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

REPLY BRIEF OF APPELLANT

WILLIAM A. MARKHAM, ESQ.
DORN BISHOP, ESQ.
TARA BURD, ESQ.
LAW OFFICES OF WILLIAM MARKHAM, P.C.
402 West Broadway, Suite 400
San Diego, California 92101
(619) 221-4400 Telephone
(619) 224-3974 Facsimile

Attorneys for Appellant, Curtin Maritime Corp.

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS

//

//

//

TABLE OF AUTHORITIES

Note: Unless otherwise indicated, internal citations and quotations have been omitted from each citation given in this memorandum.

Cases

Statutes and Rules

Other Authorities

I. INTRODUCTION

Plaintiff-Appellant, Curtin Maritime Corporation ("Curtin"), has pled a hallmark case for exclusive dealing against Appellees-Defendants – Santa Catalina Island Company ("SCIC") and Avalon Freight Service, LLC ("AFS").[1]

An island's owner, SCIC, has given a crony, AFS, an exclusive lease for ten years to use the only possible commercial port that can serve its island, which is Santa Catalina Island (the "Island"). It is not possible to build another port anywhere else on the island (because SCIC owns all of the available land), and it is not possible to bring goods to the general public on the Island by any means other than shipping them by sea to this port (because goods are not produced locally and cannot be transported there by road, rail or air). The exclusive lease between SCIC and AFS thus confers on AFS a monopoly over a distinct line of commerce – the shipping of goods by sea to the general public on the Island (the "Island Shipping Market").

Insulated from any possible competition by its exclusive lease, AFS charges its captive public supracompetitive prices, splits its gains with SCIC, and subjects SCIC's downstream competitors to a permanent disadvantage by forcing them to accept inferior service (SCIC has exempted only itself from AFS' exclusive

[1] Appellees-Defendants are referred to collectively as "Defendants".

concession, so that it can arrange private shipping on better terms for its own numerous businesses on the Island).

Curtin is the only shipper other than AFS that is presently authorized and equipped to serve this Island. It seeks a *non-exclusive* lease to use SCIC's commercial landing for this purpose.[2] If permitted to ship goods to the Island, it would immediately charge lower prices than those charged by AFS and deliver at all times. Curtin's entry into the Island Shipping Market would therefore introduce competitive conditions immediately.

According to Curtin's challenge, the exclusive lease between SCIC and AFS (the "exclusive lease" or the "SCIC-AFS Arrangement") constitutes unlawful exclusive dealing that violates both Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Section 1") and Section 2 of the Sherman Act, 15 U.S.C. § 2 ("Section 2").

More specifically, Defendants' leasing arrangement can be properly challenged under the law on exclusive dealing because it *forecloses a substantial share of competition in the relevant market* (100%), for a *long duration* (ten years), with ensuing *anticompetitive harm* (prices are supracompetitive, output has been

---

[2] Curtin originally bid on the exclusive lease on the mistaken belief that the regulatory authority (the "CPUC") permitted only one shipper to carry goods to the Island. After learning that this information was incorrect, Curtin sought to obtain a non-exclusive lease. *See* ER-II 174-210 at ¶¶ 43, 76-85.

restricted, and no potential rival can gain a foothold in the market). Such an arrangement is plainly subject to review under a rule-of-reason standard. *See* pp. 20-23, *infra*.

Crucially, the court below (the "District Court") did not rule that Curtin's allegations failed to describe actionable exclusive dealing. It held only that Curtin had failed to plead its own antitrust injury arising from Defendants' exclusive dealing. *See* ER-1 3:18 – 4:18. That ruling was made on the basis of an erroneous standard.

Specifically, the District Court found that Curtin's claimed losses would have been the same even if SCIC had acted in an unambiguously pro-competitive manner by awarding "multiple" leases to various shippers, thereby ensuring competitive conditions among shippers that serve the Island. *On this basis alone*, the District Court concluded that Curtin's losses could not qualify as antitrust injury. *See id*. In other words, the District Court held that Curtin's losses from the exclusive-leasing arrangement were not antitrust injury because *in theory* they could have been caused by lawful conduct. *See id*.

That was an erroneous standard, incorrectly and adroitly urged by Defendants below. If it were the standard, it would never be possible for any private litigant to identify its antitrust injury, since in every instance it is possible

to conceive of a blameless cause of any loss.

Rather than address this standard directly in their opposition papers, Defendants have denied that they argued below in its favor or even that the District Court employed it, yet they still ask this Court to adopt it. That is a very confusing way to argue the matter. *See* pp. 13-14, *infra*.

Defendants' other arguments are equally unavailing.

First, they repeatedly challenge Curtin's allegations of material fact. That is improper during pleadings litigation. *See* pp. 15-17, 23, *infra*.

Second, they rely on a series of evasive arguments that are hard to pin down and imply more than they say. All of them are misplaced in pleadings litigation.

For example, Defendants appear to argue that their exclusive lease cannot be challenged on antitrust grounds because it was put out for bid. But no law supports this position, and besides this argument contradicts Curtin's extensive allegations that Defendants conducted a "sham" bidding process for the exclusive lease. *See* pp. 23-24, *infra*.

Defendants also appear to argue that Curtin in particular cannot raise the challenge, since it originally bid for the very lease that it now challenges. But the controlling law states the contrary: *in pari delicto* and unclean hands are not affirmative defenses in antitrust cases, save in exceptional circumstances that

Curtin has not pled. Indeed, Curtin's allegations, if credited, establish its good faith from the start. *See* pp. 25-27, *infra*.

In the end, Defendants state only one argument with clarity. It concerns this Circuit's decision in *Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1233 (9th Cir. 1998) ("*Lucas*"). Defendants insist that the holding of *Lucas* is controlling and requires that this case be dismissed on the pleadings. But the plaintiff in *Lucas* lost only at summary judgment after the trial court had determined from undisputed evidence that the challenged conduct was undertaken for procompetitive purposes and did not result in higher prices or restricted output. On those facts, this Circuit affirmed the dismissal of the plaintiff's claims for antitrust damages and found that the plaintiff lacked any antitrust injury. *See* pp. 28-30, *infra*.

Lucas should not be read to establish the sweeping absolutions that Defendants attribute to it. Indeed, the Sixth Circuit has already rejected the standard for antitrust injury that Defendants ascribe to *Lucas*, doing so in response to identical arguments made by litigants in that Circuit. This Court should do the same to avoid a legal absurdity – namely, that an antitrust defendant is absolved of wrongdoing whenever the plaintiff's losses in theory could have been caused by procompetitive conduct. *See* pp. 30-31, *infra*.

Curtin has pled sound claims. Perhaps no other case in the entire antitrust canon presents such an egregious instance of anticompetitive exclusive dealing. Owing to the filed-tariff doctrine, the ill-served public on the Island cannot challenge Defendants' arrangement, but Curtin, a competitor, can do so. It should be afforded the opportunity. The judgment below should be reversed, and the case should be remanded to the District Court with instructions.

II. THE DOCTRINE OF ANTITRUST INJURY AFFORDS NO BASIS FOR DISMISSING CURTIN'S CLAIMS ON THE PLEADINGS

A. Curtin's Losses Are the Epitome of a Competitor's Antitrust Injury

Curtin's losses in this matter are the epitome of a competitor's antitrust injury.

First, the relevant market is the shipment of goods by sea to the general public on the Island (the Island Shipping Market), since there is no other service by which the general public can procure most goods, including basic necessities. *See* Curtin's Op. Memo. at 14-15; ER-II 174-210 at ¶¶ 9-15.

Second, Curtin and AFS are the only two shippers equipped and authorized to serve the Island Shipping Market. *See* Curtin's Op. Memo. at 18-19; ER-II 174-210 at ¶¶ 58-85.

//

Third, Defendants have used their exclusive lease to prevent Curtin from calling on the Island, thereby suppressing competitive conditions in the Island Shipping Market, so that AFS can charge supracompetitive prices without losing sales. In exchange for its exclusive concession, AFS splits its monopoly profits with SCIC under an express revenue-sharing arrangement stated in their exclusive lease. In the bargain, AFS saddles the general public with restricted service (deliveries only at high tides), thereby giving an insuperable advantage to SCIC's businesses, which unlike all other businesses on the Island are not obliged to receive their shipping services from AFS, but instead procure their goods on more favorable terms by private shipping arranged by SCIC. *See* Curtin's Op. Memo. at 22-24; ER-II 174-210 at ¶¶ 50, 76-85.

Defendants' exclusion of Curtin from the Island Shipping Market made this anticompetitive arrangement possible. Otherwise, there would be competition for shipping services on the Island: if Curtin were allowed to compete, it would offer lower prices, which AFS would be obliged to match in order to remain in business. Curtin would also provide deliveries at convenient times, not only at high tides, placing pressure on AFS to match its more accommodating service. The general public would immediately and durably benefit from a competitively performing market for shipping services. By excluding Curtin from this market, Defendants

have made possible the anticompetitive conditions that prevail in this market. *See* Curtin's Op. Memo. at 22-24; ER-II 174-210 at ¶¶ 50, 76-85.

Curtin's ensuing losses (the profits it has failed to earn) therefore constitute its antitrust injury, according to the controlling case law directly on point. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010) (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"); *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.")

At a minimum, Curtin has placed this matter in dispute and should not have had its claims tossed on the ground that it failed to plead antitrust injury arising from Defendants' use of an exclusive contract. *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.")

B. Antitrust Injury Is a Limiting Doctrine Used To Weed Out Opportunistic Claims Brought by a Plaintiff That Has Not Suffered Harm Caused by Anticompetitive Conduct

As Curtin explained in its Opening Brief, a private litigant's obligation to plead its own antitrust injury is a limiting doctrine. It nonsuits a private plaintiff whose claimed losses demonstrably could not have been caused by an *anticompetitive aspect or effect* of the challenged antitrust violation. *See Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 697 (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.")

The doctrine does not refer to a plaintiff *whose claimed losses could in theory have been caused by procompetitive or blameless conduct*. *See In re: Cardizem CD Antitrust Litig.*, 332 F.3d 896, 912 (6th Cir. 2003) (stating this very point at length). But that is what the District Court held.

Antitrust injury likewise does not refer to a plaintiff *who has failed to plead any antitrust violation at all*. That is a failure to plead an antitrust offense, not a failure to plead antitrust injury. *See Gelboim v. Bank of Am. Corp*., 823 F.3d 759, 770 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017) (explaining how these issues are sometimes confused); *SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 43 (1st Cir.1995) (a plaintiff's lack of antitrust injury and its failure to show an

antitrust violation are distinct issues that are sometimes confused).

Defendants' opposition briefs confuse these issues rather than respond to Curtin's arguments. To untangle the confusion, Curtin offers the following further commentary.

The doctrine of antitrust injury applies only when (1) a private plaintiff has correctly identified an antitrust violation and (2) even shown that it has been proximately harmed by this violation, but (3) its claimed losses were merely incidental to the violation, rather than caused by any anticompetitive feature of the violation. Such a plaintiff cannot proceed because the redressing of its losses do not vindicate our antitrust policies. *See generally Areeda and Hovenkamp, Fundamentals of Antitrust Law* (3rd Ed. 2010) at §3.03a (explaining these points at length). *See also Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 171-72 (3d Cir. 2015) (explanation of same points); *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013) (sets forth three-part test intended to apply these principles).

Antitrust injury, then, is a limiting doctrine that obliges an antitrust plaintiff to show that its losses arise from *"a competition-reducing aspect or effect"* of the antitrust violation it alleges occurred. *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.")

In practice, antitrust injury occurs to a competitor (or occasionally some other market participant) when it loses profits or goes out of business because the defendant has subjected it to wrongful exclusionary conduct in order to suppress competitive conditions in violation of an antitrust law.[3] When the exclusion of a competitor is the means by which a defendant consummates its antitrust violation, the competitor's ensuing losses are antitrust injury. *See Dolphin Tours,* 773 F.2d at 1511; *W. Penn Allegheny Health Sys.,* 627 F.3d at 102; *Hanover 3201 Realty*, 806 F.3d at 172.

For consumers, antitrust injury occurs when they must pay supracompetitive prices to the defendant or accept its restricted offerings because it has already undermined competitive conditions in violation of an antitrust law. *See Brunswick,* 429 U.S. at 489 (antitrust injury includes harm "made possible" by the antitrust

---

[3] The inquiry typically turns on whether the defendant has employed the challenged practices in order to improve its offerings (which is procompetitive conduct that is lawful) or whether it has done so principally to impede or ruin its rivals and thereby undermine competitive conditions in the market (which is wrongful, exclusionary conduct that lays a predicate for an antitrust violation if the other elements of the antitrust offense are present). *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.")

violation).

At the pleadings stage, a plaintiff that otherwise alleges a viable antitrust claim pleads its antitrust injury by alleging either kind of harm. Curtin has easily met this standard, having pled facts that plainly show a competitor's antitrust injury. Defendants merely persuaded the District Court to employ the wrong standard when determining whether Curtin had pled its antitrust injury.

C. The District Court Used the Wrong Standard to Decide the Issue of Antitrust Injury – a Standard that Defendants Have Declined to Support in Their Opposition Briefs After Urging Its Use Below.

Rather than consider whether Curtin's exclusion and ensuing losses were the very means by which Defendants restrained and monopolized trade in the Island Shipping Market (which is what it should have done), the District Court adopted Defendants' suggestion that it determine whether *in theory* these same losses could have been caused by blameless conduct. The District Court thus concluded that in theory Curtin's losses would have been the same if SCIC had properly given non-exclusive shipping leases to "multiple" shippers, but had refused Curtin's application for such a lease. *On this basis alone*, the District Court held that Curtin had failed to pled any cognizable antitrust injury arising from exclusive lease used by SCIC-AFS. *See* ER-1 3:18 – 4:18 (holding that Curtin failed to plead antitrust injury arising from the exclusive lease because its claimed "injury would be the

same had SCICo awarded the lease to multiple companies – resulting in competition and the exclusion of Curtin.")

That was reversible error – one that Defendants invited below by their successive arguments on the matter. *See, e.g.* SCIC's first Motion to Dismiss, ER-IV 556:15 – 557:2 ("To the extent plaintiff has suffered any injury at all, it is the loss of business sustained by not being selected as a provider of common carrier services to Avalon. That alleged injury would be exactly the same had SCICo selected two, three, or even more competitors to provide common carrier services, instead of just AFS.... [T]hat injury does not constitute 'antitrust injury' and plaintiff's claim fails as a matter of law. This fact alone defeats plaintiffs' antitrust claim in its entirety."); SCIC's second Motion to Dismiss, ER-III 360:23 – 361:8 (same points, repeated almost verbatim); SCIC's third Motion to Dismiss, ER-II 158:1-13 (same points, repeated almost verbatim).

Strikingly, in their appellate submissions Defendants now deny having made the very argument on which they prevailed below. *See* SCIC's Opposition Memo. at 23 ("Curtin claims that it is being held to an improper standard because the District Court required it to show that the harm 'could not have been caused even in theory by blameless conduct.' Such is simply not the case, nor was such argument raised below.")

Despite this denial, Defendants nevertheless urge the exact same argument anyway. *See id*. at 23-24 ("Curtin's alleged injury would be exactly the same had SCICo remained with CFL, the prior exclusive lessee, or if SCICo had selected two, three, or even more competitors to provide common carrier services, instead of AFS. The alleged injury depends only on the fact that Curtin was not selected as a shipper and was not given access to SCICo's private property. (....) [T]hat injury does not constitute 'antitrust injury' and plaintiff's claim was properly dismissed as a matter of law."). *See also* AFS' Opposition Memo. at 14 ("Curtin would have suffered the same injury if the lease was awarded to multiple companies, thereby increasing competition," and therefore its claimed losses are not antitrust injury).

This argument, openly acknowledged or not, is mistaken. The doctrine of antitrust injury does not nonsuit a plaintiff whose losses in theory could have been caused by procompetitive or blameless conduct. Such a standard, being impossible to satisfy in virtually every case, would eviscerate private enforcement of antitrust law.

Instead, the doctrine of antitrust injury nonsuits only a plaintiff whose claimed losses did not arise from an anticompetitive feature of the challenged antitrust violation. *See Atl. Richfield*, 495 U.S. at 344, 110 S. Ct. at 1894. That is a very different standard. It weeds out opportunistic antitrust claims, but does not in

effect abolish private antitrust litigation, as the District Court's standard would do if it were rigorously applied in every private antitrust case.

III. THE SCIC-AFS ARRANGEMENT IS THE EPITOME OF ANTICOMPETITIVE EXCLUSIVE DEALING

In each version of its complaint, Curtin pled straightforward claims against Defendants for unlawfully restraining and monopolizing trade by exclusive dealing. Curtin challenged Defendants' exclusive dealing under both Section 1 and Section 2 and has explained the sufficiency of this challenge in its opening brief (at pp. 48-62). Curtin now offers only a reply to Defendants' scattershot attacks.

A. Defendants Have Improperly Disputed Curtin's Allegations of Material Facts During Pleadings Litigation

Defendants have repeatedly argued the facts of the case and disputed Curtin's allegations of material fact even though they seek a dismissal on the pleadings. That is improper. *See Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Curtin lacks the space in this brief to chronicle their use of this tactic. But two examples of it are sufficiently important to deserve special mention.

First, Defendants openly dispute Curtin's allegation that there is no cross-elasticity of demand between shipping services to the general public on the Island and any other service. *See* AFS' Opposition Memo. at 7. But Curtin has pled in great detail why there is no service that can serve as a substitute for shipping

services to the general public on the Island: goods are not produced locally and can be carried there only by sea. *See* ER-II 174-208 at ¶¶ 9-15; Curtin's Op. Memo. at 14-15. That means that there is no cross-elasticity of demand between these shipping services and any other service. *See Flovac, Inc. v. Airvac, Inc.*, 817 F.3d 849, 854 (1st Cir. 2016) ("Determining the scope of a product market begins with examining the universe of products that are considered reasonably interchangeable by consumers for the same purposes. The market is established by examining both the substitutes that a consumer might employ and the extent to which consumers will change their consumption of one product in response to a price change in another, *i.e.*, the 'cross-elasticity of demand.'") (quotation marks in original).

Second, Defendants openly dispute Curtin's allegation that AFS has been charging supracompetive prices. *See* AFS' Opposition Memo. at 7. But Curtin has supported this allegation of material fact with more specific allegations. In particular, Curtin alleges that (1) AFS' prices are "close to the maximum" rates permitted by the CPUC (ER-II 174-208 at ¶ 81); and (2) Curtin would offer significantly lower prices if it were permitted to ship goods to the Island. *Id*. at ¶¶ 77, 81-83. This circumstance in turn would oblige AFS to match Curtin's prices in order to remain in business. *Id*. Curtin has thus pled the fact of AFS' supracompetitive prices – *i.e.*, prices higher than those that it could profitably

charge in a competitive market. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 74 (3d Cir. 2010) (a firm has market power when it can profitably charge supracompetitive prices – *i.e.*, it can successfully raise its "prices above those that would exist in a competitive market.")

The District Court did not decide these matters against Curtin on the pleadings. *Cf.* ER-I 1-6. This Court should decline Defendants' invitation do so on this appeal.

B. Defendants' Argument on the Relevant Market Is Frivolous

According to Defendants, Curtin's proposed relevant market is fatally defective because Curtin acknowledges that it ships goods to two other islands in the Channel Island chain, San Nicolas Island and San Clemente Island. Defendants thus argue that Curtin's market definition improperly overlooks alternative suppliers of shipping services and wrongly concentrates "only on the demand side for the freight hauling services." *See* SCIC Opposing Memo. at 37.

But other shippers' operations on different islands elsewhere in the Pacific Ocean have no bearing on the options available to inhabitants and businesses on the Island, since Defendants will not permit other shippers to supply the Island. That is the whole point of Curtin's present challenge.

//

To survive, live, and conduct business on the Island, individuals and businesses require the services of a sea shipper that can carry goods to them. There is no roadway, railway or practical air delivery between the Island and any other point of land, nor are goods produced on the Island itself. ER-II 174-210 at ¶¶ 10-15.

Sea shipping, the carrying of goods by sea to the Island, is thus the relevant service market – *i.e*., the relevant category of services for purposes of antitrust review. Curtin's market definition is therefore proper and should not be rejected on the pleadings. *See Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001) (For antitrust purposes, a relevant product market consists of "the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand."); *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (a plaintiff's proposed relevant market should be rejected on the pleadings only when it manifestly excludes reasonable substitutes).

C. Curtin Has Alleged the Existence of an Agreement Made Between Defendants

According to Defendants, Curtin has failed to plead facts that support a plausible inference of an agreement between SCIC and AFS that can be challenged under either Section 1 or Section 2. *See* SCIC Opposition Memo at 31-34; AFS' Opposition Memo. at 33-36.

The assertion is unavailing. The unlawful agreement at issue is the exclusive lease between SCIC and AFS, which is stated in writing, and whose existence Defendants concede. *See* AFS Opposition Memo. at 6. This lease is a "contract, combination or conspiracy" that in appropriate circumstances can be challenged under Section 1. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885, 127 S. Ct. 2705, 2712 (2007) (Section 1 forbids any "contract" that restrains trade unreasonably).

Defendants' exclusive lease can also be challenged under Section 2. *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 raised precisely such a challenge here.

Lastly, the exclusive lease is Curtin's best proof that SCIC and AFS have conspired to monopolize in violation of Section 2. Curtin has pled numerous other particulars that also support this inference (*e.g.*, AFS won the bid for the exclusive lease even though it was the only bidder that lacked prior experience; AFS and SCIC agreed to split AFS's shipping revenues, which was a provision not disclosed

to the other bidders; the two companies have extensive interlocking interests and inter-company affiliations; AFS has agreed to restrict service to SCIC's downstream competitors; etc.). *See* ER-II 174-210 at ¶¶ 13, 21-24, 26-40, 54, 57, 63-66, 81, 91-92, 98-99, 108.

Defendants are grasping at straws by arguing that Curtin has failed to allege any "agreement" that can be challenged under Section 1 or Section 2.

D. Defendants Have Practiced Exclusive Dealing in Violation of Section 1 and Section 2 of the Sherman Act

Using a scattershot attack that is hard to pin down, Defendants argue that Curtin has failed to plead a claim for exclusive dealing claim under either Section 1 or Section 2. *See* SCIC Opposing Memo. at 34-38. This argument is misplaced. In its opening brief, Curtin explained how its allegations describe exclusive dealing that can be condemned under both Section 1 and Section 2. *See* Curtin Op. Memo. at 53-54, 61-62. Here Curtin explains further why it has presented a compelling antitrust challenge under the law of exclusive dealing.

1. The Law of Exclusive Dealing

A plaintiff can challenge exclusive dealing either as an unlawful restraint of trade under Section 1 or as a means of unlawful monopolization in violation of Section 2. *See LePage's*, 324 F.3d at 157.

//

In exclusive dealing cases, the courts apply the rule-of-reason standard. They undertake the inquiry only when, as here, the plaintiff makes a *prima facie* showing that the exclusive-dealing contract at issue harms marketwide competition in a properly defined relevant market. *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) ("The main antitrust objection to exclusive dealing is its tendency to 'foreclose' existing competitors or new entrants from competition in the covered portion of the relevant market during the term of the agreement. (....)We thus analyze challenges to exclusive dealing arrangements under the antitrust rule of reason."); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012) (exclusive-dealing contracts can be condemned under antitrust law when imposed by a firm that has market power in order to foreclose competition and prevent entry for a substantial term).

When undertaken, the inquiry turns on whether the seller uses exclusive-dealing contracts to promote procompetitive purposes, such as assured sales for the seller or assured supplies for the buyer at stated prices, or whether it uses the contracts to lock down a market, prevent competition, and perpetuate its market power. *See U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993) ("Exclusive dealing arrangements ... come in a variety of forms and serve a range of objectives. Many of the purposes are benign.... But there is one common

danger for competition: an exclusive arrangement may 'foreclose' so much of the available supply or outlet capacity that existing competitors or new entrants may be limited or excluded and, under certain circumstances, this may reinforce market power and raise prices for consumers.")

Generally speaking, the courts condemn only exclusive-dealing contracts that *foreclose a substantial share of overall competition* in the relevant market for an *extended duration*, with *ensuing anticompetitive harm* (*e.g.*, supracompetitive prices) because rival sellers cannot establish or maintain a foothold in the market. Those considerations are the proper lynchpins of proper exclusive-dealing analysis. *See ZF Meritor, LLC,* 696 F.3d at 270-72 (extended discussion); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1302-09 (9th Cir. 1982) (extended discussion and affirmance of trial court's finding that defendant had market power and used exclusive-dealing contracts and related practices in violation of Section 1 and Section 2).

Here, remarkably, Defendants have used an exclusive-dealing contract that confers absolute market power on one of them, forecloses 100% of sales in the Island Shipping Market, does so for ten years, and has resulted in the immediate, durable imposition of supracompetitive prices and restricted offerings. It also causes harm to downstream competitors of the other Defendant. Curtin has pled

these matters clearly in each version of its complaint. Those allegations more than suffice to state a *prima facie* claim for unlawful exclusive dealing, one that should not be dismissed on the pleadings.

2. Exclusive-Dealing Contracts Put Out for Bid Are Not Lawful *Per Se*

Without ever stating the point openly, Defendants imply throughout their papers that their exclusive lease cannot constitute an antitrust violation because there was competitive bidding for it. This argument, or insinuation, contradicts Curtin's specific allegations that the competitive bidding was a "sham," and that Defendants planned from the start to award the exclusive lease to AFS. *See* ER-II 174-210 at ¶¶ 23, 27-43.

Even more fundamental, there is no blanket absolution of exclusive-dealing contracts that are put out for bid. Rather, in some cases the courts have declined to condemn exclusive-dealing contracts when the evidence reveals the following circumstances: (1) there is ongoing competition among viable sellers to win exclusive contracts with customers in the same market; and (2) these customers play rivals off one another in order to elicit advantageous exclusive contracts, which come up for renewal after short terms, leading to a new round of competition to win each exclusive contract. *See ZF Meritor,* 696 F.3d at 270 ("[C]ompetition to be an exclusive supplier may constitute a vital form of rivalry,

which the antitrust laws should encourage.")

Curtin has pled no such scenario in its complaint, and it would be improper to make such findings against it at the pleadings stage. Indeed, Defendants will never be able to prove any such scenario, since it does not describe their market. Here it suffices to observe that the District Court made no such finding, and it would be improper to decide this matter in favor of Defendants during pleadings litigation.

E. Curtin's Section 2 Claim Does Not Depend on a Theory of Shared Monopolization

On the basis of the allegations of fact made below, Curtin has clarified in its opening brief that its Section 2 claim does not depend on a theory of shared monopolization.[4] Rather, Curtin has pled facts that support a claim of unlawful monopolization against AFS and a claim for conspiracy to monopolize against both AFS and SCIC. *See* Curtin's Op. Memo. at 51-56.

Since Curtin fully pled the facts that support these theories, it respectfully requests that the Court consider them on this appeal. *See Broad v. Mannesmann*

---

[4] In the District Court, Curtin specifically pled and argued that SCIC and AFS had conspired to monopolize the market for shipping goods by sea to the Island. *See* ER-II at 75:23 – 79:15. Curtin also argued in the first two rounds of pleadings litigation that SCIC and AFS could be treated as a "single entity" for purposes of its monopolization claim. *See* ER-IV at 514:16 – 516:8; ER-III 341:12 – 343:8.

Anlagenbau AG, 196 F.3d 1075, 1076 n. 3 (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.") (*quoting Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir.1990)).

IV. CURTIN HAS PROPERLY CHALLENGED DEFENDANTS' EXCLUSIVE LEASE, EVEN THOUGH IT PREVIOUSLY BID FOR THE LEASE ITSELF

Without urging the point, Defendants imply that Curtin has no case and must lose at the pleadings stage because it made a bid for the very exclusive concession that it now challenges as an ongoing antitrust violation. It is this insinuation, never directly and fully stated, that perhaps lies at the heart of Defendants' opposition briefs. It is an incorrect proposition.

The affirmative defenses of *in pari delicto* and unclean hands are not usually permitted in an antitrust case. In order to encourage private enforcement of antitrust law, and in recognition that smaller parties often find themselves constrained to accept anticompetitive terms merely to preserve a business opportunity, the Supreme Court long ago established that a party to a contract or business arrangement can challenge it on antitrust grounds, unless it was the "instigator" of the contract or arrangement, or at least has borne "equal" responsibility and played a "substantial" role in enforcing it. *See Perma Life*

Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138-40 (1968) (explaining the rule and the public policy behind it, and confirming that the defense of *in pari delicto* will not lie in an antitrust case) (overruled on other grounds by *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)); *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976) (clarifying the above rule and its narrow exception, and emphasizing that the defendant bears a "high burden" to establish the exception). *See also Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1381 (9th Cir. 1977) ("'Unclean hands' has not been recognized as a defense to an antitrust action for many years.")

Indeed, Curtin has pled circumstances that, if assumed true, definitively exclude *in pari delicto* and unclean hands from this case. Namely, owing to SCIC's past dealings, Curtin mistakenly understood that only one shipper would be authorized by the CPUC to ship goods to the island. On this basis, Curtin submitted its bid. Curtin later learned that the CPUC did not take this position, but on the contrary favored competition between rival shippers and encouraged but could not compel SCIC to authorize at least two rival shippers. Curtin subsequently obtained a Certificate of Necessity from the CPUC precisely so that it could compete against SCIC's chosen shipper, AFS. Thereafter, Curtin repeatedly requested and eventually sued so that it could obtain *non-exclusive* access to

SCIC's commercial landing, which is the only one that serves the island. That is the Curtin's challenge, accurately summarized. *See* ER-II 174-210 at ¶¶ 43, 76-85.

If Curtin can prove these facts, the defenses of *in pari delicto* and unclean hands would fail even if they were permitted, but they would not even be permitted. *See Perma Life,* 392 U.S. at 140; *Javelin*, 546 F.2d at 280; *Memorex,* 555 F.2d at 1381. Accordingly, Defendants' insinuations about Curtin's role in the bidding process should not nudge this case towards dismissal.

V. *LUCAS* SHOULD NOT BE CONSTRUED TO ESTABLISH THE BLANKET ABSOLUTIONS THAT DEFENDANTS ATTRIBUTE TO IT

According to Defendants, Curtin's challenge was properly dismissed on the pleadings in accordance with sweeping antitrust doctrines that they attribute to *Lucas.* But a careful review of *Lucas* belies this line of argument.

A. The Facts of *Lucas*

In *Lucas,* the plaintiff ("Lucas") was a distributor of one major brand of vintage car tires (Firestone vintage tires). Two defendants were the legacy manufacturer of these tires and its parent company (collectively, "Firestone"), and the third defendant was a rival distributor ("Coker"), which was already the exclusive distributor of most other major brands of vintage tires. Firestone decided to stop producing vintage tires itself. Instead, it decided to sell an exclusive

manufacturing license to either Lucas or Coker. To this end, Firestone conducted a bidding contest for the license. Coker won this contest, acquiring an exclusive license to make and distribute Firestone vintage tires. Coker thereby gained an even greater overall percentage of an alleged relevant market for major brands of vintage tires. *See id*. 140 F.3d at 1230-31.

B. The Holdings of *Lucas*

On these facts, Lucas sued Firestone (parent and subsidiary) and Coker for violations of both Section 2 and Section 7 of the Clayton Act (15 U.S.C. § 18) ("Section 7"), which prohibits mergers and acquisitions that pose a substantial risk of anticompetitive consequences. Specifically, Lucas challenged Coker's acquisition of the exclusive license to make Firestone vintage tires, by which it acquired an even greater percentage of the alleged relevant market than it had previously held. *Id.* 140 F.3d at 1231.

The trial court heard two rounds of summary judgment. It granted summary judgment to Firestone after finding undisputed evidence that (1) Firestone had procompetitive reasons for awarding the exclusive license to Coker rather than Lucas; and (2) Firestone had no specific intent to conspire with Coker in order to confer on it a monopoly in any market. *See id*. at 140 F.3d at 1231.

//

The trial court then granted summary judgment to Coker on the basis of the following findings: (1) Lucas' losses were not antitrust injury because they did not arise from Coker's distribution rights to most of the major brands of vintage tires, but only from Lucas' own failed bid to win the Firestone licence – a failure that undisputed evidence showed was the result of Firestone's procompetitive decision to award the license to Coker; and (2) Coker's acquisition of the Firestone license did not result in any actual anticompetitive consequences: specifically, there was no evidence that Coker had raised the prices for vintage tires after acquiring the Firestone license. *See id.* at 1231.

On appeal, Lucas sought relief only from the dismissal of its Section 7 claim, which it asserted in its capacity as both a direct competitor of Coker (a "primary supplier") and as a downstream purchaser/reseller of Firestone vintage tires. This Circuit reached a split decision, which upheld the trial court's summary dismissal of Lucas' claims for damages, but remanded the case to the trial court for a further inquiry into Lucas' claim for a compelled divestiture of Coker's license to make and distribute Firestone vintage tires. Lucas was allowed to make this claim solely in its capacity as a downstream purchaser/reseller of Firestone tires. *See id*. at 1233-37.

//

Those facts and holdings are easily distinguishable from the present case. Above all, the trial court in *Lucas* made its findings on the basis of *undisputed evidence* of the following two points: (1) there were procompetitive justifications for the challenged conduct; and (2) the challenged conduct did not result in supracompetitive prices. *See id.* at 1231.

Crucially, Lucas' appeal was raised only under Section 7, which the courts have long ruled is an antitrust provision that usually cannot be privately enforced by competitors. *See Herbert Hovenkamp, Federal Antitrust Policy* (3d. 2d. 2005) at § 16.3a (the Supreme Court has used the doctrine of antitrust injury largely to prevent competitors from seeking relief under Section 7, since their usual complaint, once analyzed, is that *the challenged merger threatens their businesses with increased competition*, even though it might also pose an incipient threat of excessive market concentration with eventual anticompetitive effects on consumers) (citing *Brunswick,* 429 U.S. 477, 97 S.Ct. 690, and *Cargill v. Monfort of Colorado,* 479 U.S. 104, 107 S. Ct. 484 (1986)).

C. The Rationale of *Lucas* Quoted by Defendants Should Be Clarified to Avoid a Legal Absurdity

Although its holdings are narrow, *Lucas* offers a rationale in support of them that can be used to support Defendants' position: namely, the *Lucas* court observed that Lucas' claimed losses would have been the same "had a small business

acquired the exclusive right to manufacture and to distribute Firestone tires," and that its harm therefore should not be considered "antitrust injury." *See id.* at 1233.

Curtin now respectfully requests that this Court clarify that this statement does not mean that an antitrust defendant is absolved any time it can offer a hypothetical procompetitive scenario that results in the same injuries that the plaintiff attributes to its alleged antitrust violation.

That cannot be the standard. It would sound the death knell of virtually all private antitrust litigation. The Sixth Circuit has rightly rejected it. *See Cardizem CD Antitrust Litig.*, 332 F.3d at 912. This Court should do the same.

The rationale in *Lucas* was given in a case properly dismissed on summary judgment after *the undisputed evidence confirmed procompetitive motives and outcomes*, not anticompetitive conduct that entailed wrongful exclusionary measures against a competitor, causing it harm. That should suffice as the proper basis for the holdings in *Lucas.*

Curtin respectfully submits that the present matter is sufficiently important to deserve a published decision that explains and clarifies the reach and meaning of antitrust injury as well as its practical application in cases.

//

//

VI. CONCLUSION

Curtin's antitrust claims are well pled. Any required clarification can be easily provided in an amended complaint. This Court should therefore reverse the District Court's dismissal of these claims without leave to amend and remand this case to the District Court with appropriate instructions.

DATED: September 5, 2018 Respectfully submitted,

/s/ William Markham

By: William A. Markham,
LAW OFFICES OF WILLIAM MARKHAM, P.C.
Attorneys for Plaintiff-Appellant,
CURTIN MARITIME CORPORATION

VII. 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 6983 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: September 5, 2018 Respectfully submitted,

/s/ William Markham

By: William A. Markham,
LAW OFFICES OF WILLIAM MARKHAM, P.C.
Attorneys for Plaintiff-Appellant,
CURTIN MARITIME CORPORATION

VIII. CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2018 I filed Appellant's Reply 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: September 5, 2018 Respectfully submitted,

/s/ William Markham

By: William A. Markham,
LAW OFFICES OF WILLIAM MARKHAM, P.C.
Attorneys for Plaintiff-Appellant,
CURTIN MARITIME CORPORATION