Docket No. 18-55338

In the

United States Court of Appeals

For the

Ninth Circuit

CURTIN MARITIME CORP., a California Corporation,

Plaintiff-Appellant,

v.

SANTA CATALINA ISLAND COMPANY, a Delaware Corporation and AVALON FREIGHT SERVICES, LLC, a Delaware Corporation,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Central District of California, No. 2:16-cv-03290-TJH-AGR · Honorable Terry J. Hatter

BRIEF OF APPELLANT

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APPELLANT'S CORPORATE DISCLOSURE STATEMENT

Appellant, Curtin Maritime Corporation ("Curtin"), is a privately owned, closely held corporation that has no corporate affiliates. No parent company owns any part of Curtin's stock, nor does any publicly held corporation.

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I. INTRODUCTION

Plaintiff-Appellant is Curtin Maritime Corporation ("Curtin"). It has brought an antitrust challenge under the Sherman Act (15 U.S.C. §§ 1 *et seq*.). Defendant-Appellee Santa Catalina Island Company ("SCIC") owns most of the private land on an American island called Santa Catalina Island (the "Island"), which is in Los Angeles, County, California and lies twenty-six miles off the coast of California. Among its other holdings, SCIC owns and controls the only possible commercial landing on the Island. It has given exclusive access to this landing for ten years to a crony, Defendant-Appellee Avalon Freight Services, LLC ("AFS").

AFS is thus vested with an exclusive, long-term concession to ship goods to the general public on the Island – four thousand permanent residents, one million visitors per year, and numerous businesses that are independently owned. These customers must depend only on AFS for nearly all of the goods that they require in order to live and work on the Island. They have no other means of acquiring these goods, as is fully explained below.

Crucially, SCIC has signed up the general public to AFS' exclusive concession, but exempted only itself from it. Instead, it performs its own shipping for its numerous businesses on the Island. No other person or entity on the Island is permitted to do so.

Unburdened by any competition, AFS charges its captive public customers supracompetitive prices and makes deliveries only during high tides.[1] This means that independently owned businesses must pay supracompetitive shipping prices and accept limited delivery times, while SCIC's businesses, which receive shipments directly from SCIC, pay lower prices for better shipping services. In consequence, SCIC's businesses enjoy insuperable procurement advantages over independent businesses on the Island.[2]

Last but not least, AFS shares its monopoly profits with SCIC in accordance with an express revenue-sharing arrangement.

Plaintiff-Appellant, Curtin, is the only shipper other than AFS that is authorized by the CPUC to ship goods to the Island. If permitted to serve the general public on the Island, Curtin would immediately offer prices substantially lower than those now charged by AFS, which in consequence would become

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[1] AFS' prices are approved by the California Public Utilities Commission (the "CPUC"), but lie within the upper-range of allowed prices.

[2] Owing to the filed-rate doctrine, the independent businesses likely cannot raise any antitrust challenge to these practices, but Curtin can do so, since it is a competitor, not a customer. *See* p. 22, *infra*. Relatedly, the arrangement between SCIC and AFS is not protected by state-action immunity, so that Curtin may maintain its present challenge if it is otherwise actionable under federal antitrust law – a point specifically confirmed by the court below in a decision from which no appeal has been taken. *See* p. 21, *infra*.

obliged to match Curtin's prices in order to remain a viable competitor. Curtin would also make deliveries at all tides, ensuring that public customers can receive time-sensitive deliveries when needed (e.g., restaurants and grocers that wish to provide fresh products).

AFS and SCIC, however, have vigorously opposed Curtin's efforts to introduce competitive shipping services to the Island. If they had not done so, Curtin would have generated profits by providing superior shipping services on competitive terms to the general public on the Island.

Curtin has been prevented from earning profits by SCIC and AFS' arrangement, whose very purpose is to eliminate all possible competition for shipping services on the Island, so that AFS can overcharge customers, split its monopoly profits with SCIC, and give SCIC's businesses a decisive advantage over independent businesses on the Island. Curtin's losses have thus been caused by a competition-reducing feature of SCIC and AFS's anticompetitive arrangement.

On the basis of these matters, Curtin sued SCIC and AFS for violations of Section 1 of the Sherman Act (15 U.S.C. § 1) ("Section 1"), Section 2 of the Sherman Act (15 U.S.C. § 2) ("Section 2"), and California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq*.) (the "UCL"). Curtin's legal

theories in support of these claims are explained below.

The court below is the United States District Court for the Central District of California (the Hon. Terry J. Hatter) (the "District Court"). It dismissed Curtin's claims on the pleadings, finding that Curtin cannot plead compensable antitrust injury, since the very losses that it attributes to the above arrangement could in theory have been caused by blameless conduct. The District Court offered one such example, observing that SCIC could have lawfully awarded non-exclusive leases to "multiple" shippers, but not to Curtin, in which case Curtin's losses would have been the same. On this basis, the District Court concluded that Curtin's claimed losses were not an antitrust injury, since in theory they could have been caused by a procompetitive arrangement or some other activity that is blameless under federal antitrust law.

By so ruling, the District Court adopted an erroneous definition of antitrust injury urged by SCIC and AFS. This interpretation is premised on dicta given in one of this Court's cases, but it is directly contradicted by a long, unbroken line of cases, including the leading cases on point decided by the Supreme Court and this Court. The Sixth Circuit has decided this very matter, rejecting the interpretation adopted by the District Court and explaining the proper significance of the dicta in question. This Court should do the same. *See* pp. 37-48, *infra*.

Properly understood, antitrust injury is not an injury that could have been caused only by the challenged antitrust violation, and the doctrine of antitrust injury does not absolve antitrust defendants when, in mere theory, the plaintiff's losses could have been caused by something other than the challenged antitrust violation. That is not the standard.

Rather, a private party suffers antitrust injury when, as in this case, *it suffers losses that arise from an impairment of competition caused by an antitrust violation*. If defendants commit an antitrust violation whose competition-reducing features cause harm to the plaintiff, the plaintiff's harm is antitrust injury. *See* pp. 38-43, *infra*. Conversely, a plaintiff fails to suffer antitrust injury when its losses were incidentally caused by the defendants' antitrust violation, but not by any competition-reducing aspect or consequence of this violation. That is the proper meaning and reach of the doctrine of antitrust injury. *See id*.

Curtin's claimed losses arise from the anticompetitive features of the antitrust violations that it alleges were committed by SCIC and AFS. That is antitrust injury. The District Court erred by ruling that it is not. *See* pp. 43-48, *infra*.

The District Court also made a second error, holding that Curtin's Section 2 claim failed because it could not satisfy either the *Aspen Skiing* doctrine (which

concerns a monopolist's unilateral duty-to-deal in exceptional circumstances) or the essential-facilities doctrine. But Curtin pled specific facts that, if assumed true, establish or support reasonable inferences of each element required for a Section 2 claim. On the facts presented, Curtin was not further required to meet the narrow requirements of *Aspen Skiing* or the "essential-facilities" doctrine. *See* pp. 48-56, *infra*.

Lastly, the District Court erred by denying Curtin's request to amend its pleadings to provide any necessary clarification in its pleadings. *See* p. 62, *infra*.

The present case raises significant issues and presents a compelling antitrust challenge. It never should have been dismissed on the pleadings. Curtin respectfully requests a reversal of the dismissal and a remand of this case to the District Court for further proceedings.

II. STATEMENT OF JURISDICTION

A. The District Court Had Jurisdiction Over Curtin's Claims

Curtin filed the present case in the District Court on May 13, 2016. The District Court had subject-matter and personal jurisdiction over Curtin's claims, and it was a proper venue for the adjudication of these claims.

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1. Subject-Matter Jurisdiction

In its original complaint and amended pleadings, Curtin asserted one claim under Section 1, a second claim under Section 2, and a third claim under California's UCL, and all three claims arose from the same transactions and events. *See generally* ER-II 174-208; ER-III 412-442; ER-IV 600-623.

The District Court had exclusive subject-matter jurisdiction over the two claims brought under the Sherman Act. *See* 15 U.S.C. § 15(a); 28 U.S.C. §§ 1331, 1337(a)). The UCL claim arose from the same "nucleus of operative facts," so that the District Court could have exercised supplemental jurisdiction over it under 28 U.S.C. § 1367(a). *See Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 939 F. Supp. 2d 1002, 1006 (N.D. Cal. 2013) (a federal district court has exclusive jurisdiction over Sherman Act claims and can exercise supplemental jurisdiction over state-law claims that "arise from the same nucleus of operative fact as the Sherman Act claims.")[3]

2. Personal Jurisdiction and Venue

The District Court had personal jurisdiction over both Defendants, and its venue was proper, since both Defendants maintain their headquarters in the Central

[3] The District Court declined to exercise supplemental jurisdiction over the UCL claim because it dismissed the Sherman Act claims on the pleadings. *See* ER-I 6:9-11; ER-III 220:5-7; ER-IV 447:7-8.

District of California, regularly conduct business there, and can be "found" there within the meaning of 15 U.S.C. § 22. *See* 15 U.S.C. §§ 15, 22; 28 U.S.C. § 1391.

B. Curtin Seeks Review of Appealable Matters

Curtin seeks appellate review of the District Court's final order on the pleadings (ER-I 1-6), which dismissed all of Curtin's claims without leave to amend. This order, having disposed of Curtin's entire action, is appealable. *See Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1250 (9th Cir. 2010) (confirming this point).

Curtin also seeks appellate review of two preceding interlocutory orders rendered by the District Court. By these interlocutory orders, the District Court dismissed prior versions of Curtin's claims, but with leave to amend them. *See* ER-III 209-221; ER-IV 443-447. Curtin may properly challenge these interlocutory orders, having appealed from the District Court's final order. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114 S. Ct. 1992, 1996 (1994) ("[A] party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.")

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C. Curtin's Appeal Is Timely

Curtin filed its notice of appeal on March 15, 2018, which was twenty-two days after the date of entry (February 21, 2017) of the District Court's final order dismissing Curtin's claims without leave to amend. *See* ER-I 1-6.[4] Curtin's appeal is therefore timely. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A) (a notice of appeal is timely if made within thirty days of the appealable judgment or order).

III. ISSUES PRESENTED

The issues before this Court on appeal are as follows.

1. Did the District Court err by ruling that, to plead antitrust injury, a plaintiff must allege a loss that, even hypothetically, could not have been caused by lawful conduct, but instead must have been caused by the challenged antitrust violation? Did the District Court err by using this standard in order to find that Curtin had failed to allege antitrust injury arising from the exclusive-leasing arrangement between SCIC and AFS? Did Curtin sufficiently plead its antitrust injury by alleging specific losses directly caused by the principal anticompetitive feature of Defendants' antitrust violations – their unjustified use of an exclusive lease for the Island's only commercial landing solely in order to prevent any

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[4] The District Court's final order on the pleadings was filed on February 20, 2018, but owing to a clerical error it was entered on February 21, 2018. *See* ER-IV 630-631 at Dkt. 60, 61.

competition in the relevant market for ten years?

2. Did the District Court err by dismissing Curtin's Section 2 claim on the ground that it failed to meet the narrow requirements of two particular monopolization doctrines (the *Aspen Skiing* doctrine and the essential-facilities doctrine)? Did Curtin plead facts sufficient to support a claim under Section 2 even if the claim could not satisfy either of these two doctrines?

3. Did the District Court abuse its discretion by denying Curtin leave to amend its complaint in order to cure any lack of clarity in its allegations or legal theories?

IV. CURTIN'S STATEMENT OF THE CASE

Curtin seeks appellate review of the District Court's dismissal of its claims on the pleadings under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), as well as the District Court's denial of Curtin's request for leave to amend its second amended complaint.

For the purposes of this review, Curtin's allegations of fact must be treated as true. *See Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017) (when reviewing the dismissal of plaintiff's complaint for failure to state a claim, an appellate court will deem plaintiff's allegations of fact to be true, and "must construe the pleadings in the light most favorable to [the appellant.]")

Curtin now offers the following summary of its charging allegations in its operative pleading – its second amended complaint.[5]

A. Curtin's Essential Allegations: an Overview

Curtin's case raises an antitrust challenge that concerns the shipment of goods to the general public on Santa Catalina Island (the "Island"), which is an American island off the coast of California that is part of Los Angeles, County. *See generally* ER-II 174-208.[6]

Defendant SCIC owns most of the private land on the Island, as well as its only commercial landing (commercial port). *Id*. at ¶¶ 2, 12, 14-15. It also owns and

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[5] Curtin stated the same essential challenge in three different versions of its complaint (ER-II 174-298; ER-III 412-442; ER-IV 600-623), each of which the District Court dismissed under Rule 12(b)(6) for failure to state a claim (ER-I 1-6; ER-III 209-221; ER-IV 443-447). In its first and second amended complaints (ER-II 174-298; ER-III 412-442), Curtin added allegations concerning SCIC's sham bidding process, as well as elaborations on its antitrust theories to try to satisfy the District Court. In this brief, Curtin has summarized the allegations set forth in its second amended complaint (ER-II 174-298), which was its operative complaint when this case was terminated in the District Court. *See Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011) ("[A]n amended complaint supersedes the original, the latter being treated thereafter as non-existent.")

[6] In this brief, all citations to the Excerpts of Record use the abbreviation "ER"and include the volume number, the page number(s), and sometimes more specific references to line numbers (*e.g.*, ER-I 1:20-22) or to paragraph numbers (*e.g.*, ER-II 177 at ¶ 2). In this section of the brief, all of the citations are to Curtin's second amended complaint, which appears at ER-II 174-208.

operates numerous businesses on the Island, catering to its four-thousand permanent residents and millions of visitors (the Island receives one million visitors per year). *Id.* at ¶¶ 2, 9.

In 2016, after a sham bidding process, SCIC gave an exclusive lease of its commercial landing to Defendant AFS. *Id.* at ¶¶ 13, 21, 26-43. This exclusive leasing arrangement lasts until 2026. *Id.* at ¶ 21. It permits AFS alone to ship goods by sea to the general public on the Island and authorizes only SCIC to ship goods to itself and its own businesses. *Id.* at ¶¶ 21-23. AFS charges supracompetitive prices for its shipping services to its captive public (*id.* at ¶¶ 81, 91-92, 98-99, 108) and offers deliveries only during high tides (*id*. at ¶ 50), while SCIC and its businesses enjoy lower prices and private shipping arrangements (*id.* at ¶¶ 57, 92) – a circumstance that confers insuperable advantages on SCIC's businesses that rival businesses cannot attain (*id*.). In addition, SCIC and AFS share AFS' monopoly profits earned from its shipment of goods to the general public on the Island. *Id*. at ¶¶ 22-23, 39.

Plaintiff, Curtin, is a highly experienced shipping company and the only shipper other than AFS that is publicly licensed and equipped to serve the general public on the Island. *Id*. at ¶¶ ¶¶ 37, 58-61, 77-84. It has attempted to gain docking rights at SCIC's commercial landing (*id*. at ¶¶ 76-84), but SCIC and AFS have

excluded it and all other shippers by their exclusive-leasing arrangement (*id*. at ¶¶ 21-23, 26, 38, 85).

Curtin claims that by this conduct SCIC and AFS have violated Section 1, Section 2, and California's UCL (as explained more fully below).

B. Santa Catalina Island

Santa Catalina Island lies twenty-six miles off the coast of Los Angeles and is part of Los Angeles County, California. ER-II 174-208 at ¶ 2. Most of the land on the Island is owned by a conservancy and remains undeveloped. *Id.* Virtually all of the remaining land is privately held by one company, Defendant SCIC, which in turn is controlled by the descendants of William Wrigley, Jr., the legendary land developer. *Id*.

SCIC's land holdings on the Island include all coastal land where a commercial landing could be constructed to serve the town of Avalon (*id*. at ¶ 14), which is the Island's sole population center (*id*. at ¶ 9). SCIC also owns and operates many businesses on the Island, dominates its commerce, and is the largest employer there. *Id*. at ¶¶ 2, 20.

The Island has more than four-thousand permanent residents who mostly live in Avalon, and it also receives more than one million visitors each year. *Id*. at ¶ 9. Numerous independent businesses also operate there. *Id*. at ¶¶ 2, 9-10, 48, 51,

57, 92. Many of them compete directly against businesses owned by SCIC. *Id*. at ¶¶ 2, 20, 48, 51, 57, 92.

C. Shipment of Goods by Sea to Public Customers on Santa Catalina Island Is the Relevant Service Market. There Is No Other Way for Individuals and Independent Businesses on the Island to Procure Most Goods, Including Basic Necessities

Residents and independent businesses on the Island regularly and necessarily purchase various goods, including basic necessities, such as food, water, other beverages, clothing, furniture, building materials, fuel, and other such items. ER-II 174-208 at ¶¶ 10-12. These goods are not produced locally on the Island (*see id*. at ¶ 12), and there is no road or railway between the Island and the United States mainland, or between the Island and any other island or point of land, so that it is not possible to transport goods to the Island by truck or freight train (*see id*). Nor can most goods be delivered to the Island by air: the Island's sole airport is equipped to receive only light aircraft, but not cargo planes or commercial passenger flights. *Id*. at ¶ 10. In consequence, air delivery of goods to the Island is uneconomical, technically infeasible, or in most cases both uneconomical and technically infeasible. *Id.*

Individuals and independent businesses on the Island *must* therefore import most goods by sea from the mainland. *Id.* at ¶¶ 10-12. In practice, this means that

they receive these imports by barge from the nearby harbors of San Pedro and Long Beach, Los Angeles County, California. *Id.*

The relevant market in this case, then, is the *shipment of goods by sea to public customers on the Island* (the "Island Shipping Market"), which is accomplished by sea barge deliveries from Southern California to SCIC's commercial landing in Avalon. *See id.* at ¶¶ 11-15. For the general public on the Island, there is no cross-elasticity of demand between this service and any other service, owing to the lack of any viable alternative for nearly all kinds of goods, including basic necessities. *Id*. at ¶¶ 10-15.

D. SCIC Owns and Controls the Only Available Commercial Landing on the Island; No Other Landing Can Be Constructed

The Island is served by only one commercial landing (commercial port), which is owned and controlled by SCIC. ER-II 174-208 at ¶¶ 12, 14-15. Specifically, SCIC owns the *only* commercial docking facility and freight operations yard on the Island (*id*. at ¶ 14), as well as an adjoining commercial warehouse (*id*.) It also owns all of the other private land on the Island that might be converted into a functional commercial landing. *Id*. Therefore, no other party can build another commercial landing anywhere else on the Island. *Id*.

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The California Public Utilities Commission (the "CPUC") regulates the delivery of sea freight to the Island, but lacks regulatory authority over SCIC's commercial landing. *Id.* at ¶ 16. This circumstance appears to be anomalous: all other municipalities in California have *public* commercial landings, but the Island has only one commercial landing, and it is *privately* owned by SCIC. *Id.*

E. There Are Several Commercial Shippers That Can Serve Santa Catalina Island, but SCIC Permits Only AFS to Do so

To ship goods by sea to the Island, a shipper requires (1) barges, tug boats, and other "equipment" used to ship goods by barge; (2) expertise and sufficient experience; (3) docking and warehouse facilities on the Southern California mainland; and, crucially, (4) docking and warehouse facilities on the Island itself. *See* ER-II 174-208 at ¶¶ 10-12, 28-31, 79, 82-83. A shipper also requires a special license from the CPUC, which is called a Certificate of Public Convenience and Necessity (a "Certificate"). *Id.* at ¶ 44.

Several shippers, including Curtin, have the necessary shipping equipment, personnel, and expertise and also wish to serve the Island. *Id.* at ¶ 37. Only two of them, Curtin and AFS, hold current Certificates that authorize each to serve the Island. *Id.* at ¶ 58. Only AFS, however, can serve the Island because of its exclusive-leasing arrangement with SCIC, which owns and controls the Island's only commercial landing. *Id*. at ¶¶ 13-15, 21, 26, 33. AFS's exclusive concession

will last at least until 2026. *Id.*

F. SCIC Has Exempted Itself from the Captive Shipping Arrangement it Has Imposed on the General Public, So That its Businesses Receive Superior Shipping at Lower Prices. SCIC and AFS Have Split AFS' Monopoly Profits

Crucially, SCIC has preserved the right to ship goods to the Island for its own use, including goods used by its own businesses on the Island. ER-II 174-208 at ¶¶ 23-24, 57, 92. In contrast, the general public (*i.e.*, individuals and independent businesses) can receive goods only from AFS. *Id*. at ¶¶ 13, 21, 26, 33. In other words, SCIC has not signed itself up for the exclusive-supplier arrangement that it has imposed on the general public on the Island. *See id*.

This entire arrangement is blatantly anticompetitive. AFS charges supracompetitive prices for its shipping services to the general public on the Island (*id*. at ¶¶ 81, 91-92, 98-99, 108); it offers deliveries only during high tides (*id*. at ¶ 50), and it splits its monopoly profits with SCIC (*id*. at ¶¶ 22-23, 37, 39, 54). Unlike the general public, SCIC's businesses pay less for shipping services provided on superior terms directly by SCIC and therefore enjoy insuperable procurement advantages over independent businesses on the Island. *Id*. at ¶¶ 57, 92.

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G. Curtin Is a Licensed, Qualified Shipper That Seeks a Non-Exclusive Lease in Order to Compete to Provide Shipping Services to the Island; its Exclusion Harmed its Business, Causing it Demonstrable Losses

Curtin is a rival shipping company authorized by the CPUC to ship goods by sea to the Island (ER-II 174-208 at ¶¶ 37, 58-61, 77-84), but it is completely excluded from doing so by the exclusive leasing arrangement enforced by SCIC and AFS (*id*. at ¶¶ 82-84).

Crucially, Curtin seeks access to the Island's commercial landing only on *non-exclusive terms* in order to introduce competition for shipping services to the Island. *Id.* at ¶¶ 76-85.

If permitted to ship goods to the Island, Curtin would charge prices lower than those currently charged by AFS, placing competitive pressure on AFS to lower its own prices. *Id*. at ¶¶ 77, 81-83. Curtin could also deliver goods at all times, since its barges have longer docking ramps and therefore can call on the Island's landing during any tide, while AFS, which has shorter ramps, can make deliveries there only during high tides. *Id*. at ¶ 50.

If Curtin were permitted to compete against AFS, it would immediately introduce significant competition on price by charging lower prices, which would oblige AFS to do the same in order to remain a competitive shipper. *See id*. at ¶¶ 77, 81-83. Curtin would also increase output by offering deliveries at all times of

the day, not only during high tides. *Id.* at ¶ 50.

The exclusive-shipping arrangement at issue in this case insulates AFS from this competition, permitting it to charge supracompetitive prices (*id*. at ¶¶ 81-83, 91-92, 98-99, 108), offer only restricted services (*id*. at ¶ 50), split its supracompetive profits with SCIC (*id*. at ¶¶ 22-23, 37, 39, 54), and confer an insuperable advantage on businesses owned by SCIC in the bargain (*id*. at ¶¶ 57, 92). AFS' customers are thus obliged to pay supracompetitive prices for goods that can be shipped to them only during high tides. *Id*. at ¶¶ 50, 81, 91-92, 98-99, 108.

Because of this arrangement, Curtin has been prevented from generating profits by providing competitive services, and its exclusion been the very means by which SCIC and AFS have implemented their anticompetitive arrangement, which depends on obliging the general public on the Island to use only AFS's services and to have no option to purchase shipping services on competitive terms. *Id*. at ¶¶ 76-85, 99-101, 108-109.

H. SCIC's Sham Bidding Process for Its Exclusive Lease

Before 2016, SCIC granted an exclusive lease of its commercial landing to a shipper called Catalina Freight Line ("CFL"). ER-II 174-208 at ¶ 27. Under this lease, CFL acted as the sole authorized freight shipper to the Island for "several decades." *Id*. Its own lease did not require it to share its profits with SCIC, and it

was unaware of any requirement to do so when it participated in the bidding process for the new lease (described directly below). *Id*. at ¶ 23.

When the CFL lease neared expiration, SCIC invited eight shippers to submit bids to become the new freight shipper to the Island under the new exclusive lease. These shippers included CFL and Curtin. *Id*. at ¶¶ 27-43. When bidding for this concession, Curtin mistakenly believed that the CPUC would authorize only one shipper to serve the Island. *Id.* at ¶ 43. It objected to SCIC's proposed exclusive leasing arrangements as soon as it discovered its mistake. *Id.*

AFS won this bidding process, even though it was the only participant that lacked prior experience as a freight shipper. Rather, it was newly formed for the purpose of bidding for the new exclusive lease. *Id*. at ¶ 31.

SCIC's bidding process was a sham from the start. SCIC intended all along to permit only AFS to call upon its landing and serve the Island, and it conducted the bidding process only to give this arrangement an "aura of legitimacy." *Id*. at ¶¶ 27-43. AFS did not meet any of SCIC's stated minimal requirements, while the remaining bidders did so, but SCIC nevertheless granted its exclusive concession to AFS. *Id.*

SCIC and AFS are closely related, affiliated companies that have common stakes in various business ventures. *Id*. at ¶¶ 64-66, 70. The profit-sharing

provisions in the SCIC-AFS lease were not disclosed to other shippers invited to participate in the bidding process. *Id*. at ¶¶ 23, 39.

I. The District Court Held That the SCIC-AFS Exclusive Arrangement Is Not Protected by State-Action Immunity

Neither the State of California, nor the CPUC, nor any other agency of the State of California has articulated a policy in favor of permitting only one shipper to ship goods to Santa Catalina Island. *See* ER-II 174-208 at ¶¶ 16, 18-19. On the contrary, the CPUC's express policy is to favor competition among shippers to provide this service (*id*. at ¶¶ 18, 58-59, 61), but it lacks authority to ensure that such competition occurs because it wields no regulatory authority over SCIC's private commercial landing. *See id*. at ¶¶ 16, 19, 60.

Indeed, the CPUC has *underscored* its express preference that shippers compete against one another to ship goods to the Island. *Id*. at ¶¶ 58-59, 61. For this reason, it issued Certificates to two shippers, Curtin and AFS, in order to encourage competition between them. *Id.*

The District Court agreed with Curtin that there is no state-action immunity that protects the challenged conduct in this case, and it denied Defendants' motion to dismiss Curtin's claims on the ground of state-action immunity. *See* ER-III 214:3–215:10. Defendants did not bring a cross-appeal from this decision. *See* ER-IV 624-631.

J. AFS' Prices and the Filed-Tariff Doctrine

AFS' prices are regulated by the CPUC and lie at the upper end of allowed prices for shipping services. ER-II 174-208 at ¶¶ 69, 81. They are nevertheless supracompetive (*id*. at ¶¶ 81, 91-92, 98-99, 108), since Curtin would charge lower prices if it were permitted to compete, thereby obliging AFS to lower its prices in order to preserve sales (*id*. at ¶¶ 77, 81-83, 93).

Crucially, the filed-rate doctrine likely prevents customers of AFS from challenging its supracompetitive prices or its "rate-related activity," but the doctrine does not so preclude direct competitors, such as Curtin. *See Transmission Agency of N. California v. Sierra Pac. Power Co.*, 295 F.3d 918, 929 (9th Cir. 2002) ("[T]he filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question."); *but cf. Cost Mgmt. Servs., Inc. v. Washington Nat. Gas Co.*, 99 F.3d 937, 943-48 (9th Cir. 1996) (the filed-rate doctrine should be narrowly construed and *prevents only consumers, but not competitors*, from challenging "rate-related activity.")

K. Curtin's Antitrust Challenge

Curtin's antitrust challenge in the present case is as follows. First, SCIC and AFS have violated Section 2 by conspiring to give AFS a monopoly concession in

a properly defined relevant market – the Island Shipping Market. Moreover, AFS has violated Section 2 by using anticompetitive practices in order to acquire and maintain monopoly power in this market. *See* ER-II 174-208 at ¶¶ 86-101. Second, SCIC and AFS have violated Section 1 under the rule-of-reason standard by using their exclusive-leasing arrangement and related practices to restrain trade in the Island Shipping Market. *See id*. at ¶¶ at 102-110. Third, SCIC and AFS have violated California's UCL by committing the above violations of federal antitrust law. *See id*. at ¶¶ 111-122.

Curtin, an excluded competitor, seeks antitrust relief for its antitrust injury: namely, the profits that it would have earned from providing competitive shipping services in the Island Shipping Market. *Curtin has lost these profits because of the principal anticompetitive feature of SCIC and AFS's antitrust violations*. *Id*. at ¶¶ 50, 76-85, 99-101, 108-109. That is antitrust injury, according to the controlling case law. *See* pp. 37-48, *infra*.

More specifically, the exclusive leasing arrangement between SCIC and AFS has harmed competition in the Island Shipping Market by excluding the only other available competitor, Curtin. *Id*. at ¶¶ 76-85, 99-101, 108-109. Otherwise, Curtin would have introduced competitive pricing, superior service, and increased output in this market. *Id*. By entirely excluding Curtin and all other potential

shippers for at least ten years, SCIC and AFS have insulated AFS from competitive pressures on price, output and service in this market, so that AFS can generate monopoly profits, share them with SCIC, and also confer insuperable procurement advantages on SCIC's numerous businesses on the Island. *Id*.

Curtin's exclusion from the Island Shipping Market has thus been the very means by which SCIC and AFS have accomplished their anticompetitive scheme. *See id.* Curtin's ensuing lost profits therefore constitute its antitrust injury: they have been caused by the impairment of competition wrought by SCIC and AFS's antitrust violations. *See* pp. 41-45, *infra*.

L. Related CPUC Proceedings: the District Court Held That this Case Should Not Be Stayed Pending the Outcome of the CPUC Proceedings

Before bringing the present case, Curtin, AFS and CFL were involved in longstanding CPUC proceedings, by which the CPUC issued Certificates to both AFS and Curtin in order to authorize them to ship cargo by sea to the Island. ER-II 174-208 at ¶¶ 58-59, 61.

On April 6, 2016, Curtin requested a rehearing so that the CPUC could decide certain competition issues that it has also raised in this case, as well as certain related matters. *See* ER-III 225. The CPUC granted its request in part on April 28, 2017, agreeing to consider the antitrust implications of its grant of a

Certificate to AFS. *Id*. 226-230.

When doing so, the CPUC confirmed that it lacked jurisdiction or authority to decide various antitrust issues, which only the federal courts can do. *See id.* 228 ("At the same time, the Commission is not ultimately responsible for adjudicating antitrust claims. Moreover, although we are required to consider competition issues *sua sponte*, Curtin, or other potential competitors, may be in the best position ultimately to pursue redress of any violations. 'Our consideration of antitrust is for purposes quite different from those of the courts; it does not usurp their function.'") (*quoting Northern California Power Agency v. Public Utilities Comm.*, 15 Cal.3d 370, 378 (1971)).

The CPUC also confirmed that it lacked authority to regulate SCIC's commercial landing. *See* ER-III 231-232.

In light of these matters, and after finding that there is no state-action immunity for the challenged conduct, the District Court denied AFS' motion to stay or dismiss the present case on the ground of primary jurisdiction until the CPUC completed its rehearing. *See* ER-III 214:3–215:10. Defendants did not bring a cross-appeal from this decision. *See* ER-IV 624-31.

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V. THE DISTRICT COURT'S RULINGS

On February 17, 2017, in response to Defendants' first set of motions to dismiss, the District Court dismissed Curtin's original complaint under Rule 12(b)(6), finding that it had failed to state an actionable claim. When so ruling, the District Court granted Curtin leave to amend its pleading. *See* ER-IV 443-447.

On June 23, 2017, in response to Defendants' second set of motions to dismiss, the District Court dismissed Curtin's first amended complaint under Rule 12(b)(6), finding again that Curtin had failed to plead an actionable claim. When so ruling, the District Court again gave Curtin leave to amend its pleading. *See* ER-III 209-221.

On February 21, 2018, in response to Defendants' third set of motions to dismiss, the District Court dismissed Curtin's second amended complaint and denied its request for leave to amend its pleading. *See* ER-I 1-6.

A. The District Court's Ruling on Antitrust Injury: Curtin Failed to Plead Cognizable Antitrust Injury Because its Claimed Losses Conceivably Could Have Been Caused by Lawful Conduct

In each of its rulings, the District Court found that Curtin's claimed losses arising from the SCIC/AFS exclusive-leasing arrangement did not constitute

antitrust injury.[7]

The District Court's reasoning was as follows. Curtin claimed that the SCIC/AFS exclusive-leasing arrangement was an antitrust violation that had caused it to forgo profits – the profits that it could have earned, had it been permitted to provide shipping services to the general public on the Island. The District Court concluded, however, that even if the arrangement were unlawful under Section 1 (a point it never decided), Curtin's claimed losses from the arrangement could not qualify as antitrust injury, since in theory they could have been caused by lawful conduct. *See* ER-I 3:18–4:21. To clarify this point, the District Court observed that Curtin would have suffered the same losses if SCIC had rejected its bid and given leases to "multiple" shippers other than Curtin. *See id*. at 3:28–4:2 ("Curtin's injury would be the same had SCICo awarded the lease to multiple companies – resulting in competition and the exclusion of Curtin.")

On this ground, which was unchanging, the District Court rejected Curtin's essential challenge in each of its pleadings and finally dismissed its Section 1 claim without leave to amend.[8] *See* ER-I 3:18–4:21(final order); ER-III 215:12–216:17,

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[7] To state an antitrust claim, a private plaintiff must plead *inter alia* its own actionable antitrust injury. *See* pp. 38-40, *infra*.

[8] The District Court did not dismiss Curtin's Section 2 claim on this ground, finding that Curtin had pled a different kind of antitrust injury that offered (continued...)

218:23–219:12 (interlocutory order on Curtin's first amended complaint); ER-IV 444:25– 447:6 (interlocutory order on Curtin's original complaint).

B. The District Court Held That Curtin Adequately Pled Antitrust Injury Caused by SCIC's Bidding Process

Notwithstanding the above ruling, the District Court found that Curtin had sufficiently pled antitrust injury in support of its Section 2 claim on a very narrow basis – by alleging that SCIC's bidding process had been rigged from the start. *See* ER-I 4:19-21 ("The Court previously held that Curtin adequately alleged an antitrust injury with respect to the [bidding process.] ... Curtin has antitrust standing with respect to the [bidding process.]")

The District Court ruled, however, that Curtin's harm from the rigged bidding process could not constitute antitrust injury in support of its Section 1 claim. *See* ER-III 216:18-218:14.

The District Court never explained how Curtin could challenge the bidding process without also challenging its outcome – the anticompetitive exclusive-leasing arrangement between SCIC and AFS. *See id.*

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[8](...continued)
narrow, limited support for the Section 2 claim, as is explained directly below.

C. The District Court Rejected Curtin's Section 2 Claim, Finding That it Was Unsupported by Any Recognized Theory of Liability

In its final order, the District Court dismissed Curtin's Section 2 claim without leave to amend even after finding that Curtin had pled antitrust injury sufficient to support the claim. According to the District Court, Curtin's Section 2 claim could succeed only if it satisfied the requirements of either the *Aspen Skiing* doctrine or the essential-facilities doctrine. The Court then determined that Curtin's allegations were insufficient to meet the requirements of either doctrine. On this basis, the District Court dismissed the claim without leave to amend. *See* ER-I 4:23–6:7.

1. The District Court Found That Curtin Could Not Plead an Actionable Refusal-to-Deal under *Aspen Skiing*

The District Court held that Curtin's allegations could not suffice to establish an actionable refusal-to-deal under the *Aspen Skiing* doctrine, which in exceptional circumstances imposes a unilateral duty-to-deal on monopolists. *See* ER-I 5:1-14. Specifically, under *Aspen Skiing* a monopolist engages in exclusionary conduct that establishes a predicate for a Section 2 claim when (1) it discontinues an established, profitable relationship with a rival, (2) solely to harm the rival and thereby entrench its monopoly position, and (3) by so doing it suffers a loss of short-term profits from the cancelled collaboration and lessens its own

offerings to customers for the sake of maintaining or enlarging its long-term market power. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-11, 105 S. Ct. 2847, 2858-62 (1985) (explaining these points at length).

According to the District Court, Curtin could not satisfy the narrow rule of *Aspen Skiing*, since there were no prior dealings between it and SCIC that SCIC had terminated. *See* ER-I 5:1-14. This circumstance meant that SCIC enjoyed complete liberty to refuse to deal with Curtin. *See id.*

2. The District Court Found That Curtin Could Not Meet the Requirements of the Essential-Facilities Doctrine

The District Court determined that the only alternative basis for Curtin's Section 2 claim was the essential-facilities doctrine, which Curtin had pled at length in its second amended complaint. *See* ER-I 5:5-7. According to the District Court, Curtin adequately pled that SCIC's commercial landing was an "essential facility" within the meaning of the doctrine (*see id*. at 5:23), but the District Court nevertheless held that Curtin could not prevail on this theory, reasoning as follows: (1) SCIC owned the essential facility, but was not a competitor of Curtin; (2) AFS, although a competitor of Curtin, did not own the essential facility; and (3) the doctrine required that a direct competitor must own the essential facility and withhold its use from one or more direct competitors in order to monopolize a market (*see id*. at 5:23–6:5.) The District Court found that Curtin could not meet

this standard on the above facts, and it therefore held that the essential-facilities doctrine could not be invoked to support its Section 2 claim. *See id*.

3. The District Court Declined to Entertain Any Other Theory of Liability to Support Curtin's Section 2 Claim

Having determined that Curtin's Section 2 claim necessarily depended on the *Aspen Skiing* doctrine and/or the essential-facilities doctrine, and having concluded that neither doctrine could be properly invoked in this case, the District Court dismissed Curtin's Section 2 claim without leave to amend. *See* ER-I 4:23–6:7.

D. The District Court Denied Curtin's Request for Leave to Amend its Second Amended Complaint

In its final substantive submissions, Curtin requested leave to amend its second amended complaint if for any reason the District Court found that its allegations were deficient. ER-II 82:6-7, n. 11; 115:5-7, n. 13. The District Court denied this request, dismissing this complaint without leave to amend. *See* ER-I 3:14-16, 6:15-16.

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VI. THE APPLICABLE STANDARDS OF REVIEW

Two standards of review govern Curtin's present appeal.

A. The District Court's Dismissal of Curtin's Claims Is Reviewed *De Novo*

The District Court's dismissal of Curtin's claims under Rule 12(b)(6) is subject to a *de novo* review. *See Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1205 (9th Cir. 2016) ("We review a dismissal for failure to state a claim *de novo*, accepting all well-pleaded allegations as true.")

B. The District Court's Denial of Curtin's Request for Leave to Amend Is Reviewed for Abuse of Discretion

The abuse-of-discretion standard governs the District Court's denial of Curtin's request for leave to amend its second amended complaint. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) ("The district court's denial of leave to amend the complaint is reviewed for an abuse of discretion. Although leave to amend should be given freely, a district court may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile.")

VII. SUMMARY OF CURTIN'S ARGUMENTS

Curtin respectfully submits that the District Court committed three reversible errors. Its dismissal of Curtin's claims should therefore be reversed, and the case

should be remanded with appropriate instructions.

A. The District Court Used the Wrong Standard When Deciding Whether Curtin Had Pled Cognizable Antitrust Injury

The District Court erroneously dismissed Curtin's Section 1 claim and sharply circumscribed its Section 2 claim because it mistakenly concluded that Curtin had failed to plead antitrust injury caused by the exclusive lease between SCIC and AFS. The District Court reached this conclusion because it adopted Defendants' proposed standard for antitrust injury, which was as follows. A private plaintiff does not suffer antitrust injury when its claimed losses could *in theory* have been caused by conduct that is blameless under federal antitrust law. If it is possible to envision a lawful hypothetical scenario that results in the same losses, then those losses do not qualify as antitrust injury, no matter what might have been their actual cause. *See* ER-I 3:18–4:21.

This was not the proper standard. The District Court nevertheless used it to measure Curtin's allegations, and, finding that in theory Curtin's claimed losses could have been caused by blameless conduct, it wrongly concluded that Curtin had failed to plead antitrust injury that arose from the exclusive lease between SCIC and AFS. On the basis of this erroneous ruling, the District Court dismissed Curtin's Section 1 claim and limited the scope of its Section 2 claim. That was

reversible error.

This standard of antitrust injury was not only erroneous, but also impossible to satisfy. If it were enforced in all cases, it would result in the *abolition* of private antitrust litigation, since in every case it is possible to articulate a hypothetical scenario of lawful conduct that results in the very losses that the plaintiff attributes to the defendant's antitrust violation. *See* pp. 45-46, *infra*.

This standard was supported only by dicta taken out of context. The Sixth Circuit has specifically rejected this standard and explained why the dicta in question is unavailing. *See* pp. 46-48, *infra*. This Court should do the same.

In fact, Curtin sufficiently pled its antitrust injury by alleging facts that, if credited, establish the following matters: (1) antitrust violations committed by SCIC and AFS (*see* pp. 48-62, *infra*.), that (2) destroyed competitive processes in the Island Shipping Market by means of wrongful exclusionary practices directed against the only qualified competitor, Curtin, which suffered lost profits in consequence (*see* pp.43-45, *infra*.). That is antitrust injury that falls within a well-recognized category – *harm caused to a competitor by wrongful exclusionary conduct*. *See* pp. 41-43, *infra*.

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B. The District Court Erroneously Ruled That Curtin's Section 2 Claim Could Not Succeed Because it Failed to Satisfy Narrow Requirements Not Necessary to the Claim

The District Court also erred by dismissing Curtin's Section 2 claim after mistakenly concluding that the claim could proceed only if it satisfied certain narrow standards that in fact were not required for the claim.

This error was prejudicial. Curtin adequately pled that AFS unlawfully monopolized a properly defined relevant market (the Island Shipping Market) by means of anticompetitive conduct (its anticompetitive arrangement with SCIC). Curtin thus stated a claim against AFS for unlawful monopolization in violation of Section 2. *See* pp. 48-54, *infra*.

Curtin also adequately pled that SCIC and AFS conspired to give AFS monopoly power in the Island Shipping Market, took one overt act in furtherance of the conspiracy, and specifically intended to vest AFS with a monopoly concession. Curtin thus stated a claim for conspiracy to monopolize in violation of Section 2. *See* pp. 54-56, *infra*.

Curtin was not additionally required to meet the exacting requirements of two doctrines invoked by the District Court - the *Aspen Skiing* doctrine and the essential-facilities doctrine. The District Court erred by accepting Defendants' argument that Curtin must satisfy one or the other doctrine in order to pled a viable

Section 2 claim. *See* pp. 48-56, *infra*.

C. The District Court Abused its Discretion by Denying Curtin's Request for Leave to Amend

The District Court lastly erred by denying Curtin's request for leave to amend its second amended complaint. Curtin pled a compelling antitrust challenge that implicates significant, brazen violations of Section 1 and Section 2. It also pled its own antitrust injuries. If there was any point or legal theory that required further clarification or refinement, Curtin should have been granted leave to furnish it. *See* p. 62, *infra*.

In addition, if Curtin were given leave to amend it could plead in the alternative that SCIC and AFS both act as shippers[9] and have engaged in a concerted refusal to deal in order to withhold from a rival (Curtin) necessary access to a market. Such a claim would be subject to *per se* condemnation under Section 1. *See* pp. 62-63, *infra*.

Curtin respectfully submits that its case should not have been dismissed on the pleadings under Rule 12(b)(6), and it requests that this Court reverse the District Court's dismissal and remand the case to the District Court with

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[9] SCIC is a private shipper that does not make sales in the Island Shipping Market, but it has the ability to act as a shipper and acts as one for its own businesses. *See* ER-II 174-208 at ¶¶ 23-24, 57, 92.

appropriate instructions.

VIII. CURTIN ADEQUATELY PLED ITS OWN ANTITRUST INJURY BY ALLEGING DEFENDANTS' WRONGFUL EXCLUSIONARY PRACTICES AND ITS OWN ENSUING HARM

The central premise of Curtin's present appeal is that the District Court adopted an erroneous standard of antitrust injury, one that is impossible to satisfy, and on this basis reached the mistaken conclusion that Curtin had failed to allege antitrust injury arising from the exclusive lease that SCIC awarded to AFS. According to the District Court, Curtin failed to allege antitrust injury arising from the accused lease agreement because its claimed losses could in theory have been caused by blameless conduct. *See* ER-I 3:18–4:21.

To reach this conclusion, the District Court relied on an interpretation of this Court's dicta urged by SCIC and AFS. Faced with identical arguments and the same kind of dicta, the Sixth Circuit expressly rejected this interpretation and explained the proper meaning of the dicta. *See In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 912-14 (6th Cir. 2003). Curtin asks that this Court do the same and respectfully submits that this issue deserves a published decision. These matters are explained below.

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A. What Is Antitrust Injury?

The doctrine of antitrust injury is a limiting doctrine. It requires a private plaintiff to show not only that the defendants have committed an antitrust violation, but also that *its own losses arise from a competition-reducing aspect or effect of their antitrust violation*. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S. Ct. 1884, 1894 (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.")

The doctrine of antitrust injury thus requires an antitrust plaintiff to identify an antitrust violation, show how it has harmed competition, and show that this harm to competition entailed harming the plaintiff (by restraining its operations or excluding it) or enabled the defendant to harm the plaintiff (by imposing supracompetitive prices or other oppressive trading terms after competition was subdued or eliminated by the violation). *See Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 97 S.Ct. 690 (1977) (An antitrust injury is one that "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (the doctrine of antitrust injury requires a private plaintiff to "prove that his loss flows from an anticompetitive

aspect or effect of the defendant's behavior...."). *See also Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999) (stating these matters as a four-part test).

If the plaintiff's losses were not caused by an anticompetitive aspect or effect of the defendants' antitrust violation, they do not qualify as antitrust injury, and the plaintiff therefore lacks an actionable antitrust claim, even if the defendant has committed an antitrust violation, and indeed even if its violation is unlawful *per se* under Section 1. *See Pool Water Prod. v. Olin Corp*., 258 F.3d 1024, 1034 (9th Cir. 2001) (stating these points); *Rebel Oil,* 51 F.3d at 1433 (same).

The doctrine exists because sometimes a defendant's antitrust violation causes incidental harm to a plaintiff, but the harm was neither inflicted to impair competitive conditions (exclusionary harm), nor was the result of impaired competition (supracompetitive prices or restricted output). In such a case, the defendant's conduct has diminished competition in some manner or other, or else it would not constitute an antitrust violation, but it has not caused anticompetitive harm to the plaintiff, whose losses instead were caused by some other aspect or consequence of the defendant's conduct. Such a plaintiff lacks antitrust injury and cannot maintain an antitrust claim against the defendant. *See Atl. Richfield*, 495 U.S. at 334 (a plaintiff's "injury, although causally related to an antitrust violation,

nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny....")

Properly applied, the doctrine prevents a plaintiff from litigating opportunistic antitrust claims when it has not been harmed by a competition-reducing feature of the antitrust offense in question. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 101 (3d Cir. 2010) ("The antitrust-injury requirement helps ensure that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place....") (*citing, inter alia,* IIA *Phillip E. Areeda, Herbert Hovenkamp et al., Antitrust Law* ¶ 337a, at 82-83 (3d ed. 2007)).

That is the doctrine of antitrust injury, properly stated.

B. How Can a Plaintiff Show Antitrust Injury?

A private plaintiff typically can show antitrust injury by proving either of the following two scenarios:

1. A Consumer's Antitrust Injury. A consumer suffers antitrust injury when she must pay supracompetitive prices to the defendant or accept its restricted offerings because the defendant has committed an antitrust offense that has impaired competition in the relevant market. In this scenario, the antitrust violation impairs competition, and *in consequence* the defendant gains or preserves market

power and can therefore subject the plaintiff to supracompetitive prices or restricted offerings. *See Brunswick,* 429 U.S. at 489 (antitrust injury includes harm "made possible" by the antitrust violation).

2. A Competitor's Antitrust Injury. A competitor (or other market participant) suffers antitrust injury when it loses profits or is run out of business because the defendant commits an antitrust violation that entails wrongful exclusionary conduct directed against the competitor. In this scenario, the defendant employs the wrongful practices against the plaintiff *in order to impair competition in the relevant market*, so that it can insulate itself from competitive pressures and profitably impose supracompetitive prices or restricted output on captive customers. *See W. Penn Allegheny Health*, 627 F.3d at 102 (antitrust injury occurs to a competitor or other market participant "whose injuries are the means by which the defendants seek to achieve their anticompetitive end"); *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1035-36 (C.D. Cal. 2007) (a competitor suffers antitrust injury if the defendant uses wrongful exclusionary conduct to hinder or prevent it from competing, so that the defendant can acquire or preserve market power).

3. Wrongful Exclusionary Conduct. A competitor, such as Curtin, suffers antitrust injury when, as here, the defendants harm it by employing

wrongful exclusionary practices in furtherance of an unlawful antitrust scheme that depends on impairing or destroying competitive processes in a relevant market. *See Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985) ("An antitrust plaintiff who is excluded from the relevant market by anticompetitive activity is entitled to recover his lost profits."); *Areeda & Hovenkamp, Analysis of Antitrust Principles and Their Application* (4th ed. 2013) at ¶ 337a ("a rival clearly has standing to challenge the conduct of rival(s) that . . . tends to exclude rivals from the market, thus leading to reduced output and higher prices.") *See, e.g.*, *Retrophin, Inc. v. Questcor Pharm., Inc.*, 41 F. Supp. 3d 906, 913-14 (C.D. Cal. 2014) (plaintiff, a competitor, pled antitrust injury by alleging that defendant, a monopoly seller of a pharmaceutical drug, purchased the rights to a known substitute drug solely in order to prevent plaintiff from selling the substitute drug and thereby introducing competition in the relevant markets; plaintiff sought its lost profits, which were its antitrust injury.)

Under this standard, a defendant's conduct is exclusionary if it *gratuitously impedes or excludes its rivals*, but is not exclusionary if it is *meant to improve the defendant's own offerings without needlessly restraining rivals*. *See Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) ("Anticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does

not further competition on the merits or does so in an unnecessarily restrictive way.")

If, as in this case, one or more defendants employ wrongful exclusionary conduct against a rival in furtherance of an antitrust violation and thereby exclude it from the relevant market, they inflict antitrust injury on the rival. *See Dolphin Tours*, 773 F.2d at 1511; *Retrophin*, 41 F. Supp. 3d at 913-14.

That is precisely what Curtin has alleged, as is explained directly below.

C. Curtin Has Pled Actionable Antitrust Injury under the Exclusionary Practices Test

In Sections IX and X of this brief, Curtin fully explains why its allegations against SCIC and AFS describe antitrust violations. *See* pp. 48-62, *infra*. Curtin has also alleged its antitrust injury caused by these antitrust violations – the profits it lost because SCIC and AFS, in furtherance of their antitrust violations, directed wrongful exclusionary conduct against it in order to prevent competition in the Island Shipping Market. *See* ER-II 174-208 at ¶¶ 20-26, 50, 76-85, 89-101, 104-109.

Specifically, SCIC and AFS have used their exclusive-leasing arrangement to exclude from the relevant market for ten years all other shippers, including the only other one that is presently authorized to make sales – Curtin. ER-II 174-208 at ¶¶ 13-15, 21, 26, 33, 76-85. By this arrangement, AFS is fully insulated from any

competitive pressure and therefore can profitably charge its captive customers supracompetive prices while offering them deliveries only at high tides. *Id*. at ¶¶ 50, 81, 91-92, 98-99, 108**.** SCIC gave this exclusive concession to AFS in exchange for a *quid pro quo*: AFS agreed to share its monopoly profits with SCIC and to offer only high-tide deliveries to its captive customers, so that SCIC, which alone on the Island can arrange for its own shipping, can provide its own businesses on the Island with superior shipping services at lower prices, thereby giving them insuperable procurement advantages over all independent businesses on the Island, which must pay AFS' high prices and accept its unaccommodating delivery schedules. *Id.* at ¶¶ 22-23, 39, 54, 57, 92.

It is difficult to conceive of a more profoundly anticompetitive exclusivity arrangement. *See ZF Meritor, LLC v. Eaton Corp*., 696 F.3d 254, 270-72 (3d Cir. 2012) (extended discussion of possible anticompetitive consequences of long-term exclusivity arrangements). SCIC and AFS engineered this utterly anticompetitive scenario specifically by excluding Curtin, whose ensuing losses therefore constitute antitrust injury. Had SCIC and AFS not excluded Curtin by their unlawful exclusivity arrangement, it would have introduced competition in the Island Shipping Market, offering competitive prices as well as deliveries at all tides. This in turn would have obliged AFS to offer competitive prices and to seek

to improve its offerings to avoid losing sales. *See* ER-II 174-208 at ¶¶ 20-26, 50, 76-85, 89-101, 104-109.

Because it has been excluded, Curtin has been deprived of the profits that it would have earned in the Island Shipping Market. Those losses were caused by SCIC and AFS's wrongful impairment of competition in this market and therefore constitute an antitrust injury. *See Atl. Richfield*, 495 U.S. at 344; *Rebel Oil*, 51 F.3d at 1433.

Having pled these matters fully, Curtin properly placed its antitrust injury in issue. *See Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co*., 113 F.3d 405, 417 (3d Cir. 1997) ("[T]he existence of antitrust injury is not typically resolved through motions to dismiss.")

D. The District Court Used an Erroneous Standard to Determine Whether Curtin Had Sufficiently Pled its Antitrust Injury

Rather than reach the foregoing conclusion, the District Court adopted the erroneous standard proposed by SCIC and AFS and determined that Curtin's claimed losses from the SCIC-AFS lease *could have been caused* by blameless conduct rather than their alleged antitrust violations. On this basis, it mistakenly concluded that Curtin had failed to plead antitrust injury arising from their use of a long-term exclusive lease. *See* ER-I 3:18–4:18.

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By so ruling, the District Court misstated the controlling law on antitrust injury, misapplied it to Curtin's claims, and contradicted the express ruling of another Circuit Court on this exact same point. In so doing, the District Court established a standard for antitrust injury that can never be met, since it is always possible to articulate a hypothetical cause for a plaintiff's loss that is not unlawful under federal antitrust law.

1. The Sixth Circuit Has Rejected the Standard Adopted by the District Court

Rejecting the standard used by the District Court, the Sixth Circuit has ruled that the doctrine of antitrust injury does not require a plaintiff to plead losses that must have been caused by the alleged antitrust violation and could not have been caused even in theory by blameless conduct:

> The defendants contend that [the doctrine of antitrust injury] means that in order to allege antitrust injury adequately, a plaintiff must allege that the only way the defendant could have caused the plaintiff's injury was by engaging in the antitrust violation. In other words, if the defendant could have in theory caused the same injury without engaging in an antitrust violation, the plaintiff has not suffered an 'antitrust injury,' even if in fact it was the antitrust violation that caused the actual injury in a particular case. (....)
>
> We disagree.

In re Cardizem CD Antitrust Litig., 332 F.3d 896, 912 (6th Cir. 2003).

In contrast, SCIC and AFS persuaded the District Court to reach the opposite conclusion in reliance on the following dicta from *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1233 (9th Cir. 1998):

> As a competitor of [defendant], [plaintiff's] alleged injury is that it has been foreclosed from serving as a [designated supplier of the relevant product.] However, [plaintiff] would have suffered the same injury had a small business acquired the exclusive right to manufacture and to distribute [the relevant product.] Because it cannot demonstrate 'antitrust injury' as defined in *Brunswick,* [plaintiff] lacks competitor standing to sue [defendant] for treble damages under § 4 [of the Clayton Act]."

This dicta should not have been so construed. On the contrary, it expressly acknowledges that antitrust injury refers to the doctrine announced in *Brunswick*, 429 U.S. 477. That doctrine, as explained above, teaches that antitrust injury is a loss caused by an anticompetitive aspect or effect of the defendant's antitrust violation. *See id*., 429 U.S. at 489. The doctrine, properly understood, was never meant to prevent a private plaintiff from complaining of any loss that in theory could have been lawfully caused.

The Sixth Circuit has already clarified this point, and this Court should do the same. *See Cardizem*, 332 F.3d at 912-14 ("[T]he facts and holdings of those cases [in which comparable dicta appeared] provide no support for the defendants' proposed interpretation.... In none of these cases was a complaint dismissed for

failure to allege antitrust injury based on a defendant's claim that it could have caused the same injury without committing the alleged violation.")

The District Court's adoption of the very standard rejected by the Sixth Circuit was erroneous and prejudicial and should be reversed.

IX. CURTIN STATED A CLAIM AGAINST AFS FOR UNLAWFUL MONOPOLIZATION, AS WELL AS A CLAIM AGAINST BOTH AFS AND SCIC FOR CONSPIRACY TO MONOPOLIZE

At Defendants' urging (ERII 133:13–135:27; 158:14–162:8), the District Court erroneously held that Curtin's Section 2 claim must fail unless it satisfied the narrow requirements of either the *Aspen Skiing* doctrine or the essential-facilities doctrine. *See* ER-I 4:23–6:7. While those two doctrines can be invoked to establish liability under Section 2 in appropriate cases, neither was necessary to the pleading of Curtin's Section 2 claim. Rather, Curtin's allegations suffice to plead a claim against AFS for *unlawful monopolization* of the Island Shipping Market, as well as a claim against both SCIC and AFS for *conspiracy to monopolize* this market.

A. The Elements of a Claim for Unlawful Monopolization

To state a claim for unlawful monopolization in violation of Section 2, a plaintiff must plead facts that establish the following matters: (1) a properly defined relevant market; (2) the defendant's possession of monopoly power in this market; (3) the defendant's use of anticompetitive conduct to acquire or maintain

its monopoly power; and (4) the plaintiff's antitrust injury. *See Cost Mgmt. Servs.,* 99 F.3d at 949 (listing these elements); *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir.1996) (same).

There is no additional requirement. *See id.*

B. Curtin Has Pled the Necessary Elements of a Claim for Unlawful Monopolization in Violation of Section 2

Curtin's allegations satisfy each of the necessary elements of a claim for unlawful monopolization. Curtin has explained above its pleading of antitrust injury (*see* pp. 37-45, *supra*) and here addresses the remaining elements of the offense.

1. Curtin Has Properly Defined its Proposed Relevant Market in Accordance with the Authoritative SSNIP Test (Hypothetical Monopolist Test)

Curtin's proposed relevant market is properly defined. It is the market for shipping goods by sea to public customers on Santa Catalina Island (referred to in this brief as the "Island Shipping Market"). This is the market that Curtin alleges AFS has monopolized. *See* ER-II 174-208 at ¶¶ 11-15.

Curtin's proposed market satisfies the standard econometric criteria used by the courts and federal agencies in order to define relevant markets for purposes of antitrust review. Specifically, it satisfies the exacting requirements of the SSNIP test (also known as the "hypothetical monopolist's test"), which is the preferred or

authoritative econometric methodology used to define relevant markets for purposes of antitrust review. *See F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1037-38 (2008) (D.C. Cir. 2008) (explaining how the SSNIP test is used to test proposed market definitions); *U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines* (2010) at §§ 4.1.1 – 4.2.2 (same).

The application of the SSNIP test to Curtin's allegations is easily applied and conclusive: a hypothetical monopolist or cartel, if given control over all shipping services to the public on the Island, could profitably increase its prices for these services by a statistically significant amount for a non-transitory duration; that is, it could profitably impose a SSNIP (a small but significant non-transitory increase in price). Indeed, that is precisely what AFS has done. *See* ER-II 174-208 at ¶¶ 81, 91-92, 98-99, 108.

Curtin's proposed market therefore meets the authoritative standard. *See Whole Foods Market,* 548 F.3d at 1037-38; *Department of Justice/Federal Trade Commission, Horizontal Merger Guidelines* (2010) at §§ 4.1.1 – 4.2.2. *See also Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784-85 (9th Cir. 2015) (affirming district court's use of SSNIP test to define the relevant market).

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Curtin's allegations make clear *why* its market definition satisfies the authoritative SSNIP test: public customers on the Island lack *any* alternative means of purchasing most kinds of goods, including *basic necessities that they require to survive on the Island*, such as food, clothing, fuel, and building materials. Shipping goods by sea is the only service that can meet this demand. There is no substitute service that is reasonably interchangeable with this shipping service. *See* ER-II 174-208 at ¶¶ 10-12.

That means that Curtin's market definition is sound and should not be decided on the pleadings. *See Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (a plaintiff's proposed relevant market is typically a question of fact that should be decided by summary judgment or at trial, save where it is "facially unsustainable" because it manifestly fails to account adequately for all reasonably interchangeable substitute products) (*citing Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997)).

2. AFS Possesses Monopoly Power in the Island Shipping Market

According to Curtin's allegations, AFS makes 100% of all sales in the Island Shipping Market. *See* ER-II 174-208 at ¶¶ 13, 21, 26, 33. This total market share is protected by an absolute barrier to entry: the exclusive lease between AFS and SCIC that runs until 2026. *Id*. These facts, which are fully pled, serve as

circumstantial evidence that AFS has monopoly power in the relevant market. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) (monopoly power "can be proven by either direct or circumstantial evidence") and at 1206 (circumstantial evidence of monopoly power is shown when the defendant has "a 65% market share" that is protected by market barriers).

Curtin has also pled direct evidence of the same point: since acquiring the exclusive concession, AFS has been charging supracompetitive prices to the general public. ER-II 174-208 at ¶¶ 81, 91-92, 98-99, 108. Curtin, which is authorized to ship goods to the Island (*id.* at ¶¶ 37, 58-61, 77-84), would immediately undercut its prices if it were permitted to ship there (*id.* at ¶¶ 77, 81-83), but by the express terms of the exclusive lease between SCIC and AFS it cannot do so (*id*. at ¶¶ 13, 21, 26, 33). These facts, if assumed true, directly demonstrate AFS's monopoly position in the relevant market. *See Rebel Oil*, 51 F.3d at 1434 (a defendant's profitable charging of supracompetitive prices or restriction of marketwide output for an extended duration is direct evidence of its monopoly power); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (same).

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3. AFS Employed Anticompetitive Practices in Order to Acquire its Monopoly Position

According to Curtin's carefully pled challenge, AFS holds an absolute monopoly in the Island Shipping Market not because its services are superior, or because its prices are lower, or because the market can accommodate only one seller (e.g., owing to natural economies of scale). Rather, a crony business (AFS) gained its monopoly position by colluding improperly and reaching an illicit agreement with the owner of the only commercial landing on the Island (SCIC): AFS agreed to split its monopoly profits with SCIC and to subject independent businesses to a crippling disadvantage in exchange for its exclusive concession for ten years, during which it could impose supracompetitive prices without fear of losing sales. This entire arrangement depends on the absolute exclusion of any shipper willing to compete on price or service, such as Curtin. *See* ER-II 174-208 at ¶¶ 22-23, 37, 39, 50, 54, 81-83, 91-92, 98-99.

That is Curtin's challenge. If credited, as it must be at the pleadings stage, it describes anticompetitive conduct rather than competition on the merits: contractual arrangements that substantially foreclose overall competition for a long duration (often termed exclusive-dealing contracts) sometimes constitute anticompetitive conduct by which a defendant wrongly acquires or preserves monopoly power. *See LePage's Inc. v. 3M*, 324 F.3d 141, 157 (3d Cir. 2003)

("Even though exclusivity arrangements are often analyzed under § 1, such exclusionary conduct may also be an element in a § 2 claim."); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) ("Although not illegal in themselves, exclusive dealing arrangements can be an improper means of maintaining a monopoly.")

Curtin has therefore pled a claim against AFS for unlawful monopolization in violation of Section 2. It has a pled (1) a relevant market, (2) in which AFS holds monopoly power, (3) which it acquired by anticompetitive conduct. At the pleadings stage, it was not required to plead more. *See Cost Mgmt. Servs.*, 99 F.3d at 949.

In particular, Curtin was not additionally required to meet the requirements of *Aspen Skiing* or the "essential-facilities" doctrine (*see id.*), but even on this latter point, Curtin can fairly argue that SCIC and ASF conspired to manipulate an essential facility in order to confer an illicit monopoly on ASF. This point is explained directly below.

C. The Elements of a Claim for Conspiracy to Monopolize in Violation of Section 2

The elements of a claim for conspiracy to monopolize in violation of Section 2 are as follows: "(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to

monopolize; and (4) causal antitrust injury." *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). Moreover, the requisite "specific intent" can be inferred from the defendants' conduct. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980) ("Specific intent to monopolize will normally be proved by inference from conduct.")

D. Curtin Has Pled the Elements of a Claim for Conspiracy to Monopolize

This case is perhaps the ultimate example of a conspiracy to monopolize. As summarized in this brief at pp. 11-21, the owner of most of the private land on the Island (SCIC) has given an exclusive concession to its crony (AFS) after conducting a sham open bidding process for the exclusive concession. Under this arrangement, individuals and independent businesses on the Island can receive nearly all goods *only* from AFS, which ships to them at inflated prices while offering only inferior service, thereby placing the independent businesses at a disadvantage when they try to compete against SCIC's businesses, which alone are exempt from this anticompetitive arrangement. The goods that AFS provides to its captive public include basic necessities required for survival on the Island. The public must pay for AFS' shipping services at supracompetitive prices and accept its inferior service, or perish (literally). AFS and SCIC have shared AFS' monopoly profits from this arrangement and vigorously oppose any effort to

disrupt the arrangement. *See* pp. 11-21, *supra* (including all citations to the record).

By its allegations, Curtin has pled an actionable claim under Section 2 for conspiracy to monopolize: (1) SCIC and AFS formed a conspiracy in order to give AFS a monopoly position in the Island Shipping Market; (2) AFS and SCIC took at least one overt act in furtherance of this scheme; (3) SCIC and AFS specifically intended to confer monopoly power on AFS – a matter that can be inferred from their conduct; and (4) Curtin has suffered antitrust injury in consequence (*see* pp. 37-45, *supra*). *See Paladin Assocs.,* 328 F.3d 1158 (9th Cir. 2003) (listing these elements); *Hunt-Wesson Foods,* 627 F.2d at 926 (specific intent can be inferred from the defendants' conduct).

Curtin has therefore pled a claim under Section 2 not only for AFS' monopolization, but also for SCIC and AFS' conspiracy to monopolize. Curtin's Section 2 claim should not have been dismissed on the ground that it fails to satisfy the *Aspen Skiing* doctrine or the essential-facilities doctrine.

X. CURTIN PLED AN ACTIONABLE VIOLATION OF SECTION 1 UNDER THE STRUCTURED RULE OF REASON

Other than ruling on Curtin's lack of antitrust injury, the District Court did not address the sufficiency of Curtin's Section 1 claim. *See* ER-I 1-6; ER-III 209-221; ER-IV 443-447. Curtin here addresses this matter briefly.

Curtin's allegations suffice to state a Section 1 claim that meets the requirements of the "structured rule of reason," which is now generally used to adjudicate rule-of-reason claims made under Section 1. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998) ("Courts have imposed a consistent structure on rule of reason analysis by casting it in terms of shifting burdens of proof.").[10]

The structured rule-of-reason, which was first developed by the late Professor Phillip Areeda, offers a roadmap to courts in rule-of-reason cases. It entails shifting burdens of proof that allow the courts to manage rule-of-reason cases efficiently and in accordance with uniform standards. *See generally Areeda and Hovenkamp, Fundamentals of Antitrust Law* (3rd Ed. 2010) at §§16.09 *et seq*. (explaining the rule and how it promotes sound antitrust jurisprudence as well as judicial economy).

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[10] Certain practices, such as horizontal price-fixing, have long been understood to be "always or nearly always anticompetitive," and as such are treated as *per se* violations of Section 1. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562 (1979). Other practices can be condemned under Section 1 in accordance with the abbreviated "quick-look" standard. *See California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 769-71, 119 S. Ct. 1604, 1612-13 (1999) (explaining the quick-look doctrine). All other challenges under Section 1 must show that the challenged conduct fails under "the rule of reason." *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-87, 127 S. Ct. 2705, 2712-13 (2007) (explaining this point at length).

More specifically, the structured rule-of-reason employs the following burdens of proof:

First, the plaintiff must define a proper relevant market and show that two or more independent defendants have made use of a trade restraint that impairs competition in this market (a trade restraint is a "contract, combination or conspiracy" that restricts the commercial prerogatives of one or more contracting parties or their business partners). *See Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

The plaintiff can establish this point by *either* of the following proofs: (1) empirical evidence that the defendants use the challenged restraint to facilitate the imposition of supracompetitive prices or a market-wide restriction of output; *or* (2) a showing that (a) the defendants wield substantial market power in the relevant market, and (b) their challenged restraint apparently or likely impairs competitive interplay in the relevant market. *See Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96-97 (2d Cir. 1998) (an antitrust plaintiff can prove anticompetitive harm in a rule-of-reason case by showing either (1) "an actual adverse effect on competition, such as reduced output"; or (2) "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.")

Second, if the plaintiff makes the above showing, the burden shifts to the defendants to justify their trade restraint by showing that it furthers a legitimate commercial purpose, such as improved efficiency. *See United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 669 (3d Cir. 1993) ("If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.")

Third, if the defendants meet their burden, the plaintiff can show in rebuttal that they could accomplish their stated commercial purposes by using less restrictive practices. Thereafter, the question is presented to the finder of fact, who must decide whether the challenged restraint on balance is justified or overly anticompetitive. *See Bhan*, 929 F.2d at 1413. ("The plaintiff, driven to this point, must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner. Finally, the court must weigh the harms and benefits to determine if the behavior is reasonable on balance.")

Curtin's allegations, summarized above at pp. 11-21, *supra*, suffice to state a Section 1 claim under the structured rule of reason.

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First, Curtin's proposed relevant market, the Island Shipping Market, is properly pled. *See* pp. 49-51, *supra*.

Second, Curtin has pled that SCIC and AFS have used a contract (their exclusive lease) in a manner that causes actual harm to competition by (1) foreclosing 100% of all sales in the Island Shipping Market, (2) insulating AFS from any competitive pressure, and (3) thereby permitting it to impose both supracompetitive prices and a marketwide restriction of output (deliveries only at high tides). Moreover, Curtin's allegations show that AFS has market power in the Island Shipping Market (a 100% market share that is protected by an absolute barrier to entry in place until 2026), and that its exclusive-leasing arrangement with SCIC apparently harms competitive interplay by excluding all possible competition until at least 2026. *See* pp. 11-21, *supra*.

Curtin has thus pled a *prima facie case* against AFS and SCIC under the structured rule of reason. *See Tops Markets,* 142 F.3d at 96-97 (in a rule-of-reason case, a plaintiff can prove harm to competition by direct evidence of harm to competition or circumstantial evidence – market power, plus apparent harm); *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) (same).

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If Curtin can substantiate the above allegations, the burden will pass to SCIC and AFS to offer pro-competitive justifications for their exclusive-leasing arrangement. *See Brown Univ.*, 5 F.3d at 669. Curtin will then have occasion to rebut these justifications, showing either that they are pretexts or that they could be accomplished by less restrictive commercial practices. *See Bhan*, 929 F.2d at 1413.

Curtin's allegations therefore suffice to state a Section 1 claim under the structured rule of reason.

A. Contracts That Foreclose All Sales in a Market for a Long Duration Constitute a Well-Recognized Category of Trade Restraints

Long-term contracts that substantially foreclose competition in a relevant market, such as the SCIC-AFS exclusive lease, constitute a well-recognized category of trade restraints that in appropriate circumstances can be condemned under the rule-of-reason. *See Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010) (confirming this point). *See generally ZF Meritor,* 696 F.3d at 270-72 (explaining the doctrine of exclusive dealing).

Such a claim should not be dismissed on the pleadings when, as here, the exclusive lease has foreclosed 100% of the market for at least ten years and has immediately resulted in supracompetitive prices and restricted output. *See ZF*

Meritor, 696 F.3d at 270-72.

Indeed, AFS did not sign up SCIC to a long-term exclusive arrangement, but rather AFS and SCIC *imposed* AFS' exclusive services on the Island's general public (but not on SCIC) at supracompetitive prices and with inferior service for at least ten years. Such a matter merits review under Section 1, not a dismissal on the pleadings. *See id.*

XI. CURTIN SHOULD HAVE BEEN GIVEN LEAVE TO AMEND IF THERE REMAINED ANY LACK OF CLARITY IN ITS PLEADINGS

If there remained any lack of clarity in Curtin's second amended complaint, Curtin should have been given leave to amend it, since, as shown above, its claims were not fatally flawed or incurable. *See Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) ("Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.") (*quoting Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir.1991)).

A. In the Alternative, Curtin Could Have Raised a *Per Se* Challenge under Section 1

On the facts alleged, Curtin could have alternatively pled that SCIC and AFS are shippers that have coordinated a concerted refusal to deal, or group boycott, by depriving a rival shipper (Curtin) necessary access to the Island's only possible

commercial landing. Such conduct is actionable as a *per se* violation of Section 1. *See Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1030 (9th Cir. 1988) (a "group boycott" or "concerted refusal to deal" is unlawful *per se* under Section 1 when the boycotting firms hold market power, deprive the targeted firm of "access to a supply, facility, or market necessary to enable the victim firm to compete" and lack "plausible" pro-competitive justifications for the boycott); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294, 105 S.Ct. 2613, 2619-20 (1985) (a group boycott is unlawful *per se* when it has "involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.") (*quoting L. Sullivan, Law of Antitrust* at 261-62 (1977)). *See also NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135, 119 S.Ct. 493, 498 (1998) (the *per se* rule against group boycotts applies only when it entails a horizontal arrangement made by direct competitors).[11]

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[11] Curtin did not raise this argument in the District Court, but it is a legal argument that arises from Curtin's allegations. This Court may therefore consider the argument on appeal. *See Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999) ("We may consider an argument not raised in the district court if it is an issue of law not dependent on a factual record developed by the parties.") (*citing Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir.1990)).

XII. CONCLUSION

The facts of this case are extraordinary and reveal significant antitrust violations that have caused antitrust injury to Curtin. The challenged conduct in this case is not protected by state-action immunity, but AFS' captive customers cannot bring an antitrust challenge because of the filed-tariff doctrine. Lastly, Curtin is properly motivated, since its theories and claimed losses, if proven, are the very epitome of antitrust injury caused by anticompetitive, exclusionary conduct. The litigation of its claims should therefore vindicate the principles and policies of federal antitrust law, not work at cross-purposes to them: if Curtin cannot prove its claims, it will lose for the right reasons, but if it can prove them, it will prevail for the right reasons. These claims are well-pled, arise from easily provable facts, and deserve a hearing.

For the above reasons, Curtin respectfully requests that this Court reverse the District Court's dismissal of its claims and remand this case to the District Court for further proceedings with proper instructions.

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DATED: May 14, 2018

Respectfully submitted,

/s/ William Markham

By: William A. Markham,
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XIII. CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies the following matters to the Court: (i) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and Circuit Rule 32-1(a) because it contains 13,987 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (ii) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional font that includes serifs (Times New Roman) and has a uniform font size of 14 points.

DATED: May 14, 2018

Respectfully submitted,

/s/ William Markham

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XIV. STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

XV. CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2018 I filed Appellant's Opening Brief by uploading it to the electronic docket for this case in this Court's CM/ECF system. By this filing, I accomplished service of the foregoing document on Appellees' attorneys of record, all of whom are registered recipients of CM/ECF filings in this case.

DATED: May 14, 2018

Respectfully submitted,

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