

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCT 7 2019

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U.S. COURT OF APPEALS

CURTIN MARITIME CORP., a California corporation,

Plaintiff-Appellant,

v.

SANTA CATALINA ISLAND COMPANY, a Delaware corporation;
AVALON FREIGHT SERVICES, LLC, a Delaware corporation,

Defendants-Appellees.

No. 18-55338

D.C. No.
2:16-cv-03290-TJH-AGR

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted September 11, 2019
Pasadena, California

Before: RAWLINSON, IKUTA, and BENNETT, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Curtin Maritime Corp. appeals from an order dismissing with prejudice its claims under Sections 1 and 2 of the Sherman Act. We have jurisdiction under 28 U.S.C. § 1291.

1. The district court did not err in dismissing Curtin Maritime’s Section 1 claim because Curtin Maritime failed to allege an antitrust injury to support that claim. “Antitrust injury” requires that the plaintiff “‘prove that its alleged injury ‘flows from that which makes defendants’ acts unlawful.’” *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1233 (9th Cir. 1998) (citing *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986)). Curtin Maritime claims it suffered antitrust injury because the exclusive lease between Santa Catalina Island Co. (the Island Company) and Avalon Freight Services, LLC (Avalon Freight) precludes it from using the Pebbly Beach freight seaport, which in turn prevents it from competing in the Catalina freight-shipping market. However, Curtin Maritime would have suffered the same injury had the Island Company leased the facility to multiple companies, but not Curtin Maritime. *See Lucas*, 140 F.3d at 1233. Therefore, Curtin Maritime cannot demonstrate antitrust injury.

We respectfully disagree with the dissent that “both *Brunswick* and *Lucas Automotive* stand for the proposition that a plaintiff does not suffer an antitrust injury merely because a large player competes in the market,” *dissent* at 1-2, and

decline the dissent's invitation to cabin *Lucas* to the facts of *Brunswick* based on one line in a factually dissimilar case. Whatever the original teaching and limits of *Brunswick*; in *Lucas*, we extended its principles beyond market competition to instances of market exclusion.¹ *See Lucas*, 140 F.3d at 1233. We also did not condition our holding in *Lucas* on the pro-competitive aspects of the executive license.²

Because Curtin Maritime had three opportunities to allege an antitrust injury to support its Section 1 claim and was unable to do so, the district court did not abuse its discretion in denying Curtin Maritime leave to amend the Section 1 claim. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

2. The district court did not err in dismissing Curtin Maritime's claim under Section 2 to the extent it was based on a theory of unlawful monopolization. Curtin Maritime failed to make the necessary allegation that a single entity (either the Island Company or Avalon Freight) had monopoly power by itself in the relevant market, or that Island Company and Avalon Freight constitute a single

¹ Even if *Lucas* was incorrectly decided, we are bound by decisions of prior panels. *See Miranda v. Selig*, 860 F.3d 1237, 1243 (9th Cir. 2017).

² We have serious doubts that the proper standard in the Ninth Circuit is to require a defendant to demonstrate a *pro-competitive* aspect to the agreement. *See Rebel Oil, Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (noting that the standard is whether defendant's conduct is beneficial or neutral to competition); *see also Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (same).

entity for purposes of a monopolization claim. *See Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995).

The district court erred in dismissing Curtin Maritime's Section 2 claim to the extent it is based on a conspiracy-to-monopolize theory. Curtin Maritime's Second Amended Complaint (SAC) plausibly alleged the elements of a claim for conspiracy to monopolize. The SAC first alleged that the Island Company and Avalon Freight entered into an agreement in August 2012 that Avalon Freight would be the sole provider of freight services between Santa Catalina Island and the California mainland and, in exchange, Avalon Freight would share its profits with the Island Company. According to the SAC, the parties entered into this agreement with the specific intent to monopolize the Catalina freight-shipping market. Further, the SAC alleged that the Island Company and Avalon Freight took an overt act in furtherance of the conspiracy; they conducted a sham RFP process, which resulted in Avalon Freight being "awarded" an exclusive lease to the Pebbly Beach facility giving it 100 percent control of the "freight originating from or shipped to the City of Avalon by barge." Finally, the SAC alleged that this conspiracy precluded competition, causing injury to competitors, indeed, the district court held, and neither the Island Company nor Avalon Freight contest, that Curtin Maritime adequately alleged an antitrust injury with respect to the Pre-RFP

Agreement. *See Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003); *see also Hunt–Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir.1980).

Each party shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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Curtin Maritime Corp. v. Santa Catalina Island Co., 18-55338
IKUTA, Circuit Judge, dissenting:

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If two companies enter into a collusive agreement that completely precludes *any* competition in a particular market, an excluded competitor has suffered an antitrust injury. See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 348a (3rd & 4th eds., 2019 Cum. Supp.) (“[A] rival clearly has standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude rivals from the market, thus leading to reduced output and higher prices.”). That’s exactly the situation here. The Island Company and Avalon Freight entered into an exclusive lease agreement that precludes Curtin Maritime or any other company from competing in the market for shipping freight to some 4,000 inhabitants of Catalina Island for a period of ten years. The defendants have failed to identify any plausible pro-competitive effects of the exclusive lease. At least at the motion to dismiss stage, Curtin Maritime has more than adequately alleged an antitrust injury to supports its Section 1 claim.

The majority concludes otherwise based on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228 (9th Cir. 1998), a case in which we applied *Brunswick*. But this reliance is misplaced. Both *Brunswick* and *Lucas*

Automotive stand for the proposition that a plaintiff does not suffer an antitrust injury merely because a larger player competes in a market. In *Brunswick*, the plaintiffs alleged they were injured when a large owner of bowling alleys acquired three failing bowling alleys near where plaintiffs' bowling alleys were located. 429 U.S. at 480. In *Lucas Automotive*, the plaintiff claimed it was injured when a larger competitor acquired the exclusive right to distribute one of four original equipment brands of vintage tires. 140 F.3d at 1231. In both cases, the plaintiffs alleged that the defendants' superior competitive strength in a particular market was the source of the harm; the plaintiffs did not claim that the specific *agreement* at issue hurt competition. Because in each case a company with less competitive strength could have lawfully entered into the same agreements (i.e., acquired the bowling alleys in *Brunswick* or acquired the exclusive distribution right in *Lucas Automotive*), and the resulting injury to the plaintiffs would have been the same, the plaintiffs had not suffered an antitrust injury.

These cases are not applicable here. In this case, Curtin Maritime alleges it was injured due to the specific agreement at issue—the exclusive lease—not because of Avalon Freight's comparative competitive strength. Indeed, Curtin Maritime's Section 1 claim would be the same regardless which competitor entered into an exclusive ten-year lease with the Island Company. Moreover, “the

Brunswick line of cases,” which includes *Lucas Automotive*, does not deny antitrust standing to plaintiffs whose injury is caused by strategic agreements that have “no pro-competitive aspects.” *Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 343 F.3d 1000, 1013 (9th Cir. 2003).¹ Here, the defendants have failed to identify any pro-competitive aspects of the exclusive lease arrangement. Under these circumstances, Curtin Maritime has alleged an antitrust injury that survives a motion to dismiss. See *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 791 F.2d 1356, 1363–64 (9th Cir. 1986) (antitrust injury where agreement “restrained competition between NFL teams and among football stadia by restraining the Raiders attempting to move and operate in Los Angeles”). Accordingly, I dissent from the decision to affirm the dismissal of Curtin Maritime’s Section 1 claim but otherwise concur in the memorandum disposition.

¹ The majority asserts that *Lucas Automotive* “extended” the “principles” of *Brunswick* to cases where competitors are excluded from the relevant market, **Maj. at 3**, but in fact *Lucas Automotive* merely applied *Brunswick*’s holding that a disgruntled competitor did not suffer an antitrust injury when a large company entered into an agreement that increased its market share but there was still competition in the relevant market.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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