwell, Inc., all their interest concerning the brokerage services. In February, 1976, Robert
Hossan, the president of Hossan-Maxwell, Inc., informed a Dean Heights homeowner that her efforts to sell her home through a competing real estate broker violated Hossan-Maxwell's exclusive brokerage rights and that Hossan-Maxwell would take steps to prevent sales through any other broker.

I

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (tied) product, or at least agree that he will not purchase that product from any other supplier. *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545. Since it is undisputed that a tying arrangement exists, we first consider the defendant's claim that the Connecticut act does not apply to arrangements involving services. General Statutes § 35-29 provides that "[e]very lease, sale or contract for the *furnishing of services* or for the sale of commodities, or for the fixing of prices charged therefor, or for the giving or selling of a discount or rebate therefrom, on the condition or

understanding that the lessee or purchaser shall not deal in the services or the commodities of a competitor or competitors of the lessor or seller, shall be unlawful where the effect of such lease or sale or contract for sale or such condition or understanding may be to substantially lessen competition or tend to create a monopoly in any part of trade or commerce
660 and where such goods or services are for the use, consumption or resale in this state." Thus, *660 in light of the clear wording of General Statutes § 35-29, the defendant's claim that the Connecticut act does not apply to services is without merit.[4]

II

Our construction of the Connecticut Anti-Trust Act is aided by reference to judicial opinions interpreting the federal antitrust statutes. *Elida, Inc.* v. *Harmor Realty Corporation,* 177 Conn. 218, 226-27, 413 A.2d 1226; *Mazzola* v. *Southern New England Telephone Co.,* 169 Conn. 344, 348, 363 A.2d 170. Cf. *Wilson* v. *Freedom of Information Commission,* 181 Conn. 324, 435 A.2d 353.

Tying arrangements are among the small group of practices which courts have found to be "unlawful in and of themselves." *Northern Pacific Ry. Co.* v. *United States,* supra, 5; *International Salt Co.* v. *United States,* 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20; *Elida, Inc.* v. *Harmor Realty Corporation,* supra, 227, 228. The justification for the per se approach is that "[t]ying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co.* v. *United States,* 337 U.S. 293, 305, 69 S. Ct. 1051, 93 L. Ed. 1371. Nonetheless, "[it is only] when certain prerequisites are met, [that] arrangements of this kind are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required." *Fortner*
661 *661 *Enterprises, Inc.* v. *United States Steel Corporation,* 394 U.S. 495, 498, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (hereinafter *Fortner I)*. The classic formulation of these prerequisites was expressed by Justice Black in *Northern Pacific Ry. Co.* v. *United States,* supra, 6. In that case, brought under § 1 of the Sherman Antitrust Act; 15 U.S.C. § 1; tying arrangements were deemed per se illegal, "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a `not insubstantial' amount of interstate commerce is affected." *Northern Pacific Ry. Co.* v. *United States,* supra, 6.

Although both tests must be met to constitute a violation of § 1 of the Sherman act, under § 3 of the Clayton Antitrust Act; 15 U.S.C. § 14; a tie-in is per se illegal if either condition is met. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 608, 609, 73 S. Ct. 872, 97 L. Ed. 1277; *Moore* v. *Jas. H. Matthews & Co.,* 550 F.2d 1207, 1214 (9th Cir.); *Advance Business Systems & Supply Co.* v. *SCM Corporation,* 415 F.2d 55, 61-62 (4th Cir.), cert. denied, 397 U.S. 920, 90 S. Ct. 928, 25 L. Ed. 2d 101; *ILC Peripherals Leasing Corporation* v. *Internationl Business Machines Corporation,* 448 F. Sup. 228, 230 (N.D. Cal.). Since General Statutes § 35-29 is patterned after § 3 of the Clayton act;[5] 14 H. R. Proc., Pt. 9, 1971
662 Sess., p. 4182 *662 (remarks of Rep. David H. Neiditz); Brodigan, "The Connecticut Antitrust Act," 47 Conn. B.J. 12, 15 (1973); and specifically includes the provision of services within its ambit, we believe that it is appropriate to adopt the Clayton act test in determining whether a violation of § 35-29 has occurred. Thus, the declaration of covenants and restrictions is unlawful per se if either condition under *Northern Pacific Ry. Co.* v. *United States,* supra 6, is met;[6] that is, if (1) the party has sufficient economic power in the tying product, or (2) a not insubstantial amount of commerce is affected. If the restraint violates both tests, the tying arrangement violates General Statutes § 35-26 as well as § 35-29.

A

663 The tying of brokerage services to the sale of residential development of real estate is automatically *663 illegal under § 35-29 whenever a substantial volume of commerce in the tied product is restrained. *Advance Business Systems & Supply Co.* v. *SCM Corporation,* supra. The amount of commerce affected is not measured by reference to the size of the tied product market. *Moore* v. *Jas. H. Matthews & Co.,* supra, 1216. "... [N]ormally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie, for as [the Supreme Court] held in *International Salt,* [supra, 396,] `it is unreasonable, per se, to foreclose competitors from any substantial market through use of a tying arrangement.'" *Fortner I,* supra, 501.

In the case at hand, the dollar volume of business foreclosed to competitor real estate brokers is not insubstantial. Houses have been built on fifty-seven of the sixty-four building lots in the Dean Heights development. The defendant's affidavit states that an average of 10 to 15 percent of the homes will be sold each year if the development is typical of the real estate

market in New Milford. The affidavit further states that the average commission on the sale of a home is 6 percent of the selling price. If we take the defendant at his word, an average of seven homes in the Dean Heights development will be sold each year at an average price (as of 1976) of $50,000. The total commerce involved each year is $350,000 and the annual volume of real estate commissions foreclosed is $21,000. The not insubstantial test has been met by showing dollar
664 volumes which total $60,800; *United States* v. *Loew's, Inc.,* 371 U.S. 38, 49, 83 S. Ct. 97, 9 L. Ed. 2d 11; and *664 estimated sales of $86,377. *Detroit City Dairy* v. *Kowalski Sausage Co.,* 393 F. Sup. 453, 472 (E.D. Mich.). See also *Anderson Foreign Motors* v. *New England Toyota,* 475 F. Sup. 973, 987 (D. Mass.), describing the "very liberal interpretation" of the "not insubstantial" test by the United States Supreme Court. Even without delving into the nuances of present value and future discount rates, $21,000 per year into perpetuity clearly represents a "not insubstantial" sum.

B

The United States Supreme Court has made it clear that the sufficient economic power standard does not require that the defendant have a monopoly or even a dominant position in the market for the tying product. *United States Steel Corporation* v. *Fortner Enterprises, Inc.,* 429 U.S. 610, 620, 97 S. Ct. 861, 51 L. Ed. 2d 80 (hereinafter *Fortner II); Fortner I,* supra, 502-503. Market power in the tying product may also be shown by product uniqueness or desirability. *United States* v. *Loew's, Inc.,* supra, 45; *Moore* v. *Jas. H. Matthews & Co.,* supra. The *Fortner II* opinion emphasizes that the proper focus of concern is whether the seller has the power to raise prices, or to require other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product. *Fortner II,* supra. The policy underlying antitrust law's
665 prohibition of tying arrangements is that competing sellers as well *665 as consumers should be protected from unfair competition.[7] Turner, "The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 60-61 (1958).

In the present case, the defendant has imposed a tying arrangement upon sixty-four pieces of residential property. The situation is analogous to that in *Northern Pacific Ry. Co.* v. *United States,* supra, where the tying product was a unique item, choice land. The Supreme Court found sufficient economic power on the basis of the land's uniqueness and strategic location. *Northern Pacific Ry. Co.* v. *United States,* supra; accord, *Bogosian* v. *Gulf Oil Corp.,* 561 F.2d 434, 453-54 (3d Cir.), cert. denied, 434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791. In Connecticut, the uniqueness and special characteristics of a particular plot of land have long been recognized. *Anderson* v. *Yaworski,* 120 Conn. 390,395,399,181 A. 205. While the quantity of land involved in the present case does not approach the volume of land holdings owned by the Northern Pacific Railway, the uniqueness of residential property is nevertheless sufficient evidence of the market power possessed by the defendant.

666

*666 III

When the plaintiff has demonstrated either sufficient economic power to appreciably restrain free competition or that a not insubstantial amount of commerce is involved, the standards required for per se treatment of the tying agreement have been met. When the per se standards have been met, summary judgment may be appropriate. 2 Areeda & Turner, Antitrust Law ¶ 316d, pp. 68-69 (1978). Here, the pleadings and affidavits of the parties clearly established (1) the foreclosure of a not insubstantial volume of commerce in the tied product, and (2) defendant's market power over the tying product due to the uniqueness of the land. *Fortner I,* supra, 499. In tying cases, the Supreme Court has approved summary judgments issued against the defendants. *Northern Pacific By. Co.* v. *United States,* supra; *International Salt Co.* v. *United States,* supra. It is only where motive and intent play leading roles that the court has indicated that summary procedures should be used sparingly. *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458; *Capital Temporaries, Inc. of Hartford* v. *Olsten Corporation,* 506 F.2d 658, 667 (2d Cir.). In the *Loew's* case, the Supreme Court noted that "it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product, and into the corollary problem of the seller's percentage share in that market." *United States* v. *Loew's, Inc.,* supra, 45n.

The plaintiff is entitled to judgment as a matter of law because it is clear from the pleadings and affidavits that (1) a tying
667 arrangement did exist, *667 and (2) the tying arrangement satisfied the prerequisites for application of a per se rule of illegality. When a per se violation is demonstrated and found to exist, in such a case the restraint may be presumed to be illegal without further evidence. *Northern Pacific Ry. Co.* v. *United States,* supra.[8]

There is no error.

In this opinion the other judges concurred.

[1] Although the defendant contends that genuine factual issues do exist, aside from the bald assertion that the summary judgment standard is not met, the defendant fails to specify any such controversy, nor do we find any to be revealed by the pleadings or affidavits of the parties.

In evaluating the propriety of a summary judgment, we are confined to an examination of the pleadings and affidavits of the parties to determine whether (1) there is no genuine issue as to any material fact, and (2) the moving party is entitled to judgment as a matter of law. Practice Book, 1978, § 384. As we do not find any issue of material fact to be in dispute, the sole issue is whether the summary judgment is correct as a matter of law.

[2] Paragraphs 19 and 20 of the "Declaration of Covenants and Restrictions" read as follows:

"19. If the Grantee decides to sell said above described premises through any other person, agent or real estate broker to whom a commission would be payable, he hereby gives exclusive sales right to James F. Hartnett, or such person, agent or broker as he may designate, said listing to be at the lowest price the Grantee is willing to accept, and for a period of three (3) months. When decision to sell is made Grantee hereby agrees to list in writing the lowest price he is willing to accept.

"20. If the Grantee decides to lease through any other person, agent or real estate broker to whom a commission would be payable, he hereby gives exclusive leasing right to the Grantor, or such other person, agent or broker as he may designate, the said listing to be at the lowest price the Grantee is willing to accept and for a period of three (3) months. In the event of such lease the amount of said commission shall not exceed 10%. When decision to lease is made Grantee hereby agrees to list in writing the lowest price he is willing to accept."

[3] The validity of the restrictive covenants as to subsequent grantees was not raised in the pleadings, litigated or considered at trial and therefore we express no opinion as to this issue. Authorities discussing the question whether similar covenants run with the land or are personal indicate that the covenant here found invalid on antitrust grounds may be susceptible to attack premised upon traditional rules of property law. See Restatement, 5 Property § 537; *Pulver* v. *Mascolo,* 155 Conn. 644, 237 A.2d 97; *Patrone* v. *Falcone,* 345 Mass. 659, 189 N.E.2d 228.

[4] The defendant also interposes a claim of immunity from the Connecticut Anti-Trust Act under the exception provided in General Statutes § 35-31b. This claim, while assigned as error, was not addressed in the defendant's brief or at oral argument and is therefore considered abandoned. *Gluck* v. *Gluck,* 181 Conn. 225, 435 A.2d 35; *Healy* v. *White,* 173 Conn. 438, 441, 378 A.2d 540; Maltbie, Conn. App. Proc. § 327. Nor does the defendant make any claim that the sale of interests in land does not fall within the statutory language of General Statutes § 35-29.

[5] Comparison of § 3 of the Clayton Antitrust Act; 15 U.S.C. § 14; printed below, to General Statutes § 35-29 highlights the similarity of their provisions.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or 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, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[6] Under federal law, a complaint concerning a tying arrangement involving services can only be brought under the Sherman act and its two-pronged per se test because the federal Clayton act, unlike its Connecticut counterpart, is applicable only to commodities. *Robbins Flooring, Inc.* v. *Federal Floors, Inc.*, 445 F. Sup. 4, 10 (E.D. Penn.). The Clayton act test requires that only one of the two requirements be met. The justification for the lesser standard is that under § 3 of the Clayton act there need not be the actuality of an unreasonable restraint or monopoly which the Sherman act requires, but merely the probability that the activity complained of "may substantially lessen commerce or tend to create a monopoly." *Mytinger & Casselberry, Inc.* v. F.T.C., 301 F.2d 534, 535 (D.C. Cir.); *Robbins Flooring, Inc.* v. *Federal Floors, Inc.*, supra, 10, 11.

[7] The defendant's argument that the limited duration of the exclusive sales and leasing rights (three months) as well as the competitive commission rate (6 percent) saves the tying agreement is unsupported by the case law. A tying agreement is not valid even if the price charged and the terms offered are the same as those offered by competitors. The United States Supreme Court has condemned agreements even where the tie was removed if a competitor offered a better price. *International Salt Co.* v. *United States,* 332 U.S. 392, 397, 68 S. Ct. 12, 92 L. Ed. 20. A tying arrangement which forces competitors to undercut the market while the tie holder merely meets competition is impermissible. *Northern Pacific Ey. Co.* v. *United States,* 356 U.S. 1, 12, 78 S. Ct. 514, 2 L. Ed. 2d 545.

[8] Because our decision on the tying issue is dispositive of this appeal, no opinion is expressed on the boycott claim.

THE PLS.COM, LLC, Plaintiff,

v.

THE NATIONAL ASSOCIATION OF REALTORS; BRIGHT MLS, INC.; MIDWEST REAL ESTATE DATA, LLC; and CALIFORNIA REGIONAL MULTIPLE LISTING SERVICE, INC., Defendants.

Case No. 2:20-cv-04790-JWH-RAOx.

United States District Court, C.D. California.

February 3, 2021.

MEMORANDUM OPINION ON MOTIONS OF DEFENDANTS TO DISMISS PLAINTIFF'S AMENDED COMPLAINT [ECF Nos. 50, 53, & 55] and MOTION TO STRIKE OF DEFENDANT CALIFORNIA REGIONAL MULTIPLE LISTING SERVICE, INC. [ECF No. 54]

JOHN W. HOLCOMB, District Judge.

I. INTRODUCTION

This antitrust case concerns an alleged conspiracy among three regional real property multiple listing services—Defendants Bright MLS, Inc. ("Bright MLS"); Midwest Real Estate Data, LLC ("Midwest RED"); and California Regional Multiple Listing Service, Inc. ("Cal Regional MLS") (collectively, the "MLS Defendants")—and Defendant The National Association of Realtors ("NAR") to eliminate a competitor, Plaintiff The PLS.com, LLC. PLS maintains that Defendants are engaging in an unreasonable restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, Cal. Bus. & Prof. Code § 16720(a)-(c).[1]

Before the Court are the three motions of Defendants Bright MLS and Midwest RED (jointly), Cal Regional MLS, and NAR, respectively, to dismiss PLS's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[2] Also pending before the Court is the motion of Cal Regional MLS to strike the second claim for relief in PLS's Amended Complaint pursuant to California's Anti-SLAPP Statute, Cal. Civ. Proc. Code § 425.16.[3] The Court held a hearing on Defendants' three Motions to Dismiss and on Cal Regional MLS's Motion to Strike on October 15, 2020. After considering the papers filed in support of and in opposition to all four Motions[4] and the arguments of counsel presented at the hearing, for the reasons explained herein, the Court will GRANT Defendants' Motions to Dismiss without leave to amend and will DENY Defendant Cal Regional MLS's Motion to Strike as moot.

II. BACKGROUND[5]

Transactions for the sale of residential real estate involve a seller and a buyer who are typically each represented by a real estate professional.[6] Real estate professionals are licensed real estate brokers and agents.[7] Agents have the most direct relationship with the consumer; they solicit listings, work with sellers to market their homes, and work with buyers to find homes that match the buyers' preferences.[8] Brokers supervise agents and often provide branding, advertising, and other services that help agents attract sellers and buyers and complete transactions.[9] Brokers and agents compete between and among themselves to provide residential real estate brokerage services to home sellers and buyers.[10]

A. The MLS Defendants and NAR

Most residential real property for sale in the United States is marketed through a multiple listing service ("MLS") platform.[11] MLSs are joint ventures among, in effect, their members: licensed real estate professionals doing business in a particular local or regional area.[12] Real estate professionals pay for membership and, therefore, access to an MLS, and those professionals must adhere to any restrictions that the MLS imposes.[13] An MLS combines its members' home sale listings information into a central database and then makes the listing data available to all of its members.[14] Listing a property on an MLS enables a home seller's professional to market the property to a large set of potential buyers.[15] Correspondingly, a professional who represents a buyer can search an MLS for listed homes in the area that match the buyer's preferences.[16]

The value of the network services provided by an MLS is largely a function of the number of members within the network.[17] That is, the greater the number of members in the MLS, the greater the number of listings on the MLS, which increases the value of membership.[18] Bright MLS, Cal Regional MLS, and Midwest RED are each regional MLSs: Bright MLS serves the Mid-Atlantic region;[19] Cal Regional MLS serves California;[20] and Midwest RED serves areas in the Upper Midwest.[21]

NAR is a trade association with more than 1.4 million individual members who are organized into 54 state and territorial associations and more than 1,200 local associations (the "Realtor Associations").[22] NAR establishes and promulgates policies and professional standards for its individual members and for its Realtor Associations.[23] Most real estate professionals in the U.S. are NAR members.[24] Realtor Associations are required to adopt the rules and polices promulgated by NAR and to enforce those rules on the real estate professionals comprising the associations.[25] Those policies include NAR's Handbook on Multiple Listing Policy.[26]

B. The NAR-Affiliated MLS System

There are around 600 MLSs nationwide that are affiliated with NAR through their ownership or operation by NAR's Realtor Associations (the "NAR-affiliated MLSs").[27] NAR-affiliated MLSs are required to adopt new or amended NAR policies.[28] All NAR-affiliated MLSs are actual or potential competitors with other NAR-affiliated MLSs.[29] Bright MLS and Cal Regional MLS are NAR-affiliated MLSs,[30] while Midwest RED is indirectly owned and controlled by NAR members.[31] Real estate professionals are not required to be NAR members to participate in NAR-affiliated MLSs.[32] Consequently, many real estate professionals who are not NAR members participate in NAR-affiliated MLSs.[33]

The majority of NAR-affiliated MLSs are for-profit entities that charge membership fees for access to their services.[34] For years, NAR-affiliated MLSs have enjoyed a high market share across the country.[35]

C. Pocket Listings

MLSs generally impose specific requirements for their members' entry of listing data regarding residential real properties. Sometimes, for a variety of reasons (including privacy), sellers of residential real property want to avoid providing all of the information required to market a listing through an MLS. A seller with those interests might ask her real estate professional to market the listing by other means, outside of an NAR-affiliated MLS system. An off-MLS listing service is referred to as a "pocket listing."[36] A pocket listing allows a seller to customize and to limit the amount of information that she provides about her home, and, in this way, a pocket listing affords a seller with a level of privacy and discretion that is not available with an MLS listing.[37] Historically, pocket listings were marketed bilaterally by real estate professionals—"face to face, through phone calls, or by email."[38]

PLS was created in 2017 in response to consumer demand for a centralized, nationwide searchable repository for pocket listings.[39] Like an MLS, membership in PLS is available to all licensed real estate professionals who pay a membership fee. But unlike the many regionally-based MLSs, each of which charges its own membership fee, PLS charges a single fee to access its nationwide network.[40] By joining PLS, real estate professionals can privately share pocket listings in cooperation with other members while avoiding the exposure of those listings through the NAR-affiliated MLSs.[41] Also unlike MLS listings, PLS offers sellers the ability to share as much or as little information about their property as they desire.

[42] In sum, PLS's business model combines the network efficiencies of an MLS with the privacy and discretion of the pocket listing on a national—as opposed to a local or regional—platform.[43]

D. The Clear Cooperation Policy

1. Definition

On November 11, 2019, NAR adopted its "Clear Cooperation Policy."[44] The text of the Clear Cooperation Policy is as follows:

> Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays . . ., digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public.[45]

NAR created an exception to its Clear Cooperation Policy for so-called "office listings," which are listings marketed entirely within a brokerage firm without submission to an MLS.[46] The Clear Cooperation Policy became effective on January 1, 2020, and it was included as a mandatory rule in the 2020 NAR Handbook on Multiple Listing Policy.[47] NAR-affiliated MLSs enforce Clear Cooperation by monitoring members' adherence to the policy, by encouraging members to report violations, and by threatening or imposing penalties on members for non-compliance.[48]

2. History and Adoption

In the months leading up to NAR's adoption of the Clear Cooperation Policy, the MLS Defendants privately and publicly coordinated with NAR, which has a national footprint, to formulate Clear Cooperation as a method to stamp out pocket listings.[49] The collusion between the MLS Defendants and NAR began in August 2019 at a meeting of NAR's MLS Technology and Emerging Issues Advisory Board.[50] PLS alleges, on information and belief, that a representative of Midwest RED was present at this meeting as a representative of the Council of Multiple Listing Services (the "MLS Council").[51] The NAR Technology and Emerging Issues Advisory Board ultimately voted to recommend a version of what would become the Clear Cooperation Policy.[52]

In September 2019, the MLS Defendants were among the signatories of a white paper that called for action against the threat of pocket listings.[53] On October 16, 2019, Bright MLS adopted a policy similar to the Clear Cooperation Policy, which (as discussed above) NAR adopted the next month.[54] Around the same time, Midwest RED published a statement supporting the adoption of the Clear Cooperation Policy at NAR's upcoming convention.[55] On October 17 and 18, 2019, the MLS Defendants met at an MLS Council conference.[56] The CEO of Midwest RED and the Chairman of Bright MLS each made statements at the conference to address the purported threat of pocket listings to the MLS business model. Midwest RED's CEO discussed Midwest RED's pocket listing policy,[57] and Bright MLS's Chairman advocated for the adoption of similar policies—including the policy that eventually became Clear Cooperation—and encouraged participants to attend the upcoming NAR convention.[58]

III. LEGAL STANDARD

A. Motions to Dismiss

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In ruling on a Rule 12(b)(6) motion, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1120 (9th Cir. 2002). Although a complaint attacked through a Rule

12(b)(6) motion "does not need detailed factual allegations," a plaintiff must provide "more than labels and conclusions." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

To state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . ." *Twombly,* 550 U.S. at 555 (citations and footnote omitted). Accordingly, to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," which means that a plaintiff must plead sufficient factual content to "allow[] 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) (internal quotation marks omitted). A complaint must contain "well-pleaded facts" from which the Court can "infer more than the mere possibility of misconduct." *Id.* at 679.

B. Leave to Amend

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely granted when justice so requires." The purpose underlying the amendment policy is to "facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000). Leave to amend should be granted unless the Court determines "that the pleading could not possibly be cured by the allegation of other facts." *Id.* (quoting *Doe v. United States,* 8 F.3d 494, 497 (9th Cir. 1995)).

IV. DISCUSSION

PLS argues that, by promulgating and adopting the Clear Cooperation Policy, Defendants engaged in an unreasonable restraint of trade in violation of § 1 of the Sherman Act and California's Cartwright Act.[59] To assess the plausibility of PLS's claims, it is necessary first to take note of the applicable antitrust principles and the elements that PLS must plead to state a claim. *See* *Iqbal,* 556 U.S at 675; *Twombly,* 550 U.S. at 553-54.

A. PLS's Claim Under § 1 of the Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. "Congress designed the Sherman Act as `a consumer welfare prescription.'" *Reiter v. Sonotone Corp.,* 442 U.S. 330, 343 (1979) (quoting R. BORK, THE ANTITRUST PARADOX 66 (1978)). Key concepts underlying antitrust law include the notion that when economic resources are allocated to their best use, and when competitive price and quality are assured to the consumer, consumer welfare is maximized. *See* *Rebel Oil Co. v. Atl. Richfield Co.,* 51 F.3d 1421, 1433 (9th Cir. 1995); *accord* *National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City,* 452 U.S. 378, 387-88 & n.13 (1981). Thus, "an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality." *Id.* Accordingly, the Supreme Court has repeatedly emphasized that in enacting the Sherman Act, "Congress intended to outlaw only unreasonable restraints" on trade or commerce. *Texaco Inc. v. Dagher,* 547 U.S. 1, 5 (2006) (quoting *State Oil Co. v. Khan,* 522 U.S. 3, 10 (1997)).

Restraints can be unreasonable for antitrust purposes in one of two ways. Some restraints are unreasonable *per se* because they "always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,* 441 U.S. 1, 19-20 (1979); *see also* *Ohio v. American Express Co.,* 138 S. Ct. 2274, 2283 (2018) ("*Amex*"). If the challenged restraint is not unreasonable *per se,* then the restraint is judged under the Rule of Reason. *Id.* at 2284.

Most antitrust claims are analyzed under the Rule of Reason. *See* *State Oil Co. v. Khan,* 522 U.S. 3, 10 (1997). The goal of the Rule of Reason analysis is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 886 (2007)). To state a § 1 claim under the Rule of Reason, a plaintiff must plead sufficient facts to show the plausible existence of "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc.,* 518 F.3d 1042, 1047 (9th Cir. 2008). In addition, a plaintiff must also plead (4) that it was harmed by the unlawful anti-competitive restraint and that such harm flowed from an "anti-competitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 334 (1990). The latter element is referred to as an "antitrust injury." *Brantley v. NBC Universal, Inc.,* 675 F.3d 1192, 1197 (9th Cir. 2012); *accord Atl. Richfield,* 4985 U.S. at 334.

The underlying goal of the *per se* rule and the Rule of Reason is, ultimately, the same; both "`are employed "to form a judgment about the competitive significance of the restraint.'" [Citation.] `[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.'" *Atl. Richfield,* 495 U.S. at 342 n.12 (internal citations omitted). In this regard, the antitrust injury requirement is paramount. "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Id.* at 341 (emphasis in original).

1. Antitrust Injury

Standing is a "threshold question in every federal case;" it implicates "the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 498 (1975) ("the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues"). In private antitrust cases, the plaintiff is required to make plausible allegations regarding both *constitutional standing* and *antitrust standing. See Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters,* 459 U.S. 519, 535 n.31 (1983). In the constitutional dimension, standing requires justiciability: that "the plaintiff has made out a `case or controversy' between himself and the defendant within the meaning of [Article] III." *Warth,* 422 U.S. at 498. In most antitrust cases, the "[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact." *Associated Gen. Contractors,* 459 U.S. at 535 n.31. But the standing inquiry does not end there.

In addition to the traditional constitutional limitations upon standing, "Congress imposed . . . limitations upon those who can recover damages under the antitrust laws." *Pool Water Prods. v. Olin Corp.,* 258 F.3d 1024, 1034 (9th Cir. 2001); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 485-86 (1977). These limitations are often referred to as "antitrust standing requirements." *Pool Water,* 258 F.3d at 1034. Because § 1 of the Sherman Act does not provide a private right of action, private parties like PLS must bring their Sherman Act claim "pursuant to the authorization under [§] 4 of the Clayton Act."[60] *Id.* Under that statute, "private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent." *Id.*; *see also Atl. Richfield,* 495 U.S. at 334 (the plaintiff must plausibly allege "the existence of `antitrust injury.'" (quoting *Brunswick,* 429 U.S. at 489)).[61]

As a rule of standing, the "antitrust injury" requirement embodies the fundamental principle that antitrust laws "were enacted for `the protection of *competition* not *competitors*'" *Brunswick Corp.,* 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962)) (emphasis in original), because "`[i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition," *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 109-110 (1986) (quoting *Brunswick,* 429 U.S. at 488).[62] The Supreme Court has explained that "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 458 (1993). In this regard, the antitrust injury requirement clarifies that the Sherman Act is not directed against "conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself . . ., out of concern for *the public interest.*" *Id.* (emphasis added).

Thus, even when a challenged restraint has the effect of eliminating a rival, thereby reducing competition (at least with that rival), the elimination of a rival without harm to consumer welfare does not invoke the Sherman Act. *See Rebel Oil Co.,* 51 F.3d at 1433 (citing *Prods. Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.,* 682 F.2d 660, 663 (7th Cir. 1982)); *see also Reiter,* 442 U.S. at 343. A private antitrust plaintiff must allege a plausible connection between the harm to itself and harm to the ultimate consumer. *See Atl. Richfield,* 495 U.S. at 340-42. In sum, to allege a plausible antitrust injury, a private plaintiff must allege facts that, assumed to be true, show that the plaintiff's injuries are caused by an anticompetitive aspect of the defendant's conduct that also injures competition and consumers. *See id.* at 334-35 & 342-44; *Rebel Oil Co.,* 51 F.3d at 1445; *see also Cargill,* 479 U.S. at 109-110; *Brunswick,* 429 U.S. at 489.

Here, Defendants contend that PLS has not alleged facts plausibly to demonstrate that PLS has suffered an antitrust injury and, therefore, that PLS does not have standing as an antitrust plaintiff. For the reasons explained below, the Court agrees.

In analyzing the antitrust injury requirement in the context of this case, one fundamental point informs the Court's analysis: the distinction between, on the one hand, a pocket listing as a particular service offered to home sellers by real estate professionals, and, on the other hand, PLS's business, which provides a platform for its members to market their pocket listings. As described above, a pocket listing, or an off-MLS listing, is a type of brokerage service provided by real estate professionals to home sellers who, "for reasons of privacy or security"[63] for example, wish to avoid providing the detailed information that is required for a listing to be submitted to, and marketed through, an NAR-affiliated MLS.[64] PLS emerged as a platform for real estate professionals to market private listings to other members without having to provide the detailed listing information required by the NAR-affiliated MLSs, thus preserving the home seller's interest in not disclosing certain information about her listing.[65]

a. The Alleged Injury to PLS

To assess whether PLS states a plausible antitrust injury, the Court begins with PLS's allegations regarding how the Clear Cooperation Policy harms PLS's business.

PLS alleges that the Clear Cooperation Policy has "eliminated the ability and incentive of real estate professionals to market pocket listings through PLS,"[66] which has foreclosed PLS from accessing "a critical mass of listings necessary to obtain significant network effects and compete with the NAR-affiliated MLSs in the relevant market(s)."[67] Consequently, listings were removed from PLS and submitted to NAR-affiliated MLSs, agent participation in PLS declined, and "PLS was foreclosed from the commercial opportunities necessary to innovate and grow."[68] PLS claims damages in the form of "lost profits"[69] and "lost equity and goodwill,"[70] which "diminish[ed] the value of PLS as a going concern."[71] PLS seeks injunctive relief and an award of compensatory and treble damages.[72]

PLS's allegations in this regard are sufficient to meet the constitutional requirement for injury-in-fact and the first element of antitrust injury. PLS plausibly alleges that the Clear Cooperation Policy effectively discourages real estate professionals who are also members of an NAR-affiliated MLS from marketing their listings on PLS's platform. Those real estate professionals' refusal to use PLS's platform necessarily harms PLS's business. But this is only the first element of antitrust injury—the constitutional dimension of the standing inquiry.

Whether the Clear Cooperation Policy "may be properly characterized as exclusionary" for the purpose of an antitrust injury cannot be answered simply by considering its alleged effects on PLS. *See* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985); *Brantley*, 675 F.3d at 1200 ("Plaintiffs may not substitute allegations of injury to the claimants for allegations of injury to competition."). The Court must also consider whether PLS has alleged facts to show that the Clear Cooperation Policy harms competition and consumers in the same way. *See id.*; *Rebel Oil Co.*, 51 F.3d at 1445 ("because the Sherman Act's concern is consumer welfare, antitrust injury occurs only when the claimed injury flows from acts harmful to consumers").

b. The Alleged Injury to Consumers

In evaluating whether conduct can be properly characterized as exclusionary, the Court must consider how the challenged restraint affects consumers and "whether it has impaired competition in an unnecessarily restrictive way." *Aspen Skiing Co.*, 472 U.S. at 605. In this regard, "`exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 605 n.32 (quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW 78 (1978)) (quotation marks omitted).

Thus, the second element of antitrust injury requires PLS to allege facts showing a plausible injury to consumers that flows from an anticompetitive aspect of Defendants' conduct; in this case, the alleged restraint on output through the Clear Cooperation Policy that limits the ability of NAR members, or members of an NAR-affiliated MLS, to compete to provide services to consumers.[73] *See* *Atl. Richfield*, 495 U.S. at 335-36, 338-40, & 342-44 (rejecting the contention that "any loss flowing from a *per se* violation of § 1 automatically satisfies the antitrust injury requirement" and explaining that antitrust injury does not arise until "an *anticompetitive* aspect of the defendant's conduct" injures both the plaintiff and consumers (emphasis in original)). The Supreme Court has explained that violations of the antitrust laws may have three, often interwoven, effects: "In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition." *Id.* at 344. An antitrust injury does not arise, however, unless and until the challenged restraint also injures consumers. *Id.* at 335-36, 338-40, & 342-44.

PLS attempts to translate its own harm into harm to consumers by alleging that the Clear Cooperation Policy injures real estate professionals (the proximate purchasers of real estate listing network services) and home sellers and buyers (the ultimate consumers) through the same "mechanism of injury" to PLS.[74] Specifically, PLS avers that through the Clear Cooperation Policy, NAR "restrained the ability of licensed real estate professionals to offer" pocket listings, which purportedly harms consumers and competition by eliminating "from the market a form of real estate brokerage services desired by consumers,"[75] thus excluding PLS, and thereby artificially maintaining or increasing the prices paid by real estate professionals for listing services.[76] The Court finds that these allegations do not show a *plausible* injury to the ultimate consumers—the home buyers and sellers. Fatally, PLS's theory that the Clear Cooperation Policy is a restraint on the output of brokerage listing services to consumers is illogical, and, additionally, it is contradicted by the allegations that PLS makes elsewhere in its Amended Complaint.[77] *See* *Iqbal,* 556 U.S at 675 ("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."); *Brantley,* 675 F.3d at 1198 ("a complaint's allegation of a practice that may or may not injure competition is insufficient to `state a claim to relief that is plausible on its face.'" (quoting *Twombly,* 550 U.S. at 570)); *Kendall,* 518 F.3d at 1047-48.

PLS does not allege any facts showing when, where, or, notably, how the output of real estate brokerage services or off-MLS listing services has decreased.[78] Defendants and PLS provide different marketing platforms for those listings. PLS does not adequately allege that the Clear Cooperation Policy has increased prices for services purchased or otherwise paid for by home sellers and buyers[79] or that home sellers and buyers have been denied brokerage services[80] that they desire as a result of the Clear Cooperation Policy.[81] In the absence of any specific factual allegations to support PLS's conclusions regarding consumer harm, there is no plausible antitrust injury.

PLS's antitrust injury contention is fundamentally flawed in yet another respect. PLS does not allege a plausible injury to participants on both sides of the market. The real estate market is a typical two-sided market where different products or services are offered to two distinct groups of customers—home sellers and home buyers. Listing platforms such as those provided by the MLS Defendants and PLS facilitate transactions by connecting sellers with potential buyers.[82] *See* *Ohio v. American Express,* 138 S. Ct. 2274, 2280 (2018) ("a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them"); *see also* Evans & Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms,* 2005 COLUM. BUS. L. REV. 667, 668 (2005) ("members of one customer group need members of the other group").[83] *Amex* sets forth a pleading standard in antitrust cases involving two-sided platforms: a plaintiff must allege (and later prove) injury to participants on both sides of the market. *See Amex,* 138 S. Ct. at 2287 ("Evaluating both sides of a two-sided transaction platform is . . . necessary to accurately assess competition."); *Iqbal,* 556 U.S. at 675.

Accordingly, PLS must allege a plausible injury to *both* home sellers *and home buyers,* which it has not done. It is, perhaps, telling that PLS's allegations focus almost entirely on home sellers. PLS makes no allegations regarding any demand for pocket listings by home buyers, no allegations explaining how pocket listings are beneficial to home buyers,[84] and no allegations regarding how the Clear Cooperation Policy harms home buyers. PLS's failure to address the buyer's side of the market is not surprising given that the alleged inherent advantages of a pocket listing—*e.g.,* increased privacy and security for a seller to market his home without the wide exposure of the MLS and the avoidance of the stigma from listing and then delisting a property from the MLS[85]—appear to benefit the seller, almost exclusively. In contrast, home buyers stand to benefit from an increase in available information about the market (which increases price competition), not from a reduction in the provision of such information.

PLS simply has not alleged plausible facts to show an injury to consumers on both sides of the market. These fundamental problems, taken together, show that PLS cannot allege a plausible antitrust injury.

c. The Alleged Injury to Competition

On its face, the Clear Cooperation Policy does not preclude real estate professionals from offering pocket listing services, nor does it preclude them from marketing their listings on PLS. Furthermore, there is no plausible inference from the alleged facts that the Clear Cooperation Policy has any such restrictive effect on the output of brokerage services to consumers. PLS does not allege any facts to show that real estate professionals have stopped (or will stop) offering pocket listings, or other types of listing services, when those services are demanded by consumers.[86] To the contrary, sellers who desire to avoid listing their properties on an MLS may do so, for example, by working with an NAR-affiliated MLS member through the office exclusive exception[87] or by engaging a real estate professional who does not belong to an NAR-affiliated MLS.[88] Moreover, the plain text of the policy does not proscribe real estate professionals from marketing pocket listings in the same way as they have previously: "bilaterally . . ., face to face, through phone calls, or by email."[89] Furthermore, the Clear Cooperation Policy does not proscribe real estate professionals from making a choice about the listing network platforms in which they choose to participate. Of equal importance, consumers are not deprived of any choice in products or services.

Indeed, accepting PLS's allegations as true, the Clear Cooperation Policy has some plainly pro-competitive aspects, which underscore that PLS cannot allege a plausible connection between harm to its business and harm to competition and consumers. *See* *F.T.C. v. Indiana Federation of Dentists,* 476 U.S. 447, 459 (1986) (in some cases, anticompetitive effects, or their absence, can be logically inferred based upon a rudimentary understanding of economics). At worst, the Clear Cooperation Policy is neutral to competition. And when a challenged restraint is beneficial or neutral to competition, "there is no antitrust injury, *even if* the defendant's conduct is illegal *per se.*" *Rebel Oil Co.,* 51 F.3d at 1433 (emphasis added).

The Clear Cooperation Policy requires listings that are publicized by a member of an NAR-affiliated MLS to be reciprocally listed on an MLS for exposure to other MLS members.[90] This means that all MLS members have access to information about listings that are publicly marketed by other MLS members, which ultimately promotes competition among real estate professionals and home sellers and buyers.[91] Basic economics dictates that increased information about market conditions stimulates more competition among real estate professionals, whose goal is, at least in part, to match a buyer and a seller as quickly and efficiently as possible. This effect minimizes transaction costs. Consumers also have access to more information regarding market conditions, enabling them to make better informed choices about the bundle of real estate brokerage services that will best serve their needs.

Although the Clear Cooperation Policy may harm PLS by discouraging the use of PLS's platform,[92] that injury to PLS's business model does not translate to consumer harm. Notably, PLS alleges that the Clear Cooperation Policy results in, among other things, listings being "removed from PLS and submitted instead to NAR-Affiliated MLSs."[93] Shifting sales to "other competitors in the market," however, "does not directly affect consumers and therefore does not result in antitrust injury." *Pool Water Prods.,* 258 F.3d at 1036. Indeed, based upon this allegation (and others like it),[94] it is evident that the Clear Cooperation Policy does not reduce the output of brokerage services to home sellers and buyers, nor does the policy reduce competition among the real estate professionals who provide services to consumers. *Compare Cal. Dental Ass'n,* 526 U.S. at 776-77 (no reduction in overall output of services to consumers), *and* *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 21-24 (1979) (to similar effect), *with* *Sunday Ticket Antitrust Litig.,* 933 F.3d at 1155 (the challenged restraint plausibly reduced the overall output of services to consumers by restricting games available for viewing).

2. Leave to Amend

In sum, based upon the foregoing, the Court finds that PLS fails to allege a plausible antitrust injury, so it will grant Defendants' Rule 12(b)(6) Motions. PLS requests leave to amend.[95] The Court, however, finds that another amendment of the complaint would be futile, for two reasons.

First, the parties' substantive meet-and-confer efforts already resulted in PLS's filing of the Amended Complaint, and PLS declined to amend its pleading a second time.[96] *See* *Salameh v. Tarsadia Hotel,* 726 F.3d 1124, 1133 (9th Cir. 2013) (a district court has "particularly broad" discretion to deny leave to amend where the plaintiff has previously amended). Second, under these circumstances, an amended complaint must allege "other facts consistent with the challenged pleading" that could "cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir.

1986). In view of the fundamental problems with PLS's theory of antitrust injury discussed above, the Court finds that the complaint cannot be saved by amendment. *See Steckman v. Hart Brewing,* 143 F.3d 1293, 1298 (9th Cir. 1998) ("Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any amendment would be an exercise in futility or where the amended complaint would also be subject to dismissal.") (citations omitted).

Accordingly, the Court will GRANT Defendants' respective Motions, without leave to amend.

3. The Remaining Elements of PLS's Claim Under § 1 of the Sherman Act

With respect to Defendants' other arguments for the dismissal of PLS's Amended Complaint, the Court would grant the motion by Midwest RED for the reasons set forth below.

As stated in the preceding sections, to state a § 1 claim, a plaintiff must plead facts showing the plausible existence of "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall,* 518 F.3d at 1047.

With respect to the first element, the Court would find that PLS sufficiently alleges concerted action by Defendants Bright MLS, Cal Regional MLS, and NAR. NAR promulgated the Clear Cooperation Policy, *see Alvord-Polk, Inc. v. Schumacher Co.,* 37 F.3d 996, 1007 (3d Cir. 1994) (a trade association's adoption of regulations that govern competition between members is sufficient to plead concerted action); *see also Silver v. N.Y. Stock Exchange,* 373 U.S. 341 (1963), and Bright MLS and Midwest RED, as NAR-affiliated MLSs,[97] were obligated to adopt the Clear Cooperation Policy by May 1, 2020, pursuant to the 2020 NAR Handbook on Multiple Listing Policy,[98] *see, e.g., Robertson v. Sea Pines Real Estate Cos.,* 679 F.3d 278, 286-87 (4th Cir. 2012) (MLS rules are concerted action under § 1); *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d at 1150; *Realty Multi-List,* 629 F.2d at 1361 & n.20. Although the Amended Complaint does not allege that Bright MLS and Cal Regional MLS ultimately adopted the Clear Cooperation Policy, PLS's allegation that Bright MLS and Cal Regional MLS were required to do so supports a plausible inference that they did.[99] At this stage of the litigation, such allegations are sufficient to plead concerted action under § 1.

PLS does not, however, allege facts plausibly to show that Midwest RED was part of the alleged conspiracy. Notably, Midwest RED is not an NAR-affiliated MLS, and PLS does not allege that Midwest RED adopted the Clear Cooperation Policy. PLS merely alleges that Midwest RED participated in private communications about the Clear Cooperation Policy through the MLS Council, voiced support for the Clear Cooperation Policy, and was present for a vote recommending that NAR adopt the Clear Cooperation Policy at a later date.[100] These are allegations of parallel business conduct; they are not sufficient to establish Midwest RED's participation in the alleged conspiracy because such allegations do not give rise to a plausible inference that Midwest RED ever reached an agreement with the other MLS Defendants or NAR regarding the Clear Cooperation Policy. *Twombly,* 550 U.S. at 553-554 (allegations of parallel business behavior, even "conscious parallelism," falls short of establishing an agreement constituting a Sherman Act offense); *In re Musical Instruments & Equip. Antitrust Litig.,* 798 F.3d 1186, 1194 (9th Cir. 2015) (to similar effect). Moreover, PLS's conclusory allegation that Midwest RED is a competitor with the other MLS Defendants is not plausible, given that each of the MLS Defendants serves a different geographic market.[101]

Putting aside, for the moment, the Court's analysis and conclusion with respect to the element of antitrust injury, the Court would otherwise find that PLS has alleged facts plausibly to show that the Clear Cooperation Policy is a *prima facie* unreasonable restraint of trade under the Rule of Reason framework.[102] *See Indiana Fed. Of Dentists,* 476 U.S. at 459-62 (agreement to limit services offered to consumers requires a procompetitive justification under the Rule of Reason); *In re Nat'l Football League's Sunday Ticket Antitrust Litig.,* 933 F.3d 1136, 1150-51 (9th Cir. 2019) (same); *Newcal Indus.,* 513 F.3d at 1044-45 (there is no requirement that a plaintiff allege the defendants' power within the relevant market with specificity, and "relevant market" element is typically a factual element); *Rebel Oil Co.,* 51 F.3d at 1433-35. Whether PLS would ultimately prevail under the Rule of Reason framework necessarily would involve questions of fact—such as the procompetitive justifications offered by Defendants and the market power of the respective Defendants—that would not be appropriate for resolution at this stage of the litigation.

B. PLS's Claim under the Cartwright Act

Claims under § 1 of the Sherman Act and claims under the Cartwright Act are analyzed under the same legal standard. *See name.space, Inc. v. Internet Corp. for Assigned Names & Numbers,* 795 F.3d 1124, 1131 n.5 (9th Cir. 2015); *City of Tuolumne v. Sonora Cmty. Hosp.,* 236 F.3d 1148, 1160 (9th Cir. 2001). Accordingly, the Court's analysis of and conclusion regarding, PLS's claim under § 1 of the Sherman Act are dispositive of PLS's claim under the Cartwright Act.

V. CONCLUSION

Based upon the foregoing, the Court will enter an Order GRANTING Defendants' respective Motions to Dismiss, without leave to amend, on the ground that PLS fails to allege a plausible antitrust injury. The Court will also DENY Cal Regional MLS's Motion to Strike as moot, in view of its ruling on the Motions to Dismiss.

[1] First Am. Compl. (the "Amended Complaint") [ECF No. 46] ¶¶ 123 & 126.

[2] Defs. Bright MLS's and Midwest RED's Mot. to Dismiss (the "Bright MLS & Midwest RED Motion") [ECF No. 50]; Def. Cal Regional MLS' Mot. to Dismiss (the "Cal Regional MLS Motion") [ECF No. 53]; and Def. NAR's Mot. to Dismiss (the "NAR Motion") [ECF No. 55] (collectively, the "Motions").

[3] Def. Cal Regional MLS' Mot. to Strike Pl.'s Second Claim for Violation of the Cartwright Act Pursuant to Cal. Code Civ. Proc. § 425.16 (Anti-SLAPP Statute) (the "Motion to Strike") [ECF No. 54].

[4] The Court considered the following papers: (1) the Amended Complaint; (2) the Motions (including all of their respective supporting declarations and attachments); (3) the Motion to Strike; (4) Pl.'s Opp'n to the Motions (the "Opposition") [ECF No. 62]; (5) Pl.'s Opp'n to the Motion to Strike [ECF No. 63]; (6) Defs. Bright MLS's and Midwest RED's Reply in Supp. of Mot. to Dismiss (the "Bright MLS & Midwest RED Reply") [ECF No. 64]; (7) Def. Cal Regional MLS' Reply in Supp. of Mot. to Dismiss (the "Cal Regional MLS Reply") [ECF No. 65]; (8) Def. NAR's Reply in Supp. of Mot. to Dismiss (the "NAR Reply") [ECF No. 66]; (9) Def. Cal Regional MLS' Reply in Supp. of Motion to Strike [ECF No. 67]; (10) Pl.'s Notice of Suppl. Authority in Supp. of Opposition [ECF No. 71]; (11) Suppl. Brief in Supp. of the Motions (the "Defs.' Suppl. Brief") [ECF No. 83]; (12) Suppl. Brief in Supp. of the Opposition (the "Pl.'s Suppl. Brief") [ECF No. 84]; (13) Pl.'s Notice of Suppl. Authority [ECF No. 86] and Pl.'s Ex. to Suppl. Authority. [ECF No. 87]; and (14) Def. NAR's Notice of Resp. to Pl.'s Suppl. Authority (including its attachments) [ECF No. 88].

[5] The Court assumes the truth of the factual allegations in PLS's Amended Complaint solely for the purpose of deciding the Motions. The Court restates PLS's allegations for context, but it makes no determination regarding their veracity at this stage of the case. *See, e.g., Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir. 1996) (on a motion to dismiss for failure to state a claim, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party").

[6] Amended Complaint ¶¶ 27 & 28.

[7] *Id.* at ¶ 27.

[8] *Id.*

[9] *Id.*

[10] *Id.* at ¶ 32.

[11] *Id.* at ¶ 1.

[12] *Id.* at ¶ 32 & 34.

[13] *Id.* at ¶ 32.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at ¶ 50 & 51.

[18] *Id.* at ¶¶ 32, 50, & 51.

[19] *Id.* at ¶ 19 (Bright MLS is owned and controlled by NAR members throughout the states of New Jersey, Delaware, Maryland, Pennsylvania, West Virginia; the Commonwealth of Virginia; and the District of Columbia).

[20] *Id.* at ¶ 18 (Cal Regional MLS "is the largest MLS in the United States with over 100,000 members who have access to more than 70[%] of the listings for sale in California").

[21] *Id.* at ¶ 20 (Midwest RED serves northern Illinois, southern Wisconsin, and northwest Indiana, with over 45,000 members).

[22] *Id.* at ¶ 17. "Realtor" is a registered trademark of NAR.

[23] *Id.* at ¶¶ 30 & 33.

[24] *Id.* at ¶ 29.

[25] *Id.* at ¶ 30.

[26] *Id.* at ¶ 33.

[27] *Id.* at ¶¶ 2 & 33.

[28] *Id.* at ¶ 35.

[29] *Id.* at ¶ 40.

[30] *Id.* at ¶¶ 18 & 19.

[31] *Id.* at ¶ 20.

[32] *Id.* at ¶ 34.

[33] *Id.*

[34] *Id.* at ¶ 39.

[35] *Id.* at ¶ 38.

[36] *Id.* at ¶ 7.

[37] *Id.* at ¶¶ 6 & 61.

[38] *Id.* at ¶ 8.

[39] *Id.* at ¶¶ 8 & 58.

[40] *Id.* at ¶¶ 59, 60, 63, & 64.

[41] *Id.* at ¶ 8.

[42] *Id.* at ¶ 61.

[43] *Id.* at ¶¶ 12 & 61.

[44] *Id.* at ¶¶ 86-90.

[45] *Id.* at ¶ 89.

[46] *Id.* at ¶ 93.

[47] *Id.* at ¶ 90. NAR-affiliated MLSs, including Bright MLS and Cal Regional MLS, were required to modify their rules by May 1, 2020, to conform to the Clear Cooperation Policy. *Id.*

[48] *Id.* at 94.

[49] *See id.* at ¶¶ 69-86.

[50] *Id.* at ¶ 71.

[51] *Id.*

[52] *Id.*

[53] *Id.* at ¶ 75.

[54] *Id.* at ¶ 76.

[55] *Id.* at ¶ 77.

[56] *Id.* at ¶ 78.

[57] *Id.* at ¶ 79.

[58] *Id.* at ¶¶ 80-85.

[59] *Id.* at ¶¶ 123 & 126.

[60] PLS alleges that it has standing to assert its claim under § 1 of the Sherman Act pursuant to §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26. Amended Complaint ¶ 23.

[61] "[A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *See* *Papasan v. Allain,* 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level. . . ." *Twombly,* 550 U.S. 544.

[62] In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Supreme Court explained that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *Id.* at 610; *see also* William Page, *The Scope of Liability for Antitrust Violations,* 37 STAN. L. REV. 1445, 1451 (1985) ("most commentators now agree that the purpose of [antitrust] law is to maximize economic efficiency, or consumer welfare, by the preservation of competitive markets" (footnote omitted)).

[63] Amended Complaint ¶ 6. A seller might also desire a pocket listing in order "to test the market for their home without the stigma that comes from listing and then delisting the property on a NAR-affiliated MLS." *Id.*

[64] *Id.* at ¶¶ 6-8 & 61.

[65] *Id.* at ¶¶ 8, 58-60, 63,& 64.

[66] *Id.* at ¶ 112.

[67] *Id.* at ¶ 113.

[68] *Id.* at ¶ 121.

[69] *Id.* at ¶ 124.

[70] *Id.* at ¶ 125.

[71] *Id.* at ¶¶ 125 & 128.

[72] *See id.* at Prayer for Relief.

[73] *See* Opposition 27:1-13.

[74] Amended Complaint ¶ 122.

[75] *Id.* at ¶ 115.

[76] *Id.* at ¶¶ 115 & 122.

[77] *Cf. id.* at ¶¶ 35-37, 88-91, & 106-115. Citing these paragraphs, PLS succinctly summarizes its antitrust injury allegations as follows: "By requiring third-party listing agents who wish to obtain the essential benefits of NAR membership to provide their listings to the MLS defendants, *id.* ¶¶ 35-37, 88-91, Clear Cooperation not only harms competition by reducing output and quality in the market for listing services, *id.* at ¶¶ 106-15, but in so doing, it `cut[s] off' PLS's access to a supply, pocket real estate listings, that is `necessary to enable the boycotted firm'—PLS—`to compete.'" Pl.'s Suppl. Brief 7:1-7 (quoting *Nw. Wholesale Stat., Inc. v. Pac. Stat. & Print. Co.*, 472 U.S. 284, 294 (1985)).

[78] *Cf.* Amended Complaint at ¶¶ 95, 111, 112, & 121 (listings were removed from PLS and submitted *instead* to NAR-affiliated MLSs, and NAR-affiliated MLSs continue to allow members to market off-MLS listings).

[79] With respect to conspiracies to restrict output and how they injure consumers, *compare, e.g., In re National Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1155, 1157-58 (9th Cir. 2019) (allegations of conspiracy to restrict output of telecasts resulting in prices paid by the ultimate consumers being higher than they would be in the absence of the conspiracy were sufficient to allege antitrust standing), *with* Amended Complaint ¶¶ 114, 115, & 122; *see also* *Apple Inc. v. Pepper,* 139 S. Ct. 1514, 1521-23 (2019).

[80] PLS acknowledges that the market for real estate brokerage services is relevant to assess harm to competition and consumers. Amended Complaint ¶ 115 (the Clear Cooperation Policy "harmed consumers and competition by eliminating from the market a form of real estate brokerage services desired by consumers").

[81] *See* *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 776-77 (1999) (the relevant question is whether the challenged restraint obviously tends to limit the total delivery of services to the consumer); Amended Complaint ¶ 95 (NAR-affiliated MLSs continue to allow members to market

off-MLS listings through private networks); *cf. Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma,* 468 U.S. 85, 114-15 (1984) (plaintiffs alleged a reduction in overall output of services to consumers as a consequence of the challenged restraint).

[82] *See* Amended Complaint at ¶ 31; *see also id.* at ¶¶ 19, 26, & 31 (explaining that the MLS Defendants "facilitate[ ]" real estate transactions).

[83] *Compare* Amended Complaint ¶¶ 50 & 51 (discussing the value of network services offered by MLSs), *with* Evans & Noel, *supra,* at 686-87 (indirect network effects promote larger and fewer two-sided platforms because "[p]latforms with more customers in each group are more valuable to the other group").

[84] *Cf. id.* at ¶ 8. PLS alleges that its platform benefits buyers by offering them an opportunity to learn about properties that were not widely marketed. This allegation, however, does not explain how buyers are otherwise benefited by off-MLS listings. According to PLS's allegations, PLS effectively offers buyers the same basic benefit as an MLS (an opportunity to learn about properties on the market), but without the other efficiencies that are created by increased information and competition (mostly through information sharing on an MLS), as explained above. Indeed, one of the most important market efficiencies created by an MLS "is manifested in the reduction of the obstacles brokers must face in adjusting supply to demand: market imperfections are overcome in that information and communication barriers are reduced, along with the easing of the built-in geographical barrier confronting the buyer-seller relationship. Moreover, a realistic price structure is engendered." Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 COLUM. L. REV. 1325, 1329 (1970), *cited with approval in U.S. v. Realty Multi-List, Inc.,* 629 F.3d 1351, 1356 (5th Cir. 1980).

[85] *Id.* at ¶ 6.

[86] *Cf.* Amended Complaint ¶ 115 (suggesting the opposite, *i.e.,* that real estate professionals will presumably continue to compete to provide pocket listings as they have before).

[87] The office exclusive exception is significant. PLS alleges that the presence of large brokerages operating across the nation increased demand for a nationwide listing network. *See id.* at ¶¶ 46, 48, & 49. Surely, then, marketing a private listing within a large nationwide brokerage under the office exclusive exception provides significant exposure of the property in an off-MLS setting. This is important in evaluating whether the Clear Cooperation Policy has the plausible effect of reducing output of services to consumers. It does not.

[88] *Id.* at ¶ 95 (since the adoption of the Clear Cooperation Policy, NAR-affiliated MLSs have "effectively allow[ed] their members to market off-MLS listings under the auspices of the NAR-affiliated MLSs without violation of . . . Clear Cooperation Policy"); *see also id.* at ¶¶ 89, 93, & 115-17 (implicitly recognizing that the Clear Cooperation Policy has not resulted in a decrease in overall output of services to consumers).

[89] *Id.* at ¶ 8; *see also id.* at ¶ 95.

[90] *Id.* at ¶ 89; *see also id.* at ¶¶ 32, 50, & 51 (explaining the inherent benefits of MLS membership, and that the value of membership in an MLS is a function of the contributions of the MLSs members).

[91] *Id.* at ¶ 89; *see also id* at ¶¶ 32, 50, 51, & 95.

[92] *Id.* at ¶¶ 111 & 112.

[93] *Id.* at ¶ 121.

[94] *See, e.g., id.* at ¶¶ 95, 108, & 121.

[95] *See* Opposition 37:26-27.

[96] *See* NAR Motion 20:4-14; NAR Reply 15:11-16.

[97] *Id.* at ¶¶ 18 & 19.

[98] *Id.* at ¶ 90; *see also id.* at ¶¶ 103-105.

[99] *See id.* at ¶¶ 68-94, 102, & 104-05.

[100] *Id.* at ¶¶ 71, 73-74, 77-79, & 86.

[101] The Court would not make any such finding with respect to the NAR-affiliated MLS Defendants because PLS's allegation that the NAR-affiliated MLSs were obligated to adopt the Clear Cooperation Policy is sufficient to plead concerted action, as explained above. Thus, the question with respect to Bright MLS and Cal Regional MLS is whether they were competitors with each other, and competitors with PLS in a national market. The Court would find that this is a question of fact not suitable for resolution on a motion to dismiss. *See Newcal Indus., Inc. v. Ikon Office Solution,* 513 F.3d 1038, 1044-45 (9th Cir. 2015).

[102] *See* Amended Complaint at ¶¶ 1-15, 28-32, 38-41, 46-51, 94-101, & 106-116.

629 F.2d 1351 (1980)

UNITED STATES of America, Plaintiff-Appellant,
v.
REALTY MULTI-LIST, INC., Defendant-Appellee.

No. 78-2481.

United States Court of Appeals, Fifth Circuit.

November 14, 1980.

1354 *1352 *1353 *1354 Gregory J. Leonard, Asst. U.S. Atty., Macon, Ga., Andrea Limmer, Dept. of Justice, Washington, D. C., for plaintiff-appellant.

Champion & Champion, Forrest L. Champion Jr., Columbus, Ga., for defendant-appellee.

Before GOLDBERG, CHARLES CLARK and THOMAS A. CLARK, Circuit Judges.

GOLDBERG, Circuit Judge:

At least since the time in 1880 when a group of Irish tenants organized and refused to work on the estate managed by Captain Charles Cunningham Boycott (who, perhaps not so willingly, loaned his name to their tactic), the concerted refusal to deal, or group boycott, has been recognized as an effective means of achieving certain types of economic and political goals. To invoke Captain Boycott's name in the context of contemporary antitrust law, however, is generally to incur legal condemnation.

This case involves an action brought by the United States under the Sherman Act, 15 U.S.C. § 1 *et seq.,*[1] against Realty Multi-List, Inc. (RML), a Georgia corporation formed to operate a real estate multiple listing service. Although there are other issues raised, the basic question presented is whether the membership criteria promulgated by RML are illegal under either the *per se* rule or the rule of reason because they authorize RML to establish a group boycott of those real estate brokers
1355 who fail to qualify under them.[2] The many nuances of antitrust law presented by this case have *1355 plagued the rulemakers, the decisionmakers, and the commentators for the reason that the issues raised fit no facile categories of the jurisprudence. We therefore feel compelled, after a recital of the facts, to attempt to harmonize the sometimes discordant strains that sound in the background of this case and to reach a result in accord with the policies embodied in the Sherman Act.

I.

A.

RML was organized in 1967 by eight state-licensed real estate brokers in Columbus (Muscogee County), Georgia.[3] Each broker initially paid $200 to purchase one share of stock in the corporation. All subsequent members of RML have also been state-licensed real state brokers in Muscogee County and have been required to purchase a share of RML stock at prices up to $3,000 per share. R.389.[4] Members pay additional fees for the maintenance of RML and for the provision of various services by RML. R.688a, 697a.

RML's central function-indeed, its *raison d'etre*-is to provide a multiple listing service for its members. R.686. Through the agreements which form the basis for this service, *see* Rules and Regulations of Realty Multi-List, Inc., R.686-692a, RML members have obligated themselves to attempt to obtain from sellers "exclusive" rather than "open" listings[5] of real estate[6] and to pool their exclusive listings through RML. RML itself is the hub of the multiple listing service; it acts as the "central processing and distributing point" for its members' listings. R.686. RML compiles the listings it receives from its members into a listing book, containing not only the listing data submitted by members, but often photographs of the property as well, and distributes copies to RML members. RML distributes a completely updated listing book each month

and provides members with a daily update on new listings and new data on old listings. Using the information provided by RML, member brokers are able to cooperate in bringing together buyers and sellers. A broker may show a prospective purchaser all the properties contained in the RML listing book, identify those properties which meet the purchaser's needs and desires, and show those properties to the purchaser. If the selling broker succeeds in his efforts, he brings the
1356 purchaser, the listing broker and the seller together to consummate the *1356 transaction. R.690-691. The selling broker and the listing broker then determine, by their own agreement, how the commission on the sale shall be divided. *Id.;* R.686a.

In essence, a multiple listing service like RML functions as a trade exchange for the purchase and sale of real estate, an analogy that has not gone unnoticed in the cases and literature dealing with these institutions. *See, e. g.,* *Grillo v. Board of Realtors,* 91 N.J.Super. 202, 219 A.2d 635, 644 (Ch. Div.1966); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1353-1359 (1970). The benefits offered by a multiple listing service are manifest:

> Use of the multiple has had significant impact on the real estate industry as a whole. This impact is manifested in the reduction of the obstacles brokers must face in adjusting supply to demand: market imperfections are overcome in that information and communication barriers are reduced, along with the easing of the built-in geographical barrier confronting the buyer-seller relationship. Moreover, a realistic price structure is engendered. In effect, real estate becomes by virtue of the multiple "a more liquid commodity."
>
> The use of the multiples has, in addition, had a significant positive impact on the individual sales transaction. The transactional benefits are fairly evenly distributed among the broker, the buyer, and the seller. In the absence of the multiple, a seller has three alternatives: first, he can sell the property himself, a course of action requiring facilities and expertise which most home owners do not possess; second, he can use an open listing; third, he can give a broker the exclusive right to sell. The multiple allows him to combine the advantages of the last two alternatives and to avoid the dangers of the first. The buyer benefits from the wider selection of purchase opportunities than would be available from the office of a single broker. In addition, there is a time-saving factor: "The buyer often has to spend only a short time in the office selecting properties to inspect, merely by carefully screening the MLS sheets." The broker is particularly benefited by having immediate access to a large number of listings and at the same time by being furnished with a method for quickly and expansively exposing his own listings to a broader market.

Id. at 1329-1330 (footnotes omitted). These factors may have a dramatic effect on the business of a member broker. One RML member testified that in the year following his admission to RML his firm's sales doubled and that approximately half of his listings are sold by other members of RML. Deposition of Donald A. Watson at 102-103.

In addition to these benefits and operational efficiencies, RML provides a number of other services to aid its members in the conduct of their business. An RML member may, for example, affix a lock box, containing a door key, to a listed property, allowing a potential selling broker easy physical access to the property without the consent or presence of the listing broker. The Government has provided a summary of other important advantages offered by RML:

> Many other RML services keep members abreast of the real estate market and promote the professional development of the membership. Information concerning new homes and repossessed properties being offered for sale by the United States Veterans Administration is periodically circulated ..., as are mortgage rates being offered by local lenders ..., and comparable sales data for each RML listing sold. RML issues a monthly newsletter, operates a twice-weekly bus tour of homes to familiarize members with new listings ..., and maintains a rotational referral service for customers who call to obtain a broker .... Seminars and instructional clinics are offered .... An ethics and arbitration committee insures compliance with RML's rules and constitutes a forum in which its members can resolve disputes without the necessity for resort to litigation .... An appraisal committee acts when a member questions whether a property is priced at an
> 1357 appropriate level .... Most importantly, *1357 RML provides a forum for closer cooperation and greater understanding among members of the same profession ....

Brief for United States at 7 n.8 (citations omitted).

From its inception as a group of eight cooperating brokers in 1967, RML had grown by 1976, at the time this suit was filed, to be a significant force in the Muscogee County real estate market. By its own admission, its members "constitute a vast majority of the active residential real estate brokers in Muscogee County Georgia." R.15. In 1976, RML's membership consisted of over 45 member firms with approximately four hundred sales associates. In that same year, it had more than 4,300 listings and over $50 million in sales. Although it had faced competition in the past from other multiple listing services in Muscogee County,[7] by the time suit was filed, RML stood alone as the sole multiple listing service in the county.

RML's Rules and Regulations limit the ability of nonmembers to share in the benefits it provides. They prohibit members from allowing a nonmember access to the listing book, its prime resource.[8] Further, while RML's rules allow members to cooperate with nonmembers on an individual sale of an RML-listed property, they prohibit any member, other than the listing broker, from responding directly to a nonmember's inquiries regarding a listed property,[9] and the RML office may not disclose any information to nonmembers.[10] Finally, nonmembers are barred from access to the other services provided by RML. R.686; Deposition of Betty Meroney at 37-39, 52.

B.

In August 1976, the United States filed suit against RML,[11] alleging that, beginning in September 1967 and continuing to the present, RML and its members have conspired together to restrain interstate commerce unreasonably in violation of
1358 Section 1 of the Sherman Act, 15 U.S.C.A. § 1, *as amended.* (West Supp.1979).[12] In particular, *1358 the United States contends that RML's present and past membership criteria violate Section 1 and that various other restrictive practices, though now abandoned by RML, were also Section 1 violations. We shall briefly set these charges in context.

We begin with RML's membership criteria, the principal issue in this suit. From the formation of RML until settlement negotiations on this suit began, its by-laws required an applicant for admission to hold a real estate broker's license in the state of Georgia, to agree to abide by all RML's internal rules, to receive the favorable recommendation of RML's membership committee after it investigated his or her application, *to receive an 85% affirmative vote from RML's active members,*[13] and to purchase a share of RML stock at a price, and subject to other conditions, set by RML's Board of Directors. R.315, 374-375. During negotiations with the United States directed toward avoidance of this suit, RML amended some of these rules. In April 1975, RML reduced the voting requirement for admission from 85% to a simple majority. In October 1975, RML abolished its stockholder voting requirement and instituted its current requirements that an applicant, to be eligible for membership, must:

> (b) Have an active real estate office in Muscogee County.
>
> (c) Have a favorable credit report and business reputation.

By-Laws of Realty Multi-List, Article V, Section 5, R.683a.[14] It is undisputed that, to meet the first of these requirements, an applicant must have "an office kept open during customary business hours."[15] R.17. RML relies, in its application of the second requirement, on a "special character-financial" report supplied by Equifax Credit Bureau, which report includes personal as well as business and financial information. Although RML adopted these criteria in order to do away with its stockholder voting requirements, if any question regarding an applicant's qualifications is raised by the Equifax report, RML's Board of Directors then votes on the applicant's fitness to be an RML member.[16] Deposition of Betty Meroney at 94-98; 101-104; 106-107.

RML's revised membership criteria also retain the requirement that the prospective member must purchase one share of stock at "a price set by the Board of Directors." *See* note *14 supra.* As already noted, RML originally charged $200 for a share of stock, but by 1973 the price had risen to $3,000 per share. R.389. During negotiations with the Government, RML lowered the per share price to $1,000, at which it has remained.

1359 The United States sought a declaration that RML's membership criteria, both in *1359 their present and earlier versions, violate Section 1 and also sought an injunction against their enforcement. It sought similar relief relating to other restrictive rules which RML abandoned under threat of the present lawsuit. These rules have (1) prohibited members from joining any other multiple listing service or from advertising open listings; (2) prohibited an unsuccessful applicant from reapplying to RML for six months after being rejected; and (3) imposed a complete moratorium on new membership.[17] R.376, 377, 379.

C.

In the district court, RML moved for summary judgment, based upon affidavits and documentary evidence which, it contended, established that the issues relating to its abandoned practices were moot and that its current practices were not unreasonably restrictive of interstate commerce. After conducting its discovery, including the taking of depositions of RML members and others, the United States also moved for summary judgment. The district court denied the motion of the United States and granted that of RML.

In a terse opinion, almost entirely devoid of citation to legal authority or to the record, the district court agreed with RML's contentions. The court found that the issues relating to RML's past practices were mooted by RML's abandonment of them and found it unlikely that RML would resume them.[18] The court also approved all of RML's present membership criteria. First, it held that the "favorable credit report and business reputation" standard was reasonable since the inquiry was "capable of objective determination" and since the possession of a valid real estate broker's license was not "conclusive evidence" of a broker's present fitness to be an RML member. In addition, it held that RML's requirement that a prospective member must keep an office open during customary business hours was reasonable even though it operated to exclude parttime brokers. The court found that this rule was "reasonably related to the purposes" of RML since it ensured that all members would be "readily available for contact and for negotiations and for the closing of transactions." The court also feared that parttime brokers might sell or give away the information furnished by RML and thought this rule would serve as valid protection against these practices. Finally, the district court upheld RML's practice of requiring a prospective member to purchase a share of RML stock at $1,000. Any other rule, it held, would be unfair to present RML members who had purchased shares of stock. It also found that the fair value of RML stock was in excess of $1,000 and that, upon the
1360 company's dissolution, RML's members *1360 could recover their investment. The court concluded that the requirement was reasonable in light of the benefits of membership and was "hardly likely" to impose a "serious impediment" to any prospective member's desire to join.

The United States appeals from the summary judgment entered for RML and also contends that summary judgment should be entered in its favor. While we cannot now agree with the latter contention, we do agree with the former and therefore reverse and remand the case to the district court.

II.

We first review the district court's grant of summary judgment for RML. The Government's position in this case is, in essence, that in light of RML's competitive significance in Muscogee County, RML cannot impose any conditions upon access to its multiple listing service other than the requirements of a valid broker's license from the state of Georgia and the payment of the applicant's proportionate share of the costs of developing, maintaining and improving RML as a going concern, including the accumulation of reasonable reserves. *See, e. g.,* Brief for United States at 34, 35, 42. In keeping with this position, it contends that RML's present membership criteria—the requirements that a prospective member be found by RML to have a "favorable credit report and business reputation", that he or she maintain an "active real estate office" which is "open during customary business hours," and that he or she pay a fee for a share of stock, currently $1,000, set in the discretion of the RML Board of Directors—are violations of Section 1 of the Sherman Act. Contending that these rules give RML the power to order a group boycott of nonmembers, it advances three alternative legal theories, each of which it contends is sufficient to justify its conclusion. It argues first that RML's membership criteria are so blatantly anticompetitive on their face that the district court should have found them illegal *per se* and refused to consider any proffered justifications for their lawfulness. Second, it argues that, even if these criteria should be analyzed under the rule of reason, they should still have been held facially unreasonable, without elaborate inquiry into their actual effects in the market. Specifically, asserting that RML is so powerful a force in the Muscogee County market that a broker who is denied access to its listing pool cannot compete effectively with RML members, the Government argues that RML's criteria either do not have legitimate procompetitive justifications or are overbroad to accomplish any legitimate goals of the association, so that their anticompetitive effects must necessarily outweigh any benefit to competition they may produce. Finally, the Government argues that, even if RML's criteria do not warrant outright condemnation under either of these theories, their actual anticompetitive effects should have been found to outweigh their benefits to competition under full rule of reason analysis.

After setting out our standards for review of the district court's grant of summary judgment for RML, we shall consider the Government's contentions that the district court erred in finding that RML's membership criteria are not violations of Section

1, either under the *per se* rule or the rule of reason. Then we shall turn to the question whether the issues as to RML's past practices are moot.

A. *Summary Judgment Standards*

Summary judgment should only be entered when the pleadings, answers to interrogatories, depositions, affidavits and admissions filed in the case "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R. Civ.P. 56(c). *See* *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). The burden lies with the movant to demonstrate that no such issue of material fact exists, *Keiser v. Coliseum Properties, Inc.,* 614 F.2d 406, 410 (5th Cir. 1980), and any doubt must be resolved against it. *Id.* Moreover, the
1361 court must draw all reasonable inferences from undisputed *1361 facts in favor of the party resisting the motion in determining whether any genuine issue exists. *American Telephone & Telegraph Co. v. Delta Communications Corp.,* 590 F.2d 100, 101-102 (5th Cir.), *cert. denied,* 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (1979). Thus, in reviewing the grant of summary judgment for RML, we place upon RML the burden of demonstrating the absence of any genuine and material controversy and draw all reasonable inferences for the Government.[19]

B. *Characterization of RML's Practices*

We first consider the character of the restrictive practices to which the Government objects. The Government's primary concern is with the situation in which a properly licensed broker is barred from access to the multiple listing service because RML has determined that he fails to meet its membership criteria or because he cannot afford the membership fee. In this circumstance, RML's rules require it to deny him access to its pool of listings or to any other of its other services. Moreover, the rules prohibit any RML member from allowing the nonmember access to the listing pool or other RML services.[20] The problem presented is that addressed in cases involving concerted refusals to deal or group boycotts.[21] Knowledge of available listings of real estate is a broker's "stock in trade." *Marin County Board of Realtors, Inc. v. Palsson,* 1976-1 Trade Cases ¶ 60,898 at 68,901 (Cal.Sup.Ct. 1976); *Oates v. Eastern Bergen County Multiple Listing Service, Inc.,* 113 N.J.Super. 371, 273 A.2d 795, 800 (Ch.Div. 1971); *Grillo, supra,* 219 A.2d at 646. A concerted denial of access to RML's listing service, when RML members have agreed to pool and share their listings, amounts to a group boycott of the nonmember. *See, e.g., Oates, supra;* 273 A.2d at 803; *Grillo, supra,* 219 A.2d at 644. In *Silver v. New York Stock Exchange,* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), the Supreme Court, in finding a Section 1 violation when the stock exchange ordered members to remove private wire connections with a nonmember broker, stated:

> The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker—dealers in the over—the—counter securities market.

Id. at 1252.[22] We must therefore determine whether this group boycott offends Section 1 of the Sherman Act.

C. *Application of the Per Se Rule*

1362 The Government contends first that RML's membership criteria—that a prospective *1362 member be found to have "a favorable credit report and business reputation," have an office "open during customary hours of business," and purchase a share of RML stock at a fee set in the discretion of the Board of Directors—constitute *per se* violations of Section 1, and that the district court erred in holding otherwise. It argues that these rules are plainly anticompetitive on their face and, equally plainly, serve no legitimate procompetitive purpose. After careful scrutiny of the case law and the functioning of the multiple listing mechanism, however, we cannot agree that *per se* treatment is proper.

Since the decision in *Standard Oil Co. v. United States,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), the rule of reason has been the basic test for the legality of a business practice which allegedly operates to restrain trade. While application of the rule requires the courts to focus directly—even exclusively—on "the challenged restraint's impact on competitive conditions," *National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978), the scope of the analysis employed by the courts is copious indeed. In his classic formulation of the rule of reason in

Chicago Board of Trade v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), Justice Brandeis adumbrated some of its contours:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 244. Yet this full and searching analysis is not required in the case of every restraint alleged to violate Section 1.

The *per se* rule stands as a complementary form of antitrust analysis to the rule of reason. *National Society of Professional Engineers, supra,* 98 S.Ct. at 1365. As the Supreme Court has recently noted:

> In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978); *Continental TV, Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 50, 97 S.Ct. 2549, 2558, 53 L.Ed.2d 568 (1977), and so often "lack ... any redeeming virtue," *Northern Pac. R. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.

Broadcast Music, Inc. v. Columbia Broadcasting Co., 441 U.S. 1, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1 (1979). (hereinafter cited as *BMI*) When a class of restraints is determined to fall within this category, a court's task in evaluating its legality is considerably abbreviated. A court need not then inquire whether the restraint's authors actually possess the power to inflict public injury, *Klor's, Inc. v. Broadway—Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 709, 3 L.Ed.2d 741 (1959); *United States v. Socony—Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 845 n. 59, 84 L.Ed. 1129 (1940), nor will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect. *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 2557 n. 16, 53 L.Ed.2d 568 (1977); *Klor's, supra,* 79 S.Ct. at 709; *Northern*
1363 *Pacific Railway Co. v. United States,* 356 U.S. 1, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). The *per se* rule is the *1363 trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score. Properly applied, the *per se* rule is "a valid and useful tool of antitrust enforcement." *BMI, supra,* 99 S.Ct. at 1556.[23]

In light of the potency of the *per se* rule, however, the Supreme Court has recently re—emphasized that the invocation of this conversation—stopper must be limited to those situations which fairly fall within its rationale. In *BMI, supra,* the court held that defendants' practice of blanketing licensing of copyrighted musical compositions, though it literally involved price fixing, did not fall within the *per se* rule's rationale since defendants' practices, viewed in their full context, offered the potential for significant competitive advantages for buyers and sellers of rights to use the compositions. 99 S.Ct. at 1556-1557, 1561-1565.[24] And in *Continental T.V., supra,* the Court reversed an earlier holding that some forms of vertical market division were *per se* illegal. The Court found that there was substantial evidence of the "economic utility" of such restraints, 99 S.Ct. at 2561,[25] and, in effect, reaffirmed the position in *White Motor Co. v. United States,* 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963), that more knowledge of the competitive effects of this type of restraint was needed before *per se* treatment was appropriate.[26] *See Continental T.V., supra,* 97 S.Ct. at 2561. These and other recent cases make it clear that the legal characterization of a class of restraints requires "a judgment about [its] competitive significance" and that, in formulating their judgment, courts must pay heed to relevant "economic conceptions." *National Society of Professional Engineers, supra,* 98 S.Ct. at 1365 & nn. 16 & 17.

In light of these developments and before passing on whether RML's group boycott is to be declared *per se* illegal, we must examine the criteria which require a particular type of restraint to be classed within the *per se* rule. In *BMI, supra,* the Court stated that *per se* classification was required when the restraint was "plainly anticompetitive" and lacking of "any redeeming virtue." 99 S.Ct. at 1556. To determine whether a restraint falls within this ban, one first must have some conception of the nature of the competition protected by the Sherman Act. This competition cannot be equated simply with business rivalry. Otherwise, the Sherman Act would require the condemnation of any partnership wherein two former rivals agree to combine

their resources and cease competing against each other in order to function more efficiently, regardless of whether the two
1364 partners were thus enabled to better *1364 serve their customers. That the Sherman Act requires no such result has been settled since Judge (later Chief Justice) Taft's classic opinion in *United States v. Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). The nature of the competition protected by the Act can perhaps best be divined by looking to the Supreme Court's statements of the Act's goals. In *Northern Pacific Railway Co., supra,* the Court stated:

> The Sherman Act was designed to be a comprehensive character of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

78 S.Ct. at 517. Similarly, in *National Society of Professional Engineers, supra,* it was stated:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC,* 340 U.S. 231, 248, 71 S.Ct. 240, 249, 95 L.Ed. 239. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

98 S.Ct. at 1367. *See BMI, supra,* 99 S.Ct. at 1562. The emphasis on the "free opportunity to select among alternative offers" indicates that rivalry is in fact important to the competition envisioned. In fact, where a practice has no other purpose than the elimination of a business rival, it may readily be condemned. *See, e.g., Klor's, supra.* On the other hand, when a practice tends to reduce competition of this type, but nevertheless operates to make the market more efficient—thereby aiding in the reduction of prices and the better allocation of resources, for example—then it may still be found, under the rule of reason, to further the Act's goal of aiding competition. *See, e.g., BMI, supra; Continental T.V., supra; Chicago Board of Trade, supra.* Thus, in regard to exchange of price and other information among competitors, the Supreme Court has stated:

> The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed *such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.* For this reason, we have held that such exchanges of information do not constitute a per se violation of the Sherman Act.

United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16, 98 S.Ct. 2864, 2875, 57 L.Ed.2d 854, 872 n.16 (emphasis added). To evaluate the effect of a practice on competition under the Sherman Act, one must look not only to rivalry but to economic efficiency as well.

A practice is "plainly anticompetitive" and lacking in "any redeeming virtue" under the Sherman Act, therefore, when it can further none of the Act's goals—when it operates to deny to consumers the opportunity to choose among alternative offers without offering the possibility of any joint, efficiency—producing economic activities. *See, BMI, supra,* 99 S.Ct. at 1562.[27]
1365 These *1365 practices—"naked restraints of trade," *White Motor Company, supra,* 83 S.Ct. at 702—are those condemned to *per se* illegality.

A few concluding observations regarding *per se* rules are necessary. First,

> *Per se* rules ... require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.

Continental T.V., supra, 99 S.Ct. at 2557 n.16. Thus, when the law declares price fixing to be a *per se* violation, it is irrelevant that a particular agreement may be between two small firms occupying an insignificant market position: the generalization about naked price fixing retains sufficient validity to govern the legal consequences of the practice. Second, "

[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1976). When the Courts are uncertain of the competitive significance of a particular type of restraint, they decline to apply the *per se* label. *See* *Continental T.V., supra,* 97 S.Ct. at 2561-2562; *White Motor Co., supra,* 83 S.Ct. at 702. Finally, courts must be careful not to extend the *per se* treatment to a type of restraint literally falling within a *per se* category where the rationale of the generalization is not applicable. Price fixing is perhaps the archetypal Section 1 violation, striking at the "central nervous system of the economy." *Socony—Vacuum Oil, supra,* 60 S.Ct. 845 n.59. Nevertheless, the Supreme Court has refused to accord *per se* treatment to practices literally comprehended within the term when, viewed in its full context, the practice appeared potentially to be reasonably ancillary to procompetitive, efficiency-creating endeavors and therefore not a naked restraint of trade. *See BMI, supra;*[28] *Chicago Board of Trade, supra.*[29]

Group boycotts are among the categories of business behavior which the courts have declared to be *per se* violations of Section 1. *See, e. g.,* *United States v. General Motors Corp.,* 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); *Radiant Burners v. People's Gas Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Klor's, supra; Fashion Originators' Guild Association v. FTC,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914). We have found RML's membership rules literally to constitute a group boycott. "But easy labels do not always supply ready answers." *BMI, supra,* 99 S.Ct. at 1556. The question we face now, therefore, is whether this type of group boycott falls within the rationale of the *per se* rule.

1366 *1366 We begin our inquiry with the recognition that "there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine." L. Sullivan, Antitrust 229-230 (1977). *See* R. Bork, The Antitrust Paradox 330 (1978). Judge Thornberry in the opinion for this court in *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee,* 467 F.2d 178 (5th Cir.1972), *cert. denied,* 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973), summarized the major cases dealing with this problem:

> Cases applying *per se* illegality to collective refusals to deal fall into roughly three categories. The first group, exemplified by *Eastern States Retail Lumber Dealers Assoc. v. United States,* 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914), have involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. Thus, in *Eastern States,* a combination of retail lumber dealers black—listed lumber wholesalers who sold directly to the retailers' customers. The obvious purpose of the combination—eliminating competition from the wholesalers—placed it "within the prohibited class of undue and unreasonable restraints." 234 U.S. at 612, 34 S.Ct. at 954 ....
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> *Klor's, Inc. v. Broadway-Hale Stores,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), illustrates a second category of group boycott cases, involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination. For example, in *Klor's,* a large appliance dealer, Broadway-Hale, used its purchasing power to induce defendant manufacturers and wholesalers to sell only at discriminatory prices to plaintiff, a competing appliance dealer. Since the effect of the agreement was to drive Klor's out of competition with Broadway, the Court found the three-cornered agreement illegal *per se,* notwithstanding the fact that the manufacturers and wholesalers, not in competition with Klor's, probably had no such anti-competitive motive. *See also* *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.,* 5th Cir.1966, 365 F.2d 478.
>
> Unlike these first two categories, the third group of cases has concerned combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors. The leading case in the area is *Fashion Originators Guild of America v. Federal Trade Comm'n,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941), in which a group of "original" designers refused to sell their creations to retailers who purchased and sold copies of the original designs. In holding this refusal to deal illegal *per se,* the Court declared that even though the object of the boycott was to prevent the retailers from dealing with manufacturers of the copies and thereby eliminate "style piracy," the coercion practiced indirectly on a rival method of competition precluded application of the rule of reason. *See also* *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951) (liquor manufacturers' collective refusal to sell to pricecutting wholesalers).

> In all of these cases, the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. . . . We conclude that resort to the *per se* rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a "naked restraint of trade."

1367 To Judge Thornberry's cogent analysis,[30] we must add the following observations. *1367 The presence of purposefully exclusionary or coercive conduct is a strong indication that the boycott is a naked restraint of trade; indeed, if no other purposes are present, this purpose will warrant outright condemnation of the practice. In light of our discussion of the *per se* rule, however, and particularly in light of the *BMI* case, it is also necessary to inquire further to determine whether the practice is at least potentially reasonably ancillary to joint, efficiency-creating economic activities. In *BMI, supra,* the Court held that the *per se* rule was inapplicable to the form of price-fixing practiced by defendants in its blanket licensing system in part because it "accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use." 99 S.Ct. at 1562. The generalization supporting *per se* treatment lost its force in that situation, and, even though defendants purposefully "fixed a price," it became necessary to assess under the rule of reason the net competitive impact of the practice when compared to the procompetitive effects of the integration. *Id.* at 1565. Similarly, with group boycotts, we must be cautious to determine whether conduct whose apparent purposes, standing alone, might warrant *per se* treatment are reasonably connected to an integration of productive activities or other efficiency-creating activity in such a manner as to require an inquiry into the net competitive effect under the rule of reason. *See* L. Sullivan, Antitrust § 89 (1977).

Turning at long last to the case at hand, we find that, under the analysis set forth above, RML's membership criteria do not warrant *per se* treatment. "There is good in the multiple listing system." *Grillo, supra,* 219 A.2d at 644. It is, above all, an
1368 *1368 effective response to the pervasive market imperfections in the real estate industry.

> In a perfectly competitive market, "[t]ime lags, immobility of capital and labor, ignorance on the part of producer and consumer, ... [and] irrational decisions by buyers and sellers" are assumed not to exist. Perfect competition is a theoretical concept; all markets are subject to varying degrees of imperfections. . . . In the real estate industry, imperfections constitute a serious handicap to the seller, the purchaser, and the industry. A critical imperfection arises from the immobility of the product—real property is, of course, immovable. This insurmountable geographical imperfection magnifies the importance of communicating useful sales data. Unfortunately, because of the limitations of local media in areas contiguous to the situs, effective sales promotion is difficult. Moreover, most homeowners do not possess the necessary experience in the specialized field of effectively presenting to the public essential and enlightening information about property offered for sale. Imperfections also arise from the lack of knowledge by both buyer and seller regarding property values and available sources and methods of financing. Always crucial, this information is decisive in a tight money market. Operating as a knowledgeable middleman, the real estate broker can reduce the level and impact of these imperfections. He cannot, however, completely eliminate them; even with the facilities he has, the broker is still confronted with a sizable communication imperfection. One method of achieving a further reduction of imperfections is by resort to the trade exchange format of the multiple listing service.

Austin, *Real Estate Boards, and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1353-1354 (1970) (footnote omitted). We have shown how a multiple listing service like RML may reduce these imperfections.[31] By serving as a central processing and distributing point for listings of real estate, RML helps reduce "information and communication barriers" and ease "the built-in geographical barrier confronting buyer and seller." *Id.* at 1329. Further, it aids the market in its function as price-setter for properties and financing. *Id.* It aids the seller by allowing him to give an exclusive listing to a broker, and thus to choose the agent with whom he prefers to deal, while nevertheless enabling him to place his listing in the hands of all RML's members to attempt to procure a buyer. *See id.* The buyer benefits by gaining access to a wider selection of properties in a shorter time period than would be the case if he engaged a lone broker. *Id.* The broker himself doubly benefits: he gains a larger inventory to sell and gains broader exposure for his own listings. *Id.* Finally, RML's other services—such as the furnishing of lock boxes and arbitration procedures—provide clear competitive benefits to all parties.

Certainly the antitrust laws must allow reasonably ancillary restraints necessary to accomplish these enormously procompetitive objectives. And restraints of the general types imposed by RML are not subject to out-of-hand
1369 condemnation.[32] First, the operation of a multiple listing service is not cost free. While a fee structure could be *1369 abused to effectively deter all newcomers from entrance, the service must be allowed to recoup its costs of operation. Further, it may well be necessary to the success of a multiple listing service to establish some standards of competence,

professionalism and mode of operation for admission to membership. Indeed the Government implicitly concedes as much by neglecting to challenge RML's requirement that prospective members have a valid state broker's license. More fundamentally, the sharing of listings is the essence of the multiple listing concept. The listing broker retains the primary fiduciary responsibility, with its legal and ethical ramifications, to the property owner. *See* *Brown v. Indianapolis Board of Realtors,* 1977-1 Trade Cases ¶ 61,435, at 71,614 (S.D.Ind.1977); *Iowa ex rel. Miller v. Cedar Rapids Real Estate Board,* 1980-1 Trade Cases ¶ 63,012, at 77,042 (Iowa Dist.Ct.1979). Without some insurance that the brokers who act as subagents to the listing broker through the listing service are responsible and competent, it is possible that neither brokers nor the public will utilize the service, thus forfeiting the benefits it may yield to all. *Id. Cf. McQuade, supra,* 467 F.2d at 188 (in case challenging exclusion from industry-wide tour guide manual, insurance of responsibility of all included tour operators found necessary to induce listing).

The purpose and effect of membership criteria of the general types employed by RML are complex. It has been observed that services like RML are "basically self-restricting entities" whose primary intent is "to impose internal, not external, restraints." Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1326, 1340 (1970). While some restraints may in fact be basically internal,[33] membership criteria have both internal and external significance. While they limit a member's freedom to deal with nonmembers, and thus deny to the member potential sellers of his listings, they also are designed to exclude from membership those who do not meet them. *See, e. g., Collins, supra,* 304 A.2d at 496; *Oates, supra,* 273 A.2d at 803; *Grillo, supra,* 219 A.2d at 646-647.

In light of these complex intentions and effects and the potential connection to the achievement of significant economic efficiencies, we cannot subject RML's membership criteria to *per se* treatment. We need to know more about the justifications for the particular restraints imposed and their competitive significance before we can judge their legality. This type of analysis takes place under the rule of reason.

D. *Application of the Facial Unreasonableness Theory*

The Government argues that, even if RML's current membership criteria are held not to constitute *per se* violations, the district court erred in holding them facially reasonable, in light of RML's power in the Muscogee County real estate market, because they lack sufficient grounding in the competitive needs of the listing service or because they are broader than is necessary to accomplish any legitimate objectives of the service. RML's market power and the competitive importance of its services, the Government claims, make it essential that its membership rules not possess the potential arbitrarily to exclude any prospective member.

1370 This argument is, of course, a version of the rule of reason. When analysis shifts *1370 from *per se* to rule of reason, new factors become relevant. We may no longer completely avoid the issues of the market power of the combination or the validity of the competitive justifications given for the precise restraint imposed. But as the Supreme Court has recently stated, the rule of reason gives the Sherman Act "both flexibility and definition." *National Society of Professional Engineers, supra,* 98 S.Ct. at 1363. It gives definition by focusing analysis solely upon the competitive significance of the restraint involved. *Id.* Its flexibility inheres in the fact that it requires the courts to void any restraint whose anticompetitive effects outweigh its contributions to competition. *Id.* at 1363-1365. As we shall show, this flexibility allows the courts to reach and void on its face any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination's legitimate needs. Under this theory of facial unreasonableness, the Government asserts, RML's membership criteria should have been found invalid.

1. *Competitive Harms of Exclusion*

When a group of competitors like the members of RML join together to cooperate in the conduct of their business, there naturally arise antitrust suspicions. As Adam Smith, the archangel of the free enterprise system, observed, "People of the same trade seldom meet, even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."[34] While, as we have shown, a trade group like a multiple listing service may create significant competitive advantages both for its members and for the general public, there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from access to its pooled resources. One may isolate two factors whose presence indicates the greatest danger of this type. First, one can access the degree to which the association is involved in the actual business activities of its members. The more directly the association is involved in its member's business, the more likely it is that exclusion from membership will produce concrete anticompetitive effects. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1345 (1970). Since a multiple listing service like RML "is directly engaged in the buying and selling process, its duplicatory connection with the business interests of individual brokers is manifest." *Id.* Second, one may determine whether the association possesses sufficient economic power "to shape and influence the economic environment of particular field involved." *Id.* at 1345-1346. This determination will, of course, turn on the facts of the case at hand. *See generally* *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,901; Bodner, *Antitrust Restrictions on Trade Association Membership and Participation,* 54 A.B.A.J. 27 (Jan. 1968).

Thus, when the association possesses the requisite market power, membership in the listing service becomes essential to a broker's ability to compete effectively, and the unreasonable (in competitive terms) exclusion of a broker may create unjustified harm to the broker and the public. The harm to the excluded broker is the mirror image of the benefits to members. Whereas members gain wide exposure of their listings, with numerous potential sellers, the nonmember remains dependent upon his individual efforts to find a buyer. Similarly, the nonmember will have only those listings which he has personally procured to sell. "He has only a limited supply of `shoes on the shelves.'" *Oates v. Eastern Bergen County*
1371 *Multiple Listing Service, Inc.,* 113 N.J.Super. 371, 273 A.2d 795, 800 (1971). Denial of access to the service may thus *1371 directly and indirectly[35] impair a nonmember broker's ability to compete effectively with members. As one court has observed, "[u]nder these circumstances, one does not need an advanced degree in economics to predict whose services a buyer or seller of a home is likely to engage." *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,900.

Buyers and sellers are also harmed by unjustified exclusions. Even though member brokers still compete with each other to procure listings[36] and to sell any listing in the pool, the public is denied the incentive to competition that new entry may bring. *Cf. Associated Press, supra,* 65 S.Ct. at 1421 (harm to competition from wire service bylaws which tended to limit new entry into newspaper field); *id.* at 1424 (harm created by barriers to new entry not alleviated by fact that existing papers supplied AP news to public). A new entrant into the market might, for example, be more aggressive and willing to accept a lower commission rate. Exclusion of such a broker would tend to reduce the amount of price competition in the market. *See* *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,900-68,901. Moreover, consumer choice would be limited in another way:

> A person wishing to sell or buy a home may believe that a particular nonmember is more competent than available members. But if the consumer wishes to have ready access to a large market in a short period of time, he may be forced to deal with a less desirable member broker or salesman.

Id. Thus, where a broker is excluded from a multiple listing service with the requisite market power without an adequate justification in the competitive needs of the service, both the broker and the public are clearly harmed.[37] The cases show that, in these circumstances, the exclusion from the association will be found to violate Section 1. *See e. g., Silver, supra,* 83 S.Ct. at 1252; *United States v. St. Louis Terminal Railroad Association,* 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912);
1372 [38] *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.,* 194 *1372 F.2d 484 (1st Cir.), *cert. denied,* 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952); *American Federation of Tobacco Growers v. Neal,* 183 F.2d 869 (4th Cir. 1950); *Blalock v. Ladies Professional Golf Association,* 359 F.Supp. 1260 (N.D.Ga.1973); *United States v. Southwestern Greyhound Lines, Inc.,* 1953 Trade Cases ¶ 67,470 (N.D.Okl.1953). *Cf.* *Deesen v. Professional Golfers' Association of America,* 358 F.2d 165 (9th Cir.), *cert. denied,* 358 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 680 (1966) (exclusion from PGA sponsored golf tours found competitively reasonable in light of necessity for some limitation of size of playing field).

After having identified some of the competitive benefits and dangers of an association like RML, the task of antitrust law is to define judgmental standards which will, insofar as is possible, minimize the latter and not interfere with the former. It will, as we shall show, be possible in many cases to determine the reasonableness of an association's rule on its face by gauging its justification in terms of the competitive needs of the association and by examining the rule itself to determine if it is drawn in such a manner as to further that need without unnecessarily trampling competitive opportunities. It is under this analysis that we must determine whether the district court correctly upheld RML's rules.

2. *Market Power*

Since RML is directly involved in the business of its members, *see* p. 1370, *supra,* our threshold inquiry in determining its competitive significance is as to the market power of the association. *Id.* For purposes of reviewing the grant of summary judgment to RML, we take residential housing in Muscogee County as the relevant market.[39] Our inquiry then becomes whether RML possesses sufficient power in this market that an exclusion not reasonably grounded in competitive needs produces the kind of competitive harm outlined above.[40]

1373 *1373 While "[t]he issue of market power is inescapably present in any inquiry about impact on competition," L. Sullivan, Antitrust 189 (1977), the question before us is not whether RML has a monopoly in the relevant market; rather, we must determine whether RML is of "sufficient economic importance that exclusion results in the denial of the opportunity to compete *effectively* on equal terms." Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1346 (1970) (footnote omitted); *see* Silver, *supra,* 83 S.Ct. at 1252; L. Sullivan, Antitrust 192, 255 (1977). The reason for the adoption of this standard in a case tried on the facial unreasonableness theory is not complex. As we have indicated, the rules which fall under this approach are those which lack grounding in the competitive needs of the cooperating group or those which are clearly broader than is necessary to protect those needs. These rules, then, are those whose application may create a clear loss to competition, without any compensating gain.[41] For this reason, when the cooperating group possesses sufficient market power that a nonmember can no longer compete effectively with members, the restraint must be found to have sufficient adverse competitive impact to violate Section 1.[42] *Cf.* *Northern Pacific Railway Co., supra,* 98 S.Ct. at 521 (requiring, in order to strike down a tying arrangement on its face, a showing of "sufficient economic power [in the tying product] to impose an appreciable restraint on free competition in the tied product").

We do not set strict mathematical standards regarding the level of market power which must be shown; in any given case, the question whether the association has the requisite power may turn on a number of different factors relevant to the structure of the market.[43] There are, however, several objective factors which may help to determine the competitive necessity of membership:

> The effectiveness of the multiple listing system can be determined by three methods. The number of brokers who use the services can be ascertained. The greater the number of his rivals who can utilize the benefits of the facilities for daily trading purposes, the greater becomes the economic disadvantage of exclusion to the nonmember. Another approach is to determine the total dollar amount of annual listings sold through the multiple listing system. These figures would indicate the extent of the market that is unavailable and
> 1374 foreclosed to the nonmember as a consequence of *1374 exclusion. A final method is to evaluate the efficacy of the multiple as a generator of sales, *i.e.,* the rate of sales (the percentage of actual sales out of total listings over a period of a year) under the multiple as compared with the nonmultiple rate of sales.

Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1346 (1970) (footnotes omitted). After analyzing the structure of the market and such indices of market power as those above, the court must form its judgment as to whether the threat posed to competition by arbitrary exclusion from membership is significant enough to warrant the application of the Sherman Act. At the least, when broker participation in the listing service is high, the service itself is economically successful and competition from other listing services is lacking, rules which invite the unjustified exclusion of any broker should be found unreasonable. *See id.*[44]

Drawing our inferences from the undisputed facts favorably to the Government in reviewing the summary judgment for RML, we think the record shows that RML has sufficient market power to warrant facial review of its membership rules.[45] First, RML has conceded that its members "constitute a vast majority of the active residential real estate brokers in Muscogee County, Georgia." R.15. In 1976, when suit was filed, its membership consisted of over 45 member firms with approximately four hundred sales associates. In addition, in 1976 RML had more than 4,300 listings and over $50 million in sales. In absolute terms, this volume of listings and sales indicates that nonmembers were effectively foreclosed from a not insignificant segment of the market. It is also important to note in this context that RML is the only multiple listing service in Muscogee County; it has, essentially, absorbed the services that arose to compete with it.[46] Finally, testimony of RML's members indicates its market significance; some termed it a "very important" competitive advantage;[47] others deemed membership in RML a competitive necessity.[48]

3. *Standards for Facial Evaluation*

Proceeding from the premise, then, that RML has the requisite power in the market, we turn to the standards for the evaluation of its membership criteria. First, the rules must be shown to be justified by the legitimate competitive needs of the association. Our analysis must focus "directly on the challenged restraint's impact on competitive conditions," *National Society of Professional Engineers, supra,* 98 S.Ct. at 1363, for "[t]he true test of legality is whether the restraint imposed is such as merely regulates and thereby perhaps promotes competition or whether it is such as may suppress or even destroy
1375 competition." *Chicago Board of Trade, supra,* 38 S.Ct. at *1375 243. As we have shown, while RML creates a number of significant competitive benefits, any exclusion from membership carries the potential for competitive harm; our inquiry here, therefore, is whether the RML criteria which give it power to exclude brokers have legitimate justifications in the competitive needs of the association itself. *See e.g., National Society for Professional Engineers, supra; Chicago Board of Trade, supra; Hatley, supra,* 552 F.2d at 652-653; *McQuade, supra,* 467 F.2d at 188; *Deesen, supra,* 358 F.2d at 170-171; *Gamco, supra,* 194 F.2d at 487-488; *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,901. Second, the requirements of the rules themselves must be reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end.[49] *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,901. *See, e.g., Hatley, supra,* 552 F.2d at 652-653; *McQuade, supra,* 467 F.2d at 188; *Gamco, supra,* 194 F.2d at 487-488. *See generally* L. Sullivan, Antitrust 255 (1977);[50] R. Bork, The Antitrust Paradox 335-337 (1978). *See also id.* at 278-279; L. Sullivan, Antitrust § 88 (1977). When the rules fail to measure up to these standards, the justification asserted for them fails. They have, in essence, an anticompetitive effect which has no countervailing procompetitive benefit.

If this analysis indicates that the rule gives the association power to produce such harm, the rule may be condemned on its face, without proof of past effect. "Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be `wholly nascent or abortive on the one hand, or successful on the other.'" *Associated Press, supra,* 65 S.Ct. at 1421. Moreover, it is irrelevant that the restrictive practice may not be strictly
1376 enforced *1376 by its terms; it is the power to bring about the unjustified anticompetitive effect which the Sherman Act condemns. *See, e.g., Northern Pacific Railway Co., supra,* 78 S.Ct. at 521-522; *St. Louis Terminal Railroad Association, supra,* 32 S.Ct. at 512, 514.[51]

a. The Government argues that RML's "favorable credit report and business reputation" standard should have been held unreasonable on its face and that the district court erred in approving it. It asserts first that, in light of the comprehensive statutory scheme for the licensing and regulation of real estate brokers in Georgia, RML cannot establish itself as an extra-governmental body to impose additional standards for those entering the profession. Second, the Government contends that even if the imposition of some additional standards may be justified, the inherent subjectivity of RML's standards renders them overly broad.

We examine first the possible justifications for the "favorable credit report and business reputation" standards. To begin, there are no finite limitations on the size of a multiple listing service like the size limitations necessary to the operation of some sports leagues, *see, e.g., Deesen, supra,* 358 F.2d at 170, or inherent in the allocation of space in a market building, *see, e.g., Gamco, supra,* 194 F.2d at 487; indeed, a multiple listing service succeeds in its goals of creating a public market and reducing market imperfections only insofar as it brings all brokers and listings into its operation. *See* Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1357 (1970); note *42* supra. Thus, any claimed rationale for exclusion from a multiple listing service must be closely scrutinized in terms of the operational needs of the service.

Similarly, a multiple listing service may not validly assert a generalized concern with the competency and professionalism of real estate brokers as a rationale for exclusion. While the Supreme Court has indicated that in some circumstances an association may adopt ethical norms which "regulate and promote ... competition," *National Society of Professional Engineers, supra,* 98 S.Ct. at 1367, it has voided restraints of this type when they produce anticompetitive effects and are not reasonable ancillary to procompetitive activity. *Id.; see id.,* 98 S.Ct. at 1367 n.22. Here, exclusion from the multiple listing service has pronounced anticompetitive effects; unless those effects are counterbalanced by some direct benefit to competition, the regulation must fail.[52] Again, the adoption of any exclusionary membership criteria must be shown to be justified by the operational needs of the association.

An association's enforcement of membership criteria founded upon professional and ethical norms has sometimes been justified as necessary to induce individuals in a given business to join the association, and thus necessary to make the
1377 association's procompetitive *1377 goals a realistic possibility. *See, e. g., McQuade, supra,* 467 F.2d at 188. This rationale,

however, is only partially applicable to a multiple listing service. The service produces its own incentives to membership by presenting the possibility of significant market efficiencies through its pooling of listings and consequent reduction of market imperfections. Membership gives a broker the potential for more efficient operation and hence larger profits by increasing the number of potential sellers for his listings and by increasing the number of listings he has to sell. Similarly, buyers and sellers are attracted to use the service by its ability to offer broader exposure for the sellers' listings and a wider selection of listings from which the buyer may choose.[53]

The inducement rationale does afford a justification for some membership criteria based on professional and ethical norms in this case, however, at least in a negative sense. Before they join a listing service, brokers may require some insurance that they will not be endangered legally or ethically by the brokers with whom they enter a listing-sharing agreement. As one court has explained:

> An MLS [Multiple Listing Service] listing, in effect, offers a subagency to every other MLS participant who can sell the listed property as well as the listing broker. . . . The subagency relationship is the keystone of MLS. Through this subagency appointment, the listing broker authorizes the other broker to show the property, and attempt to procure a ready, willing and able buyer. If the subagent is successful, the listing broker compensates him by splitting the commission according to whatever formula the two brokers deem appropriate. The subagency appointment necessarily creates significant duties and liabilities, both between the brokers themselves, and between the brokers and the public. A listing broker, by virtue of his agency appointment, owes significant legal and moral duties and responsibilities to the property owner. He bears the legal responsibility to the owner for the acts of other MLS participants who show the home. In addition, the listing broker is responsible for any false or misleading statement made by an MLS participant to a potential buyer. Thus, an essential element of the MLS is broker and public confidence that all MLS participants adhere to high and uniform professional standards.

Cedar Rapids Board of Realtors, supra, 1980-1 Trade Cases at 77,042. *See* *Brown v. Indianapolis Board of Realtors,* 1977-1 Trade Cases ¶ 61,435, at 71,614 (S.D.Ind. 1977). Membership criteria reasonably necessary to ensure this protection, and narrowly tailored to this end, may thus be justified in competitive terms and able to survive at least facial review.

RML argues that its requirements that a prospective member have "a favorable credit report and business reputation" are justified under this theory and meet the requirements of facial reasonableness. The Government implicitly concedes that some insurance of a member's competence and responsibility may be required by its acceptance of RML's requirement that all prospective members must possess active brokers' licenses from the state of Georgia. The Government contends, however, that in light of Georgia's extensive regulation of the business of real estate brokering, RML's other requirements are not necessary to its operations and that these requirements are so inherently subjective that they cannot be considered narrowly tailored to accomplish any legitimate justification that might underlie them.

1378 A number of courts considering this problem have held that, where a state extensively *1378 regulates the licensing and business conduct of real estate brokers, a multiple listing service may not impose additional standards of responsibility and competence on those who seek to join. *See* *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,901; *Collins v. Main Line Board of Realtors,* 452 Pa. 342, 304 A.2d 493, 497 (1973); *Grillo, supra,* 219 A.2d at 648. There exists a persuasive argument for this position. When a state extensively regulates a field such as this one, it provides a collective, community judgment as to the standards of professional conduct and responsibility necessary to protect the public from harm.[54] Moreover, it provides the remedial mechanisms necessary to insure that those standards are adhered to in practice. It thus ill-benefits the judiciary, the argument goes, to engage in its own inquiry as to what is necessary to protect individuals in their dealings with state-licensed brokers.

Georgia's licensing and regulatory scheme is indeed extensive. It provides that

> Licenses shall be granted only to persons who bear a good reputation for honesty, trustworthiness, integrity and competence to transact the business of broker or salesman in such manner as to safeguard the interest of the public, and only after satisfactory proof of such qualifications has been presented to the commission.

Ga.Code Ann. § 84-1410(a).[55] Moreover, it provides that applicants who have been convicted of certain crimes involving financial misdealings, such as forgery or embezzlement, or of crimes involving moral turpitude, may for that reason alone be denied a license, Ga.Code Ann. § 84-1410(b),[56] and that upon conviction of any of these crimes a broker's license may be suspended or revoked. Ga.Code Ann. § 84-1410(c). Applicants for a broker's license must also be at least 18 years of age, have a high school diploma or its equivalent, and have completed additional study in courses related to real estate. Ga.Code Ann. § 84-1411(a), (b).[57] Moreover, applicants must pass a written examination "covering generally the matters confronting real estate brokers." *Id.*

Licensing is not the only form of regulation of broker conduct in Georgia. The Georgia Real Estate Commission has power to regulate the conduct of licensees by passing rules and enforcing the provisions of all state regulations. Ga.Code Ann. §
1379 84-1405(d).[58] Georgia law also requires that *1379 brokers maintain a separate checking account, open to inspection by the Georgia Real Estate Commission, for the deposit of all funds received on behalf of a client in a real estate transaction and mandates that a broker shall not be entitled to any part of such fund as his commission or fee "until the transaction has been consummated or terminated." Ga.Code Ann. § 84-1419. The Commission may cause the Attorney General of the state to bring an action against any broker who fails to comply with these requirements, to enjoin such failure, or, if necessary, to appoint a receiver. Ga. Code Ann. § 84-1420. Finally, Ga.Code Ann. § 84-1421 provides that the commission "may, upon its own motion, and shall upon the sworn complaint in writing of any person, investigate the actions of any" real estate broker, associate broker, or sales person. After investigation, the Commission conducts a hearing to determine if the individual has violated any of the state's statutes governing the activities of real estate brokers or any rule of the real estate commission, or has committed any unfair trade practice, defined to include, *inter alia,* various species of fraud,
1380 incompetence, or financial misdealing. *Id.*[59] If a broker is *1380 found guilty, the Commission has power to censure him, revoke or suspend his license, require further education, or require an independent accounting for his separate trust account. *Id.*

In the light of this barrage of state regulation, the Government's argument that RML may reasonably require no more of its prospective members than a valid state license has no little force. Nevertheless, we decline to hold that the presence of an extensive state regulatory scheme automatically bars RML from adopting its own standards of professional competence and responsibility. Giving due weight to the Georgia legislature's judgment as to what is reasonably necessary for the protection of the public in this field, our analysis leads us to the following conclusions: When a multiple listing service seeks to establish the reasonable necessity of membership criteria regulating areas already generally covered by state regulation, it must make a showing either that the legitimate needs of the service require protection in excess of that provided by the state or that the state does not adequately enforce its own regulations.[60] If the state has no regulation comparable to that established by the multiple listing service, then the service must make the showing of its rule's justification and necessity which we have already outlined. Under this approach, due respect is given to the state's attempt to determine which individuals should be allowed to act as brokers, while the multiple listing service is allowed to vindicate those operational necessities which enable it to achieve its procompetitive goals.[61]

1381 *1381 While neither party in this case has addressed the issue of Georgia's enforcement of its rules, and that issue is thus left open on remand, RML has conceded that its "favorable credit report and business reputation" criteria are covered by Georgia law. Brief for Appellee at 32. It does contend, however, that it has a right to make a current investigation into the professional competence and responsibility of a prospective member and points out that broker's licenses are automatically renewable at two year intervals. *See* *Georgia Real Estate Commission v. Howard,* 133 Ga.App. 199, 210 S.E.2d 357, 358 (1974). This argument is, in essence, that the state's regulations do not vindicate RML's need for a current assessment of the competence and responsibility of prospective members. Even though we concede the potential necessity of such a current assessment, RML's argument fails to take account of the fact that under Ga. Code Ann. § 84-1421, as mentioned above, any member of RML can bring a complaint to Georgia Real Estate Commission if RML's investigation shows that the prospective member is guilty of any professional derelictions. If RML is required to use this means of vindicating its needs, not only is the public interest better served, but the danger of wrongful exclusions from the service, and thus injury to competition, is lessened.[62] *See* *Collins, supra,* 304 A.2d at 497. In sum, only if RML could show that the state's enforcement of its rules does not vindicate RML's needs could we conclude that it is reasonably necessary for RML to exclude licensed brokers from membership under the rules at issue here.[63]

Even if RML can make this showing, however, its present rules must be deemed not narrowly tailored to accomplish their legitimate goals. The problem with the requirement of a "favorable credit report and business reputation" as a condition of membership is that RML does not define these terms or the type of proof required. The inherent subjectivity of these standards is thus in no way limited. Under these standards, RML could conceivably exclude a broker whose business reputation was unfavorable because he was not sufficiently aggressive or because he was thought of as inefficient, even though he had never violated any relevant law or committed a serious breach of any duty. Similarly, a broker with a reputation as a "slow pay" but who had never actually defaulted on any financial obligation, might be excluded because he did not have a favorable credit report. Moreover, under RML's rules, these determinations might be based upon hearsay allegations or subjective impressions of an applicant's reputation or creditworthiness. In sum, RML's criteria allow it to exclude a licensed broker whom, according to RML's subjective evaluation, it determines to be generally unfit to be a member of the service.

In assessing a rule's potential for anticompetitive effects, a court is entitled to consider the purpose of the restraint because "knowledge of intent may help the court to interpret facts and predict consequences." *Chicago Board of Trade, supra,* 38 S.Ct. at 244. *See BMI, supra,* 99 S.Ct. at 1562. Here, statements of RML's members regarding the intent of the criteria at
1382 issue reinforce our conclusion that they call for *1382 an inherently subjective evaluation of the applicant. One member testified, for example that an applicant meets RML's criteria if he "has got a license and has a clean record and hasn't been in trouble and hadn't been in Bankruptcy or in lawsuits or charged with any immoral acts." Deposition of Charles Lowe at 31-32. In assessing the significance of the applicant's having been "in trouble," this member specified that he would consider not only convictions, but also "my personal knowledge of the facts." *Id.* Addressing the favorable business reputation requirement, this member stated:

> It has been discussed many times and you get a definition from everybody, it is a different definition. I think that is something a man has to define for himself because my definition of anything and yours is [*sic*] probably different ..., but I think every man has to let his conscious [*sic*] define it.

Id. This broker was a member of RML's Board of Directors at the time the credit and reputation standards were adopted. R.186-187. Testimony by other brokers who were the members of the Board are of similar import.[64] It is thus undisputed that these criteria call for a subjective evaluation of an applicant's fitness for membership.[65]

Subjective membership criteria are generally not narrowly tailored to accomplish any legitimate goal of an association. *See,*
1383 *e. g., Radiant Burners, Inc. v. People's Gas Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365, *1383 5 L.Ed.2d 358 (1961); *Blalock, supra,* 359 F.Supp. at 1265-1266.[66] As one commentator has observed in an analogous context:

> Once it is concluded that the program is not an objective one, no further evaluation of benefits to competition which are supposed to flow from the program is appropriate. The potential for harm is so great and the potential for offsetting benefits so small when the program is not objectively run, that the courts will decline to weigh and measure the harms and benefits and will treat the program precisely as they do an explicit boycott.

L. Sullivan, Antitrust 249 (1977). Because RML's "favorable credit report and business reputation" criteria give it the power to exclude brokers from membership on grounds not justified by its competitive needs, the district court erred in upholding them. Assuming, as we must, that RML possesses the requisite market power, we conclude that the district court should have held them facially unreasonable.[67]

b. The Government also argues that the district court erred in holding facially valid RML's requirement that an applicant must have an office "open during customary hours of business." This requirement, the Government points out, gives RML the power to exclude from membership (1) part-time brokers who are engaged in additional lines of endeavor or who otherwise do not choose to maintain full-time real estate offices and (2) brokers who do not choose or cannot afford to hire a full-time staff to keep an office open during customary business hours.[68] The Government contends that there is no legitimate justification for a rule which has these effects and that the rule is overly broad to further any other legitimate objectives of the association.

RML's defense takes three lines. First, it argues that its "customary hours" rule serves to insure that the applicant will be in a likely position to contribute listings to RML and, since the sharing of listings is the essence of RML's operation, the requirement is justified by its operational needs. Second, RML argues that its "customary hours" rule insures that members will be available to conduct negotiations and to service the listings they do furnish and hence is justified. Finally, RML contends that the "customary hours" rule has never been applied to exclude brokers of the two classes the Government has identified and that therefore it should not be voided.[69] We consider each of the contentions in turn.

1384 *1384 It may well be justified for RML to require that a prospective member be actively engaged in the business of being a real estate broker in order that he may contribute to RML's functioning. But a rule requiring that a broker be actively engaged in the business of brokering is a far cry from one requiring that he maintain an office open during customary hours of business. If, for example, a broker holds another job during regular working hours and works in his brokering business on nights and weekends, he may still be very actively engaged as a broker. Indeed, he may find that his hours as a broker mesh well with those of many clients who also hold down jobs during normal working hours and transact their real estate business in their off-hours. In this manner, the off-hours broker may fulfill a genuine market demand. To exclude all brokers who function primarily in this off-hours market on the ground that some may not be "actively engaged" as brokers is clearly a response in excess of need. In such a case as this one, it is incumbent on RML to regulate those *practices* of its members which are necessary to its functioning, instead of needlessly excluding an entire class of brokers from membership. *See* *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,902.

Similarly, the "customary hours" rule is drawn too broadly to be justified by RML's need to insure that its members be available to service listings and conduct negotiations. As RML asserts, the concept of shared listings, which forms the basis of a multiple listing service, requires that the listing broker be available for negotiations and to close the deal since the listing broker retains the primary responsibility to the seller of the property.[70] This need, however, will not support the total exclusion from membership of all brokers who do not maintain customary office hours. Considering again the example of the broker who conducts his real estate business during his "off hours," one cannot conclude that such a broker will not be reasonably available to carry out the duties relevant to his listings. He may for example, be able to conduct many of his servicing and negotiating duties during his off hours[71] and may be able to absent himself from his other job for those duties which cannot be postponed. In fact, it is in the self-interest of a listing broker to make sure that he is available to supply essential services for his listings. One cannot lightly presume that a broker who supplies a listing will forfeit the commission to which he is entitled by failing to service it. Again, to the extent that there exists a danger that brokers will not be reasonably available to service their listings, it is incumbent upon RML to establish rules governing the troublesome
1385 practices of its members[72] and not *1385 to exclude from membership an entire class of brokers on the basis of an overly broad generalization.[73]

We thus find RML's "customary hours" rule to be overly broad to accomplish any legitimate goals of the association. RML's final contention is that, since it has never applied this rule to exclude any part-time brokers (even though it concedes none have applied) and does not intend to so apply it, the rule should not be found unreasonable. We cannot accept this contention. In the first place, the requirement by its own terms allows the results about which the Government complains.[74] Moreover, there is record evidence to indicate that RML members believe part-time brokers should be excluded and that this rule allows such exclusion.[75] Finally, as we have already pointed out,[76] the antitrust laws do not require that we wait until the restraint is accomplished before we hold invalid a rule which gives an association power to produce unjustified anticompetitive effects; the Sherman Act is offended by the power as well as the deed. *See, e.g., Associated Press, supra,* 65 S.Ct. at 1421; *St. Louis Terminal Railroad, supra,* 38 S.Ct. at 512. The district court erred in approving the rule.[77]

c. The Government's next contention is that the district court erred in upholding RML's stock purchase requirement. As noted, RML requires new members to purchase one share of stock "at a price to be determined by the Board of Directors." [78] Noting that RML has established no objective criteria for determining a reasonable purchase price, the Government argues that this rule is invalid on the theory that, in cases such as this one, the unrestricted power to set an entrance fee
1386 which is unrelated to either the cost of the service provided or the cost of maintaining the service as a *1386 going concern is the power to exclude, and hence to destroy competition.[79] We agree.

Doubtlessly, RML must be allowed to establish fee schedules which allow it to recoup its costs of operation and to maintain its viability as a going concern.[80] Among those costs which it must be allowed to recover are the start-up costs involved in serving a new member. In addition, it is reasonable to assess a new member a *pro rata* contribution toward the maintenance and development of RML, including the accumulation of reasonable reserves. To require more than this, however, is to create problems. A sizeable membership fee which bears no relation to the cost factors outlined above may not only create a significant barrier to new entry into the association, but may create "a strong inference that the amount has been set up as a barrier against" new applications. *Grillo, supra,* 219 A.2d at 640; *see* Austin, *Real Estate Board and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1352 (1970). Since the antitrust laws reach the power to create anticompetitive effects, as well as the effects themselves, a rule which allows an association such anticompetitive potential should be held unreasonable.

In reaching our conclusion, we rely on the Supreme Court's decision in *United States v. St. Louis Terminal Railroad Association,* 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912). There a group of competing railroads formed a terminal association which acquired all available means of access across the Mississippi River at St. Louis. Other railroads were allowed to use these facilities only after they obtained the unanimous consent of all the owners and after payment of a use fee.[81] The Court found this combination of competing railroads to be acting in unreasonable restraint of trade. *Id.* at 515.[82] Noting, however, that the association served a number of useful, procompetitive purposes through its unification of the terminal systems in St. Louis, *id.* at 512-514, the Court refused to order dissolution, as the Government requested. Rather, the Court required the association to reform its organizational rules in such a manner as to allow all competing railroads to use its facilities on equal terms.[83] Particularly pertinent here, the Court required the association to provide first

> for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.
>
> Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as
> 1387 will, in respect of use, *1387 character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Id. at 516.

These requirements are directly relevant here. In order to avoid running afoul of the antitrust laws, RML may not assume the power to set fees at a level greater than its legitimate needs. While it may continue to allow applicants to become joint owners of the service upon "just and reasonable terms," *id.,* and may condition certain rights (such as the right to become a member of the Board of Directors) on such ownership, it must also permit applicants to become members upon the payment of a fee based on its operational needs—one representing, for example, the actual cost of starting up his service and a *pro rata* contribution toward the costs of the maintenance and development of RML, including the accumulation of reasonable reserves.[84] *See, e. g., Marin Board of Realtors,* 1976-1 Trade Cases at 68,902; *Grillo, supra,* 219 A.2d at 640.[85] Moreover, RML must be allowed to recover the actual costs of its continuing services to members, just as it does now. RML's present stock purchase rule, however, is without justification in its competitive needs, and the district court erred in approving it.[86]

D. *Mootness*

We have thus concluded that the district court erred in granting RML's motion for summary judgment as to the legality of its present practices. We turn now to the district court's conclusion that the question of the legality of RML's past practices is moot.

RML has, in the past, maintained various restrictive practices other than its present membership requirements. Among those practices were (1) a membership voting requirement for admission to the service;[87] (2) a prohibition against belonging to a competing multiple listing service; (3) a prohibition against the advertising of open listings; (4) a prohibition against reapplication to RML for six months after having been rejected; and (5) a complete moratorium on new membership. The Government has contested the legality of all these practices and asserts here that the district court erred in determining that, because RML had abandoned these practices and affirmed that it did not intend to reinstate them, all the issues they presented are moot. We agree.[88]

1388 It is well-settled that, in a suit for injunctive relief, the voluntary cessation of *1388 allegedly illegal practices in an attempt to avoid suit does not moot the controversy they present. *See, e. g., Allee v. Medrano,* 416 U.S. 802, 94 S.Ct. 2191, 2198, 40 L.Ed.2d 566 (1974); *NLRB v. Raytheon Co.,* 398 U.S. 25, 90 S.Ct. 1547, 1549, 26 L.Ed.2d 21 (1970); *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968); *United States v. W. T. Grant Co.,* 345 U.S. 629, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); *Ciudadanos de San Juan v. Hidalgo County Grand Jury Commissioners,* 622 F.2d 807, 824-825 (5th Cir. 1980). The Court's discussion in *W. T. Grant, supra,* is particularly pertinent here:

> Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.,* does not make the case moot. . . . A controversy may remain to be settled in such circumstances .... The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion .... For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right . . . . The courts have rightfully refused to grant defendants such a powerful weapon against public law enforcement.
>
> The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." The burden is a heavy one. Here the defendants told the court that the [alleged violations] no longer existed and disclaimed any intention to revive them. Such a profession does not serve to make the case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts.

73 S.Ct. at 897 (footnotes and citations omitted).

Similarly, in this case, RML's abandonment of the practices described above and its disclaimer of any intention to revive them cannot serve to moot the issues they present. Neither the district court nor RML has cited to any other evidence indicating that it is unlikely that RML will reinstitute these practices, nor has our research discovered any. For these reasons, the district court erred in concluding that the controversy relating to these issues is moot.

We leave to the district court on remand the question of the legality of these discontinued practices, in light of our discussion of the applicable rules. *See* note 18 *supra.* Even if that court finds these practices illegal and issues the declaratory relief that the Government seeks, however, it may still decline to enter injunctive relief unless the Government can show "that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.* at 898. *Cf.* *SEC v. Caterinicchia,* 613 F.2d 102 (5th Cir. 1980) (refusing injunctive relief to SEC under analogous statutory standard where SEC failed to show likelihood of future violations). While the district court's discretion in this area is broad, it must always be utilized to insure that the public interest is adequately protected from any realistic threat of future injury. *See* *United States v. Glaxo Group, Ltd.,* 410 U.S. 52, 93 S.Ct. 861, 868, 35 L.Ed.2d 104 (1973); *United States v. Parke, Davis and Company,* 362 U.S. 29, 80 S.Ct. 503, 514, 4 L.Ed.2d 505 (1960).

III. Conclusion

There are, in our universe of antitrust precedent, fewer lines of symmetry than we might wish. Nevertheless, with sextant in hand and competition as our lodestar, we have in this case attempted to chart a course that neither sacrifices efficiency nor unduly neglects the commerce that, while waiting upon the shore, looks for an outlet to the sea. Our looks thus commercing with the skies, we have endeavored to make free the channels of commerce here below.

We have concluded that the district court erred in granting summary judgment to RML. Assuming that RML possesses the
1389 *1389 requisite degree of economic power in its market, we have concluded that its present membership criteria on their face create restraints on commerce that are not justified by RML's competitive needs. Moreover, we have concluded that the questions presented by the restrictive practices which RML abandoned under threat of suit are not moot and that the district court should have addressed the question of their legality. Still, we cannot grant the Government's request to order the district court to enter summary judgment in its favor. In the first place, the district court did not consider, and the parties have not briefed in this court, the question whether RML's activities have sufficient connection to interstate commerce to invoke Sherman Act jurisdiction. *See* *McLain v. Real Estate Board of New Orleans, Inc.,* 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). In addition, we are not prepared to hold, on the basis of the record and briefs before us, that RML has the degree of economic power in the relevant market which we have shown to be necessary to allow facial review of its membership criteria. Although the existence of such power is a reasonable inference from the record, we think it appropriate to allow the parties to define this issue more clearly on remand in light of our decision. Should the Government choose then to renew its motion for summary judgment, it is free to do so.

Accordingly, the district court's judgment in this case is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

[1] Jurisdiction is founded on Section 4 of the Sherman Act, 15 U.S.C. § 4.

[2] There are no federal appellate court decisions evaluating the membership criteria for real estate multiple listing services, and only a few in the federal district courts. *See, e. g., Brown v. Indianapolis Board of Realtors,* 1977-1 Trade Cases ¶ 61,435 (S.D.Ind.1977); *Oglesby & Barclift, Inc. v. Metro MLS, Inc.,* 1976-2 Trade Cases ¶ 61,064 (E.D.Va.1976). We have found some guidance, however, in a number of state court decisions, relying on federal antitrust precedent, which deal with this problem. *See, e. g., Iowa ex rel. Miller v. Cedar Rapids Real Estate Board,* 1980-1 Trade Cases ¶ 63,012 (Iowa Dist.Ct.1979); *Marin County Board of Realtors, Inc. v. Palsson,* 1976-1 Trade Cases ¶ 60,898 (Cal.Sup.Ct.1976) (en banc); *Blake v. H-F Group MLS,* 36 Ill.App.3d 730, 345 N.E.2d 18 (1976); *Barrows v. Grand Rapids Real Estate Board,* 51 Mich.App. 75, 214 N.W.2d 532 (1974); *Collins v. Main Line Board of Realtors,* 452 Pa. 342, 304 A.2d 493, *cert. denied,* 414 U.S. 979, 94 S.Ct. 291, 38 L.Ed.2d 223 (1973); *Oates v. Eastern Bergen County MLS,* 113 N.J. Super. 371, 273 A.2d 795 (Ch.Div.1971); *Grempler v. Multiple Listing Service,* 1970 Trade Cases ¶ 73,204 (Md.Ct.App.1970); *Grillo v. Board of Realtors,* 91 N.J.Super. 202, 219 A.2d 635 (Ch.Div.1966).

[3] The facts relevant to the organization and growth of RML and to the promulgation of, and amendments to, its rules, regulations and by-laws are, in general, undisputed. Where there exists any dispute as to a material fact or where there is no evidence relating to such fact, it will be noted in the opinion.

[4] The member-stockholders of RML are principal brokers. All sales agents of such member brokers are required to join as associate members. While associate members must agree to abide by RML by-laws, rules and regulations, they pay no dues, hold no stock and have no vote. R.683a.

All citations to the record in this case will be in the form used above.

[5] In an "exclusive" listing, the seller agrees to list with only one broker. The listing broker is then guaranteed a share of the commission even if another broker eventually secures a buyer. In an "open" listing, any broker may list and sell the property, and only the selling broker is entitled to the commission.

[6] RML Rules and Regulations require that all new and used single family residences located in Muscogee County for which an RML broker has obtained an exclusive listing be turned in to RML for distribution to all members. Other types of property, such as farmland or commercial property, whether located in Muscogee County or elsewhere, may be listed with RML at the member broker's option. In the event an owner refuses to allow an RML broker to list his property with RML, the listing may be taken by the broker as an office exclusive. The broker must nonetheless provide RML with listing data and cooperate with a member in connection with the sale of such property. R.686-687.

[7] Shortly after RML was formed, a competing multiple listing service was organized under the name Multiple Selling Service, later changed to Columbus Multiple Listing Service. Although it achieved at least a modicum of success, it suffered a severe setback in the early 1970's when most of its active members left to join RML. Deposition of Earl Bowden at 27-30; 51; 73-80; Deposition of Donald Watson at 46-52; Deposition of Ezekial Carter at 10-14. After the Carter Realty Company, one of the competing service's major members and one of Columbus' largest brokerage firms, was rejected by RML, the Carter firm, along with several other brokers, attempted to revitalize the competing service. Despite its success, the effort was abandoned in 1975 when the Carter firm and most of the competing service's members were finally accepted into RML. Deposition of Earl Bowden at 51-51; 61; 80; 84-86; Deposition of Donald Watson at 62-63; 80-81; 83-93; Deposition of Beatrice Breaux at 49-52.

Until October 1975, RML's rules prohibited any member from belonging to a competing multiple listing service. R.379.

[8] RML Rule 5(9) provides:

Each member shall keep his file of RML listings confidential and shall see to it that no Broker who is not an RML Member, and no salesperson not associated with an RML Member shall ever have access to them.

R.688.

[9] RML Rule 5(8) provides:

It is intended that the listing Broker only share or Co-Broker the listing with Non-RML members. Any inquiries from non-RML members must be referred to the listing Broker for information and showing of the property.

R.688. *See* R.686a.

[10] Among the duties of RML's central office is the following:

"To maintain a confidential atmosphere in the office, giving out no information to anyone not a member of Realty-Multi-List, Inc." R.686.

[11] In October 1973, the Department of Justice advised RML that its membership restrictions and high initiation fees might be in violation of the antitrust laws. R.157-158. During the negotiations which followed, RML, as discussed in the text below, amended some of its rules. On several occasions, representatives of the Department and RML met to attempt to negotiate a consent decree. When they failed to reach an accord on the terms of the decree, the United States filed suit.

[12] Section 1 provides, in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

[13] The rules provide no standards whatsoever to guide the members in casting their votes.

[14] Article V, Section 5 sets forth the following criteria:

MEMBERSHIP: To be eligible for membership in Realty Multi-List, Inc., a broker must:

(a) Hold an active real estate Principal Broker's license in the State of Georgia.

(b) Have an active real estate office in Muscogee County.

(c) Have a favorable credit report and business reputation.

(d) Agree to abide by the Realty Multi-List, Inc. By-Laws and Rules & Regulations.

(e) Purchase one (1) share of stock in Realty Multi-List, Inc., at a price set by the Board of Directors.

A prospective future member's application shall be forwarded to the President of Realty Multi-List, Inc. The President shall submit the prospective member's application to the membership committee for their investigation of the applicant. The membership committee will then report their findings to the President in writing.

[15] Although this requirement is nowhere specified in RML's rules, RML has taken the position in this appeal that it so interprets its "active real estate office" rule and that, as construed, the rule is valid. We thus treat the requirement as part of RML's Rules and Regulations. The language is derived from the criteria developed by the National Association of Realtors for membership in a Member Board of Realtors. R.234.

[16] From June 13, 1975, to December 17, 1975, RML also imposed a requirement that, before applying for admission to RML, a broker must have maintained an office of his own for at least six months. R.708-709, 713.

[17] The relief sought by the United States, as summarized in its brief, is

a declaration that RML's past and present restrictive rules are unlawful, and ... an injunction ordering that RML: (1) be required to afford access to its listings and related services to any state licensed broker requesting it; (2) be required to charge only fees and dues for access which are reasonably related to a member's pro rata share of the costs of operating defendant, including the accumulation and maintenance of reasonable reserves for developing, maintaining, or improving defendant as a going concern; (3) be prohibited from restricting or limiting the admission of new members (or affiliation of new users) through moratoria on new memberships or affiliations; (4) be prohibited from imposing any restrictions on a member's (or a user's) place of business or office hours; (5) be prohibited from restricting or preventing any member (or user) from advertising any type of real property; (6) be prohibited from preventing any member (or user) from belonging to or utilizing the services of any other multiple listing service; and (7) be restrained from continuing, or renewing any other concert of action having a similar purpose or effect.

Brief for United States at 2 n.1.

[18] The Government has argued that, despite its mootness holding, the district court went on to uphold the legality of RML's past practices by stating near the end of its opinion that "Defendant's operation has not in the past unreasonably restrained competition...." In light of the fact that the district court expressly held the controversy regarding the past practices moot and made no inquiry as to the reasonableness *vel non* of these practices, the opinion cannot reasonably bear the construction the Government puts upon it.

[19] In *Poller, supra,* the Supreme Court observed that summary judgment procedures should be used sparingly in complex antitrust litigation. 82 S.Ct. at 491. This cautionary note does not mean, of course, that they will never appropriate in this type of litigation. *See, e. g., First National Bank v. Cities Services Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

[20] The concerted action necessary to establish a Section 1 violation exists in the agreement of RML's members to adopt and apply these rules and membership criteria. *See Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 1252 n. 5, 10 L.Ed.2d 389 (1963); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 1421, 89 L.Ed.2d 13 (1945).

[21] For reasons detailed in Part D(3) *infra,* it is not significant that we are not called upon here specifically to review any one exclusion from RML. Only one individual has in fact been excluded from RML under its present membership criteria, and the Government has not sought an order specifically requiring that he be admitted, although it has suggested that that exclusion was unreasonable.

[22] The district court refused to characterize RML's practices as a group boycott because a listing broker remains free to cooperate with a nonmember on an individual basis for the sale of his listings. The *Silver* court rejected an analogous argument. It adhered to its characterization of the removal of Silver's private wire services as a group boycott despite "the fact that the collective refusal to deal was only with reference to the private wires, the member firms remaining willing to deal with petitioners for the purchase and sale of securities." Wire service itself was "a valuable business service germane to petitioners' business and important to their effective competition with others," so that concerted withdrawal of access to that service, without any justification, violated Section 1. *Id.* at 1252 n. 5.

[23] principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into

the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). *See* *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n. 16, 97 S.Ct. 2549, 2558 n. 16, 53 L.Ed.2d 568 (1977); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 n. 10, 92 S.Ct. 1126, 1134 n. 10, 31 L.Ed.2d 515 (1972).

Id., 99 S.Ct. at 1556 n. 11.

[24] The Court noted that blanket licensing aided in the effectuation of rights granted under the copyright laws, *id.* at 1562, accompanied the integration of sales, monitoring and copyright enforcement facilities, *id.,* was, to some extent, a "different product" than an individual license, *id.* at 1563, and did not fully eliminate the presence of price competition. *Id.* at 1564.

[25] The Court noted that the market impact of these restraints was complex "because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." *Id.* at 2558.

[26] need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack ... any redeeming virtue" (*Northern Pac. R. Co. v. United States, supra*, 356 U.S. p. 5, 78 S.Ct. 514, [p. 518]) and therefore should be classified as *per se* violations of the Sherman Act.

Id. at 702.

[27] generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States v. United States Gypsum Co.*, 438 U.S. 422, 436, n. 13, 98 S.Ct. 2864, 2873 n. 13, 57 L.Ed.2d 854 (1978), the purpose of the practice is to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more rather than less competitive."

Id. (footnote omitted).

[28] The Supreme Court in *BMI* provided one important caveat regarding the characterization of a particular form of a restraint as within or without the *per se* rule:

The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690-692, 98 S.Ct. 1355, 1364-1366, 55 L.Ed.2d 637 (1978), or else we should apply the rule of reason from the start. That is why the *per se* rule is not employed until after considerable experience with the type of challenged restraint.

Id. 99 S.Ct. at 1562 n.33.

[29] Regardless of whether one concludes that the Court in *Chicago Board of Trade* reached the proper conclusion, *see* *National Society of Professional Engineers, supra*, 98 S.Ct. at 1366 n.19; L. Sullivan, Antitrust § 66 (1977), it is clear that its mode of analysis fit the form outlined above. *See* 38 S.Ct. at 244-245.

[30] Two cases often included in a summary of the Supreme Court's *per se* group boycott rulings, *Associated Press v. United States*, 362 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), and *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), *see McQuade, supra,* 467 F.2d at 186, actually do not belong there.

Although some of the Court's analysis in *Associated Press, supra,* is directed toward the problems of group boycotts in the trade association context, *see* 65 S.Ct. at 1423-1424, the practice which the Court held to be *per se* illegal is more accurately described as horizontal territorial division. The Court struck down as *per se* violations the AP bylaws which gave members the right essentially to veto the admission of new members competing in their territories, but explicitly declined to void those rules prohibiting the provision of AP news to nonmembers. *Id.* at 1425-1426. Justice Douglas, in his concurring opinion, specifically called attention to this aspect of the Court's holding, noting that the decree "does not direct Associated Press to serve all applicants" and that membership restrictions, of themselves, pose "quite different problems." *Id.* at 1427. *Cf.* *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (voiding as *per se* horizontal market division analogous territorial restrictions).

Although the broad language of *Silver, supra,* certainly invites a *per se* reading, this Court has interpreted it as a rule of reason holding. In *Hatley v. American Quarter Horse Association*, 552 F.2d 646 (5th Cir.1977), the Court noted:

The termination was held to violate Section 1, but the *Silver* Court did not hold this particular boycott to be illegal *per se* as might have been expected under *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 468, 61 S.Ct. 703, 708, 85 L.Ed. 949 (1941), and *Klor's, Inc. v. Broadway—Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Instead it noted that "absent any justification derived from the policy of another statute *or otherwise,*" the defendant's action would have been a *per se* violation. 373 U.S. at 348-49, 83 S.Ct. at 1252 (emphasis added). Because the Securities Exchange Act of 1934 established a policy favoring self regulation, the Court proceeded under the rule of reason and ultimately found the boycott illegal.

The cryptic phrase "or otherwise" has been fastened upon as a signal that a statute is not essential to avoid *per se* treatment of an apparent group boycott.

"A concerted refusal to deal may, under *Silver,* be validated by a public policy in favor of collective action. Two types of justification may be postulated: those derived from governmental expressions of purpose, and those which result from the need for self-regulation inherent in the industry."

Id. at 652 (citations omitted). Although this reading attributes a great deal of meaning to the Court's "cryptic" phrase "or otherwise," there is an additional reason for construing *Silver* as outside the *per se* principle.

The *Silver* Court focused extensively in its discussion of the exclusion of plaintiffs on the market power of the Stock Exchange and the tremendous significance of its services to plaintiffs' business. These factors, especially the emphasis on market power, are usually not directly relevant to *per se* analysis, *see* pp. 1362-1363 *supra,* but may be vitally important to rule of reason analysis. *See* pp. 1372-1374 *infra.*

[31] *See* p. 1356 *supra.*

[32] As the Court explained in *Continental T.V., supra,* the applicability of the *per se* rule should be assessed in terms of the general type of restraint involved:

The location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used.... But we agree with the implicit judgment in [*U.S. v. Arnold*] *Schwinn* [*& Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249] that a *per se* rule based on the nature of the restriction is, in general, undesirable. Although distinctions can be drawn among the frequently used restrictions, we are inclined to view them as differences of degree and form.... We are unable to perceive significant social gain from channeling transaction into one form or another.

97 S.Ct. at 2561 n.29 (citations omitted). Similarly, here, we look to whether membership criteria of the general type involved merit *per se* treatment.

[33] An example of an almost purely internal restraint imposed by RML is its rule governing solicitation of future listings of an exclusive listing held by an RML member. Rule 5(5) of RML's Rules and Regulations provides:

During the life of an RML Exclusive, no solicitations on the subject of listing changes or future listing of the property are to be made by any member of RML or his salespeople other than the listing Broker and his salespeople.

R.687a. While this rule does affect the property owner, it is clearly intended to govern RML's internal operation and doubtlessly that is its principal effect. RML brokers of necessity disclose their exclusive listings to all other brokers. In order to induce them to disclose the listings, the brokers require some insurance that the disclosure will not afford competitors an opportunity to "steal" them.

[34] *Quoted in* Note, *Arbitrary Exclusion from Multiple Listing: Common Law and Statutory Remedies,* 52 Cornell L.Q. 570 (1967).

[35] Indirect effects of denial of membership include, for example, the inability to attract and retain sales people, with a resulting impediment to a firm's ability to expand its operations, *see* Deposition of Bernard Friedman at 16; Deposition of Donald Watson at 29-30, 35-35, 102; Deposition of T. M. Lowe at 22; Deposition of Clyde Averett at 13; Deposition of Jane Wright at 12, 24; and often a stigma on a broker's professional image. *See* Deposition of T. M. Lowe at 14-15, 19.

[36] Under RML's rules, the listing broker always gets a share of the commission no matter who sells the property. R.690-691.

[37] On a theoretical level, this unjustified exclusion is an example of the predatory use of an economy of scale. As one commentator has explained,

The threat of boycott is likely to be particularly effective in the case of cooperating groups because a group often creates an economy of scale to which any firm must have access in order to be profitable. A trader excluded from the Chicago Board of Trade, a broker excluded from the stock exchange, or a professional football team turned out of its league is likely to have a very hard time of it.

. . . . .

... [T]here is no doubt that predation can succeed when the distribution pattern is so much more efficient than the alternative that those forced out of the pattern cannot compete. The technique of predation is the denial of access to an essential economy of scale. Boards of trade, for example, often control such access, and their members may often easily destroy a troublesome rival by expelling him from membership or, perhaps more commonly, may bring a rival into line with the mere threat of expulsion.

R. Bork, The Antitrust Paradox 336, 158 (1978).

[38] Although the *Terminal Railroad* case is sometimes read as a monopolization case, ***see e. g.,*** L. Sullivan, Antitrust § 48 (1977), the case also involved a Section 1 charge since the Terminal Association was, in essence, a combination of competing railroads. *See* 32 S.Ct. at 515. If one reads *Terminal Railroad* as a Section 1 case, it fits squarely within the rationale of the other cases cited in text, and, in addition, this reading helps to alleviate many of the problems regarding a monopolist's duty to deal raised by the case. *See, e. g.,* L. Sullivan, Antitrust § 48 (1977). *Cf. Fulton v. Hecht,* 580 F.2d 1243, 1248 & n. 2 (5th Cir. 1978), *cert. denied,* 440 U.S. 981, 99 S.Ct. 1789, 60 L.Ed.2d 241 (1979) (making analogous point regarding the *Deesen* case, cited *infra*).

[39] The assessment of the market power of the association, and its consequent potential for inflicting competitive harm, of necessity requires the definition of the relevant market. *See Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,900. Here, it is undisputed that the relevant product market is the market for residential real estate brokerage services. *See id.* It is also necessary to assess the relevant geographic market. As one commentator has observed in the context of a case similar to that before us, "*United States*

v. Times—Picayune Pub. Co. [105 F.Supp. 670 (E.D.La.1950), *rev'd on other grounds,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953)] indicated that competitors must be foreclosed from a substantial market or part of a market for there to be restraint under the Sherman Act. If such a substantial impact on competition must be shown, it would seem to necessitate the determination of a relevant geographic market in order that the effect on competition therein may be realistically appraised." Note, *Arbitrary Exclusion from Multiple Listing: Common Law and Statutory Remedies,* 52 Cornell L.Q. 570, 576-578 (1967) (footnotes omitted). *See* Marin County Board of Realtors, *supra,* 1976-1 Trade Cases at 68,900; Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1356 n.196 (1970).

The Government has treated Muscogee County as the relevant geographic market in this case, and RML has not suggested otherwise. In reviewing the summary judgment for RML, therefore, we accept this area as the relevant market. Neither party has focused closely on this issue, however, and it will be left open on remand. We call the parties' attention to one important observation on this matter:

[C]ourts in rule of reason cases seldom proceed to engage in the meticulous analysis of power that is associated with monopolization cases. The issue is not whether defendants possess monopoly power, but whether they possess a substantial degree of market power. On this issue, a truncated or threshold analysis will suffice. For example, if defendants possess substantial shares of the market for a well differentiated product such as cellophane, we would assume significant power without scrupulous inquiry into cross-elasticity of substitute products. Courts are understandably loath to move into the intricacies and imponderables of thorough—going analysis of power and tend to avoid doing so where the need is not insistent.

L. Sullivan, Antitrust 192 (1977).

[40] If an association lacks market power, it is of course unlikely that serious anticompetitive effects will result from exclusions from membership. Thus, in *Associated Press, supra,* the Supreme Court indicated that an exclusive dealing arrangement between a reporter and his paper or between two papers in different cities would present quite different questions than the arrangement before it. 65 S.Ct. at 1422. *Cf.* *Northern Pacific Railway Co., supra,* 78 S.Ct. at 519 (analogous point regarding tying arrangements).

A significant proportion of the cases that we have found upholding the membership requirements of multiple listing services rest at least in part upon a finding that the service lacked the requisite market power. *See, e. g., Iowa ex rel. Miller v. Cedar Rapids Real Estate Board,* 1980-1 Trade Cases ¶ 63,012 (Iowa Dist.Ct. 1979); *Brown v. Indianapolis Board of Realtors,* 1977-1 Trade Cases ¶ 61,435 (S.D.Ind. 1977); *Blake v. H-F Group MLS,* 345 N.E.2d 18 (Ill.App.Ct.1976); *Grempler v. Multiple Listing Bureau,* 1970 Trade Cases ¶ 73,204 (Md.Ct.App. 1970).

[41] Professor Robert Bork styles restraints of this type "disguised naked boycotts." R. Bork, The Antitrust Paradox 335-337 (1978).

[42] One may expect that, in the case of most multiple listing services, the service will strive toward market dominance. As we have shown, the primary incentive to form a multiple listing service comes from the drive to overcome the market imperfections inherent in the real estate industry. These imperfections are overcome in direct proportion to the service's ability to attract sellers and brokers to bring their listings to it. Thus, at least in theoretical terms, the larger the service, the more effectively it may operate. *See* Note, *Arbitrary Exclusion from Multiple Listing: Common Law and Statutory Remedies,* 52 Cornell L.Q. 570 (1967). And, of course, the more the service strives toward this goal, the greater the danger of anticompetitive exclusions becomes. *Id.*

In this case, the facts reveal that RML has in fact undertaken the drive to market dominance. *See* note 46 *infra* and accompanying text.

[43] Analysis might be different, for example, in a situation where the market, before the formation of the listing service, was fragmented into a large number of small firms than in an instance where the market was divided evenly between one large firm, which stays out of the service, and a number of small firms.

[44] When these conditions are satisfied, the argument that formation of a new listing service remains a possibility is generally irrelevant. Where the existing service has already achieved significant market power, the formation of a separate competing service can only serve to perpetuate some degree of market imperfection. Moreover, "[t]he Act does not merely guarantee the right to create markets; it also ensures the right of entry to old ones." *Gamco, supra,* 194 F.2d at 487; *see* *American Federation of Tobacco Growers, supra,* 183 F.2d at 872.

[45] As in the case of the relevant market determination, *see* note 39 *supra,* we do not consider whether the record establishes this point conclusively, although the Government's evidence, as detailed in text, is strong. Since neither party has focused closely on the degree of RML's dominance in the market, this issue should be open to the parties on remand.

[46] *See* note 7 *supra.*

The Government introduced strong deposition testimony that the competing listing service initially went into eclipse and then, after having been revitalized, finally disbanded after RML members indicated that brokers who left the competing service would be admitted to RML. *See* Deposition of Earl Bowden at 36, 61; Deposition of Donald Watson at 51-53; 85-87.

[47] *See* Deposition of Henry Barbian at 27; Deposition of Beatrice Breaux at 20.

[48] *See* Deposition of Kaethey Earley at 70; Deposition of Earl Bowden at 26.

[49] The mode of analysis we outline here is quite similar to that first envisioned under the rule of reason by Judge Taft in his opinion in *United States v. Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). After identifying five classes of ancillary restraints upheld by the common law, he stated:

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.

. . . . .

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly.

Id. at 282.

[50] that a group of real estate brokers, through an association, exchanges listings and agrees to share commissions where one broker obtains a listing and another finds a buyer; this arrangement will reduce the incentives of members to provide listings to or to obtain them from non-members.

In [this hypothetical] the venture has as a likely consequence a withdrawal of trading opportunities from non-member competitors which may be useful to those competitors in their efforts to compete. If the venture is presently or potentially so powerful that loss of access will greatly reduce the competitive effectiveness of non-member firms, and if firms which want to enter are not permitted to do so on reasonable terms, elaborate analysis is not needed to support the conclusion that any gains in efficiency are outweighed by the anticompetitive effect; indeed, it may be suspected that the stifling effect on non-members may have been a purpose for the venture.

Id.

[51] Even if a rule survives this facial analysis, it may still be condemned upon full analysis under the rule of reason, when the court determines its actual effects in the marketplace. Moreover, an individual broker would still be allowed to challenge his exclusion under a valid rule which he alleges has been discriminatorily applied.

[52] Membership criteria for a multiple listing service present problems in this regard which are often distinct from those presented by those for a Board of Realtors. As we have already pointed out, a multiple listing service is directly involved in its members' commercial activities; its activities correspond directly with its members' buying and selling process. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 20 Colum.L. Rev. 1325, 1345-1346 (1970). Arbitrary exclusion from membership thus possesses serious anticompetitive potential. A Board of Realtors, on the other hand, may be less directly involved with its members' business and, therefore, the enforcement of membership criteria founded upon ethical and professional norms may have a less direct impact on competition. Since RML is not affiliated with a Board of Realtors, this case presents this distinction in its starkest form. The California Supreme Court has held in a very similar case that, while a Board of Relators may exclude nonmembers from access to many of its services, it cannot exclude licensed real estate brokers from access to the Board-sponsored multiple listing service. *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,901.

[53] one asserts, in support of its reasonableness, that a joint venture affords a significant potential for scale efficiencies not otherwise available, one is also asserting that the call of the venture to its participants is the rather insistent call of a potentially large increase in profits. It can then be argued that if the venturers really regard the venture as yielding significant efficiencies, they ought to be ready to proceed without the added inducement of a license to boycott nonmembers.

L. Sullivan, Antitrust 254-255 (1977) (footnote omitted).

[54] Indeed, it has been suggested that state licensing requirements for real estate brokers are themselves so stringent as to have serious anticompetitive effects. *See* Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum.L.Rev. 1325, 1351-1352 (1970).

[55] A corporation or partnership may be granted a license only if the stockholder or partner holding a controlling interest meets these criteria. *Id.*

[56] This section provides in full:

Where an applicant has been convicted of forgery, embezzlement, obtaining money under false pretenses, larceny, extortion, conspiracy to defraud, or other like offenses or offenses, or has been convicted of a felony or a crime involving moral turpitude, and has been convicted thereof in a court of competent jurisdiction of this or any other State, District or Territory of the United States, or of a foreign Country, such untrustworthiness of the applicant, and the conviction may, in itself, be a sufficient ground for refusal of a license.

[57] This additional study consists of either 60 in-class hours in a program approved by the Georgia Real Estate Commission or 15 credit hours in courses related to real estate in an accredited college or university. *Id.*

[58] Ga.Code Ann. § 84-1407 provides:

Whenever, in the judgment of the commission, any person has engaged in any acts or practices which constitute or will constitute a violation of this Chapter, the Attorney General may maintain an action in the name of the State of Georgia in the superior court of the county wherein such violation occurred to abate and temporarily and permanently enjoin such acts and practices and to enforce compliance with this Chapter. The plaintiff shall not be required to give any bond.

Ga.Code Ann. § 84-1408 provides:

The commission shall have the full power to regulate the issuance of licenses and to revoke or suspend licenses issued under the provisions of this Chapter and to censure licensees.

[59] "Unfair trade practices" include, but are not limited to,

(1) refusing, because of race, color, national origin or ethnic group, to show, sell or rent any real estate for sale or rent to prospective purchasers or renters;

(2) intentionally advertising material which is misleading or inaccurate or which in any way misrepresents any property, terms, values, policies or services of the business conducted;

(3) failing to account for and remitting any money coming into his possession belonging to others;

(4) commingling the money or other property of his principals with his own;

(5) failing to maintain and deposit in a separate, noninterest-bearing checking account all money received by said broker acting in said capacity, or as escrow agent or the temporary custodian of the funds of others, in a real estate transaction unless all parties having an interest in said funds have agreed otherwise in writing;

(6) accepting, giving or charging any undisclosed commission, rebate, direct profit or expenditures made for a principal;

(7) representing or attempting to represent a real estate broker, other than the broker holding his license, without the express knowledge and consent of the broker holding his license;

(8) accepting a commission or other valuable consideration by an associate broker or salesman from anyone other than the broker holding his license without the consent of the broker holding his license;

(9) acting in the dual capacity of agent and undisclosed principal in any transaction;

(10) guaranteeing or authorizing any person to guarantee future profits which may result from the resale of real property;

(11) placing a sign on any property offering it for sale or rent without the written consent of the owner or his authorized agent, and failing to remove such sign within 10 days after the expiration of listing;

(12) offering real estate for sale or lease with the knowledge and consent of the owner or his authorized agent or on terms other than those authorized by the owner or his authorized agent;

(13) inducing any party to a contract of sale or lease to break such contract for the purpose of substituting in lieu thereof a new contract with another principal;

(14) negotiating a sale, exchange or lease of real estate directly with an owner or lessor if he knows that such owner has a written outstanding contract in connection with such property granting an exclusive agency or an exclusive right to sell to another broker;

(15) accepting employment or compensation for appraising real estate contingent upon the reporting of a predetermined value or issuing an appraisal report on real estate in which he has an undisclosed interest;

(16) soliciting, selling or offering for sale real estate by offering free lots or conducting lotteries for the purpose of influencing a purchaser or prospective purchaser of real estate;

(17) paying a commission or compensation to any person for performing the services of a real estate broker, associate broker or real estate salesman who has not first secured his license under this Chapter or is not cooperating as a nonresident who is licensed in his state of residence: Provided, that nothing contained in the subsection or any other provision of this section shall be construed so as to prohibit the payment of earned commissions to the estate or heirs of a deceased real estate broker, associate broker, associate broker or real estate salesperson when such deceased real estate broker, associate broker or real estate salesperson has a valid Georgia real estate license in effect at the time the commission was earned and at the time of such person's death;

(18) failing to include a fixed date of expiration in any written listing agreement, and failing to leave a copy of said agreement with the principal;

(19) failing to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy or sell estate to the purchaser and to the seller;

(20) failure by a broker to deliver to the seller in every real estate transaction, at the time said transaction is consummated, a complete, detailed closing statement showing all of the receipts and disbursements handled by such broker for the seller, or failure to deliver to the buyer a complete statement showing all money received in said transaction from such buyer and how and for what the same was disbursed; the broker shall retain true copies of such statements in his file;

(21) making any substantial misrepresentations;

(22) acting for more than one party in a transaction without the knowledge of all parties for whom he acts;

(23) failure of an associate broker or salesman to place, as soon after receipt as is practicable possible, in the custody of the broker holding his license, any deposit money or other money for funds entrusted to him by any person dealing with him as the representative of his licensed broker;

(24) filing a listing contract or any document or instrument purporting to create a lien based on a listing contract for the purpose of casting a cloud upon the title to real estate when no valid claim under said listing contract exists;

(25) having demonstrated unworthiness or incompetency to act as a real estate broker of salesman in such manner as to safeguard the interest of the public; or any other conduct whether of the same or a different character than heretofore specified which constitutes dishonest dealing;

(26) obtaining an exclusive listing or sales contract from any owner knowing or having reason to believe that another broker has an exclusive listing on the property, unless he has written permission from the broker having the first exclusive listing;

(27) failing to keep for a period of three years a true and correct copy of all sales contracts, closing statements and other documents relating to real estate closings, or failing to produce documents at the reasonable request of the commission or any of its agents for their inspection;

(28) being or becoming a party to any falsification of any portion of any contract or other document involved in any real estate transaction.

Id.

[60] In *Barrows, supra,* 214 N.W.2d at 535, 540, the court gave little weight to the presence of state regulation of brokers where there was expert testimony indicating that the state regulatory scheme was inadequate to meet the needs of the multiple listing service. Similarly in *Cedar Rapids Real Estate Board, supra,* 1980-1 Trade Cases at 77,040, the court accorded minimal significance to the state regulatory scheme where evidence showed that the state's real estate commission regularly referred complaints to the local board for resolution.

[61] A court must presume that the state's legislative determination of what is necessary for public protection is correct and that the state adequately enforces its rules and regulations. Thus the burden of showing that it requires protection greater than that provided by the state or that the state does not adequately enforce its rules must rest upon the association.

[62] Rule 15, Article 5, of RML's Rules and Regulations provides:

It is the duty of the Realtor to protect the public against fraud, misrepresentation, and unethical practices in real estate transactions. He should endeavor to eliminate in his community any practices which could be damaging to the public or bring discredit to the real estate profession. The Realtor should assist the governmental agency charged with regulating the practices of brokers and salesmen in his state.

R.691a.

[63] Conceivably, RML might validly establish a rule barring admission of an applicant to membership while any charges brought against him with the Commission are pending. Upon the resolution of the charges favorably to the applicant, however, the justification for exclusion would expire.

[64] One of these members defined the criteria as requiring an applicant to be "a person of high moral turpitude," with a "high degree of judiciary capacity"; "I want to be sure, before I vote for him that he is a fellow that I don't mind coming into my house." He added that "a favorable credit report is just what it says it is[. I]t is a sort of a gauge of what sort of businessman this is that is asking to come in and associate with a majority of the brokers in Columbus ...." Deposition of Robert Rowe at 25-26. Another testified that the criteria required that an applicant be "doing business on a creditable scale" and conceded that "each person would have a different value and idea of what is a favorable business reputation." Deposition of George Adams at 37. *See* Deposition of Wendell Lewis at 19-20; Deposition of Charles French at 58.

[65] RML has contended in its brief on this appeal that its "favorable credit report and business reputation" standards are interpreted in accordance with the 8-point membership criteria of the National Association of Realtors (NAR). The NAR criteria define their "sound credit rating" standard in the following terms:

By "sound credit rating" is meant that the applicant is not involved in any pending bankruptcy or insolvency proceedings or otherwise involved in financial problems which could reasonably be expected to jeopardize those persons doing business with him. The evaluation of an applicant's credit rating shall be based on objective data and not on rumor or a general reputation for being "slow pay."

R.235. The NAR criteria define their "favorable business reputation in the community" standard as follows:

By "favorable reputation in the community" is meant that the applicant is not subject to any unresolved charges of civil rights violations, violations of consumer protection laws, violations of the real estate license laws, or other violations of law. It is not intended that "reputation" be evaluated on subjective impressions or hearsay.

R.234.

If RML did in fact adhere to these standards, a more difficult question would be presented. *See* note 63 *supra.* But as we have shown, neither the RML rules themselves nor the testimony of RML members support the contention that its rules incorporate these qualifications. Moreover, in light of the evidence mentioned, the district court's suggestion that RML's criteria are "*capable* of objective determination" (emphasis supplied) is irrelevant.

Nor can we attribute any great significance, in the circumstances, to RML's use of "special character financial" reports from the Equifax Credit Bureau. In addition to business and financial information, these reports contain personal information, such as an evaluation of the applicant's marital status, drinking habits and neighborhood, which the Board of Directors considers in evaluating an applicant's fitness to be an RML member. Deposition of Betty Meroney at 95-96, 106-107, 166-167. Further, RML members are allowed to supply any additional information they personally possess about the applicant to the Board for its consideration. *Id.* at 167-169, RML does not seek to verify any of this information with the applicant himself, nor does it notify the applicant of the reasons for his rejection. *Id.* at 169-170; R.701-703. Procedures of this type cannot cure the subjectivity inherent in the standards themselves. *Cf. Hatley, supra,* 552 F.2d at 653.

[66] It has been suggested that in some cases the association cannot define its membership criteria in objective terms. For example, courts have pointed out that it may be impossible to establish fully objective measures of an individual's ability to play golf in a competitive manner, *see Deesen, supra,* 358 F.2d at 167 or of what constitutes a quarter horse. *See Hatley, supra,* 552 F.2d at 652-653. In this case, however, it is clear that RML can more objectively define its membership criteria than it has done in its present rules. The standards adopted by the NAR establish this point beyond cavil. *See* note 65 *supra.* In light of Georgia's regulatory scheme and the danger of anticompetitive exclusions, it is incumbent upon RML to define its criteria with more particularity.

[67] Our conclusion that these criteria are not narrowly tailored to serve any legitimate goal of RML is the only reasonable inference from the undisputed facts, as our analysis demonstrates. We leave open on remand the questions of market power and state preemption of this area of regulation.

[68] Georgia law neither requires, nor permits, the Georgia Real Estate Commission to consider a broker's office hours in granting or refusing a license or in any of its other regulatory activities. *See O'Neal v. Georgia Real Estate Commission,* 129 Ga.App. 211, 199 S.E.2d 362 (1973). For this reason and also because RML's attempted justifications are based on needs peculiar to a multiple listing service, we have no question of state preemption of this area.

[69] RML has not argued, nor could it do so successfully, that this requirement is justified by reference to its need to insure the competence and responsibility of its members. The exclusion of brokers who do not maintain customary office hours on the theory that it promotes this goal would clearly be a response in excess of need. *See Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,902.

In addition, the district court's conclusion that this rule was justified because it prevented the excluded brokers from selling or giving away the confidential information supplied by RML is simply erroneous. There is no reason to conclude that the class of brokers excluded by this rule is more likely to commit these acts than is any other group. Moreover, RML has a specific rule prohibiting the disclosure of such information. *See* note 8 *supra.* On this appeal, RML has not defended the rule on the grounds asserted by the district court.

[70] For example, RML's Rule 12(1) provides in pertinent part:

All offers must be submitted to the listing Broker for presentation to the seller. Under no circumstances is the selling Broker or his agents permitted to make direct contact with the seller without permission from the listing Broker. The selling Broker or agent normally may accompany the listing Broker to present the offer as a silent party. Only by invitation of the listing Broker may the selling Broker speak during the time the offer is being submitted to the seller. The final authority whether the selling Broker accompany the listing Broker rests exclusively with the listing Broker.

R.690.

[71] RML's lockbox system, whereby a lockbox containing a house key is affixed to the listed property and every member can obtain a master key to the lockbox, alleviates some of the burdens of servicing a listing. By gaining access to the house key in this manner, the selling broker can show the property without the presence or consent of the listing broker.

[72] RML might, for example, require that all members furnish a set of phone numbers at which they can be reached and might establish precise sanctions for brokers who fail to service their listings in a reasonable manner. In fact, RML already has some rules of this type, the violation of which could be sanctioned under existing procedures. Rule 12(1) provides in pertinent part:

The listing Broker shall see that any offer is presented promptly to the seller for his consideration. If the listing agent or the listing Broker is unavailable to present the offer within a reasonable time, then the listing Broker should have an established procedure who in his firm will present offers. The offer must be presented to the seller within a reasonable time. Under no circumstances will the selling Broker or his agent without express permission from listing Broker or his agent be allowed to make direct contact with the seller.

R.690.

[73] The fact that it may be more socially convenient for a majority of RML's members to conduct all their business during customary working hours does not serve to justify RML's practices in competitive terms. *See* L. Sullivan, Anti-trust 178 179, 186-189 (1977). As we have shown, the Sherman Act looks only to a restraint's effect upon competition. In *Chicago Board of Trade, supra,* where the Supreme Court upheld a trade exchange rule prohibiting the making of prices after the close of established trading hours, the Court found that the practice promoted competition by making the day market more perfect. 38 S.Ct. at 244-245. *See BMI, supra,* 99 S.Ct. at 1564 n.41; *National Society of Professional Engineers, supra,* 98 S.Ct. at 1366 n.19. Here, by contrast, the market is "made" when a listing is submitted to RML and circulated to its members. As long as RML members reasonably service their listings, the hours they keep is a matter best left to their own personal preference.

[74] The district court also construed this rule to allow these results. R.1734.

[75] The minutes of RML's July 9, 1976, Board of Directors' Meeting, for example, indicate the RML erroneously believed that the Georgia Real Estate Commission would either refuse a license to, or would revoke the license of, a broker who intended to practice on less than a full time basis. Those same minutes indicate that RML's attorney advised RML against signing a proposed consent decree because it eliminated the customary hours rule and would permit "a serviceman in the performance of full time duty [to] be allowed membership in RML, just as any other broker ...." R.705. *See* Deposition of Earl Bowden at 98-99; Deposition of Donald Watson at 128-134; Deposition of Kaethey Earley at 48-49; Deposition of Jane Wright at 35-36; Deposition of Ezekial Carter at 46-47; Deposition of Henry Barbian at 33-34.

[76] *See* pp. 1375-1376 *supra.*

[77] Our conclusion that RML's "customary hours" rule is overly broad is the only reasonable inference from the undisputed facts; thus, assuming that RML possesses the requisite market power, the rule should be stricken.

[78] RML's present price for a share of stock is $1,000. As noted at p. 1358 *supra,* the charge had risen to $3,000 per share before negotiations directed toward the settlement of this lawsuit began.

[79] RML has not directly met this argument; rather, it has contended only that the $1,000 charge is reasonable. As we point out *infra,* this argument is not responsive to the Government's contention.

It is also important to note in this context that, while RML has attempted to show that many of its membership criteria are adapted from NAR criteria, it has refused to adopt the NAR's position regarding entrance fees to a multiple listing service. NAR's Interpretation No. 29 provides that an entrance fee for participation in a multiple listing service which is in excess of the approximate cost, including the accumulation and maintenance of reasonable reserves, of developing, maintaining or improving the organization as a going concern, is an inequitable limitation on membership. Exhibit 3 to Deposition of Charles Clark.

[80] RML currently charges members for some of the services it renders, such as the distribution of listing books, on the basis of the cost of the services to RML. R.697a. The Government does not object to this practice.

[81] Originally, the Terminal Association's fees were left completely to the owner's discretion. *Id.* at 511. Later, the by-laws were amended to set fees at such a level as to produce only enough revenue to cover fixed charges and operating and maintenance expenses. *Id.* at 512.

[82] *See* note 38 *supra.*

[83] The Court also required the abolition of certain anticompetitive practices of the association not here relevant. *See id.* at 516.

[84] Contrary to both RML's contention and the district court's finding, limiting the membership fee to the actual cost of admission, plus a *pro rata* contribution toward the maintenance and development of RML, would not undermine the investment of current RML members. All members would contribute to preserve the viability of RML under a fee schedule like the one outlined here. Members who do not pay a *pro rata* share of the assets, however, are not entitled to equal distribution of the assets in the event of dissolution. Thus, the investment of current members would be protected. *See St. Louis Terminal Railroad Ass'n, supra,* 32 S.Ct. at 511.

[85] This type of fee schedule is essentially that contemplated by Interpretation No. 29 of the NAR. *See* note 79 *supra.*

[86] Again, assuming that RML has the requisite market power, this rule should be voided on its face. The market power issue is open on remand, as we have indicated.

Because we conclude that the district court erred in approving RML's stock purchase rule, we do not reach the question whether the current $1,000 charge is either a "just and reasonable" price for an ownership share or a reasonable charge for membership. We do note, however, that there is conflicting evidence on these points.

[87] At one time RML required an 85% affirmative vote for admission. This requirement was later lowered to a simple majority before the present admission criteria were adopted. *See* p. 1358 *supra.*

[88] It is undisputed that RML abandoned all these practices under threat of suit by the Government and in order to avoid this litigation. After doing so, RML submitted to the district court an affidavit indicating that it had passed a resolution stating that it had no intention to resume these practices. The district court relied on this action in holding that these aspects of the case were moot.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *Plaintiff*, v. EASTERN MUSHROOM MARKETING COOPERATIVE, INC. *Defendant*.	)	CIVIL CASE NO.: 04-5829 JUDGE DATE STAMP:

ENTERED SEP 12 2005 CLERK OF COURT

FILED SEP 09 2005

FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on December 16, 2004, the Plaintiff and the Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, the Defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain nullification of certain deed restrictions that limit mushroom production;

AND WHEREAS, Plaintiff requires the Defendant to nullify the deed restrictions for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, the Defendant has represented to the United States that it will file expeditiously the documents necessary to nullify the legal effect of the deed restrictions in each jurisdiction where the Defendant has filed any such deed restrictions previously and that the Defendant will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the requirements set forth below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against the Defendant under Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

II. Definitions

As used in this Final Judgment:

A. "EMMC" means the Eastern Mushroom Marketing Cooperative, Inc., the Defendant in this case, a Pennsylvania corporation with its headquarters in Kennett Square, Pennsylvania, its successors and assigns, and its subsidiaries, affiliates, members, divisions, groups, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Mushroom Deed Restrictions" means any restriction or limitation contained in any document filed in the land records of any jurisdiction that, with respect to any real property, limits the (1) commercial growing or cultivation of any types, varieties or species of mushrooms, mushroom spawn or other fungi; (2) packaging, processing, freezing, storing, handling, selling, or marketing of any types, varieties or species of mushrooms, mushroom spawn or other fungi; (3) production of Phase I, Phase II or Phase III mushroom compost for on-site or off-site use; or (4) any other activity related to the production, processing or sale of mushrooms, mushroom spawn or other fungi, whether such production, processing or sales shall occur on or off such real property.

C. "Nullifying Documents" means such documents as are necessary to nullify the legal effect of any Mushroom Deed Restrictions filed by the EMMC previously on 1) the properties the Defendant purchased in the name of the EMMC and thereafter resold; or 2) properties in which the EMMC purchased a leasehold interest.

III. Applicability

This Final Judgment applies to the EMMC, as defined above, and all other persons in active concert or participation with the EMMC who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Nullification of Mushroom Deed Restrictions

A. The Defendant is ordered and directed, within thirty (30) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to file Nullifying Documents in each jurisdiction where the Defendant has filed any Mushroom Deed Restrictions. The Defendant shall use its best efforts to file the required Nullifying Documents as expeditiously as possible.

V. Prohibited Activity

The Defendant is enjoined and restrained from creating, filing, or enforcing any Mushroom Deed

Restrictions with respect to any real property in which the Defendant has an ownership or leasehold interest of any kind.

VI. Affidavit and Copies

A. Within ten (10) calendar days of the filing of all Nullifying Documents required by this Final Judgment, the Defendant shall provide to the United States and the Court, an Affidavit providing affirmative notice that all the required Nullifying Documents have been filed in all required jurisdictions in full compliance with the terms of this Final Judgment.

B. Within ten (10) calendar days after any Nullifying Documents have been filed in each jurisdiction, the Defendant shall provide to the United States a copy of all Nullifying Documents filed in such jurisdiction.

VII. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the Defendant, be permitted:

1. Access during the defendant's office hours to inspect and copy, or at the United States' option, to require the Defendant to provide copies of all books, ledgers, accounts, records, and documents in the possession, custody, or control of the Defendant, relating to any

matters contained in this Final Judgment; and

2. To interview, either informally or on the record, the Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by the Defendant.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, the Defendant shall submit written reports or interrogatory responses, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by the Defendant to the United States, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and the Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give the Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. Public Interest Determination

Entry of this Final Judgment is in the public interest.

X. Term

This Final Judgment shall expire ten years from the date of its entry.

Dated: 9/9/05

Court approval subject to procedures
of Antitrust Procedures and Penalties
Act, 15 U.S.C. § 16

United States District Judge

RR

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

UNITED STATES OF AMERICA Plaintiff, v. **NATIONAL ASSOCIATION OF REALTORS®** Defendant.	Civil Action No. 05 C 5140 Judge Kennelly

MK 11-18-08

[~~AMENDED PROPOSED~~] FINAL JUDGMENT

WHEREAS, Plaintiff, the United States of America, filed its Amended Complaint on October 4, 2005, alleging that Defendant National Association of Realtors® ("NAR") adopted policies that restrain competition from innovative real estate brokers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact, and without this Final Judgment constituting any evidence against, or any admission by, any party regarding any issue of fact or law;

WHEREAS, Defendant has not admitted and does not admit either the allegations set forth in the Amended Complaint or any liability or wrongdoing;

WHEREAS, the United States does not allege that Defendant's Internet Data Exchange (IDX) Policy in its current form violates the antitrust laws; and

WHEREAS, the United States requires Defendant to agree to certain procedures and prohibitions for the purpose of preventing the loss of competition alleged in the Complaint;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the Parties and subject matter of this action. The Complaint states a claim upon which relief may be granted against Defendant under Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

II. DEFINITIONS

As used in this Final Judgment:

A. "Broker" means a Person licensed by a state to provide services to a buyer or seller in connection with a real estate transaction. The term includes any Person who possesses a Broker's license and any agent or sales associate who is affiliated with such a Broker.

B. "Covered Entity" means each Member Board that, at any time prior to the expiration of this Final Judgment, operates a multiple listing service and each multiple listing service that, at any time prior to the expiration of this Final Judgment, is exclusively owned by one or more Member Boards or is otherwise obligated to comply with NAR mandatory multiple listing service policies.

C. "Customer" means a seller client of a Broker or a Person who has expressed to a Broker an interest in purchasing residential real property and who has described the type, features, or location of the property in which he or she has an interest, entitling the Broker to Provide the Customer multiple listing service ("MLS") listing information by any method (*e.g.*, by hand, mail, facsimile, electronic mail, or display on a VOW).

D. "Final Judgment" includes the Modified VOW Policy attached as Exhibit A and the definition of MLS Participant and accompanying Note attached as Exhibit B.

E. "ILD Policy" means the "ILD (Internet Listing Display) Policy" that NAR adopted on or about August 31, 2005, and any amendments thereto.

F. "Including" means including, but not limited to.

G. "Listing Information" means all records of residential properties (and any information relating to those properties) stored or maintained by a multiple listing service.

H. "Member Board" means any state or local Board of Realtors® or Association of Realtors®, including any city, county, inter-county, or inter-state Board or Association, and any multiple listing service owned by, or affiliated with, any such Board of Realtors® or Association of Realtors®.

I. "Modified VOW Policy" means the policy attached to this Final Judgment as Exhibit A.

J. "NAR" means the National Association of Realtors®, its predecessors, successors, divisions, subsidiaries, affiliates, partnerships, and joint ventures and all directors, officers, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any Person in which there is or has been partial (twenty percent or more) or total ownership or control between NAR and any other Person.

K. "Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

L. "Provide" means to deliver, display, disseminate, convey, or reproduce.

M. "Rule" means any rule, model rule, ethical rule, bylaw, policy, standard, or guideline and any interpretation of any Rule issued or approved by NAR, whether or not the final implementation date of any such Rule has passed.

N. "VOW" or "virtual office website" means a website, or feature of a website, operated by a Broker or for a Broker by another Person through which the Broker is capable of providing real estate brokerage services to consumers with whom the Broker has first established a Broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Broker's oversight, supervision, and accountability.

O. "VOW Policy" means the "Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ('Virtual Office Websites')," adopted by NAR on or about May 17, 2003, and any amendments thereto.

P. The terms "and" and "or" have both conjunctive and disjunctive meanings.

III. APPLICABILITY

This Final Judgment applies to NAR and all other Persons in active concert or participation with NAR who have received actual notice of this Final Judgment. A Member Board shall not be deemed to be in active concert with NAR solely as a consequence of the Member Board's receipt of actual notice of this Final Judgment and its affiliation with or membership in NAR and its involvement in regular activities associated with its affiliation with or membership in NAR (*e.g.*, coverage under a NAR insurance policy, attendance at NAR meetings or conventions, or review of Member Board policies by NAR).

IV. PROHIBITED CONDUCT

Subject to the provisions of Sections V and VI of this Final Judgment, the Modified VOW Policy (Exhibit A), and the definition of MLS Participant and accompanying Note (Exhibit B), NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly

A. prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

B. unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

C. prohibits, restricts, or impedes the referral of Customers whose identities are obtained from a VOW by a Broker who uses a VOW to any other Person, or establishes the price of any such referral;

D. imposes fees or costs upon any Broker who operates a VOW or upon any Person who operates a VOW for any Broker that exceed the reasonably estimated actual costs incurred by a Member Board in providing Listing Information to the Broker or Person operating the VOW or in performing any other activities relating to the VOW, or discriminates in such VOW-related fees or costs between those imposed upon a Broker who operates a VOW and those imposed upon a Person who operates a VOW for a Broker, unless the MLS incurs greater costs in providing a service to a Person who operates a VOW for a Broker than it incurs in providing the same service to the Broker; or

E. is inconsistent with the Modified VOW Policy.

V. REQUIRED CONDUCT

A. Within five business days after entry of this Final Judgment, NAR shall repeal the ILD Policy and direct each Member Board that adopted Rules implementing the ILD Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

B. Within five business days after entry of this Final Judgment, NAR shall direct Member Boards that adopted Rules implementing the VOW Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

C. Within five business days after entry of this Final Judgment, NAR shall adopt the Modified VOW Policy. NAR shall not change the Modified VOW Policy without either obtaining advance written approval by the United States Department of Justice, Antitrust Division ("DOJ") or an order of the Court pursuant to Section VIII of this Final Judgment authorizing the proposed modification.

D. Within five business days after entry of this Final Judgment, NAR shall direct each Covered Entity to adopt the Modified VOW Policy within ninety days after entry of this Final Judgment, and to thereafter maintain, act consistently with, and enforce Rules implementing the Modified VOW Policy. NAR shall simultaneously direct Covered Entities, beginning upon receipt of the directive, not to adopt, maintain, or enforce any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs).

E. If NAR determines that a Covered Entity has not timely adopted or maintained, acted consistently with, or enforced Rules implementing the Modified VOW Policy, it shall, within thirty days of such determination, direct in writing that the Covered Entity do so. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Covered Entity for as long as that Covered Entity refuses to adopt, maintain, act consistently with, and enforce rules implementing the Modified VOW Policy. NAR shall also notify the DOJ of the identity of that Covered Entity and the Modified VOW Policy provisions it refused to adopt, maintain, act consistently with, or enforce. For purposes of this provision, a failure of a Covered Entity to adopt, maintain, act consistently with, or enforce Rules implementing the Modified VOW Policy within ninety days of a written directive to that Covered Entity from NAR shall constitute a refusal by the Covered Entity to do so.

F. If NAR determines that a Member Board has adopted, maintained, or enforced any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs), it shall, within thirty days of such determination, direct in writing that the Member Board rescind and cease to enforce that Rule or practice. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Member Board for as long as that Member Board refuses to rescind and cease to enforce that Rule or practice. NAR shall also notify the DOJ of the identity of that Member Board and the Rule or practice it refused to rescind and cease to enforce. For purposes of this provision, a Member Board's failure to rescind and cease to enforce the Rule or practice within ninety days of a written directive from NAR shall constitute a refusal by the Member board to do so.

G. Within thirty days of entry of this Final Judgment, NAR shall designate an Antitrust Compliance Officer with responsibility for educating Member Boards about the antitrust laws and for achieving full compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

(1) supervising NAR's review of Rules of NAR's Member Boards for compliance with this Final Judgment and the Modified VOW Policy;

(2) maintaining copies of any communications with any Person containing allegations of any Member Board's (i) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (ii) failure to enforce any Rules implementing the Modified VOW Policy;

(3) reporting to the United States 180 days after entry of this Final Judgment and again on the first anniversary of the entry of this Final Judgment, the identity of each Covered Entity that has not adopted Rules implementing the Modified VOW Policy;

(4) ensuring that each of NAR's Member Boards that owns or operates a multiple listing service are provided briefing materials, within ninety days of the entry of this Final Judgment, on the meaning and requirements of the Modified VOW Policy and this Final Judgment; and

(5) holding an annual program for NAR Member Boards and their counsel that includes a discussion of the antitrust laws (as applied to such Member Boards) and this Final Judgment.

H. NAR shall maintain and shall furnish to the DOJ on a quarterly basis (beginning ninety days after entry of this Final Judgment) copies of any communications with any Person

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containing allegations of any Member's Board's (1) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (2) failure to enforce any Rules implementing the Modified VOW Policy.

I. Within five business days after entry of this Final Judgment, NAR shall provide, in a prominent size and location on its website (www.realtor.org) a hyperlink to a webpage on which NAR has published copies of

(1) this Final Judgment;

(2) a notification that Member Boards must repeal any Rules implementing the ILD and VOW Policies (in accordance with Sections V.A and V.B of this Final Judgment); and

(3) a copy of the Modified VOW Policy.

NAR shall also publish each of the three above items in the first issue of Realtor® Magazine scheduled for publication after the date of entry of this Final Judgment.

VI. PERMITTED CONDUCT

A. Subject to Section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting and maintaining the definition of MLS Participant and the accompanying Note, together attached as Exhibit B. However, NAR shall direct each Member Board not to suspend or expel any Broker from multiple listing service membership or participation for reasons of the Broker's then-failure to qualify for membership or participation under the definition of MLS Participant and the accompanying Note, together attached as Exhibit B, until May 27, 2009.

B. Notwithstanding any of the above provisions, and subject to Section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting, maintaining, or enforcing Rules that are generally applicable on their face and that do not, in their application, unreasonably restrict any method of delivery of Listing Information to Customers.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the DOJ, including consultants and other Persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to NAR, be permitted:

(1) access during NAR's office hours to inspect and copy, or at the option of the United States, to require NAR to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of NAR, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, NAR's officers, employees, or agents, who may have their individual counsel and counsel for NAR present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by NAR. NAR may, however, prevent the interviewee from divulging matters protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, NAR shall submit written reports or response to written interrogatories, under oath if requested, relating to its compliance with any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any Person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by NAR to the United States, NAR marks as confidential any pertinent page of such material on the grounds that such page contains information as to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, then the United States shall give NAR ten calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards.

X. EXPIRATION OF FINAL JUDGMENT

This Final Judgment shall expire ten years from the date of its entry.

XI. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: 11-18-08

Court approval subject to procedures
of Antitrust Procedures and Penalties
Act, 15 U.S.C. § 16

Matthew F. Kennelly
United States District Judge

EXHIBIT A

Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ("Virtual Office Websites")

I. <u>Definitions and Scope of Policy.</u>

1. For purposes of this Policy, the term Virtual Office Website ("VOW") refers to a Participant's Internet website, or a feature of a Participant's Internet website, through which the Participant is capable of providing real estate brokerage services to consumers with whom the Participant has first established a broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Participant's oversight, supervision, and accountability.

a. A Participant may designate an Affiliated VOW Partner ("AVP") to operate a VOW on behalf of the Participant, subject to the Participant's supervision and accountability and the terms of this Policy.

b. A non-principal broker or sales licensee, affiliated with a Participant, may, with the Participant's consent, operate a VOW or have a VOW operated on its behalf by an AVP. Such a VOW is subject to the Participant's supervision and accountability and the terms of this Policy.

c. Each use of the term "Participant" in this Policy shall also include a Participant's non-principal brokers and sales licensees (with the exception of references in this section to the "Participant's consent" and the "Participant's supervision and accountability," and in section III.10.a, below, to the "Participant acknowledges"). Each reference to "VOW" or "VOWs" herein refers to all VOWs, whether operated by a Participant, by a non-principal broker or sales licensee, or by an AVP.

2. The right to display listings in response to consumer searches is limited to display of MLS data supplied by the MLS(s) in which the Participant has participatory rights. This does not preclude a firm with offices participating in different MLSs from operating a master website with links to such offices' VOWs.

3. Participants' Internet websites, including those operated for Participants by AVPs, may also provide other features, information, or services in addition to VOWs (including the Internet Data Exchange ("IDX") function).

4. The display of listing information on a VOW does not require separate permission from the Participant whose listings will be available on the VOW.

5. Except as permitted in Sections III and IV, MLSs may not adopt rules or regulations that conflict with this Policy or that otherwise restrict the operation of VOWs by Participants.

II. Policies Applicable to Participants' VOWs.

1. A Participant may provide brokerage services via a VOW that include making MLS active listing data available, but only to consumers with whom the Participant has first established a lawful consumer-broker relationship, including completion of all actions required by state law in connection with providing real estate brokerage services to clients and customers (hereinafter "Registrants"). Such actions shall include, but are not limited to, satisfying all applicable agency, non-agency, and other disclosure obligations, and execution of any required agreement(s).

2. A Participant's VOW must obtain the identity of each Registrant and obtain each Registrant's agreement to Terms of Use of the VOW, as follows:

a. A Registrant must provide his or her name and a valid email address. The Participant must send an email to the address provided by the Registrant confirming that the Registrant has agreed to the Terms of Use (described in subsection c below). The Registrant may be permitted to access the VOW only after the Participant has verified that the email address provided is valid and that Registrant received the Terms of Use confirmation.

b. The Registrant must supply a user name and a password, the combination of which must be different from those of all other Registrants on the VOW, before being permitted to search and retrieve information from the MLS database via the VOW. The user name and password may be established by the Registrant or may be supplied by the Participant, at the option of the Participant. An email address may be associated with only one user name and password. The Registrant's password and access must expire on a date certain but may be renewed. The Participant must at all times maintain a record of the name and email address supplied by the Registrant, and the username and current password of each Registrant. Such records must be kept for not less than 180 days after the expiration of the validity of the Registrant's password. If the MLS has reason to believe that a Participant's VOW has caused or permitted a breach in the security of the data or a violation of MLS rules related to use by one or more Registrants, the Participant shall, upon request, provide to the MLS a copy of the record of the name, email address, user name, current password, and audit trail, if required, of any Registrant identified by the MLS to be suspected of involvement in the violation.

c. The Registrant must be required affirmatively to express agreement to a "Terms of Use" provision that requires the Registrant to open and review an agreement that provides at least the following:

i. That the Registrant acknowledges entering into a lawful consumer-broker relationship with the Participant;

ii. That all data obtained from the VOW is intended only for the Registrant's personal, non-commercial use;

iii. That the Registrant has a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through the VOW;

iv. That the Registrant will not copy, redistribute, or retransmit any of the data or information provided, except in connection with the Registrant's consideration of the purchase or sale of an individual property;

v. That the Registrant acknowledges the MLS's ownership of, and the validity of the MLS's copyright in, the MLS database.

After the Registrant has opened for viewing the Terms of Use agreement, a "mouse click" is sufficient to acknowledge agreement to those terms. The Terms of Use Agreement may not impose a financial obligation on the Registrant or create any representation agreement between the Registrant and the Participant.

The Terms of Use agreement shall also expressly authorize the MLS, and other MLS Participants or their duly authorized representatives, to access the VOW for the purposes of verifying compliance with MLS rules and monitoring display of Participants' listings by the VOW.

d. An agreement entered into at any time between the Participant and Registrant imposing a financial obligation on the Registrant or creating representation of the Registrant by the Participant must be established separately from the Terms of Use, must be prominently labeled as such, and may not be accepted solely by mouse click.

3. A Participant's VOW must prominently display an e-mail address, telephone number, or specific identification of another mode of communication (e.g., live chat) by which a consumer can contact the Participant to ask questions, or get more information, about properties displayed on the VOW. The Participant, or a non-principal broker or sales licensee licensed with the Participant, must be willing and able to respond knowledgeably to inquiries from Registrants about properties within the market area served by that Participant and displayed on the VOW.

4. A Participant's VOW must protect the MLS data from misappropriation by employing reasonable efforts to monitor for and prevent "scraping" or other unauthorized accessing, reproduction, or use of the MLS database.

5. A Participant's VOW must comply with the following additional requirements:

a. No VOW shall display the listing or property address of any seller who has affirmatively directed its listing broker to withhold its listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery

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mechanisms, such as email, fax, or otherwise, the listing or property address of a seller who has determined not to have the listing or address for its property displayed on the Internet.

b. A Participant who lists a property for a seller who has elected not to have the property listing or the property address displayed on the Internet shall cause the seller to execute a document that conforms to the form attached to this Policy as Appendix A. The Participant shall retain such forms for at least one year from the date they are signed.

c. With respect to any VOW that

(i) allows third-parties to write comments or reviews about particular listings or displays a hyperlink to such comments or reviews in immediate conjunction with particular listings, or
(ii) displays an automated estimate of the market value of the listing (or hyperlink to such estimate) in immediate conjunction with the listing,

the VOW shall disable or discontinue either or both of those features as to the seller's listing at the request of the seller. The listing broker or agent shall communicate to the MLS that the seller has elected to have one or both of these features disabled or discontinued on all Participants' websites. Except for the foregoing and subject to subparagraph (d), a Participant's VOW may communicate the Participant's professional judgment concerning any listing. Nothing shall prevent a VOW from notifying its customers that a particular feature has been disabled "at the request of the seller."

d. A VOW shall maintain a means (e.g., e-mail address, telephone number) to receive comments about the accuracy of any data or information that is added by or on behalf of the VOW operator beyond that supplied by the MLS and that relates to a specific property displayed on the VOW. The VOW operator shall correct or remove any false data or information relating to a specific property upon receipt of a communication from the listing broker or listing agent for that property explaining why the data or information is false. However, the VOW operator shall not be obligated to remove or correct any data or information that simply reflects good faith opinion, advice, or professional judgment.

e. Each VOW shall refresh MLS data available on the VOW not less frequently than every 3 days.

f. Except as provided elsewhere in this Policy or in MLS rules and regulations, no portion of the MLS database may be distributed, provided, or made accessible to any person or entity.

g. Every VOW must display a privacy Policy that informs Registrants of the ways in which information obtained from them will be used.

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h. A VOW may exclude listings from display based only on objective criteria, including, but not limited to, factors such as geography, list price, type of property, cooperative compensation offered by listing broker, or whether the listing broker is a Realtor®.

6. A Participant who intends to operate a VOW must notify the MLS of its intention to establish a VOW and must make the VOW readily accessible to the MLS and to all MLS Participants for purposes of verifying compliance with this Policy and any other applicable MLS rules or policies.

7. A Participant may operate more than one VOW itself or through an AVP. A Participant who operates a VOW itself shall not be precluded from also operating VOWs in conjunction with AVPs.

III. <u>Policies Applicable to Multiple Listing Services.</u>

1. A Multiple Listing Service shall permit MLS Participants to operate VOWs, or to have VOWs operated for them by AVPs, subject to the requirements of state law and this Policy.

2. An MLS shall, if requested by a Participant, provide basic "downloading" of all MLS non-confidential listing data, including without limitation address fields, listings types, photographs, and links to virtual tours. Confidential data includes only that which Participants are prohibited from providing to customers orally and by all other delivery mechanisms. They include fields containing the information described in paragraph IV(1) of this Policy, provided that sold data (i.e., listing information relating to properties that have sold) shall be deemed confidential and withheld from a download only if the actual sales prices of completed transactions are not accessible from public records. For purposes of this Policy, "downloading" means electronic transmission of data from MLS servers to a Participant's or AVP's server on a persistent basis. An MLS may also offer a transient download. In such case, it shall also, if requested, provide a persistent download, provided that it may impose on users of such download the approximate additional costs incurred by it to do so.

3. This Policy does not require an MLS to establish publicly accessible sites displaying Participants' listings.

4. If an MLS provides a VOW-specific feed, that feed must include all of the non-confidential data included in the feed described in paragraph 2 above except for listings or property addresses of sellers who have elected not to have their listings or addresses displayed on the Internet.

5. An MLS may pass on to those Participants who will download listing information the reasonably estimated costs incurred by the MLS in adding or enhancing its "downloading" capacity to enable such Participants to operate VOWs.

6. An MLS may require that Participants (1) utilize appropriate security protection, such as firewalls, as long as such requirement does not impose security obligations greater than those

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employed concurrently by the MLS, and/or (2) maintain an audit trail of Registrants' activity on the VOW and make that information available to the MLS if the MLS has reason to believe that any VOW has caused or permitted a breach in the security of the data or a violation of applicable MLS rules.

7. An MLS may not prohibit or regulate display of advertising or the identification of entities on VOWs ("branding" or "co-branding"), except to prohibit deceptive or misleading advertising or co-branding. For purposes of this provision, co-branding will be presumed not to be deceptive or misleading if the Participant's logo and contact information (or that of at least one Participant, in the case of a VOW established and operated by or for more than one Participant) is displayed in immediate conjunction with that of every other party, and the logo and contact information of all Participants displayed on the VOW is as large as the logo of the AVP and larger than that of any third party.

8. Except as provided in this Policy, an MLS may not prohibit Participants from enhancing their VOWs by providing information obtained from sources other than the MLS, additional technological services (such as mapping functionality), or information derived from non-confidential MLS data (such as an estimated monthly payment derived from the listed price), or regulate the use or display of such information or technological services on any VOW.

9. Except as provided in generally applicable rules or policies (such as the Realtor® Code of Ethics), an MLS may not restrict the format of data display on a VOW or regulate the appearance of VOWs.

10. Subject to the provisions below, an MLS shall make MLS listing data available to an AVP for the exclusive purpose of operating a VOW on behalf of a Participant. An MLS shall make MLS listing data available to an AVP under the same terms and conditions as those applicable to Participants. No AVP has independent participation rights in the MLS by virtue of its right to receive data on behalf of a Participant, or the right to use MLS data except in connection with operation of a VOW for a Participant. AVP access to MLS data is derivative of the rights of the Participant on whose behalf the AVP is downloading data.

a. A Participant, non-principal broker or sales licensee, or AVP may establish the AVP's right to receive and use MLS data by providing to the MLS a writing in which the Participant acknowledges its or its non-principal broker's or sales licensee's selection of the AVP to operate a VOW on its behalf.

b. An MLS may not charge an AVP, or a Participant on whose behalf an AVP operates a VOW, more than a Participant that chooses to operate a VOW itself (including any fees or costs associated with a license to receive MLS data, as described in (g), below), except to the extent that the MLS incurs greater costs in providing listing data to the AVP than the MLS incurs in providing listing data to a Participant.

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c. An MLS may not place data security requirements or restrictions on use of MLS listing data by an AVP that are not also imposed on Participants.

d. An MLS must permit an AVP to download listing information in the same manner (e.g., via a RETS feed or via an FTP download), at the same times and with the same frequency that the MLS permits Participants to download listing information.

e. An MLS may not refuse to deal directly with an AVP in order to resolve technical problems with the data feed. However, the MLS may require that the Participant on whose behalf the AVP is operating the VOW participate in such communications if the MLS reasonably believes that the involvement of the Participant would be helpful in order to resolve the problem.

f. An MLS may not condition an AVP's access to a data feed on the financial terms on which the AVP provides the site for the Participant.

g. An MLS may require Participants and AVPs to execute license or similar agreements sufficient to ensure that Participants and AVPs understand and agree that data provided by the MLS may be used only to establish and operate a VOW on behalf of the Participant and not for any other purpose.

h. An MLS may not (i) prohibit an AVP from operating VOWs on behalf of more than one Participant, and several Participants may designate an AVP to operate a single VOW for them collectively, (ii) limit the number of entities that Participants may designate as AVPs for purposes of operating VOWs, or (iii) prohibit Participants from designating particular entities as AVPs except that, if an AVP's access has been suspended or terminated by an MLS, that MLS may prevent an entity from being designated an AVP by another Participant during the period of the AVP's suspension or termination.

i. Except as stated below, an MLS may not suspend or terminate an AVP's access to data (a) for reasons other than those that would allow an MLS to suspend or terminate a Participant's access to data, or (b) without giving the AVP and the associated Participant(s) prior notice and the process set forth in the applicable provisions of the MLS rules for suspension or termination of a Participant's access. Notwithstanding the foregoing, an MLS may immediately terminate an AVP's access to data (a) if the AVP is no longer designated to provide VOW services to any Participant, (b) if the Participant for whom the AVP operates a VOW ceases to maintain its status with the MLS, (c) if the AVP has downloaded data in a manner not authorized for Participants and that hinders the ability of Participants to download data, or (d) if the associated Participant or AVP has failed to make required payments to the MLS in accordance with the MLS's generally applicable payment policies and practices.

11. An MLS may not prohibit, restrict, or impede a Participant from referring Registrants to any person or from obtaining a fee for such referral.

IV. Requirements That MLSs May Impose on the Operation of VOWs and Participants.

1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:

a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:

i. Expired, withdrawn, or pending listings.

ii. Sold data unless the actual sales price of completed transactions is accessible from public records.

iii. The compensation offered to other MLS Participants.

iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.

v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.

vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

b. The content of MLS data that is displayed on a VOW may not be changed from the content as it is provided in the MLS. MLS data may be augmented with additional data or information not otherwise prohibited from display as long as the source of such other data or information is clearly identified. This requirement does not restrict the format of MLS data display on VOWs or display of fewer than all of the listings or fewer authorized data fields.

c. There shall be a notice on all MLS data displayed indicating that the data is deemed reliable but is not guaranteed accurate by the MLS. A Participant's VOW may also include other appropriate disclaimers necessary to protect the Participant and/or the MLS from liability.

d. Any listing displayed on a VOW shall identify the name of the listing firm in a readily visible color, and reasonably prominent location, and in typeface not smaller than the median typeface used in the display of listing data.

e. The number of current or, if permitted, sold listings that Registrants may view, retrieve, or download on or from a VOW in response to an inquiry may be limited to a

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reasonable number. Such number shall be determined by the MLS, but in no event may the limit be fewer than 100 listings or 5% of the listings in the MLS, whichever is less.

f. Any listing displayed on a VOW shall identify the name of the listing agent.

2. An MLS may also impose the following other requirements on the operation of VOWs:

a. Participants displaying other brokers' listings obtained from other sources, e.g., other MLSs, non-participating brokers, etc. shall display the source from which each such listing was obtained.

b. A maximum period, no shorter than 90 days and determined by the MLS, during which Registrants' passwords are valid, after which such passwords must be changed or reconfirmed.

3. An MLS may not prohibit Participants from downloading and displaying or framing listings obtained from other sources, e.g., other MLSs or from brokers not participating in that MLS, etc., but may require either that (i) such information be searched separately from listings obtained from other sources, including other MLSs, or (ii) if such other sources are searched in conjunction with searches of the listings available on the VOW, require that any display of listings from other sources identify such other source.

EFFECTIVE DATE:

MLSs have until not later than [90 DAYS AFTER ENTRY OF THE FINAL JUDGMENT] to adopt rules implementing the foregoing policies and to comply with the provisions of section III above, and (2) Participants shall have until not later than 180 days following adoption and implementation of rules by an MLS in which they participate to cause their VOW to comply with such rules.

See Appendix A for Seller Opt-Out Form

Appendix A
Seller Opt-Out Form

1.[Check one]

a. [Check here] I have advised my broker or sales agent that I do not want the listed property to be displayed on the Internet; or

b. [Check here] I have advised my broker or sales agent that I do not want the address of the listed property to be displayed on the Internet.

2. I understand and acknowledge that, if I have selected option a, consumers who conduct searches for listings on the Internet will not see information about the listed property in response to their search.

____
initials of seller

EXHIBIT B

(Statement of MLS Policy)
Statement 7.9 . . . Definition of MLS "Participant"

The term "Participant" in a Board Multiple Listing Service is defined, as follows:

"Where the term REALTOR® is used in this explanation of policy in connection with the word 'Member' or the word 'Participant', it shall be construed to mean the REALTOR® principal or principals, of this or any other Board, or a firm comprised of REALTOR® principals participating in a Multiple Listing Service owned and operated by the Board. Participatory rights shall be held by an individual principal broker unless determined by the Board or MLS to be held by a firm. It shall not be construed to include individuals other than a principal or principals who are REALTOR® Members of this or any other Board, or who are legally entitled to participate without Board membership. However, under no circumstances is any individual or firm, regardless of membership status, entitled to MLS 'Membership' or 'Participation' unless they hold a current, valid real estate broker's license and ~~are capable of offering and accepting~~ offer or accept cooperation and compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property. Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey 'Participation' or 'Membership' or any right of access to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. Additionally, the foregoing does not prohibit Board Multiple Listing Services, at their discretion, from categorizing non-principal brokers, sales licensees, licensed and certified appraisers and others affiliated with the MLS 'Members' or 'Participants' as 'users' or 'subscribers' and, holding such individuals personally subject to the rules and regulations and any other governing provisions of the MLS and to discipline for violations thereof. MLSs may, as a matter of local determination, limit participatory rights to individual principal brokers, or to their firms, and to licensed or certified appraisers, who maintain an office or Internet presence from which they are available to represent real estate sellers, buyers, lessors or lessees or from which they provide appraisal services. (Amended 5/02)

Where the terms 'subscriber' or 'user' are used in connection with a Multiple Listing Service owned or operated by a Board of REALTORS®, they refer to non-principal brokers, sales licensees, and licensed and certified real estate appraisers affiliated with an MLS Participant and may, as a matter of local option, also include a Participant's affiliated unlicensed administrative and clerical staff, personal assistants, and individuals seeking licensure or certification as real estate appraisers provided that any such individual is under the direct supervision of an MLS Participant or the Participant's licensed designee. If such access is available to unlicensed or uncertified individuals, their access is subject to the rules and regulations, the payment of applicable fees and charges (if any), and the limitations and restrictions of state law. None of the foregoing shall diminish the Participant's ultimate responsibility for ensuring compliance with the rules and regulations of the MLS by all individuals affiliated with the Participant. (Adopted 4/92)

Under the 'Board of Choice' policy, MLS participatory rights shall be available to any REALTOR® (principal) or any firm comprised of REALTORS® (principals) irrespective of where they hold primary membership subject only to their agreement to abide by any MLS rules or regulations; agreement to arbitrate disputes with other Participants; and payment of any MLS dues, fees, and charges." Participatory rights granted under Board of Choice do not confer voting privileges or eligibility for office as an MLS committee member, officer, or director, except as granted at the discretion of the local Board and/or MLS. (Amended 5/97)

The universal access to services component of Board of Choice is to be interpreted as requiring that MLS Participatory rights be available to REALTOR® principals, or to firms comprised of REALTOR® principals, irrespective of where primary or secondary membership is held. This does not preclude an MLS from assessing REALTORS® not holding primary or secondary membership locally fees, dues, or charges that exceed those or, alternatively, that are less than those charged Participants holding such memberships locally or additional fees to offset actual expenses incurred in providing MLS services such as courier charges, long distance phone charges, etc., or for charging any Participant specific fees for optional additional services. (Amended 11/96)

None of the foregoing shall be construed as requiring a Board to grant MLS participatory rights, under Board of Choice, where such rights have been previously terminated by action of that Board's Board of Directors." (Adopted 11/95)

(Model MLS rules)
Section 3—Participation: Any REALTOR® of this or any other Board who is a principal, partner, corporate officer, or branch office manager acting on behalf of a principal, without further qualification, except as otherwise stipulated in these bylaws, shall be eligible to participate in Multiple Listing upon agreeing in writing to conform to the rules and regulations thereof and to pay the costs incidental thereto.* However, under no circumstances is any individual or firm, regardless of membership status, entitled to Multiple Listing Service "membership" or "participation" unless they hold a current, valid real estate broker's license and ~~are capable of offering and accepting~~ offer or accept compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property.** Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey "participation" or "membership" or any right of access

to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. (Amended 11/96)

Note: Mere possession of a broker's license is not sufficient to qualify for MLS participation. Rather, the requirement that an individual or firm 'offers or accepts cooperation and compensation' means that the Participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS. "Actively" means on a continual and on-going basis during the operation of the Participant's real estate business. The "actively" requirement is not intended to preclude MLS participation by a Participant or potential Participant that operates a real estate business on a part time, seasonal, or similarly time-limited basis or that has its business interrupted by periods of relative inactivity occasioned by market conditions. Similarly, the requirement is not intended to deny MLS participation to a Participant or potential Participant who has not achieved a minimum number of transactions despite good faith efforts. Nor is it intended to permit an MLS to deny participation based on the level of service provided by the Participant or potential Participant as long as the level of service satisfies state law.

The key is that the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation with respect to properties of the type that are listed on the MLS in which participation is sought. This requirement does not permit an MLS to deny participation to a Participant or potential Participant that operates a Virtual Office Website ("VOW") (including a VOW that the Participant uses to refer customers to other Participants) if the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation. An MLS may evaluate whether a Participant or potential Participant "actively endeavors during the operation of its real estate business" to "offer or accept cooperation and compensation" only if the MLS has a reasonable basis to believe that the Participant or potential Participant is in fact not doing so.

The membership requirement shall be applied on a nondiscriminatory manner to all Participants and potential Participants.

59 Conn. App. 545 (2000)

A. JAMES ZELLER ET AL.
v.
JOSEPH CONSOLINI ET AL.

(AC 19372)

Appellate Court of Connecticut.

Argued March 28, 2000.
Officially released August 29, 2000.

Lavery, C. J., and Spear and Cretella, Js.

546 *546 *James A. Zeller,* with whom, on the brief, was *Joseph A. Mengacci,* for the appellants (plaintiffs).

Martin B. Margulies, with whom, on the brief, were *Charlene Lavoie* and *Peter Schwartz,* for the appellees (defendants).

Opinion

LAVERY, C. J.

The plaintiffs[1] appeal from the judgment of the trial court rendered after the granting of the defendants'[2] motion for
547 summary judgment. The *547 plaintiffs contend that the court improperly (1) rendered summary judgment because there was a genuine issue of material fact as to whether the defendants' prior actions lacked probable cause and (2) imposed on the plaintiffs the burden of establishing that the defendants were barred by statute or regulation from applying to rezone the plaintiffs' property. We affirm the judgment of the trial court.

The following facts are relevant to this appeal.[3] The plaintiffs, A. James Zeller and Torringford Commercial Associates Limited Partnership, claim that the defendants tortiously interfered with a business relationship and initiated vexatious litigation. These claims arise out of challenges made by the defendants to the plaintiffs' applications to the planning and zoning commission of the city of Torrington (commission). Zeller owns six parcels of land in Torrington totaling approximately thirty-six acres, and is the general partner and majority shareholder of the plaintiff Torringford Commercial Associates Limited Partnership. The defendants consist of individual members of an unincorporated association known as Neighbors Against the Mall, attorney Maureen E. Donohue and the law firm of Howd, Lavieri and Finch.

In its memorandum of decision granting the defendants' motion for summary judgment, the court stated: "In 1987 and 1988, the plaintiffs sought and received zone changes for the subject property. After each zone change, the neighborhood defendants appealed the decision of the planning and zoning commission to the Superior Court. In both instances, the court dismissed the appeals; in both instances, these defendants sought certification to appeal further to the Appellate Court,
548 *548 which that court denied. In 1990, the inland wetlands commission of the city of Torrington granted a permit to the plaintiffs relating to the development of a mall on this property. The neighborhood defendants appealed that decision to the Superior Court, which dismissed the appeal. Certification was granted by the Appellate Court, and that court affirmed the Superior Court judgment dismissing the appeal in September, 1992.

"The events forming the basis of the plaintiffs' complaint here began in February, 1992, when the neighborhood defendants applied to the planning and zoning commission for the city of Torrington for a zone change of the subject property owned by the plaintiffs from restricted commercial to industrial park. Their application was denied, and through the representation of the attorney defendants, the neighborhood defendants appealed to the Superior Court. The plaintiff Zeller intervened as a defendant in that appeal, and the appeal was dismissed in March, 1993. The plaintiffs brought this action, claiming that the defendants knew that the plaintiffs had entered into a contract in June, 1991, to sell the subject property to a development company, conditioned on the plaintiffs' ability to deliver a final, nonappealable zoning certificate and zoning approvals for the property. The plaintiffs allege that the defendants' actions in seeking a zone change and appealing the denial to the Superior Court were sham proceedings, brought without probable cause and with improper motives."

The defendants moved for summary judgment and argued that, as a matter of law, their actions were based on probable cause so that judgment on all counts must enter in their favor. In a thoughtful and thorough memorandum of decision, the
549 court, applying the *Noerr-Pennington* *549 [4] doctrine, granted the motion for summary judgment in favor of the defendants. The plaintiffs appealed to this court.

I

The plaintiffs claim that the court improperly rendered summary judgment for the defendants because there was a genuine issue of material fact as to whether the defendants' prior application for a zoning change was supported by probable cause. We disagree.

"Our standard of review of a trial court's decision to grant a motion for summary judgment is well established. Practice Book § 384 [now § 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.... *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 744-45, 660 A.2d 810 (1995). In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party.... *Tarzia* v. *Great Atlantic & Pacific Tea Co.*, 52 Conn. App. 136, 145, 727 A.2d 219 [cert. granted on other grounds, 248 Conn. 920, 734 A.2d 569] (1999).

"On appeal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.... *Avon Meadow Condominium Assn., Inc.* v. *Bank of Boston Connecticut*, 50 Conn. App. 688, 693, 719 A.2d 66, cert. denied, 247 Conn. 946, 723 A.2d 320 (1998). Because
550 the trial court rendered judgment for the defendants as a matter of law, our review is plenary and we must *550 decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record.... *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 229, 654 A.2d 342 (1995). On appeal, however, the burden is on the opposing party to demonstrate that the trial court's decision to grant the movant's summary judgment motion was clearly erroneous." (Internal quotation marks omitted.) *Kramer* v. *Petisi*, 53 Conn. App. 62, 66-67, 728 A.2d 1097, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999).

A

We first consider the appropriate doctrine to apply to cases such as these, a question of first impression in our appellate courts. The defendants urge us to adopt, as the trial court did, the reasoning of a trio of federal antitrust cases, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and their progeny, collectively referred to as the *Noerr-Pennington* doctrine. In short, the *Noerr-Pennington* doctrine "shields from the Sherman [Antitrust] Act [15 U.S.C. § 1 et seq.] a concerted effort to influence public officials regardless of intent or purpose." *United Mine Workers* v. *Pennington*, supra, 670. The United States Supreme Court has reasoned that "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." *California Motor Transport Co.* v. *Trucking Unlimited*, supra, 510-11.

551 *551 The *Noerr-Pennington* doctrine has evolved from its antitrust origins to apply to a myriad of situations in which it shields individuals from liability for petitioning a governmental entity for redress. "[A]lthough the *Noerr-Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which [seek] to assign liability on the basis of the defendant's exercise of its first amendment rights." (Internal quotation marks omitted.) *Central Telecommunications, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711, 717 n.7 (8th Cir. 1986), cert. denied, 480 U.S. 910, 107 S. Ct. 1358, 94 L. Ed. 2d 528 (1987). For example, *Noerr-Pennington* has been recognized as a defense to actions brought under the National Labor Relations Act, 29 U.S.C. § 151 et seq.; *Bill Johnson's Restaurants, Inc.* v. *National Labor Relations Board*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); state law claims of tortious interference with business relations; *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913-15, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982); federal securities laws; *Havoco of America, Ltd.* v. *Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983); and wrongful discharge claims. *San*

Filippo v. *Bongiovanni,* 30 F.3d 424, 438-43 (3d Cir. 1994), cert. denied, 513 U.S. 1082, 115 S. Ct. 735, 130 L. Ed. 2d 638 (1995).

Although the *Noerr-Pennington* doctrine provides broad coverage to petitioning individuals or groups, its protection is not limitless. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* supra, 365 U.S. 144, the United States Supreme Court, albeit in dictum, established a "sham exception" to the general rule, stating: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application
552 of the Sherman Act would be justified." *552 Id. In short, petitioning activity is not protected if such activity is a mere sham or pretense to interfere with no reasonable expectation of obtaining a favorable ruling. See *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.,* 700 F.2d 785, 809-12 (2d Cir. 1983), cert. denied, 464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1984). In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.,* 508 U.S. 49, 60-62, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993), the court outlined a two part test to define sham litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Id., 60. Second, "the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor ... through the use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon...." (Citations omitted; internal quotation marks omitted.) Id., 60-61. Essentially, then, a sham involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action in any form. *Video International Production, Inc.* v. *Warner-Amex Cable Communications, Inc.,* 858 F.2d 1075, 1082 (5th Cir. 1988), cert. denied sub nom. *Dallas* v. *Video International Productions, Inc.,* 490 U.S. 1047, 109 S. Ct. 1955, 104 L. Ed. 2d 424 (1989).

Application of the *Noerr-Pennington* doctrine to the situation in this case—petitioning activity directed at local governments—already is well established. E.g., *Columbia* v. *Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 379-84, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) (city council); *Juster Associates* v. *Rutland,* 901 F.2d 266, 270-72 (2d Cir. 1990) (city); *Racetrac Petroleum, Inc.* v. *Prince George's County,* 786 F.2d 202, 203 (4th Cir. 1986) (county zoning board); *Bob Layne Contractor,*
553 *Inc.* v. *Bartel,* 504 F.2d 1293, 1296 (7th Cir. 1974) (city zoning board and council). Indeed, many of our *553 own trial courts have applied the *Noerr-Pennington* doctrine in their decisions. E.g., *Roncari Development Co.* v. *GMG Enterprises, Inc.,* 45 Conn. Sup. 408, 414, 718 A.2d 1025 (1997), citing *Connecticut National Bank* v. *Mase,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 269180 (January 31, 1991); *Abrams* v. *Knowles,* Superior Court, judicial district of New London at Norwich, Docket No. 95287 (December 4, 1990) (3 Conn. L. Rptr. 9); *Yale University School of Medicine* v. *Wurtzel,* Superior Court, judicial district of New Haven, Docket No. 275314 (November 9, 1990) (2 Conn. L. Rptr. 813).

In addition, the United States Court of Appeals for the Second Circuit has predicted that Connecticut's appellate courts probably would apply the *Noerr-Pennington* doctrine and the accompanying sham exception when given the opportunity to do so. "We believe that Connecticut's courts would be guided by the strong suggestions from the federal courts that imposing liability for the act of filing a non-sham lawsuit would present serious constitutional problems, and would construe Connecticut law to avoid those problems. Especially since *Noerr-Pennington's* statutory exemption is defined in terms of first amendment activity, we are confident that Connecticut's courts would carve out a similar exception to [the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.] and the common law, whether or not they believed that they were required to do so by the Constitution." *Suburban Restoration Co.* v. *ACMAT Corp.,* 700 F.2d 98, 102 (2d Cir. 1983); see also *T.F.T.F. Capital Corp.* v. *Marcus Dairy, Inc.,* 33 F. Sup. 2d 122, 125-26 (D. Conn. 1998). We agree.

The *Noerr-Pennington* doctrine subordinates antitrust considerations and commercial expediency to the constitutional rights
554 of individuals and groups to petition their government. Furthermore, failure to apply *554 the *Noerr-Pennington* doctrine aggressively may create a "chilling effect" on the first amendment right to petition in zoning and other matters. See *Ottensmeyer* v. *Chesapeake & Potomac Telephone Co.,* 756 F.2d 986, 993-94 (4th Cir. 1985). Indeed, such a chilling effect can be a virtual deep freeze when individual citizens not versed in the legal system and without financial resources do not exercise potentially meritorious legal challenges for fear of costly and protracted, retributive litigation from opponents.

The *Noerr-Pennington* doctrine is a well established body of law applicable to a wide variety of situations involving petitioning activity, including local zoning and other municipality matters. Seventeen years later, we fulfill the Second Circuit's prophecy and adopt the *Noerr-Pennington* doctrine and its accompanying sham exception as the applicable analysis for cases such as this one.[5]

B

555 For the foregoing reasons, we now apply the *Noerr-Pennington* doctrine to this case. The plaintiffs claim *555 that the defendants' actions were mere sham proceedings and invoke *Noerr-Pennington*'s sham exception. Applying the concepts previously discussed, we conclude that the court properly determined that there were no disputed facts, and that as a matter of law the defendants' actions were not objectively baseless and were not a sham that would strip away the protection of the *Noerr-Pennington* doctrine.

Activities found to be a sham involve actions rife with abusive intent and absent any indicia of success. Factors present in sham litigation include, but are not limited to, the presence of repetitive litigation (although one action may constitute a sham under certain conditions), deliberate fraud, supplying false information, and whether lower courts have stated or implied that the action is frivolous or objectively baseless and whether they have dismissed it out of hand. *Liberty Lake Investments, Inc.* v. *Magnuson,* 12 F.3d 155, 158-59 (9th Cir. 1993), cert. denied, 513 U.S. 818, 115 S. Ct. 77, 130 L. Ed. 2d 32 (1994); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.,* supra, 700 F.2d 810; see generally *California Motor Transport Co.* v. *Trucking Unlimited,* supra, 404 U.S. 513.

For example, in *Landmarks Holding Corp.* v. *Bermant,* 664 F.2d 891, 892 (2d Cir. 1981), real estate developers appealed from a summary judgment rendered against them in their action alleging that competitors and local property owners had engaged in sham litigation to prevent the developers from building a regional shipping center in Hamden. The Second Circuit noted that the developers had alleged numerous activities that, if proven, would support the conclusion that the defendants actions were nothing more than a sham. Id., 896. For example, the defendants appealed to the Connecticut Court of Common Pleas and to our Supreme Court from each decision of the Hamden planning and zoning commission,
556 knowing that they lacked *556 standing to do so. Id. Each such appeal was dismissed. The defendants deliberately protracted the proceedings by misrepresenting to the chief justice of our Supreme Court that they needed extra time to have the record printed. Id. Although a letter from the counsel for certain of the defendants stated that the defendants sought to expedite the appeal, a copy of the letter produced from the defendants' files bore on it, in the handwriting of one defendant, the words, "[t]his is purely bull to show that we are not trying to delay proceedings." Id., 894. In addition, an attorney representing competitors and local property owners failed to communicate a settlement offer from the developers to the local property owners. Id., 896. Acceptance of the offer would have removed a major obstacle to the rapid resolution of certain appeals then remaining before our Supreme Court. Id. "In sum, by the bringing of numerous meritless appeals, by deliberate delay in the prosecution of those appeals, by the solicitation and subsidization of meritless litigation by the landowners, and by their attorney's failure to convey a settlement offer ... [the defendants] successfully stalled plaintiffs' applications for zoning changes on the ... property for five years. This delay ultimately forced the plaintiffs to abandon their venture." Id., 896. The Second Circuit, concluding that the defendants had no reasonable basis for their appeals and had engaged in subterfuge, reversed the District Court's grant of summary judgment in favor of the defendants. Id., 892.

Similar chicanery occurred in *Pound Hill Corp.* v. *Perl,* 668 A.2d 1260, 1262 (R.I. 1996), in which the plaintiff developer applied for a zone change for property it had contracted to purchase. The zone change was approved, and the plaintiff became the owner of the property. Id. At that point, one of the defendants, a religious organization that earlier had sought to
557 purchase the property, began a vigorous campaign to frustrate *557 the plaintiffs efforts to obtain town council approval. Id. The organization claimed that the plaintiff had not obtained the requisite three-fifths vote required to rezone the parcel, even though the council had voted by four-fifths of its number to approve the zoning change. Id. The organization repeated this challenge, which was again rejected. The organization also filed a baseless action in the Rhode Island Superior Court and ignored procedural requirements of the judicial process. Id. Responding to those efforts, the plaintiff filed an action alleging abuse of process and tortious interference with prospective contractual relations, and the trial court granted summary judgment in favor of the defendants. Id., 1261. The plaintiff appealed. Id.

In concluding that summary judgment was inappropriate, the Rhode Island Supreme Court stated: "A trier of fact might ... determine that the filing of an action in the [Rhode Island] Superior Court to enjoin the ... Town Council from meeting was objectively baseless.... A trier of fact might determine that filing an action in the [Rhode Island] Superior Court after the time (forty days) required by [Gen. Laws] § 45-5-16 was similarly objectively baseless, particularly in view of the fact that no attempt was made to meet the appellate procedural requirements. A trier of fact might determine that the appeal from the planning-board approval of Pound Hill's plat was also objectively baseless since no substantive ground for such an appeal was presented to the zoning board of review...." Id., 1264. Other state and federal cases finding that a sham was established or supportable reveal analogous behavior. See annot., `Sham' Exception to Application of *Noerr-Pennington*

Doctrine, Exempting From Federal Antitrust Laws Joint Efforts to Influence Governmental Action, 71 A.L.R. Fed. 723 (1985).

558 The level of artifice and frivolousness found in *Pound Hill Corp., Landmarks Holding Corp.* and other cases *558 does not exist in this case. An examination of the record reveals an attempt, however persistent, by the defendants to use whatever lawful means were at their disposal to challenge the plaintiffs' activities on substantive grounds. Indeed, the conduct of parties in other cases decided by the Rhode Island Supreme Court in which the sham exception was not applied is analogous to the conduct of the parties in this case.

For instance, in *Hometown Properties, Inc.* v. *Fleming,* 680 A.2d 56, 58-59 (R.I. 1996), the plaintiff owners of a landfill brought an action against the defendant, a local resident, because of letters the defendant authored to state and federal officials regarding the plaintiffs' landfill activities. Notwithstanding the plaintiffs' demand to do so, the defendant did not retract the substance of the letters. Id., 59. The Rhode Island Supreme Court applied the *Noerr-Pennington* doctrine and directed the trial court on remand to render a summary judgment in favor of the defendant. Id., 63-64. The court stated that "[i]n her affidavit, [the defendant] presented detailed averments that her statements were based upon various scientific studies and reports. [The plaintiffs] submitted no opposing affidavit or other evidence to challenge [the defendant's] statements but relied solely on the assertions in [their] pleadings. On the basis of the record before us, it is clear that [the defendant] did not engage in sham activity that was objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring [favorable] government action, result, or outcome." (Internal quotation marks omitted.) Id., 64.

In *Cove Road Development* v. *Western Cranston Industrial Park Associates,* 674 A.2d 1234 (R.I. 1996), the defendants, some of whom were landowners whose properties abutted a proposed development and others who were owners in a
559 nearby industrial park, brought *559 an action against the plaintiff developer, alleging that a zoning amendment adopted in the plaintiffs favor violated the town's zoning plan and constituted illegal spot zoning. Id., 1235-36. The defendants ultimately lost at trial, appealed, and their case was dismissed by the Rhode Island Supreme Court. Id., 1239.

The plaintiff then brought an action against the defendants, alleging that the zoning appeal constituted an abuse of process and malicious prosecution. Id., 1235. The Rhode Island Supreme Court affirmed the trial court's granting of a summary judgment in favor of the defendants. Id., 1239. The court applied the *Noerr-Pennington* doctrine and found that the defendants' original action was not a sham. Id. The court reasoned that "[a]t trial, [the defendants] presented expert and lay testimony in support of [their] position that the development of high-density residential housing adjacent to an industrial park was inconsistent with the city's comprehensive plan and could result in nearby residential abutters complaining of industrial activities. The trial justice clearly found this evidence to be of some significance, as he refused to dismiss [the defendants'] case. Moreover, in his eleven-page decision, the trial justice addressed the substance of [the defendants'] appeal at length, but nowhere in the decision did the trial justice indicate in any way that he viewed the appeal as frivolous or lacking merit." Id.

We now apply the previously stated principles and examine separately two events: First, the various challenges made by the defendants to the plaintiffs' zoning changes and permit requests; second, the defendants' attempt to rezone the plaintiffs' property.

1

As previously stated, in 1987 and 1988 the plaintiffs applied for zone changes to their property. The defendants opposed
560 those changes and pursued available *560 appellate remedies in the Superior Court and Appellate Court, which were unsuccessful. In 1990, the plaintiffs applied to the Torrington inland wetlands commission for a building permit, which was approved. The defendants again opposed the changes and pursued appellate remedies, which were unsuccessful.

The defendants' opposition to the plaintiffs' zoning requests and the defendants' subsequent appeals were legally available to the defendants and followed applicable judicial procedure. Merely because those attempts failed does not in itself make them baseless acts. A failure of the challenged action is only one factor in determining whether an action is a sham. See *Sunergy Communities, Inc.* v. *Aristek Properties, Ltd.,* 535 F. Sup. 1327, 1331 (D. Colo. 1982). "[W]hen the ... defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." (Internal quotation

marks omitted.) *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.,* supra, 508 U.S. 60 n.5; see also *Liberty Lake Investments, Inc.* v. *Magnuson,* supra, 12 F.3d 158-59. Previous decisions by other courts reveal that the defendants' challenges possessed at least some merit. For example, the defendants' challenge to the commission's approval of zoning changes for the plaintiffs' property that were requested by the plaintiffs was addressed on its merits on appeal to the Superior Court. *Consolini* v. *Planning & Zoning Commission,* Superior Court, judicial district of Litchfield, Docket No. 48806 (September 17, 1990). The defendants' subsequent challenge to the commission's conclusion that the plaintiffs did not require additional permits to build the plaintiffs' proposed mall was addressed on its merits in this court.
561 *Consolini* v. *561 *Inland Wetlands Commission,* 29 Conn. App. 12, 15-16, 612 A.2d 803 (1992).

While not ultimately successful or of overwhelming strength, those zoning challenges were not so objectively baseless that no reasonable litigant could reasonably expect success on the merits, nor did the plaintiffs in *Consolini* v. *Inland Wetlands Commission,* supra, 29 Conn. App. 12, ignore procedure or misrepresent facts. We therefore conclude that those actions do not contribute to the conclusion that the defendants in this case have committed a sham.

2

Similarly, when the defendants "took the offense" and, in 1992, applied to change the plaintiffs' property from restricted commercial and industrial to industrial zoning, their petitioning did not constitute a sham. The defendants presented alternate proposals for an industrial park and a letter citing traffic concerns supporting the zone change. The commission denied the defendants' application by a four to one vote. Furthermore, when the denial of change was appealed to the Superior Court, the trial court addressed the issue on its merits, did not call the appeal baseless and did not reject the issue of the zone change out of hand. *Rizzo* v. *Planning & Zoning Commission,* Superior Court, judicial district of Litchfield, Docket No. 60046 (March 3, 1993).

The plaintiffs make much of the fact that the defendants' attempt to rezone the plaintiffs' property is not explicitly authorized by statutory or common law. The mere fact that the defendants' attempt to rezone the property has not been explicitly authorized, however, does not render it a baseless act. Cf. *Smith* v. *Garretto,* 147 F.3d 91, 94 (2d Cir. 1998) (government officials do not lose qualified immunity because of absence of any authority available to them one way or the other).
562 Furthermore, the defendants' attempt to rezone is not *562 totally devoid of analogous statutory or common law backing.[6] In *Ghent* v. *Zoning Commission,* 220 Conn. 584, 588-93, 600 A.2d 1010 (1991), our Supreme Court gave a municipal mayor standing to seek a zone change of property he did not own. See generally *Winslow* v. *Zoning Board,* 143 Conn. 381, 386-87, 122 A.2d 789 (1956). Furthermore, General Statutes § 22a-19 authorizes an individual or entity who has no relation to a particular property to intervene regarding that property "in certain proceedings or judicial review thereof to challenge harm to the environmental public trust." *Hyllen-Davey* v. *Plan & Zoning Commission,* 57 Conn. App. 589, 595, 749 A.2d 682, cert. denied, 253 Conn. 926, 754 A.2d 796 (2000); see *Red Hill Coalition, Inc.* v. *Conservation Commission,* 212 Conn. 710, 715, 563 A.2d 1339 (1989).

On the basis of the exhibits, affidavits and admissions in the record, the court properly found that there was no issue of material fact and that, as a matter of law, the sham exception did not apply. Nothing in the record reveals that these requests are baseless nor were they considered baseless by the commission or the courts. The defendants' attempt to rezone the plaintiffs' property was undertaken with factual and legal support, as set forth in the court's memorandum of decision. The defendants' efforts in thwarting the plaintiffs' building plans no doubt were aggressive. They were not so baseless, however, as to sink to the level of a sham, as was the situation in *Pound Hill Corp., Landmarks Holding Corp.* and other cases.[7]

563 *563 As the court correctly stated in its memorandum of decision: "The undisputed facts, including the promulgation of a master plan, the subsequent downsizing of the plaintiffs' site and the engineer's opinion on traffic impact, show that the defendants had a reasonable, good faith belief in the facts supporting the zone change application and the validity of that claim.... [B]ased upon these undisputed facts and lack of any other material facts, the court [cannot] find as a matter of law that the defendants' actions were objectively baseless.... Once denied by the zoning commission, the defendants had probable cause to appeal that denial to the Superior Court. Their motives behind these actions are irrelevant to the issue of probable cause." (Citations omitted.) We conclude that the court properly determined there was no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law. The defendants' actions are not objectively

baseless and not a mere sham.[8] We conclude that the court properly granted the defendants' motion for summary judgment and rendered judgment in favor of the defendants.

II

564 The plaintiffs also contend that the court improperly placed the burden on them to show that the defendants *564 had no authority to apply for a zone change. The plaintiffs point to the court's statement that "the plaintiffs have provided no authority, either statutory or regulatory, to state that the defendants were prohibited from applying for a zone change for property in their neighborhood." We disagree.

The court stated in its memorandum of decision that "the party seeking summary judgment has the burden of showing the nonexistence of any material fact"; (internal quotation marks omitted), quoting *Home Ins. Co.* v. *Aetna Life & Casualty Co.,* 235 Conn. 185, 202, 663 A.2d 1001 (1995); and noted that the plaintiffs had provided nothing more than the bare assertion that the defendants were prohibited from applying for a zone change. It is well settled that such bare assertions by the nonmovant are not enough to withstand summary judgment. "Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact ... [the nonmovant] must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue.... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court." (Internal quotation marks omitted.) Id. Thus, the court's statement on this issue was not improper.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The plaintiffs are A. James Zeller and Torringford Commercial Associates Limited Partnership.

[2] The defendants are the law firm of Howd, Lavieri and Finch, attorney Maureen E. Donohue and Joseph L. Consolini, Elizabeth J. Consolini, Robert A. Rizzo, Conio C. Lopardo, Marlene R. Lopardo, Robert A. Gioiele, Donna J. Gioiele, Ronald Clifford, Richard S. Gryniuk, Mary Jane Gryniuk, Edward M. Brady, Louise H. Brady, Richard R. Dwan, Georgette T. Dwan, Richard Bascetta, Kathleen Bascetta and Isobel B. Roberts.

[3] Previous decisions in this case provide the facts we discuss and additional factual background. See *Zeller* v. *Consolini*, 235 Conn. 417, 667 A.2d 64 (1995); *Zeller* v. *Consolini,* Superior Court, judicial district of Litchfield, Docket No. 60356 (June 26, 1997) (19 Conn. L. Rptr. 677).

[4] See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).

[5] We note that the *Noerr-Pennington* doctrine is similar to existing law in Connecticut governing the torts of interference with business relations and vexatious litigation. Interference with contractual relations and vexatious litigation, which the plaintiffs alleged, are closely intertwined in this case, as tortious interference with contractual relations is predicated on the facts underlying the vexatious litigation claim. See *Blake* v. *Levy,* 191 Conn. 257, 261-66, 464 A.2d 52 (1983). For a vexatious litigation claim to succeed, "it is necessary to prove want of probable cause, malice and a termination of suit in the plaintiffs favor.... Probable cause is the knowledge of facts sufficient to justify a reasonable person in the belief that there are reasonable grounds for prosecuting an action.... Malice may be inferred from lack of probable cause.... The want of probable cause, however, cannot be inferred from the fact that malice was proven.... The existence of probable cause is an absolute protection ... and what facts, and whether particular facts, constitute probable cause is always a question of law." (Citations omitted; internal quotation marks omitted.) *Vandersluis* v. *Weil*, 176 Conn. 353, 356, 407 A.2d 982 (1978); *Norse Systems, Inc.* v. *Tingley Systems, Inc.*, 49 Conn. App. 582, 594, 715 A.2d 807 (1998).

[6] In concluding that the defendants' tactics were not baseless for purposes of the *Noerr-Pennington* doctrine, we do not mean to imply any approval of the ultimate merits of the defendants' actions.

[7] Finally, we note that a party's use of its economic powers in an attempt to stifle individual citizens' use of valid governmental processes by threat of expensive litigation potentially constitutes a violation of CUTPA, which is expressly modeled on § 5 (a) (1) of the Federal Trade Commission Act, 15 U.S.C. § 45 (a) (1). *Larsen Chelsea Realty Co.* v. *Larsen*, 232 Conn. 480, 498, 656 A.2d 1009 (1995). Further, CUTPA directs state courts to be guided by federal interpretations of the federal act in construing the state statute. General Statutes § 42-110b (b). Federal courts interpreting the Federal Trade Commission Act have applied the *Noerr-Pennington* doctrine. *Federal Trade Commission* v. *Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 418-19, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990); *Rodgers* v. *Federal Trade Commission*, 492 F.2d 228, 229 (9th Cir.), cert. denied, 419 U.S. 834, 95 S. Ct. 60, 42 L. Ed. 2d 60 (1974); see also *Suburban Restoration Co.* v. *ACMAT Corp.*, supra, 700 F.2d 101-102 (interpreting CUTPA); J. Sills, Comment, "SLAPPs (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate their Appeal?" 25 Conn. L. Rev. 547, 577-78 (1993).

[8] Because we find that the petitioning was not objectively baseless, we need not consider the second prong of the *Noerr-Pennington* sham exception, namely, whether the defendants' actions constituted an attempt to interfere with the plaintiffs through abuse of the petitioning process. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, supra, 508 U.S. 60.