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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18046-3 SEA NOTICE OF MOTION AND MOTION OF THE STATE OF OREGON FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the State of Oregon, by and through Attorney General Ellen F. Rosenblum, hereby moves this Court to file an amicus curiae brief in support of Plaintiff State of Washington's motion for a preliminary injunction.

This motion seeks leave for the State of Oregon to file the proposed amicus brief that is attached as Exhibit A to this motion. The Washington Attorney General consents to the filing of

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the amicus brief. Defendant Kroger indicated it opposes; and Defendant Albertsons has expressed it may want an opportunity to respond.

MOTION OF THE STATE OF OREGON FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Allowance for an amicus at the trial court level is not unprecedented. "No specific rule permits amicus participation in the trial court, but neither is there any rule prohibiting it. We can see no reason a trial judge should not have discretion to permit such participation if it may be helpful to the court." *Parsons v. State, Dep't of Soc. & Health Servs.*, 129 Wash App 293, 302, 118 P3d 930, 934 (2005). The liberality with which courts permit amicus briefs is especially great for States. Under both the Federal Rules of Appellate Procedure and the Rules of the U.S. Supreme Court, States may file amicus briefs even without leave of court or consent of the parties. *See* Fed. R. App. P. 29(a)(2). States and their respective constituents often have an interest in, and a useful perspective on, the issues presented in cases to which they are not parties. See, e.g., *Levin Richmond Terminal Corp. v. City of Richmond*, 482 F. Supp. 3d 944, 951 n.1 (N.D. Cal. 2020) (granting leave for two States to file amicus briefs). Courts have broad discretion to permit amicus briefs, and generally have exercised "great liberality" in permitting such briefs. *See California ex rel. Becerra v. United States Dep't of the Interior,* 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019) (quotation marks omitted). In particular, courts "frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC,* 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quotation marks omitted).

The Oregon Attorney General on behalf of the State of Oregon has an interest in, and useful perspectives to add, in this case.

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First, this case—and the pending preliminary injunction motion in particular—will have a substantial effect on the public interest, beyond the State of Washington. Whether Albertsons is permitted to proceed with its proposed Special Dividend before the lawfulness of the acquisition by Kroger is fully litigated will affect competition and consumer welfare in Oregon as well as other jurisdictions. As explained in greater detail in the Oregon's proposed amicus brief, Kroger's proposed acquisition of Albertsons has the potential to harm competition, and consumers. And these potential harms are of critical interest to Oregon, which depends on the economic dynamism that competition promotes, and for which the Oregon Attorney General is tasked with protecting competition and consumers within. The proposed merger of these major retailers presents a substantial matter of public interest. As the Ninth Circuit has recognized, "assisting in a case of general public interest" like this one is a "classic role" for amici, including States. See *Funbus Sys., Inc. v. California Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986); *accord Levin Richmond*, 482 F. Supp. 3d at 951 n.1.

Second, as co-enforcers of the federal antitrust laws and enforcers of their own state antitrust laws, states like Oregon have unique perspectives and experience to bring to bear in this case.

For all these reasons, the Court should GRANT the Oregon's motion.

DATED: this 9th day of November, 2022.

ELLEN F. ROSENBLUM
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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18046-3 SEA [PROPOSED] ORDER GRANTING MOTION OF THE STATE OF OREGON FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Having considered the Oregon's Motion for Leave to File an Amicus Curiae Brief and having given the parties notice and an opportunity to be heard, the Court hereby GRANTS the Motion and ORDERS that the Oregon's Amicus Curiae brief is accepted as filed.

IT IS SO ORDERED.

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CERTIFICATE OF SERVICE

I certify that on the date noted below, I arranged for a copy of the foregoing Motion and proposed Order to be served on the parties listed below by King County eFiling Application, to:

Amy N.L. Hanson Holly A. Williams Rachel A. Lumen Valerie K. Balch Miriam R. Stiefel Assistant Attorneys General Antitrust Division Washington State Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 (206) 464-7744 amy.hanson@atg.wa.gov holly.williams@atg.wa.gov rachel.lumen@atg.wa.gov valerie.balch@atg.wa.gov miriam.stiefel@atg.wa.gov Attorneys for Plaintiff State of Washington	__X_____ via King County eFiling Application and EMail
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18046-3 SEA NON-WASHINGTON AUTHORITIES RELIED UPON IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The State of Oregon hereby provides copies of the non-Washington authorities relied on in support of its Amicus Curiae.

/ / /

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1. *Levin Richmond Terminal Corp. v. City of Richmond*, 482 F. Supp. 3d 944, 951 n.1 (N.D. Cal. 2020).
2. *California ex rel. Becerra v. United States Dep't of the Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019).
3. *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005).
4. *Funbus Sys., Inc. v. California Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986)

DATED: this 9th day of November, 2022.

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CERTIFICATE OF SERVICE

I certify that on the date noted below, I arranged for a copy of the foregoing Non-Washington Authorities Relied Upon in Support of Amicus Curiae to be served on the parties listed below by King County eFiling Application, to:

Amy N.L. Hanson Holly A. Williams Rachel A. Lumen Valerie K. Balch Miriam R. Stiefel Assistant Attorneys General Antitrust Division Washington State Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 (206) 464-7744 amy.hanson@atg.wa.gov holly.williams@atg.wa.gov rachel.lumen@atg.wa.gov valerie.balch@atg.wa.gov miriam.stiefel@atg.wa.gov Attorneys for Plaintiff State of Washington	__X_____ via King County eFiling Application and EMail
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DATED: this _9th__ day of November, 2022.

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482 F.Supp.3d 944
United States District Court, N.D. California.

LEVIN RICHMOND TERMINAL CORPORATION, et al., Plaintiffs,
v.
CITY OF RICHMOND, et al., Defendants,
Wolverine Fuels Sales, LLC, Plaintiff,
v.
City of Richmond, et al., Defendants,
Phillips 66 Company, Plaintiff,
v.
City of Richmond, et al., Defendants.

Case Nos. 20-cv-01609-YGR, 20-cv-01614-YGR, 20-cv-01643-YGR
|
Signed 08/27/2020

Synopsis

Background: Operator of a port and marine terminal, operator of oil refinery, and coal mining company brought related actions against city and city council, alleging violations of the Commerce Clause, the Contracts Clause, the Due Process Clause, the Takings Clause, and the Equal Protection Clause, and preemption under the Interstate Commerce Commission Termination Act (ICCTA) and the Hazardous Materials Transportation Act (HMTA) by city ordinance that prohibited storing and handling of coal and petroleum coke on city property. Intervenors' motion to intervene was granted, and defendants and intervenors moved to dismiss for failure to state a claim.

Holdings: The District Court, Yvonne Gonzalez Rogers, J., held that:

plaintiffs failed to state a legally cognizable theory of violation of the dormant Commerce Clause under the extraterritoriality doctrine;

plaintiffs failed to sufficiently allege an undue burden on an inherently uniform national system of transportation to support dormant Commerce Clause violation;

plaintiffs adequately alleged a dormant Commerce Clause claim;

plaintiffs stated claim for violation of foreign Commerce Clause;

plaintiffs stated Contract Clause claim;

allegations supported plausible claim that ICCTA preempted ordinance;

allegations were sufficient to state claim that Shipping Act preempted ordinance; and

plaintiffs stated a plausible substantive due process claim.

Motion to intervene granted, motions to dismiss denied in part and granted in part.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Motion to Intervene.

Attorneys and Law Firms

***951** Ronald Edward VanBuskirk, Margaret Nell Rosegay, Stacey C. Wright, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA, for Plaintiffs.

Robert Steven Perlmutter, Edward Terry Schexnayder, Shute Mihaly & Weinberger LLP, Ellison Folk, Attorney at Law, Rachel Hannah Sommovilla, Bingham McCutchen LLP, San Francisco, CA, for Defendants.

ORDER (1) GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS; (2) GRANTING MOTIONS TO INTERVENE AND AMICI MOTIONS

Yvonne Gonzalez Rogers, United States District Court Judge

Plaintiffs Levin Richmond Terminal Corporation, Richmond Pacific Railroad Corporation, and Levin Enterprises, Inc. (collectively, "Levin"); Wolverine Fuels Sales, LLC ("Wolverine"); and Phillips 66 Company ("Phillips 66") bring these related actions seeking to invalidate and enjoin an ordinance adopted by defendants City of Richmond and City Council of the City of Richmond, entitled "Prohibition on the Storage and Handling of Coal and Petroleum Coke" (the "Ordinance"). Now before the Court are defendants' motions to dismiss, as well as motions to intervene and separate motions to dismiss brought by proposed intervenors Sierra Club and San Francisco Baykeeper. The motions came on for hearing on August 18, 2020. Having carefully considered the papers submitted, the arguments of the parties at the hearing, the admissible evidence, and the pleadings in this action, and for the reasons set forth below, the Court hereby (1) **DENIES** the motions to dismiss, except with respect to the Hazardous Materials Transportation Act claim, which is **DISMISSED WITH PREJUDICE**; and (2) **GRANTS** the motions to intervene, subject to the conditions set forth herein. [1]

*952 I. FACTUAL BACKGROUND

The complaints allege as follows: [2]

Richmond, California is a city located along the San Francisco Bay. Since 1981, Levin has operated the Levin-Richmond Terminal, a port and marine terminal located in Richmond, where a range of commodities are received, stored, handled, and transferred for shipment overseas. For the past six years, petroleum coke ("petcoke") and coal have accounted for more than 80 percent of the terminal's transloading business. The terminal currently is the only coal and petcoke bulk handling facility and transfer point for marine shipment in the Bay Area.

Phillips 66 operates a nearby oil refinery, where it produces petcoke. Phillips 66 transports its petcoke to Levin-Richmond Terminal by way of covered trucks. At the terminal, petcoke is transferred from the trucks to ocean-going freighters for shipment to customers in Australia, Asia, Europe, and other locations. Similarly, Wolverine mines and sources thermal coal, which it transports from its Utah headquarters to the Levin-Richmond Terminal, via the Union Pacific Railroad, for transshipment by merchant vessel to customers in Japan. Some temporary indoor storage and handling is incidental to product transfer from trucks and rails to marine vessels.

In 2015, the Richmond City Council adopted a resolution banning the storage and export of coal and petcoke on city-owned property. The resolution included a non-binding statement that the Richmond City Council opposed the transportation of coal and petcoke along California waterways, through densely populated areas, and through the city on existing rail lines and roadways. Five years later, after receiving complaints from residents and conducting numerous public hearings, and notwithstanding the Richmond Planning Commission voting unanimously against it, the City adopted the Ordinance, which extended the prohibition on coal and petcoke storage and handling to all property in Richmond. The "whereas" clauses in the Ordinance noted, among other things, that the dust from coal and petcoke storage and handling was associated with negative health and safety impacts on disadvantaged communities in Richmond that were disproportionately burdened by and vulnerable to multiple sources of pollution. Thus, the stated purpose of the Ordinance ***953** was to "protect and promote the health, safety and welfare of the City's citizens, visitors, and workers by reducing the release of pollutants into the environment" and "reduce the public health, safety, or welfare impacts" caused by the storage of handling of coal and petcoke. The Ordinance also provided a three-year amortization period "intended to strike a proper balance between protecting the public from the health hazards of coal and petroleum coke storage and handling, while also protecting existing jobs and providing sufficient time for businesses to transition." The Ordinance required the City to extend the amortization period if an applicant demonstrated that three years was insufficient to prevent a taking of its property.

Plaintiffs claim that the Ordinance violates their constitutional rights and is preempted by federal law. Specifically, Phillips 66's complaint alleges that the Ordinance (i) places an undue burden on interstate and foreign commerce in violation of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3); and (ii) infringes on its contracts with Levin and others in violation of the Contracts Clause (U.S. Const. art. 1, § 10, cl. 1). Wolverine's complaint alleges Commerce Clause and Contracts Clause claims, as well as (i) preemption under the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101, *et seq.*; (ii) preemption under the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5101, *et seq.*; (iii) preemption under the Shipping Act of 1984 (the "Shipping Act"), 46 U.S.C. § 40101, *et seq.*; and (iv) violation of the Due Process Clause (U.S. Const. amend. XIV, § 1). Levin's complaint alleges claims under the Commerce Clause, Contracts Clause, ICCTA, Shipping Act, and Due Process Clause, [3] as well as (i) violation of the Takings Clause (U.S. Const. Amend. V; Cal. Const. art. I, § 19); and (ii) violation of the Equal Protection Clause (U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7, subd. (a)).

II. MOTIONS TO DISMISS

Defendants seek dismissal of all causes of action brought by all plaintiffs in this action. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Johnson v. Lucent Techs., Inc.,* 653 F.3d 1000, 1010 (9th Cir. 2011). However, the Court "need not accept conclusory allegations of law or unwarranted inferences." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007).

The Court addresses each cause of action in turn.

A. Commerce Clause (All Plaintiffs)

Plaintiffs' complaints allege that the Ordinance places a significant burden on interstate ***954** and foreign commerce by effectively prohibiting marine shipments of coal and petcoke through the Levin-Richmond Terminal, which is critical for transshipment to national and overseas markets. Plaintiffs claim violations of the dormant Commerce Clause and the foreign Commerce Clause.

1. Dormant Commerce Clause

The Commerce Clause provides that "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The so-called dormant Commerce Clause—the implied, negative aspect of the Commerce Clause—prohibits states and local governments from enacting laws "unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992)). "The 'central rationale' of the dormant Commerce Clause 'is to prohibit state or municipal laws whose object is local economic protectionism.' " *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 466 (9th Cir. 2001) (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994)). In considering a dormant Commerce Clause claim, the court first must determine whether the challenged action "directly regulates or discriminates against interstate commerce, or its effect is to favor in-state economic interests over out-of-state interests." *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145 (9th Cir. 2015) (alteration and citation omitted). If the challenged action is nondiscriminatory—that is, it regulates in-state and out-of-state economic interests evenhandedly—it still violates the Commerce Clause if "the burdens of the statute so outweigh the putative benefits as to make the statute unreasonable or irrational." *Id.* (citation omitted).

Plaintiffs assert two theories for recovery thereunder. First, Levin and Wolverine allege a per se violation under the extraterritoriality doctrine, namely that the Ordinance discriminates against interstate and foreign commerce by regulating transactions beyond the City's borders. All plaintiffs additionally allege that the Ordinance fails under the *Pike* balancing test because it imposes an undue burden on interstate commerce that outweighs any putative benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

As to the extraterritoriality doctrine, a regulatory action that "directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." *Healy v. Beer Inst.,* 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). Under *Healy,* the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundary of the State." *Id.* (citing *Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986)). To determine the practical effect of the regulation, courts consider not only the direct consequences of the statute itself, but also "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*

***955** The Ninth Circuit has noted that "[i]n the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013). The two most prominent cases in which the court has found a violation, *Brown-Forman* and *Healy*, involved price-affirmation statutes that required merchants to affirm that that the prices they charged in-state were as low as those charged in neighboring states. *Id.* at 1101-02. The Ninth Circuit found these price-affirmation cases to be distinguishable from the facts presented in *Rocky Mountain*. *Id.* at 1102. Specifically, the court found that while California's low carbon fuel standard regulated the use of fuel in California, it said "nothing at all about ethanol produced, sold, and used outside California," nor did it "require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California." *Id.* at 1102-03. More recently, in *Chinatown Neighborhood Ass'n*, 794 F.3d at 1145-46, the Ninth Circuit rejected an extraterritoriality challenge to a state law banning the sale and trade of shark fins, holding that "even when state law has significant extraterritorial effects, it passes Commerce Clause muster when ... those effects result from the regulation of in-state conduct."

The Court finds this case is far more analogous to *Rocky Mountain* and *Chinatown Neighborhood Ass'n* than the price-affirming cases. The Ordinance regulates the storage and handling of coal and petcoke within Richmond; it is silent regarding the use, sale, and transport of these products elsewhere. Further, while plaintiffs allege that state and local governments and environmental groups are lodging a campaign to block shipment of these commodities from other West Coast marine terminals, plaintiffs do not state facts indicating "conflicting, legitimate legislation is already in place or [ ] the threat of such legislation is both actual and imminent." *S.D. Myers*, 253 F.3d at 469-70. *Healy* does not require the Court to engage in blind speculation regarding the interaction between the Ordinance and potential legislation affecting marine ports up and down the coast. *Id.* at 470 ("The [Supreme] Court has never invalidated a state or local law under the dormant Commerce Clause based upon mere speculation about the possibility of conflicting legislation"); *see also Silver v. Woolf*, 694 F.2d 8, 13-14 (2d Cir. 1982) ("cumulative burden" of states' regulations was "totally speculative"). As such, plaintiffs fail to state a legally cognizable theory under the extraterritoriality doctrine.

Having found the extraterritoriality theory of recovery fails, the Court considers plaintiffs' claims under the *Pike* balancing test, which focuses on the issue of undue burden. Plaintiffs' allegations are best understood as asserting two intertwined, overlapping bases for finding undue burden: first, the Ordinance unduly burdens a uniform national system of transportation, and second, the Ordinance places an undue burden on the interstate market for coal and petcoke.

As to the first undue burden theory, plaintiffs allege that the Ordinance impairs the inherently national interest in a uniform and efficient system of transportation of important commodities like coal and petcoke in interstate commerce. As plaintiffs correctly note, courts have found that a law which regulates activities that are "inherently national or require a uniform system of regulation—most typically, interstate transportation"—imposes significant burdens on interstate commerce. *Chinatown Neighborhood Ass'n*, 794 F.3d at 1146-47 (internal citation omitted). The cases on which plaintiffs rely, however, ***956** involved laws that directly regulated modes of transportation. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 445-48, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978) (invalidating statute governing truck length); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529-30, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) (invalidating law requiring contour mudguards on trucks and trailers). No such regulation of transportation is at issue here. Nor have plaintiffs otherwise pleaded facts showing an inherently national or uniform system of storing and handling petcoke. Thus, plaintiffs have not sufficiently alleged an undue burden on an inherently uniform national system of transportation. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (rejecting claim that state regulation addressing retail marketing of gas interfered with national market for petroleum products); *Chinatown Neighborhood Ass'n*, 794 F.3d at 1146 (state law prohibiting the sale or possession of shark fins, whose purpose was to "conserve state resources, prevent animal cruelty, and protect wildlife and public health," did not interfere with any inherently national activity, and instead, addressed "legitimate matters of local concern"); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013) (in action challenging state ban on sale of products that were the result of force-feeding birds, finding at motion to dismiss stage that plaintiffs "ha[d] not demonstrated that a nationally uniform foie gras production method is required to produce foie gras.").

Plaintiffs' second undue burden theory is that the Ordinance so burdens the interstate markets for coal and petcoke that it outweighs any putative benefits. To withstand dismissal on this theory, plaintiffs must allege plausibly that the challenged action imposes a burden not only on them or other specific market participants but on the relevant market as a whole. *Exxon Corp.*, 437 U.S. at 127-28, 98 S.Ct. 2207; *see also Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1151 (2012) ("Under the reasoning of *Exxon*, the dormant Commerce Clause does not protect [plaintiffs'] method of operation, nor guarantee [p]laintiffs their preferred method of operation."). Here, plaintiffs allege that the Ordinance effectively precludes the transport of coal and petcoke in interstate and overseas markets by shutting down the Levin-Richmond Terminal, which is essential to the movement of those products. Levin and Wolverine claim that if the Levin-Richmond Terminal is not available, coal exports to Japan may need to be shipped from terminals as far away as Mexico. Plaintiffs further contend that the issue is complex and requires consideration of costs, availability, feasibility of entering into new contracts. Taking these allegations as true, the Court finds plaintiffs have adequately alleged a significant burden on the interstate markets for coal and petcoke.

Defendants further aver that the health and safety benefits of the Ordinance justify any burden that the Ordinance may impose on interstate commerce. For purposes of this motion, this argument fails to persuade. While the Court must give appropriate deference to the legislature's judgment, it is not a rubberstamp for the City's adoption of the Ordinance. Plaintiffs allege that the City lacked reliable scientific evidence supporting enactment of the law, and thus, any purported benefits are illusory, arbitrary, or fail to outweigh the burden. Whether the Ordinance in fact imposes an undue burden on interstate commerce is a fact-specific inquiry reserved for a later stage of this case. At this juncture, however, plaintiffs state a plausible dormant Commerce Clause claim based ***957** on the *Pike* balancing test. [4] Accordingly, defendants' motions are **DENIED** as to plaintiffs' dormant Commerce Clause claims but granted on the theory of extraterritoriality.

2. Foreign Commerce Clause

The foreign Commerce Clause grants Congress the authority to "regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. The so-called dormant foreign Commerce Clause limits the power of states or municipalities to regulate such commerce, which is "pre-eminently a matter of national concern." *Japan Line, Ltd. v. Cty. of Los Angeles*, 441 U.S. 434, 448, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979). When construing Congress' power to "regulate Commerce with foreign Nations," and the negative implications of that power, a more extensive constitutional inquiry is required than for the power to regulate interstate commerce. *Id.* ("[T]here is evidence that the Founders intended the scope of the foreign commerce power to be the greater [than the interstate commerce power]."); *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 404 (3rd Cir. 1987) (burdens on foreign commerce subjected to "more rigorous and searching scrutiny" (citation omitted)). To prevail on a foreign Commerce Clause claim, a plaintiff must allege that a state or local law contravenes "specific indications of congressional intent." *Barclays Bank PLC v. Franchise Tax Bd.,* 512 U.S. 298, 324, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994) (citations omitted).

Here, plaintiffs allege that defendants' decision to deny plaintiffs access to the Levin-Richmond Terminal, thereby halting the shipment of coal and petcoke overseas to customers in Europe, Australia, and Asia, impermissibly infringes on the federal government's exclusive role to regulate foreign commerce. Defendants counter that plaintiffs' foreign Commerce Clause claims fail because plaintiffs do not and cannot allege that Congress has articulated a specific policy requiring uniformity in the trade of coal or petcoke.

Defendants do not persuade. Congress has declared that the "continuing policy of the Federal Government in the national interest [is] to foster and encourage private enterprise in [ ] the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries," where "minerals" includes "oil, gas, coal, oil shale and uranium." 30 U.S.C. § 21a. Further, Congress long has supported the expansion of exports of coal mined in the United States, part of which has involved evaluating the infrastructure (ports, vessels, and rail lines) that support such exports. 42 U.S.C. § 13367. These are specific indications of Congressional intent to regulate the overseas trade of commodities like coal and ***958** petcoke. Accordingly, as with the dormant Commerce Clause claim, defendants' motion to dismiss the foreign Commerce Clause claim is **DENIED**.

B. Contract Clause (All Plaintiffs)

The Contract Clause of the U.S. Constitution prohibits states and local governments from passing "any Law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10, cl. 1. To determine whether a state or local law violates the Contract Clause, "the threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *In re Seltzer*, 104 F.3d 234, 236 (9th Cir. 1996) (quoting *General Motors Corp. v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992)). If the law substantially impairs a private contract, a court next must determine "whether the impairment is both reasonable and necessary to fulfill an important public purpose." *Id.*

The complaints allege distinct but overlapping Contract Clause claims. Phillips 66 alleges that the Ordinance burdens its contracts with petcoke purchasers and its "long-standing contract with the Levin-Richmond Terminal for transloading, including storage and handling, of petcoke[.]" Wolverine alleges that the Ordinance impairs its "existing," "long-term" contracts with Union Pacific Railroad, which transports the coal in interstate commerce from Utah to the Richmond; with Levin, which "exclusively" stores and transfers the coal from railcars to marine vessels for export to Japan; and with purchasers of the coal. Wolverine also alleges that the Ordinance impairs its ability to renew such contracts, which it does in the ordinary course of its business. Levin alleges the Ordinance burdens its contracts with Phillips 66 and Wolverine.

Defendants argue that the Contract Clause claims should be dismissed because (i) the Ordinance regulates land use, not plaintiffs' contracts; (ii) plaintiffs' allegations that the Ordinance substantially impairs its contracts are lacking; and (iii) Richmond's actions were reasonable and appropriate as a matter of law.

As to the first argument, defendants contend that plaintiffs cannot establish substantial impairment of a contract where, as here, the challenged law may address the subject matter of alleged contracts, but its effects are only incidental and do not act directly on the contracts' terms. Defendants rely on *Kaiser Dev. Co. v. City & Cty. of Honolulu*, 649 F. Supp. 926, 928-30 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), in which a landowner and proposed developer brought an action against the City of Honolulu alleging, in part, that a city ordinance zoning plaintiffs' land for preservation or park use foreclosed a planned development in violation of the Contract Clause. The court granted summary judgment for defendants, finding that "the zoning regulations did not alter the terms of the contract between [the parties]." *Id.* at 949 ("[a]n otherwise valid law is not unconstitutional merely because an object of regulation is also the subject of a contract," *id.* at 948.).

To the extent defendants interpret *Kaiser* as requiring a law, on its face, to regulate, amend, cancel, or mention a contract in order to give rise to a Contract Clause claim, the Court disagrees. Rather, ***959** as explained, the threshold inquiry on a Contract Clause claim is "whether the [ ] law has, *in fact, operated as a substantial impairment* of a contractual relationship." *Allied Structural Steel*, 438 U.S. at 244, 98 S.Ct. 2716 (emphasis supplied). Thus, while the Ordinance regulates land use, and its stated purpose is to promote and protect the health, safety, and welfare of Richmond's citizens, visitors, and workers, plaintiffs nevertheless may maintain a Contract Clause claim if the Ordinance operates so as to substantially impair plaintiffs' contracts.

Defendants next contend that even if there is a legal basis for plaintiffs' Contract Clause claims, the complaints fail to plead basic facts about the contracts at issue. In particular, defendants argue that plaintiffs have not specified the durations of the contracts or whether the contracts anticipated regulatory changes like enactment of the Ordinance. The Court is not persuaded. Federal pleading standards do not require such specificity. Here, plaintiffs allege that they have contracted with each other and with third parties for the transport of coal and petcoke through Levin-Richmond Terminal. The allegations summarized above are sufficient to provide defendants with notice of the Contract Clause claims asserted.

Defendants' cited authorities do not compel otherwise. *Kaiser* does not require otherwise as it was decided on summary judgment. 649 F. Supp. at 928-30. *Northwestern Nat'l Life Insurance Company. v. Tahoe Regional Planning Agency*, 632 F.2d 104 (9th Cir. 1980) was decided on a motion to dismiss, but it is factually distinguishable. There, the Ninth Circuit upheld the dismissal of a municipal bondholder's challenge to an ordinance that limited the use of various lands near Lake Tahoe. *Id.* at 105. The bondholder claimed the ordinance drastically reduced the value of the land, which had the "indirect effect" of destroying the bondholder's security interest under the bonds and impairing the bondholders' ability to enforce the bonds. *Id.* at 106. The court disagreed, noting that neither the statute authorizing issuance of the bonds nor the bonds themselves guaranteed no action would be taken to restrict zoning or affect the value of the lands. *Id.* at 106-07. Thus, no obligation was impaired as the bondholder "complain[ed] only of incidental effects on the subject matter of the bonds." *Id.* at 107. Here, however, plaintiffs plead more than an "indirect" or "incidental" effect on their contracts. Plaintiffs claim that the Ordinance prohibits them from doing precisely what they are obligated to do pursuant to contract, namely, transport coal and petcoke to the Levin-Richmond Terminal for shipment overseas.

Finally, defendants argue that even if the Ordinance substantially impairs plaintiffs' contracts, it was reasonable and necessary to protect the health, safety, and welfare of the City's residents, visitors, and workers. This, too, fails to support dismissal. Except in unusual circumstances, and even where the Court must show deference to legislative judgment, questions of reasonableness and necessity are fact dependent. [5] This case is no exception. ***960** Specifically, the complaints allege that the only scientifically reliable environmental testing performed showed no PM2.5 emissions from the terminal; the Richmond Planning Commission found the Ordinance unsupported by reliable scientific evidence and recommended against its adoption; the Bay Area Air Quality Management District emphasized the absence of and need for scientifically reliable data to support the Ordinance; and the microscopic analysis on which the City relied was riddled with scientific errors and did not identify reliably the terminal as the source of the sampled dust. Dismissal on the basis of reasonableness and necessity thus is inappropriate.

Accordingly, defendants' motions are **DENIED** as to plaintiffs' Contract Clause claims. [6]

C. Preemption Under the Federal Law

Levin and Wolverine allege that three federal statutes—the ICCTA, the Shipping Act, and the HMTA—preempt the City's regulation of coal and petcoke. The Court addresses each.

1. ICCTA (Levin and Wolverine)

By way of background, the ICCTA was passed in 1995, in part with the purpose of expanding federal jurisdiction and preemption of railroad regulation. *See* H.R. Rep. No. 104–311 at 95 (1995) ("[C]hanges are made to reflect the direct and complete preemption of State economic regulation of railroads."). To that end, the ICCTA contains an express preemption clause, which grants the U.S. Surface Transportation Board ("STB") exclusive jurisdiction over "transportation by rail carrier" "as part of the interstate rail network." 49 U.S.C. § 10501(a). The statute defines "rail carrier" as "a person providing common carrier railroad transportation for compensation." *Id.* § 10102(5). "Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation ... while permitting the continued application of laws having a more remote or incidental effect on rail transportation." ***961** *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). The ICCTA also may preempt a state law "as applied" if the law "would have the effect of unreasonably burdening or interfering with rail transportation, which involves a fact-bound case-specific determination." *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 413-14 (5th Cir. 2010).

Levin and Wolverine allege that the Ordinance is expressly and impliedly preempted by the ICCTA because the transport of coal from Utah to Richmond via the Union Pacific Railroad, and within the Levin-Richmond Terminal facility via the Richmond Pacific Railroad Corporation, is subject to the exclusive jurisdiction of the STB. Defendants seek dismissal, arguing that the Ordinance does not "regulate transportation" by a "rail carrier," and in any event, the claims are unripe.

Courts repeatedly have held that transloading facilities like the Levin-Richmond Terminal may constitute "rail carriers" under the ICCTA's preemption provision. *See, e.g., Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 118 (1st Cir. 2015) ("It is well-established that the preemption of state and local regulation under the ICCTA generally extends to transloading facilities.") (citing cases); *Green Mountain Railroad Corp. v. State of Vermont*, 404 F.3d 638, 640 (2nd Cir. 2005) (railroad corporation proposing construction of transloading facilities on property along its rail line was "rail carrier" under ICCTA). As defendants correctly note, these cases generally arise where the operator of the interstate rail (i.e., the "rail carrier") also owns and operates a transloading facility that performs rail-related activities. *See Valero Ref. Company Petition for Declaratory Order*, No. FD 36036, 2016 WL 5904757, at *3 (S.T.B., Sept. 20, 2016) ("The [STB]'s jurisdiction extends to rail-related activities that take place at transloading (or, as here, off-loading) facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier's agent, or the rail carrier exerts control over the third party's operations."). That is not what is alleged here. However, this case presents a unique set of facts not squarely addressed by the cases cited. Levin and Wolverine allege that the Union Pacific Railroad carries coal from Utah to Richmond, where it is transferred from Union Pacific's rail lines to Richmond Pacific's rail lines by Richmond Pacific Railroad Corporation, a Class III rail common carrier and wholly owned subsidiary of Levin Enterprises, Inc., which owns the terminal. The Richmond Pacific rail lines allegedly transfer the coal into an enclosed unloading facility within the terminal. In other words, Levin and Wolverine allege that the Union Pacific rail lines, the Richmond Pacific rail lines, and the Levin-Richmond Terminal are part of an integrated rail system, and further, the Ordinance disrupts this system by effectively requiring Wolverine to take its coal elsewhere. Whether the Ordinance in fact regulates transportation by rail carrier or simply has incidental effects on a rail system "is a case-by-case, fact-specific determination," *id.*, but at this juncture, the allegations support a plausible claim, especially given the stated purposes of the ICCTA. [7]

With respect to as-applied preemption, defendants raise two issues of ripeness and inadequate allegations of improper interference. ***962** These arguments fail to persuade. As to ripeness, nothing in the case law suggests Levin and Wolverine were required to seek an exception under the Ordinance before bringing their ICCTA claims. Moreover, there would be no reason for the City to adopt the Ordinance in the first place if it was willing to exercise its discretion to grant the Levin-Richmond Terminal—the only facility affected by the Ordinance—an exemption. [8] As to the sufficiency of the allegations, for the reasons discussed, the Court finds that resolution of the ICCTA claims requires a full record. [9] At this stage in the proceedings, the allegations are sufficient. As such, defendants' motions to dismiss the ICCTA claims are **DENIED**.

2. The Shipping Act (Levin and Wolverine)

The Shipping Act aims to "establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs." 46 U.S.C. § 40101; *see also In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 79 (3d Cir. 2017) ("[T]he Act seeks to promote economically sound, evenhanded, and efficient ocean commerce that responds to international shipping practices."). To that end, the Shipping Act regulates agreements among ocean common carriers and marine terminal operators and requires that such agreements be filed with the Federal Maritime Commission. 46 U.S.C. §§ 40301, 40302. Another central feature of the Shipping Act is an exemption from the antitrust laws. *Id.* § 40307. Additionally, and relevant here, the Shipping Act contains an anti-discrimination provision that provides:

> A marine terminal operator may not—(1) agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp; (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate.

Id. § 41106. The Shipping Act does not expressly preempt state or local regulation of shipping, and thus, state and local laws survive preemption challenges where they do not directly conflict with the Act. *See Pac. Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1416 (9th Cir. 1990).

Levin and Wolverine claim such a conflict exists. Specifically, they allege that the Ordinance will force Levin to refuse marine terminal services to shippers of coal and petcoke, and thus to discriminate against shippers of particular commodities, without any rational basis. Levin also alleges that the Ordinance conflicts with the Shipping Act by increasing government intervention in the transport of goods by water and diminishing the growth, development, and efficiency of ocean transportation.

Defendants counter that the Shipping Act claims fail because the Ordinance expressly provides that it does not regulate shipping activities, nor does it regulate agreements among marine terminal operators ***963** that fall within federal authority. Defendants also aver that the Shipping Act prohibits discrimination by "marine terminal operators," which does not include the City. Further, defendants argue that even if the Ordinance incidentally affects shipping and regulates a "marine terminal operator," it is not preempted because it is a legitimate land use ordinance and does not require Levin to engage in discriminatory practices.

The Court disagrees. As an initial matter, the Court is doubtful of defendants' contention that the Shipping Act "focuses primarily on conduct by nongovernmental entities." The Shipping Act applies equally to governmental and nongovernmental entities. *See* *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 543 (D.C. Cir. 1988) (local government authority was a "marine terminal operator"); *see also* *State of Cal. v. United States*, 320 U.S. 577, 585, 64 S.Ct. 352, 88 L.Ed. 322 (1944) (municipal waterfront terminals and corporations are subject to the Shipping Act). Moreover, defendants' argument misunderstands plaintiffs' claims. Levin and Wolverine do not allege that the City has violated the Shipping Act. Rather, they allege that the Ordinance is preempted because it requires Levin to act in a manner that conflicts with the Shipping Act. Thus, it is of no consequence for purposes of this action that the City itself is not a "marine terminal operator," so long as its ordinance may regulate one.

Defendants' remaining arguments are largely conclusory. Whether the Ordinance requires Levin to "discriminate unreasonably," lacks a rational basis, or regulates agreements amongst marine terminal operators that are subject to federal authority, are all questions to be answered on a full record. At this juncture, the Court's review is limited to the allegations in the complaints. Those allegations are that the Ordinance would require Levin to discriminate against shippers of coal and petcoke without credible evidence or a rational basis to support its regulation of marine services at Levin-Richmond Terminal. Contrary to defendants' assertion, the Ordinance does not "appl[y] equally to all entities within Richmond," but rather, applies to owners and operators of facilities that store and handle two specific products. Moreover, as alleged in the complaint and confirmed at the hearing, Levin-Richmond Terminal is the only facility affected by the Ordinance. The allegations are sufficient to state a claim of preemption under the Shipping Act. *See* *Reed v. City & Cty. of San Francisco*, 10 Cal. App. 4th 572, 574-75, 12 Cal.Rptr.2d 647 (1992) ("If a discriminatory practice is prohibited by the Shipping Act's unreasonable discrimination prohibition ..., any application of San Francisco's divestment ordinance to preclude a marine terminal agreement because a shipper does business with South Africa would conflict with the Act[.]"); *see also* *Plaquemines Port*, 838 F.2d at 547-8 (denying review of Federal Maritime Commission's finding that tariff exemptions for certain wharves, docks, and vessels violated antidiscrimination standards of the Shipping Act). Defendants' motions to dismiss the Shipping Act claims are **DENIED**.

3. Hazardous Materials Transportation Act ("HMTA") (Wolverine)

The HMTA, 49 U.S.C. § 5101, *et seq.*, establishes a scheme of uniform federal regulations for transportation of hazardous materials. *S. Pac. Transp. Co. v. Pub. Serv. Comm'n of Nevada*, 909 F.2d 352, 355 (9th Cir. 1990). The HMTA authorizes the U.S. Secretary of Transportation to designate materials as hazardous and regulate their safe transportation. ***964** 49 U.S.C. § 5103. It expressly preempts state and local requirements where (1) it is impossible to comply with those requirements and federal requirements under the HMTA, or (2) those requirements create "an obstacle to accomplishing and carrying out" the HMTA or related regulations. *Id.* § 5125(a).

Wolverine claims that the HMTA preempts the Ordinance because the Secretary of Transportation has not designated coal a "hazardous material," but the Ordinance treats it as such by prohibiting its storage and handling at Levin-Richmond Terminal. Wolverine further alleges that even if coal is hazardous, its storage and handling at the terminal merely is incidental to its transport and shipment, and thus, is excluded from regulation under state or local law.

Wolverine fails to state a cognizable legal theory of preemption under the HMTA. As Wolverine admits, coal is not a federally designated "hazardous material" subject to the HMTA. Nothing in the HMTA suggests that the Secretary of Transportation's silence or nonregulation of a certain material preempts a state or local law regulating that material. It strains logic for Wolverine to argue otherwise. *See* *Waering v. BASF Corp.*, 146 F. Supp. 2d 675, 681 (M.D. Pa. 2001) (holding that HMTA did not preempt state law claims stemming from exposure to chemical that was not a federally designated hazardous material). The Ordinance is not preempted by the HMTA, and thus, defendants' motions to dismiss Wolverine's HMTA claim are **GRANTED WITH PREJUDICE**.

D. Due Process Clause (Levin and Wolverine)

"[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). "To constitute a violation of substantive due process, the alleged deprivation must 'shock the conscience and offend the community's sense of fair play and decency.' " *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013) (quoting *Marsh v. Cty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012)).

Levin and Wolverine allege that the City arbitrarily interfered with their property rights by enacting the Ordinance without a rational basis or credible evidence, in violation of their due process rights. Defendants move to dismiss, asserting that enactment of the Ordinance is squarely within the City's exercise of its police power and survives rational basis review. While the plaintiffs ultimately must meet a high burden of showing that the Ordinance is arbitrary and irrational, their allegations pass muster at this early stage in the proceedings. As explained in Section II.B.2., the complaints contain numerous allegations challenging the reliability and sufficiency of the evidence on which the City purportedly relied in passing the Ordinance. At this juncture, taking these allegations as true, Levin and Wolverine have stated a plausible due process claim. Defendants' motions to dismiss the due process claims are **DENIED**.

E. Takings Clause (Levin)

A law may violate the Takings Clause either facially or as applied. In a facial takings challenge, the plaintiff must demonstrate that the "mere enactment" of a law "constitutes a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 493, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). A land use regulation can result in a facial taking if it "does not substantially advance legitimate state interests ... or denies an owner economically viable use of ***965** [their] land." *Id.* at 485, 107 S.Ct. 1232. In an as-applied challenge, the Court must engage in an "ad hoc, factual inquir[y]." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The test involves a multi-factor examination of, among other things, the economic impact of the regulation, the extent to which the regulation has interfered with investment-backed expectations, and the character of the government action. *Id.*

Levin claims that the Ordinance constitutes a facial and as-applied violation of the Takings Clause. Specifically, Levin alleges that the Ordinance denies it all economically viable uses of the terminal, which Levin has vested right to continue operating as a legal non-conforming land use. Levin further alleges that the Ordinance is not based on a valid exercise of police power.

Defendants move on three grounds. First, defendants argue that the Ordinance avoids a facial taking by providing a three-year amortization period designed to ensure that Levin can recoup reasonable investments in its operations and transition to storage of permitted substances or other permitted uses. Courts have long recognized amortization periods as a valid tool for balancing the competing interests of a landowner's property rights and a local agency's need to implement zoning changes to benefit public health and welfare. However, even defendants' authorities make clear that an amortization period is not an absolute or unqualified defense to a takings claim. Rather, legislation may validly provide for the eventual termination of nonconforming property uses without compensation if it "provides a *reasonable* amortization period *commensurate with the investment involved.*" *Elysium Institute, Inc. v. Cty. of Los Angeles*, 232 Cal. App. 3d 408, 436, 283 Cal.Rptr. 688 (1991) (emphasis supplied).

Here, Levin challenges the reasonableness and adequacy of the amortization period. Its complaint alleges, based on analysis from the Berkeley Research Group, that the amortization period is "economically unsupportable and arbitrary," the criteria for seeking a variance from the Ordinance are "misguided and fail to take account of the nature of the facility and the market" for suitable alternative commodities, and the Ordinance is likely to put the terminal out of business. Levin further alleges that the terminal "is a unique marine facility," and given market conditions, physical constraints, and infrastructure requirements, "it would be speculative to suggest that any [ ] alternative dry bulk business will be available to [the terminal] in the foreseeable future." Taking these allegations as true, the Court cannot find at this juncture that the amortization period shields defendants from a takings claim. [10]

***966** Second, defendants argue that Levin's facial takings claim fails because the Ordinance includes a mechanism for extending the amortization period, pursuant to which the City is required to grant a variance if the applicant can show a longer period is necessary to avoid a taking. Defendants note that the factors for the City to consider in deciding whether applicants are eligible for relief under the Ordinance—including the value of the property and improvements, the length of time the operation has been in existence, and the impact on the local community—mirror those identified by the California Supreme Court for assessing the reasonableness of an amortization period. *See Metromedia, Inc. v. City of San Diego,* 26 Cal. 3d 848, 883-84, 164 Cal.Rptr. 510, 610 P.2d 407 (1980), *rev'd on* *other grounds* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). Again, however, Levin's complaint alleges that the variance procedure is inadequate, inapplicable, and fails to take account of the nature of the facility and the market for suitable alternative commodities to replace coal and petcoke. Further, the City's use of the California Supreme Court's factors in considering the reasonableness of the amortization period does not insulate defendants from judicial review, particularly at the motion to dismiss stage.

Third, defendants argue the as-applied challenge is not ripe for review because Levin has not availed itself of the variance procedures in the Ordinance. Defendants note that both federal and state takings law provide that a takings claim is not ripe until a landowner receives "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *see also* *Landgate, Inc. v. California Coastal Comm'n*, 17 Cal.4th 1006, 1018, 73 Cal.Rptr.2d 841, 953 P.2d 1188 (1998) (same). A final decision requires, at a minimum, that plaintiffs "meaningful[ly]" request and be denied a variance from the challenge regulation before bringing a regulatory taking claim. *S. Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 503 (9th Cir. 1990). The only exception is where the landowner can establish that an attempt to comply with that requirement would be "futile." *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454, *modified,* 830 F.2d 968 (9th Cir. 1987).

A plaintiff generally cannot invoke the exception where it has not attempted to comply with the available administrative relief provision. *County of Alameda v. Superior Court,* 133 Cal. App. 4th 558, 568, 34 Cal.Rptr.3d 895 (2005). As explained with respect to the ICCTA claims, however, the Court finds the takings claim appropriate for review on a full record. Given that the Levin-Richmond Terminal is the only facility subject to the Ordinance, and Levin allegedly submitted materials to the City in the course of objecting to adoption of the Ordinance, it would be futile for Levin to seek relief through the variance procedures in the Ordinance. Moreover, the Court notes that the purpose of the amortization period is to ensure discontinuance of coal and petcoke storage and handling at the terminal. Thus, even if the City granted Levin an extension, Levin could not maintain its ***967** current use of the terminal indefinitely. The claim is ripe for review. Defendants' motion to dismiss Levin's takings claim is **DENIED**.

F. Equal Protection Clause (Levin)

"Scrutiny under equal protection analysis is essentially equivalent to [rational basis] scrutiny under due process doctrine." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990); *see also* *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) (in considering equal protection claim, holding that "municipal decisions are presumptively constitutional and, therefore, need only be rationally related to a legitimate state interest, unless the distinctive treatment of the party involves either a fundamental right or a suspect classification").

Levin brings an equal protection claim, alleging that the Levin-Richmond Terminal is the only facility affected by the Ordinance, and the City's singling out of this facility, arbitrarily with without any rational basis, interferes with Levin's property rights. Defendants move to dismiss on the basis that the City acted with a rational basis. This argument is subject to the same deficiencies as the due process claims. That is, even applying the rational basis test, Levin's allegations are adequate to state a plausible claim for relief. *See* *Del Monte Dunes*, 920 F.2d at 1508-09 (allegations that city "arbitrarily and unreasonably limited use and development of this property," and that appellants "were singled out to bear the burden" of the city's "rational" environmental objectives, were adequate to support equal protection claim); *Sacramento Cty. Retired Emps. Ass'n v. Cty. of Sacramento*, No. CIV S-11-0355 KJM, 2012 WL 1082807, at *6 (E.D. Cal. Mar. 31, 2012) (in an equal protection case, "it is not the court's task on a motion to dismiss to determine whether defendant's actions were rationally related to its legitimate interest; rather, the court must determine whether plaintiffs have stated a claim for violation of the federal and state Equal Protection clauses."). Defendants' motion to dismiss Levin's equal protection claim is **DENIED**.

III. MOTIONS TO INTERVENE

Sierra Club and San Francisco Baykeeper bring joint motions to intervene in this action as a matter of right, and in the alternative, permissively. The Court addresses each basis for intervention in turn.

A. Intervention as a Matter of Right

Federal Rule of Civil Procedure 24(a) requires evidence of four factors to grant intervention: (1) the motion must be timely; (2) the applicant must claim a significantly protectable interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011).

Plaintiffs do not dispute that the first factor is satisfied. The Court agrees and further finds that the second and third factors also are satisfied. That is, the Court is persuaded that disposition of this case would impair proposed intervenors' interests because members of the Sierra Club and San Francisco Baykeepers are among the intended beneficiaries of the Ordinance and they worked extensively to secure passage of the Ordinance. [11]

On the other hand, the Court is not persuaded that proposed intervenors' ***968** interests will not be represented adequately by defendants. A rebuttable presumption of adequacy applies where a proposed intervenor and an existing party have the same ultimate objective, or where the government is acting on behalf of its constituency. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011). These presumptions apply here. Proposed intervenors argue that they nevertheless are entitled to intervene as a matter of right because their interests are narrow, personal, and mission-driven, whereas defendants have broader, often conflicting interests in public health, the environment, and the economy. Proposed intervenors also argue that the City may be unable to adequately represent their interests due to its budget shortfalls and related pressures caused by the COVID-19 pandemic. However, proposed intervenors' briefing on the motions to dismiss was largely duplicative of defendants' briefing, and further, defendants' counsel zealously advocated for their clients at the hearing on the motions. Proposed intervenors have not made a compelling showing of inadequacy of representation. Thus, intervention as a matter of right is not warranted.

B. Permissive Intervention

Federal Rule of Civil Procedure 24(b) provides for permissive intervention where: (1) independent grounds for jurisdiction exist; (2) the motion is timely; and (3) proposed intervenors' claim or defense shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). Even where all prerequisites are met, a district court has considerable discretion in ruling on a motion for permissive intervention. *In re Benny*, 791 F.2d 712, 721-22 (9th Cir. 1986). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The Court finds that permissive intervention is warranted. As stated above, there is no dispute that the motions are timely. Further, in federal question cases, "the district court's jurisdiction is grounded in the federal question(s) raised by the plaintiff." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). Where, as here, proposed intervenors do not raise new claims, "the jurisdictional concern drops away." *Id.* Proposed intervenors intend to defend the Ordinance against each of the claims raised in plaintiffs' complaints, and thus, their defenses share common questions of law with the main action. Additionally, allowing intervention will result in minimal delay and cause no prejudice to plaintiffs.

However, and most compelling, while proposed intervenors have not shown that COVID-19 will render defendants' representation inadequate, the Court is mindful of the challenges faced by municipalities because of the pandemic. Given the unprecedented nature of these times, and the important constitutional and preemption questions raised in this action, the Court finds limited intervention appropriate. Accordingly, the Court **GRANTS** Sierra Club and San Francisco Baykeepers' motions to intervene with limits. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-78, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987) (approving limitations). As such, intervention shall be subject to the conditions set forth in Section IV below.

*969 IV. CONCLUSION

For the foregoing reasons, the Court hereby **ORDERS** as follows:

(1) Defendants' motions to dismiss are **DENIED**, except with respect to the Hazardous Materials Transportation Act claim, which is **DISMISSED WITH PREJUDICE**;

(2) Sierra Club and San Francisco Baykeepers' motions to intervene are **GRANTED**, subject to the following conditions:

a. Sierra Club and San Francisco Baykeepers may not expand the scope of this action or raise new issues.

They may not file any motion independent of the defendant, including a motion to dismiss, or seek to assert any counterclaims. They may only file their proposed answer. Any filings must be made jointly with the defendants and may not be duplicative. All filings must be in accordance with this Court's Standing Order.

b. Similarly, all discovery shall be coordinated with defendants and made in conjunction therewith. Intervenors' status shall not increase the scope of discovery.

(3) Defendants shall answer the complaints by no later than **September 14, 2020**.

This Order terminates Docket Numbers 20, 28, 29, 30, 42, and 43 in Case No. 20-cv-1643; Docket Numbers 20, 28, 29, 30, 45, and 46 in Case No. 20-cv-1614; and Docket Numbers 19, 27, 28, 29, 44, and 45 in Case No. 20-cv-1609.

IT IS SO ORDERED.

All Citations

482 F.Supp.3d 944, 107 Fed.R.Serv.3d 1608

Footnotes

1 The State of California, the State of Utah, and Operating Engineers Union Local No. 3 each have filed motions for leave to file amici curiae briefs. District courts have broad discretion to appoint amici curiae. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Here, the Court finds it appropriate to consider the views of the amici curaie because they, and their respective constituents, have an interest in the issues presented. *See* *Funbus Sys., Inc. v. State of Cal. Pub. Utilities Comm'n.*, 801 F.2d 1120, 1125 (9th Cir. 1986) (describing the "classic role" of amici as "assisting in a case of general public interest"); *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) ("District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved[.]"). Accordingly, the Court in its discretion **GRANTS** the proposed amici curiae's motions for leave to file and has considered the positions asserted in their briefs.

2 Under Rule 201 of the Federal Rules of Evidence, the Court may take notice of any "adjudicative fact" that is "not subject to reasonable dispute" because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Here, defendants and each of the plaintiffs request judicial notice of several documents. Having reviewed the briefing, the Court hereby takes judicial notice of the Ordinance, which is a matter of public record not subject to reasonable dispute. *See* *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 954 n.3 (9th Cir. 2011). The remaining requests are denied because they improperly are offered for the truth of the matters asserted therein and/or are moot.

3 While Wolverine brings its due process claim under the U.S. Constitution only, Levin brings its parallel claim under the U.S. Constitution and the California Constitution. *See* Cal. Const. art. I, § 7, subd. (a).

4 Defendants' cited authorities do not counsel otherwise. *See* *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) (in case predating *Pike*, finding that ordinance did not exclude vessels from the city port or "destroy the right of free passage," thus not disrupting the required uniformity of interstate commerce); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-73, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) (considering trial evidence of regulation's benefits and burdens and finding that "no approach with a lesser impact on interstate activities" was available); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1016 (9th Cir. 1994) (affirming summary judgment for state agency on challenge to wildlife regulation where there was "overwhelming evidence that the regulations are unnecessary could add

enough force to the mere existence of burdens on interstate commerce to overcome the presumption that the regulations are valid"); *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 342, 353, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (not reaching *Pike* examination in regard to century-old taxing practice based on the "current record" of that "particular case").

5 Two of the cases on which defendants rely illustrate this point. In *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413-418, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), which arose at the summary judgment stage, the court engaged in a detailed factual review of alleged contractual impairments and a law's "reasonableness and necessity" to resolve a Contract Clause claim. That meant an examination of the timing of the contracts ("At the time of the execution of these contracts, Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive."); the precise terms of the contracts ("[T]he contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law[.]"); and the context in which the law was enacted ("To analyze properly the Kansas Act's effect, however, we must consider the entire state and federal gas price regulatory structure."). *Id.* at 413, 416, 418, 103 S.Ct. 697. Similarly, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), in reviewing the validity of a Commerce Clause case, the Supreme Court evaluated the "asserted justifications" for impairment of contractual waivers caused by Pennsylvania's Subsidence Act. Specifically, the court reviewed the nature of the waivers (most over 70 years old); the status of the contracting parties (no original covenantors); and legislative goals (deterring mining practices that would have severe effects on the surface). *Id.* at 504-06, 107 S.Ct. 1232. On that record, the court upheld the tailored means of imposing liability on coal companies to repair damage to achieve Pennsylvania's goal of deterring mining activities destructive to surface land. *Id.* at 506, 107 S.Ct. 1232. The posture of these cases allowed the courts to conduct a necessary factual analysis that is impossible here.

6 Proposed intervenors also argue that plaintiffs' Contract Clause claims fail because the coal and petcoke industries are so heavily regulated that plaintiffs reasonably should have expected additional regulation. While the extent and nature of prior regulation, including the 2015 regulation banning the storage and export of coal and petcoke on city-owned property, is relevant to the question of whether the Ordinance substantially impairs plaintiffs' contracts, the inquiry is premature.

7 The Court is not persuaded that the ICCTA claims fail simply because the Ordinance states that it "is not intended to and shall not be interpreted to regulate the transportation of coal and/or petroleum coke, for example, by train or marine vessel." The Court's focus is on whether the Ordinance *in fact* manages or governs transportation by rail carrier.

8 Indeed, plaintiffs allegedly presented information to the City challenging the adequacy of the amortization period *prior* to enactment of the Ordinance.

9 For example, at the pleading stage there is no evidence of disruption to a single rail carrier's business as opposed to an interstate rail network, or whether the Ordinance represents an appropriate public health and safety regulation with only incidental effects on interstate railroads. These are fact-dependent inquiries.

10 Defendants' other cited authorities do not compel a different result. In *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 618 (9th Cir. 1993), the Ninth Circuit held that there was no constitutional taking where a law required existing nonconforming billboards to be removed before the property would be approved for development. The court emphasized that the law did not apply unless the land was developed, and thus, property owners remained free to display billboards for as long as they wanted so long as they did not develop the land. *Id.* Here, plaintiffs allege that the Ordinance applies as soon as the amortization period expires. Additionally, *Outdoor Systems* was decided at the summary judgment stage. Likewise, in *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 460-61, 274 P.2d 34 (1954), the court held that a zoning ordinance requiring

discontinuance of certain nonconforming uses within five years was a constitutional exercise of the police power. In so finding, the court noted that "[t]he distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss." *Id.* at 460, 274 P.2d 34. Thus, the court considered a variety of factors in the record, including the costs and feasibility of relocating the nonconforming uses at issue. *Id.* at 461, 274 P.2d 34. This Court does not have a full factual record before it at this stage.

11 Levin is the only plaintiff to argue proposed intervenors do not meet the second and third factors, arguing that there is no credible evidence that the Ordinance is necessary for its asserted goal of protecting public health, safety, and welfare. This argument goes to the merits of the case, however, and does not undermine proposed intervenors' asserted interests in this case.

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381 F.Supp.3d 1153
United States District Court, N.D. California, Oakland Division.

State of CALIFORNIA, BY AND THROUGH Xavier BECERRA, Attorney General; and State of New Mexico, by and through Hector Balderas, Attorney General, Plaintiffs,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR; Office of Natural Resources Revenue; David Bernhard [1], Acting Secretary of the Interior; and Gregory Gould, Director, Office of Natural Resources Revenue, Defendants.

Case No: C 17-5948 SBA
|
Signed 03/29/2019

Synopsis
Background: State of California and the State of New Mexico brought action under Administrative Procedures Act (APA) against various defendants challenging Department of Interior (DOI) agency's repeal of regulations that governed payment of royalties on oil, gas, and coal extracted pursuant to leases of federal and Indian lands. Parties filed motions for summary judgment.

Holdings: The District Court, Saundra Brown Armstrong, Senior Judge, held that:

agency failed to explain inconsistencies between prior findings in enacting regulations and decision to repeal;

agency failed to adequately consider alternatives;

agency failed to reconcile inconsistencies between promulgation of regulations and repeal;

agency purported to rely on possibility of future findings of royalty committee as basis for repeal;

agency precluded interested parties from meaningfully commenting on proposed repeal;

agency failed to provide meaningful opportunity for comment on repeal; and

declaratory relief and vacatur were appropriate remedies.

States' motion granted in part and denied in part and defendants' motion denied.

Procedural Posture(s): Motion for Summary Judgment.

Attorneys and Law Firms

***1157** George Matthew Torgun, Office of the Attorney General, Mary Tharin, California Attorney General's Office Environment Section, Oakland, CA, John William Everett, Department of Justice Office of the Attorney General, San Diego, CA, William G. Grantham, Ari Biernoff, New Mexico Attorney General's Office, Albuquerque, NM, for Plaintiffs.

Rebecca Jaffe, U.S. Department of Justice, Environment and Natural Resources Division, Washington, DC, for Defendants.

ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

SAUNDRA BROWN ARMSTRONG, Senior United States District Judge

Plaintiffs State of California and the State of New Mexico (collectively "Plaintiffs") bring the instant action under the ***1158** Administrative Procedures Act ("APA"), 5 U.S.C. § 706, to challenge the Department of Interior's ("DOI") repeal of regulations (collectively referred to as "the Valuation Rule") that govern the payment of royalties on oil, gas and coal extracted pursuant to leases of federal and Indian lands. The Office of Natural Resources Revenue ("ONRR"), the agency within the DOI responsible for royalty collections, finalized the Valuation Rule on July 1, 2016, and specified an effective date of January 1, 2017. See Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform; Final Rule, 81 Fed. Reg. 43,338 (July 1, 2016).

The repeal process began in April 2017, when the ONRR issued a notice in the Federal Register ("Proposed Repeal") proposing to (1) repeal the Valuation Rule in its entirety and (2) reinstate a set of regulations that had been in effect for decades prior to the promulgation of the Valuation Rule ("pre-Valuation Rule regulations"). See Repeal of Consolidated

Federal Oil & Gas and Federal & Indian Coal Valuation Reform; Proposed Repeal, 82 Fed. Reg. 16,323 (Apr. 4, 2017). On August 7, 2017, the ONRR issued its final rule repealing the Valuation Rule and reinstating the pre-Valuation Rule regulations ("Final Repeal"). See Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform; Final Repeal, 82 Fed. Reg. 36,934 (Aug. 7, 2017).

Plaintiffs now bring the instant action against the DOI, ONRR and related parties (collectively "Federal Defendants")[2] to challenge the ONRR's issuance of the Final Repeal. The crux of Plaintiffs' APA claims is that the ONRR failed to: (1) provide an adequate, reasoned explanation to justify the Final Repeal; (2) consider alternatives to a complete repeal of the Valuation Rule; and (3) comply with the APA's notice and comment requirement. The Complaint also alleges a non-APA claim based on various federal statutes.

The parties are presently before the Court on four summary judgment motions filed by Plaintiffs, Federal Defendants, Conservation Intervenors and Industry Intervenors. Having read and considered the papers filed in connection with this matter and being fully informed, summary judgment is GRANTED in favor of Plaintiffs on their APA claims. Plaintiffs' non-APA claim is DISMISSED and Federal Defendants' summary judgment motion as to said claim is DENIED as moot. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

I. BACKGROUND

A. FACTUAL SUMMARY

1. Statutory and Regulatory Framework

The federal government leases vast tracts of public and Indian lands to private companies for fossil-fuel exploration, development, and production. Under the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 181 et seq., the government is entitled to collect royalties based on the "value of the production removed or sold from the ***1159** lease." 30 U.S.C. § 206(b)(1)(A) (oil and gas); 30 U.S.C.A. § 207(a) (coal); see Fina Oil & Chem. Co. v. Norton, 332 F.3d 672, 673 (D.C. Cir. 2003) (citing statutes). The DOI is responsible for administering the leases and issuing regulations to carry out and accomplish the purposes of the MLA. See 30 U.S.C. § 1701; 30 U.S.C. § 189.

In 1982, Congress enacted the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), 96 Stat. 2447, as amended, 30 U.S.C. § 1701 et seq., to address the concern that the "system of accounting with respect to royalties and other payments due and owing on oil and gas produced from such lease sites [was] archaic and inadequate." Id. § 1701(a)(2). FOGRMA directed the Secretary to establish "a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed, and to collect and account for such amounts in a timely manner." 30 U.S.C. § 1711(a). The Secretary, in turn, assigned these duties to the Minerals Management Service ("MMS"). 47 Fed. Reg. 6138 (1982); Secretarial Order Number 3071, as amended on May 10, 1982; see also 30 C.F.R. § 201.100 (2006).[3]

In September 1984, the MMS promulgated regulations implementing FOGRMA. 49 Fed. Reg. 37,336, 37,346. In 1988 and 1989, the MMS amended the regulations governing royalty calculations for oil and gas as well as coal, respectively. See 30 C.F.R. § 206.100 (1988) (oil); id. § 206.150 (1988) (gas); id. § 206.250 (coal) (1989). The amended regulations provide that in the case of arm's length sales, the contract price conclusively determines the "value" of the transaction. 30 C.F.R. § 206.152(b)(1) (1988) (gas); 30 C.F.R. § 206.102(b)(1) (1988) (oil); 30 C.F.R. § 206.257(b) (1989) (coal).

In the case of non-arm's length transactions (also referred to as "captive" transactions—i.e., sales involving interested parties or affiliates)—the MMS adopted a sequential "benchmark" system that looks to outside indicia of market value. See 30 C.F.R. § 206.152(c) (1988) (gas); § 206.102(c) (1988) (oil); and § 206.257(c)(2) (1989) (coal); see generally 76 Fed. Reg. 30,881, 30,882 (2011) (summarizing benchmarks applicable to coal); 76 Fed. Reg. 30,878, 30,879 (2011) (summarizing benchmarks applicable to gas and oil). Until the enactment of the Valuation Rule, these regulations governed the valuation of gas, oil and coal in calculating royalties under federal and Indian leases. See Federal and Indian Coal Valuation; Advance Notice of Proposed Rulemaking, 76 Fed. Reg. 30,881, 30,882 (May 27, 2011); Federal Oil and Gas Valuation; Advance Notice of Proposed Rulemaking, 76 Fed. Reg. 30,878, 30,879 (May 27, 2011).

2. Promulgation of the Valuation Rule

In December 2007 the Subcommittee on Royalty Management ("Subcommittee"), a subcommittee of the DOI's Royalty Policy Committee, issued a report titled "Mineral Revenue Collection from Federal and Indian Lands and the Outer Continental Shelf." 80 Fed. Reg. 608 (Jan. 6, 2015). The report identified pervasive problems with ***1160** ONRR's valuation regulations that undermined the agency's ability to accurately calculate royalties. Id. As to the existing benchmark method for valuing non-arm's length transactions, the report noted that the regulations had proven "difficult for industry to follow and ONRR to administer." 80 Fed. Reg. 608, 617, 628. The Subcommittee proposed various amendments to the ONRR's valuation regulations, including eliminating benchmarks, to permit the DOI to better discharge its royalty valuation responsibilities. Id. at 608.

The Subcommittee's report prompted the ONRR to commence an extended process to update and modernize its royalty regulations. In 2011, ONRR published two advanced notices of proposed rulemaking, seeking suggestions for new valuation methodologies. See 76 Fed. Reg. 30,878 (May 27, 2011) (oil and gas); 76 Fed. Reg. 30,881 (May 27, 2011) (coal). The agency noted that existing rules governing federal gas and coal had been in effect since 1988 and 1989, respectively, and that the regulations "have not kept pace with significant changes that have occurred in the domestic ... market during the last 20-plus years." 76 Fed. Reg. 30,878, 30,881.[4] These notices were followed by six public workshops in September and October 2011, and a five-year rulemaking process to update the regulations pertaining to oil, gas and coal royalties. AR 21.

On January 6, 2015, the ONRR issued the "Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform; Proposed Rule" ("Proposed Valuation Rule"), a consolidated proposal to reform its coal, oil, and gas valuation regulations. 80 Fed. Reg. 608 (Jan. 6, 2015). The ONRR accepted public comment on the Proposed Valuation Rule over a 120-day period, during which the agency received more than 1,000 pages of written comments from over 300 commenters and 190,000 petition signatories, including "industry, industry trade groups, Congress, State governors, States, local municipalities, two Tribes, local businesses, public interest groups, and individual commenters." 81 Fed. Reg. 43,338, 43,338; AR 21. The agency "carefully considered all of the public comments ... and, in some instances, revised the language of the final rule based on these comments." Id. "Coupled with [ONRR's] early stakeholder engagement, [this] extended comment period allowed for a careful review of the many complexities contained in the proposed rule." Id.

On July 1, 2016, ONRR finalized the Valuation Rule, with a stated effective date of January 1, 2017. 81 Fed. Reg. 43,338, 43,338. ONRR described the purpose of the Rule as follows:

> (1) to offer greater simplicity, certainty, clarity, and consistency in product valuation for mineral lessees and mineral revenue recipients; (2) to ensure that Indian mineral lessors receive the maximum revenues from coal resources on their land, consistent with the Secretary's trust responsibility and lease terms; (3) to decrease industry's cost of compliance and ONRR's cost to ensure industry compliance; and (4) to provide early certainty to industry and to ONRR that companies have paid every dollar due.

Id. The ONRR estimated that the Rule would increase royalty collections by between $ 71.9 million and $ 84.9 million. Id. at 43,359. Importantly, the Valuation Rule responded to concerns that companies were significantly undervaluing coal sold in non-arm's length transactions. Whereas lessees previously used the benchmark system to calculate royalties in such contexts, the Valuation Rule instead required ***1161** that coal be valued using the first arm's length sale between independent, nonaffiliated parties with opposing economic interests, and added a definition of the term "coal cooperative" to clarify what constitutes an arm's length relationship. 81 Fed, Reg. 43,338, 43,339, 43,354-55. The Rule also added a "default provision" to address situations where the Secretary of Interior is unable to reasonably determine the correct value of resource production. Id. at 43,341, 43,351, 43,356.

3. Repeal of the Valuation Rule

The Valuation Rule was set to effect on January 1, 2017, but lessees were not required to report and pay royalties under the Rule until February 28, 2017. See Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule ("Postponement Notice"), 82 Fed. Reg. 11,823 (Feb. 27, 2017). Prior to the specified effective date of the Valuation Rule, the ONRR held a series of eleven training sessions from October 17, 2016 to December 15, 2016, to assist the industry's transition to the new valuation system. 82 Fed. Reg. 36,934, 36,935; AR 1305. Shortly after the conclusion of the training sessions, several industry groups challenged the Valuation Rule by filing lawsuits in the U.S. District Court for the District of Wyoming on December 29, 2016. AR 3469-78, 3479-87, 3665-72. The groups alleged that the Valuation Rule would create widespread uncertainty and render compliance impossible. AR 3472-76, 3480, 3482-86, 3668-69.

On February 17, 2017, the petitioners in the District of Wyoming cases requested the ONRR to postpone implementation of the Valuation Rule. The ONRR responded that the Wyoming lawsuits raised "serious questions concerning the validity or prudence of certain provisions of the 2017 Valuation Rule, such as the expansion of the 'default provision' and the use of the sales price of electricity to value coal." 82 Fed. Reg. 11,823, 11,823. Those concerns were identical to those "voiced by many industry representatives in workshops during the public comment period that preceded the 2017 Valuation Rule's promulgation." Id. Thus, on February 27, 2017, the ONRR published the Postponement Notice in the Federal Register, stating that "justice requires it to postpone the effectiveness of the 2017 Valuation Rule...." Id.

In response to the Postponement Notice, California and New Mexico, the same Plaintiffs herein, filed suit in this Court alleging that the ONRR's action violated the APA. See Case No. 17-cv-2376-EDL (N.D. Cal.). Magistrate Judge Elizabeth Laporte agreed and declared that the ONRR's postponement of the Valuation Rule violated the APA. Becerra v. U.S. Dept. of the Interior, 276 F.Supp.3d 953, 967 (N.D. Cal. 2017). [5] However, she declined to vacate the Postponement Notice in light of the ONRR's plan to repeal the Valuation Rule. Id.

On April 4, 2017, the ONRR posted the three-page Proposed Repeal in the Federal Register, "proposing to repeal the 2017 Valuation Rule in its entirety" and to restore the pre-Valuation Rule regulations. Id. The ONRR claimed that the repeal "would be consistent with" Executive Order 13783, issued on March 28, 2017. Id. The stated rationale for the repeal was to:

> (a) preserve the regulatory status quo while ONRR reconsiders whether revisions are appropriate or needed to the ***1162** pre-existing regulations governing royalty values; (b) avoid the costs to both government and industry of converting to controversial new royalty reporting and payment systems while the reconsideration takes place; (c) eliminate the need for continued and uncertain litigation over the validity of the 2017 Valuation Rule, and (d) enhance the lessees' ability to timely and accurately report and pay royalties, because they would continue to use a well-known system that has been in place for decades.

Id. The notice did not identify any particular defects in the Valuation Rule; rather, the ONRR asserted that, since the Valuation Rule's promulgation, "it has ... identified several areas in the rule that warrant reconsideration to meet policy and implementation objectives, including but not limited to, how to value coal production in certain non-arm's length transactions, how to value coal when the first arm's-length sale of the coal is electricity, how to value gas in certain no-sale situations, and under what circumstances, and on whom, ONRR's valuation determinations are binding." Id.

Simultaneously, but independent of the Proposed Repeal, the ONRR published a notice in the Federal Register seeking "comments and suggestions from affected parties and the interested public on whether revisions to the regulations governing the valuation, for royalty purposes, of oil and gas produced from Federal onshore and offshore leases and coal produced from Federal and Indian leases, are needed and, if so, what specific revisions should be considered." Federal Oil and Gas and Federal and Indian Coal Valuation, Advance Notice of Proposed Rulemaking ("ANPRM"), 82 Fed. Reg. 16,325 (Apr. 4, 2017). The ANPRM later clarifies the comments solicited as follows:

> As discussed above, ONRR requests comments on two possible scenarios pending the outcome of the proposed

rule to repeal the 2017 Valuation Rule. We recognize the outcome of the proposed rule to repeal the 2017 Valuation Rule may not be known by the closing date of this ANPRM. Therefore, we encourage commenters to consider both of the two possible outcomes of that rulemaking when preparing their submissions as follows.

1. If the 2017 Valuation Rule is repealed, ONRR requests comments regarding whether a new rulemaking would be beneficial or is necessary. If commenters believe that a new rulemaking would be beneficial, ONRR requests comments regarding specific changes to the Federal oil and gas and Federal and Indian coal valuation regulations.

2. If the 2017 Valuation Rule is not repealed, ONRR requests comments regarding whether potential changes to the 2017 Valuation Rule are needed. Possible topics include, but are not limited to:

• Whether ONRR should have one rule addressing Federal oil and gas and Federal and Indian coal valuation, or separate rulemakings.

• How best to value non-arm's-length coal sales and/or sales between affiliates.

• Whether ONRR should update the valuation regulations governing nonarm's-length dispositions of Federal gas, and if so, how.

• Whether ONRR should address marketable condition and/or unbundling, and if so, how.

• Whether ONRR should have a default provision clarifying how ONRR will exercise Secretarial authority to determine value for royalty purposes in cases where there is misconduct, breach of ***1163** duty to market, or ONRR cannot otherwise verify value. Other potential valuation methods or necessary changes to ONRR valuation regulations.

Id. at 16,326.

The ONRR provided for a thirty-day comment period in connection with both the Proposed Repeal and the ANPRM. Although the Proposed Repeal instructs on how to submit comments, it does not specify any areas or topics on which the ONRR would like to receive comments. The ONRR received numerous requests for extensions of the comment period, which it denied. Id.; AR 6076, 6380, 6492, 8351-52. The agency received 776 comments in favor of and 1,567 comments opposed to the Proposed Repeal. AR 8957. The majority of those comments focused on the Valuation Rule's provisions pertaining to coal. 82 Fed. Reg. 36,934, 36,939. In response to the ANPRM, ONRR received thirty-three comments, see AR 8961-62, 8973-81.

On August 7, 2017, ONRR published the Final Repeal, which repealed the Valuation Rule "in its entirety" and reinstated the pre-Valuation Rule regulations. 82 Fed. Reg. 36,934. ONRR presented three principal reasons for the Repeal: (1) the Valuation Rule "has a number of defects that make certain provisions challenging to apply"; (2) the Valuation Rule conflicts with Executive Order 13783—Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093, because "certain provisions of the ... Valuation Rule would unnecessarily burden the development of Federal oil and gas and Federal and Indian coal beyond the degree necessary to protect the public interest or otherwise comply with the law"; and (3) a Royalty Policy Committee will be reestablished to lead the "development and promulgation of a new, revised valuation rule...." 82 Fed. Reg. 36,934, 36,934.

B. PROCEDURAL HISTORY

On October 7, 2017, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief in this Court against Federal Defendants. The Complaint alleges three claims: (1) Violation of the APA, 5 U.S.C. § 706; (2) Violation of FOGRMA, 43 U.S.C. § 1701, et seq.; the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1736, 1737-1782; MLA, 30 U.S.C. § 181; and the APA; and (3) Violation of the APA, 5 U.S.C. §§ 553(b), 706. As relief, Plaintiffs seek: a judicial declaration that Federal Defendants acted arbitrarily, capriciously and contrary to law in promulgating the Final Repeal; vacatur of the Final Repeal; and an award of attorney's fees and costs.

Plaintiffs have filed a motion for summary judgment, focusing on their claims under the APA. Federal Defendants have filed a combined opposition to Plaintiffs' motion and a cross-motion for summary judgment as to all claims alleged in the Complaint. Conservation Intervenors and Industry Intervenors have filed unopposed motions to intervene and motions for summary judgment.[6] The Institute for Policy Integrity at the New York University School of Law ("Institute") has filed a motion for leave to file an amicus curiae brief in support of Plaintiffs' summary judgment motion, attached to which is a copy of the proposed brief. Only Federal Defendants oppose the Institute's motion.

C. MOTION FOR LEAVE TO FILE AMICUS BRIEF

The "classic role" of amicus curiae is to assist a court in a case of public interest by "supplementing the efforts of ***1164** counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont., 694 F.2d 203, 204 (9th Cir. 1982). As this Court has previously recognized, "[w]hether to allow Amici to file a brief is solely within the Court's discretion, and generally courts have 'exercised great liberality' " in permitting amicus briefs. Woodfin Suite Hotels, LLC v. City of Emeryville, No. C 06-1254 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007) (citations omitted, alterations in orig.).[7] There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful or otherwise desirable to the court. Id.; see Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) ("The district court has "broad discretion" to permit amicus briefs."). The scope of amicus briefs, however, should be limited to the issues raised by the parties. See Citizens Against Casino Gambling in Erie Cty. v. Kempthorne, 471 F.Supp.2d 295, 311 (W.D.N.Y. 2007) ("Amicus participation goes beyond its proper role if the submission is used to present wholly new issues not raised by the parties.").

Federal Defendants object to the Institute's amicus brief, claiming that it contains extra-record citations, raises new issues, and adds nothing new to the proceedings. None of these objections is compelling. First, the extra-record citations, which are provided to support contextual points, are neither material to the Institute's arguments nor the Court's ruling. Second, the Institute's brief does not, as Federal Defendants assert, present a new claim that the ONRR violated Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Rather, the Institute cites that Order to underscore the scope of the ONRR's obligation to conduct a cost-benefit analysis in connection with "significant regulatory action." Finally, it is inapposite that an amicus brief raises the same issues as the parties' briefs. The salient question is whether such brief is helpful to the Court. In this case, the Institute's brief is useful in that it amplifies a number of points raised in parties' papers.

Accordingly, the Institute's motion to file an amicus brief is granted.

II. LEGAL STANDARD

Summary judgment should be granted only if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In a case involving review of a final agency action under the APA, however, the "genuine dispute of material fact" standard for summary judgment normally is inapplicable. See San Joaquin River Group Auth. v. Nat'l Marine Fisheries Serv., 819 F.Supp.2d 1077, 1083-84 (E.D. Cal. 2011). Because a court is reviewing an administrative decision based on an administrative record, there typically are no "disputed facts that the district court must resolve." Occidental Eng'g Co. v. I.N.S., 753 F.2d 766, 769 (9th Cir. 1985). Rather, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." Id.

***1165 III. DISCUSSION**

Plaintiffs and Conservation Intervenors contend that the ONRR violated the APA in issuing the Final Repeal, which repealed the Valuation Rule and restored the prior regulatory scheme. First, they contend that the ONRR failed to provide a reasoned explanation for repealing the Valuation Rule. Second, they argue that the ONRR failed to comply with the APA's notice and comment requirement. Federal Defendants and Industry Intervenors disagree and argue that the Final Repeal should be upheld.

A. REASONED EXPLANATION

Judicial review of an agency's rule making process is governed by the APA, 5 U.S.C. § 706(2). Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. ("State Farm"), 463 U.S. 29, 41, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). The APA provides that a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Final agency action, which is at issue here, is reviewed under the "arbitrary and capricious" standard. Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States, 384 F.3d 721, 727 (9th Cir. 2004). "An agency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1109 (9th Cir. 2012) (internal quotation omitted). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." State Farm, 463 U.S. at 43, 103 S.Ct. 2856.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." Encino Motorcars, LLC v. Navarro, ––– U.S. ––––, 136 S.Ct. 2117, 2125, 195 L.Ed.2d 382 (2016). In FCC v. Fox Television Stations, Inc., 556 U.S. 502, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009), the Supreme Court addressed the applicable APA requirements when an agency seeks to change its policies:

> In Fox, the Court held that a policy change complies with the APA if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy."

Organized Vill. of Kake v. U.S. Dep't of Agric. ("Kake"), 795 F.3d 956, 966 (9th Cir. 2015) (quoting in part Fox, 556 U.S. at 515-16, 129 S.Ct. 1800). With regard to the fourth "good reasons" requirement, Fox makes clear that when an agency seeks to disregard facts underlying the original rule, it must provide "a more detailed justification than what would suffice for new policy created on a blank slate." 556 U.S. at 515, 129 S.Ct. 1800. In other words, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." Navarro, 136 S.Ct. at 2126 (quoting Fox, 556 U.S. at 515-16, 129 S.Ct. 1800). "It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary ***1166** and capricious change from agency practice.' " Id. (quoting National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)).

Federal Defendants maintain that the ONRR had "good reasons" for repealing the Valuation Rule and reinstating the prior regulations it had just replaced. [8] In the Final Repeal, the ONRR justified the repeal by claiming that: (1) the Valuation Rule contained a number of "defects" that posed "administrative challenges"; (2) the Valuation Rule violated Executive Order 13783; and (3) a Royalty Policy Committee would be reestablished to advise the ONRR on setting market valuations for royalty collection purposes with respect to energy and natural resources and to consider new valuation rules. 82 Fed. Reg. 36,934, 36,934. As will be discussed below, the recited justifications fail to pass muster under the Supreme Court authority cited above.

1. Defects

a) Failure to Explain Inconsistencies

The Final Repeal identified seven "defects" that allegedly "make certain provisions [of the Valuation Rule] challenging to comply with, implement or enforce." 82 Fed. Reg. 36,934, 36,934. But as the Conservation Intervenors point out—and Federal Defendants do not dispute—the purported defects cited by the ONRR in the Final Repeal were not new. Rather, they reflected industry concerns previously considered and rejected by the ONRR during the five-year rulemaking process leading to the ONRR's adoption of the Valuation Rule. [9] Given that the ONRR was not writing on a "blank slate" in connection with its adoption of the Final Repeal, it was incumbent upon it to provide a reasoned explanation as to why the industry concerns it previously rejected—as well as its prior findings in support of adopting the Valuation Rule—now justified returning to the pre-Valuation Rule regulatory framework. See Fox, 556 U.S. at 515, 129 S.Ct. 1800. Nowhere in the Final Repeal does the ONRR provide such an explanation.

The ONRR's flawed analysis is particularly illustrated in its discussion of the Valuation Rule's method of valuing non-arm's length transactions involving coal. Previously, the value of such transactions ***1167** was determined by the application of various " 'benchmarks' that look to outside indicia of market value." 76 Fed. Reg. 30,881, 30,882. [10] As noted, a 2007 report by the Royalty Policy Committee was critical of that method of valuation and recommended eliminating use of the benchmarks. Those criticisms motivated the ONRR to study the matter further. Thus, in 2011, the ONRR issued two advanced notices of proposed rulemaking, providing notice of intention to change the rules governing the valuation of coal, oil and gas produced from Federal and Indian leases. See 76 Fed. Reg. 30,881 (May 27, 2011) (coal); 76 Fed. Reg. 30,878 (May 27, 2011) (oil and gas).

The ONRR's notices identified numerous flaws in the existing coal valuation regulations and solicited comments on eliminating the use of benchmarks. 76 Fed. Reg. 30,881, 30,883 see also 80 Fed. Reg. 608, 628 ("The benchmarks applicable to coal in non-arm's length and no-sale situations have proven difficult to use in practice."). In place of the benchmarks, the ONRR proposed to value non-arm's length coal transactions based on gross proceeds from the first arm's length-sale of coal. 80 Fed. Reg. 608, 609. In cases where no arm's length-sale of coal was available for comparison—and where the lessees or their affiliates use the coal to generate electricity and sell electricity—"the ONRR propose[d] to value the coal for royalty purposes based on the gross proceeds the lessee or its affiliate receive for the power plant's arm's length sales of electricity, less applicable deductions." Id.

In promulgating the Valuation Rule, the ONRR specifically "sought input on the merits of eliminating the benchmarks for valuation of non-arm's length sales...." 81 Fed. Reg. 43,338, 43,339. The ONRR received numerous comments on its proposal to eliminate the benchmarks and to instead value coal based on the first arm's-length sale. Id. at 43,354. Industry commenters urged the ONRR to retain the benchmark system to value coal sold under non-arm's length contracts. Id. Some commenters opined that valuing coal at the first arm's-length sale was "unnecessarily complex," while others observed that such an approach would not accurately reflect the value of the coal sold. Id. The ONRR also considered comments that the benchmark system, or a modified version thereof, should be retained. Id. The ONRR rejected these concerns, finding "ample evidence" to support the conclusion that "[t]he values established in arm's length transactions are the best indication of market value." Id. In addition, it strongly criticized the benchmark system as "difficult to use in practice," "challenging" and "at times, impossible for lessees." Id. In sum, the ONRR concluded that the new Valuation Rule was superior to the benchmark system. Id.

In repealing the Valuation Rule, the ONRR completely contradicts its prior findings. Despite its previous, detailed conclusions in support of the Valuation Rule's approach to valuing non-arm's length coal transactions—and dismissing ***1168** the industry's criticisms thereof—the ONRR now finds the approach prescribed in the Valuation Rule to be "unnecessarily complicated and burdensome to implement and enforce." 82 Fed. Reg. 36,934, 36,935.[11] Likewise, in contrast to its prior criticisms of the benchmarks, the ONRR now lauds the benchmark system as "proven and time-tested," id. at 36,941, as well as "reasonable, reliable, and consistent," id. at 36,940. Although the ONRR is entitled to change its position, it must provide "a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy." Navarro, 136 S.Ct. at 2126. Neither Federal Defendants nor Industry Intervenors identify where in the Final Repeal or elsewhere in the record the ONRR provided such an explanation.[12]

The Court finds that the ONRR's conclusory explanation in the Final Repeal fails to satisfy its obligation to explain the inconsistencies between its prior findings in enacting the Valuation Rule and its decision to repeal such Rule. The ONRR's repeal of the Valuation Rule is therefore arbitrary and capricious. See Navarro, 136 S. Ct. at 2126 (holding that an agency's change in practice without explaining a prior inconsistent finding is arbitrary and capricious); accord Kake, 795 F.3d at 969 ("The 2003 [Rule] does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a 'minor' one. The absence of a reasoned explanation for disregarding previous factual findings violates the APA.").

b) Failure to Discuss Alternatives

Even if the ONRR's discussion of the alleged defects in the Valuation Rule were not deficient, the Court is unpersuaded that the ONRR adequately considered alternatives to a complete repeal. When considering revoking a rule, an agency must consider alternatives in lieu of a complete repeal, such as by addressing the deficiencies individually. Yakima Valley Cablevision, Inc. v. F.C.C., 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal.") (citing cases); Farmers Union Cent. Exch., Inc. v. F.E.R.C., 734 F.2d 1486, 1511 (D.C. Cir. 1984) ("It is well established that an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives."); e.g., Pub. Citizen v. Steed, 733 F.2d 93, 103 (D.C. Cir. 1984) (holding that the National Highway Traffic ***1169** Safety Administration's suspension of tire-grading regulation was arbitrary and capricious because agency failed to pursue available alternatives).

In response to the Proposed Repeal, the ONRR received comments suggesting that in lieu of complete repeal of the

Valuation Rule, the ONRR should address specific problems "separately and not entirely abandon the rule in its entirety." 82 Fed. Reg. 36,934, 36,940. [13] The ONRR responded that "[t]he cost of implementing the rule and subsequently trying to fix the defects in one or more separate rulemakings would far exceed the cost of repealing and replacing the rule." Id. That conclusory statement—unsupported by facts, reasoning or analysis—is legally insufficient. See Amerijet Int'l, Inc. v. Pistole, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[C]onclusory statements will not do; an agency's statement must be one *of reasoning*.") (internal quotation marks omitted); see also NetCoalition v. S.E.C., 615 F.3d 525, 539 (D.C. Cir. 2010) (holding that the court would not "defer to the agency's conclusory or unsupported suppositions") (internal quotation marks omitted)). [14] The Court finds that the ONRR's failure to adequately consider alternatives to repealing the Valuation Rule in its entirety to be arbitrary and capricious. See State of California v. Bureau of Land Mgmt. ("California I"), 286 F.Supp.3d 1054, 1066-67 (N.D. Cal. 2018) (finding that even if the agency had provided factual evidence to support its claim that the new waste reduction regulations at issue burdened small operators, a "blanket suspension" of the regulations was arbitrary and capricious because the suspension was "not properly tailored" to address the allegedly errant provision).

2. Executive Order 13783

The second justification recited in the Final Repeal for repealing the Valuation Rule is Executive Order 13783, issued on March 28, 2017. The Executive Order, entitled "Promoting Energy Independence and Economic Growth," states, in pertinent part, as follows:

> [I]t is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that *unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.*

Exec. Order 13783 (Mar. 28, 2017) (emphasis added). Citing unspecified comments and its own "internal review," the ONRR concluded in the Final Repeal that "certain provisions of the [ ] Valuation Rule would unnecessarily burden the development of Federal oil and gas and Federal and Indian coal beyond the degree necessary to protect the public interest or otherwise comply with the law." 82 Fed. Reg. 36,934, 36,934.

To support its findings regarding the Valuation Rule's alleged "burden" on the development of domestic energy sources ***1170** under Executive Order 13783, the ONRR simply repeated its assertion made in discussing the alleged defects of the Valuation Rule that the new provisions governing electricity sales and coal cooperatives were "too broad and ambiguous to comply with or enforce." 82 Fed. Reg. 36,934, 36,938-39. The ONRR further asserted that "a number of provisions" in the Rule "would unduly burden or unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the production, utilization, or delivery of Federal oil or gas or Federal or Indian coal." Id. at 36,938. These conclusory assertions are inadequate, given that the ONRR failed to provide any data or analysis to support them. See Amerijet Int'l, 753 F.3d at 1350 (conclusory agency statements deemed insufficient); e.g., California I, 286 F.Supp.3d at 1067 (finding that the agency failed to provide an adequate explanation because it failed to "point to any fact that justifies its assertion that the Waste Prevention Rule encumbers energy production").

More fundamentally, the ONRR's speculation that provisions of the Valuation Rule would be unduly burdensome, difficult to apply and increase costs, directly contradict its previous findings in its promulgation of the Valuation Rule. At that time, the ONRR specifically found that, on a net impact basis, the new regulations would increase royalty collections by between $ 71.9 million and $ 84.9 million and reduce administrative costs by $ 3.61 million. 81 Fed. Reg. 43,338, 43,359. In addition, the ONRR expressly found that the Valuation Rule would *not*: (1) "cause a major increase in costs or prices for ... individual industries"; (2) "have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises"; (3) "alter, in any material way, natural resources exploration, production, or transportation"; or (4) constitute a significant regulatory action, i.e., one likely to have a significant adverse effect on the supply, distribution, or use of energy. 81 Fed. Reg. 43,338, 43,368. Yet, in the Final Repeal, the ONRR contradicts those findings by asserting that the Valuation Rule would "unduly burden" energy production, and that the coal provisions, in particular, would produce "significant costs." 82 Fed. Reg. 36,934, 36,938. The ONRR's repeal of the Valuation Rule without a reasoned explanation reconciling these inconsistencies is arbitrary and capricious. See Navarro, 136 S. Ct. at 2126; accord Kake, 795 F.3d at 969.

Federal Defendants contend that the ONRR, in fact, considered the "pros and cons of repeal" and string-cites a number of documents in the record. Defs.' Mot. at 21. These documents consist of internal agency documents that summarize the public comments ONRR received on the proposed repeal. As such, the documents—which do not contain any agency response to the comments—hardly constitute a reasoned explanation by the ONRR for supporting its decision to forfeit the Valuation Rule's royalty benefits and administrative cost savings. See State Farm, 463 U.S. at 43, 103 S.Ct. 2856 (an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (internal quotation marks omitted); see also California v. Bureau of Land Mgmt. (California II"), 277 F.Supp.3d 1106, 1123 (N.D. Cal. 2017) (finding that the agency's failure to provide a reasoned explanation for its decision to suspend a rule based on the rule's costs, while ignoring its benefits, violated the APA). [15]

*1171 3. Royalty Policy Committee

The ONRR's third and final rationale for the Final Repeal is that the recently reestablished Royalty Policy Committee would "advise ONRR on current and emerging" valuation issues. 82 Fed. Reg. 36,934, 36,934. According to the ONRR, it "expects that" these consultations will, in turn, "lead to the development and promulgation of a new, revised valuation rule that will address the various problems that have now been identified in the rule we are repealing." Id. In essence, the ONRR anticipates that the Committee may at some point supply reasons for repealing the Valuation Rule. But predicted future actions cannot be used to support a decision already made. See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962) (noting that an agency's justification for its action must be presented in the order taking such action); N. Air Cargo v. U.S. Postal Serv., 674 F.3d 852, 860 (D.C. Cir. 2012) (explaining that "agency action ... can be upheld only on the basis of a contemporaneous justification by the agency itself"). Predicating a repeal decision on recommendations that may or may not occur in the future is arbitrary and capricious. See State Farm, 463 U.S. at 43, 103 S.Ct. 2856 (stating that an agency action is arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action").

Federal Defendants argue that the "ONRR did not rely on a future Committee analysis to justify the repeal rulemaking." Fed. Defs.' Mot. at 20. [16] Rather, they argue that the "ONRR relied on the Valuation Rule's defects" to justify the repeal, "while noting that, in the future, ONRR, through the Committee, would try to improve the valuation regulations." Id.; see also Indus. Mot. at 3, Dkt. 59 (suggesting that the Committee's process is "forward-looking" and "separate" from the repeal). To the extent that the ONRR relied solely on the alleged defects as a basis for the repeal, the repeal is improper. As already discussed, the ONRR's analysis of those defects fails to comport with the APA, inter alia, because the ONRR failed to adequately explain its decision to repeal the Valuation Rule. In any event, Federal Defendants' contention is belied by the Final Repeal itself. There, the ONRR states that "we have decided to repeal the 2017 Valuation Rule in its entirety, principally for the three following reasons," with the third reason being the reestablishment of the Committee which "will lead to the development and promulgation of a new, revised valuation rule that will address the various problems that have now been identified in the rule we are repealing." 82 Fed. Reg. 36,934, 36,934. Thus, the Court finds that the ONRR did, in fact, purport to rely on the possibility of future findings of the Royalty Policy Committee as a basis for the Final Repeal, and in doing so, violated the APA.

*1172 B. NOTICE AND COMMENT REQUIREMENT

As an independent basis for their APA claims, Plaintiffs aver that the ONRR failed to allow for meaningful public comment on the Proposed Repeal in two significant respects. First, the Proposed Repeal lacked adequate detail to meaningfully inform the public regarding the ONRR's rationale for repealing the Valuation Rule. Second, the Proposed Repeal failed to invite comments on the substance or merits of the Valuation Rule and the prior regulatory scheme that it replaced. Because of these shortcomings, the ONRR allegedly deprived the public of a meaningful opportunity to comment on important components of the Proposed Repeal, as required by the APA.

1. Overview

The APA requires that, as a prerequisite to promulgating regulations, an agency must issue a "[g]eneral notice of proposed rulemaking" in the Federal Register. 5 U.S.C. § 553(b). The notice must inform the public of "the time, place, and nature of public rulemaking proceedings," "the legal authority under which the rule is proposed," and "the terms or substance of the proposed rule or a description of the subjects and issues involved." Id. § 553(b)(1)-(3). After providing the required notice, the agency must provide for a comment process. Specifically, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." Id. § 553(c). "Among the purposes of the APA's notice and comment requirements are '(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.' " Prometheus Radio Project v. F.C.C., 652 F.3d 431, 449 (3d Cir. 2011) (citation omitted); accord Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1404 (9th Cir. 1995) ("The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process.").

The above notice and comment requirement likewise applies when an agency seeks to amend or repeal a rule that has previously has been promulgated. See Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) ("Section 553 of the Administrative Procedure Act requires agencies to afford notice of a proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, amendment, modification, or repeal."). "The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n, 673 F.2d 425, 446 (D.C. Cir. 1982). If an agency fails to comply with these procedures, a court "must" set aside the rule. California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018) (citing 5 U.S.C. § 706(2)(D)).

The APA imposes exacting requirements regarding the content of notices. Under 5 U.S.C. § 553, an agency "must provide notice sufficient to fairly apprise interested persons of the subjects and issues before the Agency." Nat. Res. Def. Council, Inc. v. U.S. E.P.A., 863 F.2d 1420, 1429 (9th Cir. 1988). "[A]n agency proposing informal rule-making has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." ***1173** Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35 (D.C. Cir. 1977). "Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose the thinking that has animated the form of a proposed rule and the data upon which that rule is based." Id. at 35.

2. Failure to Recite Rationale for Repeal

Plaintiffs contend that the Proposed Repeal failed to adequately inform the public of the ONRR's rationale for repealing the Valuation Rule. The Court agrees. The Proposed Repeal asserted that the Valuation Rule should be repealed so that the ONRR could reconsider whether changes to the Valuation Rule were needed and to avoid the costs of implementing its "controversial" provisions. 82 Fed. Reg. 16,323. The areas allegedly requiring reconsideration are listed as "how to value coal production in certain non-arm's length transactions, how to value coal when the first arm's-length sale of the coal is electricity, how to value gas in certain no-sale situations, and under what circumstances, and on whom, ONRR's valuation determinations are binding." Id. The notice also claimed that a repeal would be consistent with Executive Order 13783. Id.

The Proposed Repeal fails to pass muster under the APA. As an initial matter, it is not enough that an agency merely identify some of the problems it believes may justify a repeal; rather, "[n]otice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment[.]" Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (citation omitted); Home Box Office, 567 F.2d at 35 ("[T]he notice required by the APA ... must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based"). That level of detail is lacking in the Proposed Repeal, which merely recites conclusions. Absent is any detailed analysis, supported by evidence, explaining the reasons why the identified generalized areas of concern merited reconsideration, much less why they justified repealing the Valuation Rule in its entirety and reimplementing a regulatory framework which the ONRR itself had previously acknowledged was deficient. [17] Likewise, the notice failed to provide the requisite explanation as to how repealing the Valuation Rule was necessary to comply with Executive Order 13783.

Federal Defendants argue that the ONRR had no obligation to identify "every possible reason in its notice" and merely identifying some of the agency's concerns with the Valuation Rule was enough to comply with the APA's requirements. Fed. Defs.' Opp'n at 22. Perhaps so, but that argument misses the point. Plaintiffs are not faulting the ONRR for failing to identify every conceivable problem with the Valuation Rule. Rather, the problem is that the Proposed Repeal fails to explain in detail the reasons the ONRR allegedly believed that the problems it previously had identified now justify the complete repeal of the Valuation Rule. Without that information, Plaintiffs aver, the public could not meaningfully comment on the ONRR's proposed repeal. See Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982) ("The purpose of the comment period is to allow interested members of the public to ***1174** communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."). Tellingly, neither Federal Defendants nor Industry Intervenors address let alone acknowledge this omission.

The Court concludes that, by failing to provide the requisite information to adequately apprise the public regarding the reasons the ONRR was seeking to repeal the Valuation Rule in favor of the former regulations it had just replaced, the ONRR effectively precluded interested parties from meaningfully commenting on the proposed repeal. See Connecticut Light & Power Co., 673 F.2d at 530; accord Prometheus Radio Project, 652 F.3d at 452 (notice of proposed rulemaking lacked sufficient detail to permit "discussion of the actual issues involved"); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1403 (9th Cir. 1995) (agency violated the APA by failing to the provide the public with an opportunity to comment on an important study relied upon by the agency "to support its final rule"). The Court therefore concludes that Federal Defendants violated the APA by failing to comply with the notice and comment requirement. Nat. Res. Def. Council v. U.S. E.P.A., 279 F.3d 1180, 1186 (9th Cir. 2002) ("A decision made without adequate notice and comment is arbitrary or an abuse of discretion.") (citing 5 U.S.C. § 706(2)(A)).

3. Failure to Solicit Comments

As an alternative matter, Plaintiffs argue that the ONRR violated the APA by failing to allow for meaningful comment on their proposed rules. 5 U.S.C. § 553(c). As discussed, it is imperative that an agency provide a "meaningful opportunity for comment" on the merits of the proposed agency action. N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 770 (4th Cir. 2012). According to Plaintiffs, the Proposed Repeal improperly limited comments to whether or not to repeal the Valuation Rule without soliciting and considering comments regarding the substantive merit of the Valuation Rule or the pre-Valuation Rule regulations.

The Fourth Circuit's decision in North Carolina Growers' Association is instructive. In that case, various plaintiffs brought an APA action against the Department of Labor ("Department") after it suspended 2008 regulations governing temporary agricultural workers and reinstated the prior set of 1987 regulations. In its notice of proposed rulemaking, the Department cited difficulties in operating the program governing the employment of foreign agricultural workers under the 2008 regulations, including a lack of resources, inability to implement operations and processing delays, as the basis for the proposed action. Id. at 770. The notice further stated that the Department "would consider comments concerning the suspension action itself, and not regarding the merits of either set of regulations[.]" Id. at 761.

The Fourth Circuit held that the Department's "content restriction" in the notice of rulemaking violated the APA. Id. at 770. In reaching its decision, the court explained that the issues identified in the suspension notice "were significant, substantive matters," which necessarily implicated concerns regarding the relative merits of both sets of regulations. Id. The exclusion of comments on the merits of the regulations, however, prevented the Department from receiving or considering "comments that were not only 'relevant and important,' but were integral to the proposed agency action and the conditions ***1175** that such action sought to alleviate." Id. at 769-770. "[T]he content restriction was so severe in scope, by preventing any discussion of the 'substance or merits' of either set of regulations, that the opportunity for comment cannot be said to have been 'a meaningful opportunity.' " Id. (citing Prometheus Radio Project, 652 F.3d at 450). The court concluded that because of the Department's failure to comply with the notice and comment requirements, "the Department's action was arbitrary and capricious, in that the Department failed to follow procedures required by law." Id. at 771.

Plaintiffs argue that, like the suspension notice in North Carolina Growers' Association, the notice of rulemaking limited comments to the repeal itself, while excluding consideration of any comments regarding the merits of either the Valuation Rule or pre-Valuation Rule regulations. They contend that comments pertinent to the merits of those regulation were inappropriately deferred to the ANPRM, even though they were inextricably intertwined with the question of the whether the Valuation Rule should have been repealed in first instance. Federal Defendants counter that the Proposed Repeal did not expressly limit the scope of comments to be considered and that the ONRR fully considered comments presented in response to the Proposed Repeal and ANPRM in its repeal decision. As will be discussed below, the Court finds that Plaintiffs have presented the more compelling argument.

To facilitate the repeal of the Valuation Rule, the ONRR published two proposed agency actions simultaneously: the Proposed Repeal and the ANPRM. The Proposed Repeal recited the ONRR's intention to repeal the Valuation Rule, which would thereby "maintain the current regulatory *status quo* by keeping the longstanding pre-existing regulations in effect." 82 Fed. Reg. 16,323.[18] The justifications for the proposed repeal include "serious concerns regarding the validity or prudence of certain provisions of the 2017 Valuation Rule, such as the expansion of the 'default provision' and the use of the sales price of electricity to value coal." 82 Fed. Reg. 16,323. Separately, the ANPRM purported to seek comments depending on the outcome of the Proposed Repeal. First, in the event the Valuation Rule were repealed, whether new rulemaking would be warranted. 82 Fed. Reg. 16,325, 16326. Second, if the Valuation Rule were retained, whether changes thereto would be needed. Id.

The Proposed Repeal does not provide any guidance on the comments the ONRR was seeking. Nevertheless, the ANPRM confirms that the focus of the comments to be submitted in response to the Proposed Repeal was limited to whether to repeal the Valuation Rule and restore the pre-Valuation Rule regulations. 82 Fed. Reg. 16,325 ("In [the Proposed Repeal], [the] ONRR is seeking comments on a proposed rule to repeal the 2017 Valuation Rule to maintain the status quo in which the pre-existing regulations remain in effect while ONRR reconsiders whether changes made by the 2017 Valuation Rule are needed or appropriate."). In contrast, as to comments germane to the merits of the Valuation Rule and the pre-Valuation Rule regulations, the Proposed Repeal unequivocally stated that they are to be presented and considered in connection *with the* ***1176** *ANPRM*. 82 Fed. Reg. 16,323 ("Concurrently with this notice, ONRR is publishing an [ANPRM] seeking comments on whether revisions are appropriate or needed to the preexisting regulations governing royalty values, including comments on whether the 2017 Valuation Rule should ultimately be retained or repromulgated.").[19]

Though the Proposed Repeal did not impose an express content restriction, it effectuated a *de facto* one by deferring consideration of substantive comments regarding the regulations at issue to the ANPRM. Like the suspension notice at issue in North Carolina Growers' Association, the Proposed Repeal claimed that implementation of and compliance with the recently-enacted regulations were problematic, and therefore the current regulations should be rescinded and prior regulations reinstated. The alleged problems identified in the Proposed Repeal raised "relevant and significant issues" which, in turn, obligated the ONRR to consider and address comments concerning the substance and merits of both the Valuation Rule and pre-Valuation Rule regulations. See N. Carolina Growers' Ass'n, 702 F.3d at 770. Yet, because of the ONRR's artificial segregation of the comments between the Proposed Repeal and ANPRM, the ONRR failed to provide a meaningful opportunity to comment substantively on Proposed Repeal. Id.

For their part, Federal Defendants do not directly address whether the ONRR impermissibly deferred the comment process to the ANPRM. Instead, they argue that the ONRR "considered all of the comments it received for both the proposed repeal and the [ANPRM], regardless of their content." Fed. Defs.' Opp'n at 23 (citing AR 008957-60, AR 008961-62, AR 008973-81, AR 009011-12). But whether or not the ONRR considered all comments received is separate and distinct from whether the ONRR complied with the notice and comment requirement in the first instance. In any event, the record documents cited by Federal Defendants only show that ONRR staff summarized the thirty-three comments received in response to the ANPRM, see AR 8961-62, 8973-81; there is no indication that the ONRR responded to or otherwise considered them in deciding to repeal the Valuation

Rule. Indeed, the record shows that ONRR staff treated the ANPRM and Proposed Repeal as separate undertakings. See AR 8785-86.

Finally, the ONRR's failure to provide a meaningful opportunity to comment is underscored by the brevity of the comment period. While there is no bright-line test for the minimum amount of time allotted for the comment period, North Carolina Growers' Ass'n, 702 F.3d at 770, at least one circuit has recognized that 90 days is the "usual" amount of time allotted for a comment period, ***1177** Prometheus Radio Project, 652 F.3d at 453. In cases involving the repeal of regulations, courts have considered the length of the comment period utilized in the prior rulemaking process as we well as the number of comments received during that time-period. See North Carolina Growers' Ass'n, 702 F.3d at 770 (holding that a 10-day comment period which resulted in 800 comments failed to provide an "adequate opportunity for comment," considering that during the prior rule making the agency received about 11,000 comments over a 60-day comment period).

In the instant case, a comparison between the ONRR's rulemaking process leading to the Valuation Rule and the process used to repeal it exemplifies the ONRR's failure to provide for a meaningful rulemaking process. The Valuation Rule was promulgated following an extensive period of consideration. After issuing two advanced notices of rulemaking in 2011, the ONRR embarked on a five-year rulemaking process that included public workshops and extensive outreach to the industry, government and public. In January 2015, the ONRR published a draft Valuation Rule followed by a 60-day comment period, which was extended to 120 days at the request of coal and oil and gas companies and their trade associations. AR 6381. During the public comment period, the ONRR received more than 1,000 pages of written comments, from over 300 commenters and 190,000 petition signatories. 81 Fed. Reg. 43,338, 43,338.

In contrast to the *years* of consideration leading to the promulgation of the Valuation Rule, the ONRR's actions to repeal it took place in a matter of *months.* Whereas the ONRR provided a 120-day comment period for the draft Valuation Rule, the ONRR allowed only a 30-day comment period to consider its repeal.[20] Even then, the ONRR deferred consideration of substantive comments regarding the royalty regulations to the ANPRM. 82 Fed. Reg. 16,325. Federal Defendants do not dispute this, but counter that the Proposed Repeal generated a larger public response (2,342 commenters) than the notice of the draft Valuation Rule (300 commenters). But these numbers do not tell the entire story. The 2,342 Proposed Repeal commenters generated around 1,000 comments.[21] The 300 commenters responding to the Proposed Valuation Rule generated over 1,000 pages of comments. 81 Fed. Reg. 43,338, 43,338. In addition, 190,000 petition signatories submitted comments specifically regarding the proposed coal valuation rules. Id. Thus, notwithstanding Federal Defendants' intimations to the contrary, the apparently larger number of commenters does not show that the ONRR provided an adequate amount of time for comments.

Based on the record presented, the Court finds that the ONRR failed to provide meaningful opportunity for comment. The ONRR did not solicit or receive substantive comments regarding either the Valuation Rule or pre-Valuation Rule regulations nor did it fully consider the comments received in repealing the Valuation Rule. As a result, the ONRR "ignored ***1178** important aspects of the problem." United Farm Workers, 702 F.3d at 770 ("[B]ecause the Department did not provide a meaningful opportunity for comment, and did not solicit or receive relevant comments regarding the substance or merits of either set of regulations, we have no difficulty in concluding that the Department 'ignored important aspects of the problem.' ") (citation omitted). The ONRR's repeal of the Valuation Rule and reinstatement of the prior regulations was therefore arbitrary and capricious. See id. (citing 5 U.S.C. § 706(2)).

C. REMAINING CLAIMS

Plaintiffs' second cause of action alleges violations of FOGRMA, FLPMA, MLA and the APA. Federal Defendants contend that they are entitled to summary judgment on the non-APA claim. Fed. Defs.' Mot. at 23-24. Since Plaintiffs do not respond to this argument in their reply, the Court deems this claim abandoned. See Shakur v. Schriro, 514 F.3d 878, 892 (9th Cir. 2008) ("We have previously held that plaintiff has 'abandoned ... claims by not raising them in opposition to [the defendant's] motion for summary judgment.' ") (quoting Jenkins v. Cnty. of Riverside, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005)). Plaintiffs' second cause of action, insofar as it is premised on FOGRMA, FLPMA and MLA, is dismissed. See Shakur, 514 F.3d at 892 (dismissing abandoned claim). Federal Defendants' motion for summary judgment as to the aforementioned claim is therefore denied as moot.

D. REMEDY

The Court has determined above that the ONRR violated the APA, which presents the final question as to the proper remedy for such violation. The Complaint seeks declaratory relief and vacatur as relief. For the reasons discussed above, the Court finds that declaratory relief is the proper remedy for the ONRR's violation of the APA. Thus, the Court finds and declares that Federal Defendants' Final Repeal was arbitrary and capricious. See Becerra, 276 F. Supp. 3d at 966 (granting declaratory relief and finding that the DOI's postponement of the Valuation Rule was in violation of the APA).

Plaintiffs also seeks vacatur of the Final Repeal. Vacatur is the "standard remedy" when a court concludes that an agency's conduct was illegal under the APA. See Stewardship Council v. EPA, 806 F.3d 520, 532 (9th Cir. 2015). At the same time, a flawed rule need not be vacated in every instance. Cal. Communities Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (noting that " 'when equity demands, the regulation can be left in place while the agency follows the necessary procedures' to correct its action") (citation omitted). To determine if vacatur is appropriate, courts consider (1) the seriousness of the agency's errors and (2) "the disruptive consequences" that would result from vacatur. Id.

Federal Defendants deny that they committed any errors and claim that vacating the Final Repeal will be disruptive. They also request an opportunity to submit further briefing on these issues. With regard to the first point, the Court finds that the ONRR committed a number of serious violations of the APA and that its repeal of the Valuation Rule was effectuated in a wholly improper manner. As discussed more fully above, the ONRR violated clearly established Supreme Court precedent requiring an agency to provide a reasoned explanation for disregarding and contradicting facts and circumstances underlying the adoption of the rules that it now seeks to repeal. In addition, the ONRR failed to comport with the APA's notice and comment requirement, thereby ***1179** denying the public a meaningful opportunity to participate in the regulatory process. The Court finds these violations to be serious.

The Court also is unpersuaded by Federal Defendants claim that vacating the Final Repeal will be unduly disruptive. The only disruption identified is "that lessees and the ONRR would need [time] to convert their accounting systems." Fed. Defs.' Mot. at 25. Setting aside the lack of any facts in the record to support that assertion, Federal Defendants overlook that any significant change in the rules governing royalty calculations inevitably will result in a period of adjustment for interested parties. As for further briefing, the Court finds it unnecessary. Federal Defendants have had ample opportunity to prepare their briefs in this action. As such, any arguments regarding whether vacatur is warranted should have been included in their motion papers. Moreover, further briefing will result in further delay. The Valuation Rule was originally scheduled to take effect on January 1, 2017, but, due to the ONRR's improper attempt to postpone the rule and subsequent repeal, none of its royalty valuation provisions were implemented.

The Court finds that both declaratory relief and vacatur are appropriate remedies based on the ONRR's violations of the APA.

IV. CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT:

1. Conservation Intervenors and Industry Intervenors' motions to intervene are GRANTED.

2. The Institute's motion for leave to file an amicus curiae brief is GRANTED.

3. Plaintiff and Conservation Intervenors' motions for summary judgment are GRANTED. The Court finds and declares that the ONRR violated the APA when it issued the Final Repeal, which shall be vacated. Federal Defendants and Conservation Intervenors' motions are DENIED.

4. Plaintiffs' second cause of action is DISMISSED insofar as it is premised on statutes other than the APA.

IT IS SO ORDERED.

All Citations

381 F.Supp.3d 1153

Footnotes

1 Pursuant to Federal Rule of Civil Procedure 25(d), the Court substitutes David Bernhart, Acting Secretary of the Interior, in place of Ryan Zinke ("Zinke"), who resigned as Secretary of the Interior, effective January 2, 2019.

2 The party-defendants are: the DOI; David Bernhardt, Acting Secretary of the Interior; the ONRR; and Gregory Gould, Director of the ONRR. There are two sets of intervenors: (1) Natural Resources Defense Council, Northern Plains Resource Council, The Wilderness Society and Western Organization of Resource Councils (collectively, "Conservation Intervenors"); and (2) National Mining Association, Wyoming Mining Association and American Petroleum Institute (collectively, "Industry Intervenors"). The Conservation Intervenors and Industry Intervenors are aligned with Plaintiffs and Federal Defendants, respectively.

3 Formed in 1982, the MMS was formerly the Conservation Division of the U.S. Geological Survey. See Secretarial Order No. 3071, as amended on May 10, 1982. In 2010, the DOI reorganized the MMS. Specifically, the ONRR was created to assume MMS's responsibility for collecting payments and royalties and enforcing related regulations. Secretarial Order No. 3200; 75 Fed. Reg. 61,051-01 (Oct. 4, 2010); 76 Fed. Reg. 64,432 (Oct. 18, 2011); 25 C.F.R. §§ 212.6.

4 The federal oil valuation regulations were amended in 2000. See 80 Fed. Reg. 608.

5 Magistrate Judge Laporte, the assigned judge in Becerra, declined to relate the instant action.

6 Pursuant to Federal Rule of Civil Procedure 24, the Court grants the Conservation Intervenors and Industry Intervenors' unopposed motions to intervene.

7 Federal Defendants asserts that Woodfin is "wholly inapplicable" because it was not brought under the APA. Fed. Defs.' Opp'n to Mot. for Leave to File an Amicus Brief at 5, Dkt. 56. That contention is wholly without merit. Woodfin simply recites the general standard for permitting an amicus brief. Notably, Federal Defendants cite no authority for the notion that there is a different standard for permitting amicus briefs in APA cases.

8 Federal Defendants claim they need only articulate "good reasons" for the Final Repeal and that the ONRR amply supplied its reasons for believing that certain aspects of the Valuation Rule would be unworkable in practice. See Fed. Defs.' Mot. at 13-14; Fed. Defs.' Reply at 1-2, Dkt. 62. To that end, both Federal Defendants and Industry Intervenors focus much of their discussion on purported defects in the Valuation Rule. See Fed. Defs.' Mot. at 6-14; Fed. Defs.' Reply at 3-10; Indus. Mot. at 11-21; Indus. Reply at 3-11, Dkt. 63. As discussed, however, the Supreme Court requires a detailed or reasoned explanation when the current findings in support of a policy change contradict earlier findings, as is the case here. Fox, 556 U.S. at 515-16, 129 S.Ct. 1800. Neither Federal Defendants nor Industry Intervenors acknowledge this requirement, much less address it in the context of the Final Repeal.

9 Industry Intervenors confirm that they previously provided "voluminous comments" containing "detailed legal arguments and economic analyses" on the proposed rule that eventually became the Valuation Rule. Indus. Mot. at 5. They add that with its issuance of the Final Repeal, the ONRR was "finally willing to acknowledge" the defects in the Valuation Rule about which Industry Intervenors had "previously warned" in its comments to the ONRR. Id. at 1, 5, 6. Thus, it is abundantly clear that the defects cited by the ONRR in the Final Repeal are the same issues that the ONRR had rejected in enacting the Valuation Rule. E.g., Becerra, 276 F.Supp.3d at 965 (finding that "many, if not all, of the same objections ... were advanced during the five-year long rulemaking process").

10 The benchmarks operate in a sequential fashion such that if the criteria specified in the first benchmark is inapplicable, the lessee then applies the next benchmark, and so on. Id. (citing 30 C.F.R. § 1206.257(c)(2)(i)-(v)). The benchmark system has been viewed by some as advantageous to the energy industry. See Bethany A. Davis Noll, Denise A. Grab, Deregulation: Process and Procedures That Govern Agency Decisionmaking in an Era of Rollbacks, 38 Energy L.J. 269, 280-81 (2017) ("Prior to the [Valuation Rule], companies had been taking advantage of an antiquated 'benchmark' system to pay royalties only on lower domestic sales prices obtained through captive transactions rather than on the real (market) price obtained through the ultimate arm's length sale.").

11 In their brief, Federal Defendants assert that the Valuation Rule's method for valuing non-arm's length coal transactions "*proved to be* 'very challenging,' 82 Fed. Reg. 36,936 ... if not 'functionally impossible, id. at 36,941.' " Fed. Defs.' Reply at 4 (emphasis added). This contention is unfounded. Since the royalty provisions of the Valuation Rule were, for all intents and purposes, never implemented, it is inaccurate for Defendants to claim that valuing non-arm's length coal sales "proved to be" difficult. Moreover, the ONRR misstates the record. In the Final Repeal, the ONRR merely speculated that "it *would be* very challenging for lessees to calculate and pay royalties" if the Valuation Rule took effect. 82 Fed. Reg. 36,934, 36,936 (emphasis added). As for the "functionally impossible" remark, it was made by "industry commentators" (who prefer the benchmark system) and was not a finding by the ONRR. Id. at 36,941.

12 Like the purported defect pertaining to valuing non-arm's length coal transactions, the other "defects" in the Valuation Rule identified by the Final Repeal also lack the necessary reasoned explanation. See Navarro, 136 S. Ct. at 2126. For instance, in justifying the new "default" valuation rule in the Valuation Rule, the ONRR explained that it had encountered "a wide range of situations in which lessees have inaccurately calculated value." 80 Fed. Reg. 608, 621. However, the ONRR did not reconcile that previous finding in the Final Repeal.

13 These comments came from an unidentified member of Congress and a public interest group, who opined that, in light of the significant resources expended in developing the Valuation Rule, a complete repeal would be wasteful. 82 Fed. Reg. 36,934, 36,940.

14 It bears noting that, based on the comments received, the most controversial aspect of the Valuation Rule was its new provisions for valuing coal transactions. 82 Fed. Reg. 36,934, 36,939. That begs the question why the ONRR did not consider addressing those particular concerns, as opposed to summarily stating that it would be more cost effective to completely repeal the Valuation Rule.

15 The Industry Intervenors contend that fiscal impact on federal, state, and local governments and to the public from the Final Repeal (i.e., $ 60.1 to 74.8 million) amounts to 1 percent or less of the total amount of total royalties collected from oil, gas and coal production leases on federal and Indian lands. Industry Mot. at 21. The Court disagrees with the suggestion, inherent in Industry Intervenors' argument, an agency may disregard ostensibly nominal benefits of a rule. See California II, 277 F.Supp.3d at 1122 ("Without considering both the costs and the benefits of" a deregulatory action, an agency "fail[s] to take [an] 'important aspect' of the problem into account.").

16 This argument is at odds with statements presented earlier in Federal Defendants' brief that "establishing the Royalty Policy Committee *supported repeal* ...." Defs.' Mot. at 12 (emphasis added).

17 It bears noting that, in contrast to the few sentences in the Proposed Repeal identifying the purported defects with the Valuation Rule, the Final Repeal allocated five pages to discussing those defects—as well as other alleged problems mentioned nowhere in the Proposed Repeal.

18 As Judge Laporte recognized in Becerra, the ONRR's use of the term "status quo" is inaccurate and misleading. 276 F.Supp.3d at 964. She noted that the "ONRR's suspension of the Rule did not merely

'maintain the status quo,' but instead prematurely restored a prior regulatory regime." Id. For the same reasons, the ONRR's use of the term "status quo" in the Proposed Repeal was improper.

19 Notably, the ANPRM delineates in detail the specific merit-based comments to be submitted, such as whether the Valuation Rule should be amended or whether "new rulemaking would be beneficial or necessary" if the Rule is repealed. 82 Fed. Reg. 16,325, 16,326; see also supra § I.A.3 (summarizing comments solicited in the ANPRM). For instance, the ANPRM sought comments on "[h]ow to best value non-arm's length coal sales and/or sales between affiliates." 82 Fed. Reg. 16,325, 16,326. That question would have more appropriately been included with the Proposed Repeal, particularly since the ONRR had identified the valuation of coal "in certain non-arm's length transactions" as one of the alleged key defects warranting repeal of the Valuation Rule. See 82 Fed. Reg. 16323. Thus, by relegating comments bearing on the regulatory schemes at issue to the ANPRM, the ONRR effectively failed to provide for a manner meaningful opportunity to comment on the repeal.

20 Defendants dismiss this disparity, claiming that a comment period as short as 10 days have been found to be adequate. Fed. Defs.' Opp'n at 21. However, "instances actually warranting a 10-day comment period will be rare" and generally are limited to instances "characterized by the presence of exigent circumstances in which agency action was required in a mere matter of days." N. Carolina Growers' Ass'n, 702 F.3d at 770. No such exigent circumstances have been alleged by the ONRR or are apparent from the record.

21 The Final Repeal states that the ONRR received "more than a thousand comments from 2,342 commenters." 82 Fed. Reg. 36,934, 36,935.

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355 F.Supp.2d 1061
United States District Court,
N.D. California.

NGV GAMING, LTD., a Florida partnership, Plaintiff,
v.
UPSTREAM POINT MOLATE, LLC, a California limited liability company and Harrah's Operating Company, Inc., a Delaware corporation, Defendants.

No. C 04–3955–SC.
|
Jan. 31, 2005.

Synopsis
Background: Casino development group sued competitors for tortious interference with contract. Competitors moved to dismiss.

Holdings: The District Court, Conti, J., held that:

development agreement was valid;

group's damages were not too speculative to provide basis for recovery; and

claim was not preempted by federal law.

Motion denied.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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***1063** *ORDER DENYING DEFENDANTS' MOTION TO DISMISS*

CONTI, District Judge.

I. INTRODUCTION
Plaintiff NGV Gaming, Ltd., ("Plaintiff" or "NGV") filed this action against rival casino development groups Upstream Point Molate, LLC and Harrah's Operating Company, Inc. ("Defendants"), alleging that Defendants tortiously interfered with Plaintiff's contract with the Guidiville Band of Pomo Indians ("the Tribe"). Defendants bring the present motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted. The Tribe applies to participate as amicus curiae, and urges dismissal of the entire action due to its status as a necessary and indispensable party. This Court grants the Tribe's application to participate as amicus curiae, but does not find the Tribe to be necessary to this action at this time. Moreover, this Court finds that Plaintiff has sufficiently stated a claim, and denies Defendants' motion to dismiss the action.

II. LEGAL STANDARD
A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.,* 950 F.2d 1478, 1482 (9th Cir.1991) (*quoting Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In reviewing the motion, a court must assume all factual allegations to be true and construe them in the light most favorable to the nonmoving party. *North Star Intern. v. Arizona Corp. Comm'n,* 720 F.2d 578, 580 (9th Cir.1983). Nevertheless, a complaint must be based on more than "[c]onclusory allegations of law and unwarranted inferences" in order to defeat a motion for dismissal. *Parrino v. FHP, Inc.,* 146 F.3d 699, 706 (9th Cir.1998)(*quoting In re VeriFone Sec. Litig.,* 11 F.3d 865, 868 (9th Cir.1993)).

III. BACKGROUND
Plaintiff's factual allegations must be deemed true and considered in their best light; accordingly, the following represents the facts upon which Plaintiff brings its claim. [1]
On July 3, 2002, the Guidiville Band of Pomo Indians entered into a series of contracts (the "Transaction Agreements") with

F.E.G.V. Corporation to develop and construct a proposed gaming facility on restored trust land in Northern California. With the Tribe's written consent, F.E.G.V. assigned its interest in these contracts to NGV Gaming, Ltd. on December 23, 2003. The Transaction Agreements consist of the Development Agreement and Personal Property Lease ("Lease") and a Cash Management Agreement ("CMA"). At the time of contracting, the Tribe had not yet acquired any land, and NGV was also obligated under the Transaction Agreements to assist the Tribe in identifying and purchasing land in order to establish the trust land base on which the gaming facility would eventually be built.

In January of 2004, Defendants began negotiating with the City of Richmond to purchase 354 acres of land from the city for the purpose of building a gaming facility. According to Plaintiff, Defendants were aware of the existing contracts between NGV and the Tribe, yet intended to ***1064** put these lands into trust for the Tribe and build a gaming facility for the Tribe to operate.

On August 2, 2004, the Tribe sent a letter to Plaintiff in which it attempted to "rescind" the Transaction Agreements with Plaintiff. Plaintiff maintains that the reasons given for the rescission were "entirely pretextual" and that the Tribe was induced to terminate its agreements with Plaintiff as a result of Defendants' interference. Pl. Opp. at 3.

IV. DISCUSSION

Defendants rest their motion to dismiss on three grounds: the Transaction Agreements are void and unenforceable, Plaintiff's damages are too speculative to provide a basis for recovery, and this case is completely preempted by Federal law. This Court addresses each of these arguments in turn.

A. Validity of the Transaction Agreements

First, Defendants argue that Plaintiff's sole claim for tortious interference with contract depends on the validity of the contracts in the first place. Defendants posit that the contracts are invalid, and therefore the entire claim must be dismissed.

Under California law, the elements of a cause of action for intentional interference with contract are 1) a valid contract between plaintiff and a third party; 2) defendants' knowledge of the contract; 3) defendants' intentional acts designed to induce a breach or disruption of the contractual relationship; 4) actual breach or disruption of the contractual relationship; and 5) resulting damage. *See Tuchscher Dev. Enter. Inc. v. San Diego Unified Port Dist.,* 106 Cal.App.4th 1219, 132 Cal.Rptr.2d 57, 73 (2003). Plaintiff's complaint clearly alleges each of these elements, and is therefore sufficient on its face.

Nevertheless, Defendants argue that the Transaction Agreements are invalid for lack of regulatory approval pursuant to the Indian Regulatory Gaming Act, 25 U.S.C. §§ 2701–2721 ("IGRA"), and 25 U.S.C. §§ 81 and 415. The Court finds that this argument rests on a faulty premise, i.e., that no contractual agreement existed between NGV and the Tribe unless and until all regulatory approval required by statute was obtained. It is true that the Transaction Agreements contemplate the necessity for regulatory approval before certain aspects of the Agreements could occur. However, execution of the Agreements may also have created immediate duties and obligations relating to matters for which no regulatory approval is needed. [2]

The Agreements themselves do not condition the validity of the contract on regulatory approval, but rather make such approval "conditions precedent" to subsequent obligations of each party under the Lease Agreement. Pl.Ex. A. at 15. In California, a condition precedent is "one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." Cal. Civ.Code, § 1436. "Thus, a condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises." *Platt Pacific, Inc. v. Andelson,* 6 Cal.4th 307, 313, 24 Cal.Rptr.2d 597, 862 P.2d 158 (1993). *See also* 1 Witkin, Summary of Cal. Law, Contracts, § 721 (9th ed.1987); ***1065** Restatement [2d] Contracts §§ 224, 225 ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.") However, it is not necessary that each condition in a contract be met before we consider the contract valid and enforceable. Rather,

> [m]ost conditions precedent describe acts or events which must occur before a party is obligated to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself. In the latter situation, no contract arises 'unless and until the condition occurs.'

Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon, & Co., 86 N.Y.2d 685, 690, 636 N.Y.S.2d 734, 660 N.E.2d 415 (1995)(*citing* Calamari & Perillo, Contracts § 11–5, at 440 [3d ed.]). Accordingly, Plaintiff NGV has alleged the former

—that a valid contract existed between NGV and the Tribe—and the contract itself provides a basis for supporting this assertion.

Therefore, even accepting Defendants' contention that the Transaction Agreements never received regulatory approval, which Plaintiff does not dispute, Plaintiffs could prove the existence of a valid contract at the time of the alleged tortious interference, which is the relevant time period for Plaintiff's claim. Inasmuch as Defendants' motion suggests that regulatory approval was not simply a condition precedent to duties and obligations arising under the contract, but indeed a condition of the formation of any valid contract at all, the Court addresses this argument below.

Defendants argue that the Transaction Agreements are void pursuant to a letter written by the Acting General Counsel of the National Indian Gaming Commission ("NIGC"), the regulatory agency established pursuant to IGRA, [3] which expresses the view that the lease provisions of the Transaction Agreements provide NGV with an impermissible "proprietary interest" in the Tribe's gaming activity. Wackman Decl., Ex. 2. This letter in no way renders the Transaction Agreements void.

First, under IGRA, only "management contracts" must be preapproved by NIGC to be considered valid, [4] and the NIGC letter explicitly advised that "the Agreements do not constitute a management agreement subject to our review and approval." *Id.* Moreover, the advisory opinion of NIGC's General Counsel that the lease provisions violate IGRA has no legal effect because it is not a final decision of the agency. *See, e.g., Cheyenne–Arapaho Gaming Com'n v. National Indian Gaming Com'n,* 214 F.Supp.2d 1155 (N.D.Okla.2002) (finding that a letter written by the General Counsel of the NIGC was merely advisory and did not constitute official agency action); *see also Sabella v. United States,* 863 F.Supp. 1, 5 (D.D.C.1994)(observing that the General Counsel of a government agency is "not a decision-maker at the highest level and, therefore, her opinion does not create any law or bind the Administrator"). As a result, the NIGC letter cannot in itself invalidate the Transaction Agreements, and it is not the role of this Court to interpret and apply such an opinion to invalidate a contract on a motion to dismiss.

Defendants also argue that the Transaction Agreements cannot provide the basis for Plaintiff's claim because they are invalid for lack of regulatory approval by the Bureau of Indian Affairs ("BIA") ***1066** pursuant to 25 U.S.C. § 81(b)(2000). The statute provides:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

25 U.S.C. § 81(b). Regulations governing this section counsel that a "contract or agreement that requires Secretarial approval under this part is not valid until the Secretary approves it." 25 C.F.R. § 84.007. On its face, this language supports Defendants' position that a contract is void unless approved by the Secretary. However, the statute itself defines "Indian lands" as "lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation." 25 U.S.C. 81(a)(1). Plaintiff argues that this definition means that the statute has "no application" in the absence of Indian trust lands. Pl. Opp. at 13. *See also Penobscot Indian Nation v. Key Bank,* 112 F.3d 538, 546 (1st Cir.1997)(holding that a contract involving Indian lands held in fee simple did not require approval under § 81 because the lands were not Indian trust lands). This Court has found no decisions requiring regulatory approval of contracts under § 81 prior to the acquisition of Indian trust lands. [5]

Moreover, a court should not grant a motion to dismiss merely if the court believes a plaintiff's claim is legally or factually doubtful, as a case should be tried "on the proofs rather than on the pleadings." *Rennie & Laughlin, Inc. v. Chrysler Corp.,* 242 F.2d 208, 213 (9th Cir.1957). Drawing all inferences in a light most favorable to Plaintiff, the Court finds that Plaintiff may prove that the Transaction Agreements were not void for lack of approval under § 81, since no Indian trust lands were yet acquired. [6]

Finally, Defendants would have this Court find the Transaction Agreements void because they were not approved by the Secretary of the Interior pursuant to 25 U.S.C. § 415. Section 415, which requires the Secretary of the Interior to approve any lease of tribal lands to third parties, [7] has been read to require that such approval be obtained "*before* any valid leasing transaction can occur." *See, e.g., Brown v. U.S.,* 86 F.3d 1554, 1562 (Fed.Cir.1996). Because no Indian trust lands had been acquired during the period of time relevant to Plaintiff's claim, no leasing transactions had been instigated. As with § 81, Plaintiff may demonstrate that the Transaction Agreements created a binding contract at the relevant time for ***1067** this action and that regulatory approval of the Transaction Agreements under § 415 was not necessary prior to the acquisition of tribal lands.

In conclusion, this Court finds that the lack of regulatory approval of the Transaction Agreements is insufficient to support Defendants' motion to dismiss. Defendants' reliance on the several instances where the BIA or NIGC determined that other similar contracts were invalid is immaterial at this point. Here, the Plaintiff alleges that it never reached the stage where the parties would submit the Agreements for approval, because Defendants' tortious behavior prevented them from reaching that point. The question is simply whether a valid contractual relationship existed at the time of Defendants' alleged interference, and here, Plaintiff has alleged sufficient facts in support of that proposition to defeat a motion to dismiss.

B. Damages

Defendants also premise their motion to dismiss on the grounds that Plaintiff's claim for damages is too remote or speculative, as any profits would be realized only after a casino was successfully approved, constructed and operated. This Court does not agree that damages under a contract subject to regulatory are too speculative to sustain a complaint for interference with that contract. *See, e.g., SCEcorp v. Superior Court,* 3 Cal.App.4th 673, 4 Cal.Rptr.2d 372 (1992). Plaintiff also contends that the profits to be realized from Indian gaming are demonstrable and readily known. However difficult it might be to prove damages at trial, ultimately this is a question of fact subject to proof, and is inappropriate to support this motion to dismiss.

C. Preemption

Finally, Defendants argue that the IGRA completely preempts Plaintiff's state law claim. Def. Memo. at 22–24. Although the Tribe is not a party to this action, Defendants argue that adjudicating this claim would require this Court to examine the Tribe's relationships with NGV and Defendants, and the internal decision-making process of the Tribe with regard to its termination of the Transaction Agreements. *Id.* According to Defendants, such an inquiry is outside the scope of this Court's jurisdiction under IGRA. *Id.*

However, to prevail on a claim for tortious interference with contract under California law, the decision-making process of the party terminating the contract is not necessarily at issue. Rather, Plaintiff must show that *Defendants* intended to cause a breach or disruption of the contractual relationship, and that a disruption of the contract actually occurred. *See Quelimane Co. v. Stewart Title Guaranty Co.,* 19 Cal.4th 26, 55, 77 Cal.Rptr.2d 709, 960 P.2d 513 (1998). Given that Plaintiff could prove tortious interference with contract without implicating the decision-making process of the Tribe, Plaintiff's claim can proceed.

V. AMICUS CURIAE

Finally, we turn to the application of the Guidiville Band of Pomo Indians ("the Tribe") to participate as amicus curiae in this action. The Tribe seeks leave from this Court to file a brief concerning the motion to dismiss. District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cobell v. Norton,* 246 F.Supp.2d 59, 62 (D.D.C.2003) (*quoting Ryan v. Commodity Futures Trading Comm'n,* 125 F.3d 1062, 1064 (7th Cir.1997)).

***1068** While the Tribe has not been named a party in this action, the Court finds it appropriate to consider the Tribe's position because of its involvement in the events leading to this case and its interest in the Transaction Agreements at issue. Accordingly, the Court in its discretion grants the Tribe's application to participate as amicus curiae and has considered its amicus brief, as discussed below. However, the Court also takes this opportunity to remind the Tribe of the limits of amicus participation.

Traditionally, an amicus curiae was a non-partisan provider of legal perspective or information to the court, although amicus with partisan interests are now quite common. *Funbus Systems, Inc. v. California Public Utilities Com.,* 801 F.2d 1120, 1124–25 (9th Cir.1986). However, an amicus curiae is not a party and has no control over the litigation and no right to institute any proceedings in it, nor can it file any pleadings or motions in the case. *See, e.g., United States v. Michigan,* 940 F.2d 143, 163–64 (6th Cir.1991) (disapproving of the "legal mutant characterized as 'litigating amicus curiae'

" because it impinged on the inherent rights of the real parties in interest). The Tribe may participate as amicus curiae, but its participation is restricted to suggestions relative to matters apparent on the record or to matters of practice. *See Wiggins Bros., Inc. v. Dept. of Energy,* 667 F.2d 77 (Em.App.1981). Motions to file "oppositions" to Plaintiff's briefs, and reference to the Tribe's "pleadings" indicate that the Tribe is attempting to exceed its stated role as amicus curiae. Such motions will not be considered by this Court. The Tribe's participation in this matter does not bind the Tribe to any judgment of this Court, nor is it sufficient to trigger res judicata effect. *U.S. v. Michigan,* 940 F.2d at 165; 47 Am.Jur.2d, Judgments § 668. The only means of acquiring the status or rights of a named party is provided under the Federal Rules of Civil Procedure, including Fed.R.Civ.P. 14 and 17 through 25. *U.S. v. Michigan,* 940 F.2d at 164.

Turning now to the Tribe's amicus brief, the Tribe argues that because NGV's claim depends on the validity of the contract between the Tribe and NGV, the Tribe is a necessary and indispensable party to this action under Rule 19. Further, because the Tribe cannot be sued due to its status as a sovereign nation, the Tribe insists that the Court must dismiss this action entirely.

Federal Rule 19 provides for a two-part analysis to determine whether a court must dismiss a case for failure to join an indispensable party. The first step is to determine under Rule 19(a) whether the party is necessary to the action. If the court determines that the absent party is necessary, and cannot be joined, then the court must decide whether the party is "indispensable." If this question is answered in the affirmative, the court must dismiss the suit. Fed.R.Civ.P. 19.

Rule 19(a) provides that a person shall be joined as a party if "(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the person's interest may (i) as a practical matter impair or impede the person's ability to protect that interest..." Fed.R.Civ.P. 19(a).

"A Rule 19(a)(1) inquiry is limited to whether the district court can grant complete relief to the persons already parties to the action. The effect a decision may have on the absent party is not material." *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.,* 11 F.3d 399, 405 (3d Cir.1993) (citations omitted). This Court finds that complete relief can be afforded in this ***1069** action without the Tribe, because Plaintiff seeks only monetary damages from Defendants and does not seek to enforce the provisions or terms of the contract, nor to revive Plaintiff's former relationship with the Tribe or interfere with the Tribe's ongoing relationship with Defendants.

A closer question is whether, if it is determined that a valid contract existed between the Tribe and NGV, that finding would somehow "impede or impair" the Tribe's interests by subjecting it to claims that it breached a valid contract with NGV. However, as noted above, Plaintiff may prevail on its claim without undue examination of the Tribe's rescission of the agreement. Moreover, any judgment rendered against Defendants could not serve as a basis for any claim against the Tribe, as it could have no res judicata effect in such an action, and an invocation of "persuasive precedent" is not enough to trigger the rule that an absent party is necessary. *See Janney,* 11 F.3d at 407 (Possibility of persuasive precedent does not require joinder of absent party under Rule 19(a)(2)(i)). At this stage in the proceedings, the Court declines to find that the Tribe is a necessary party to this action seeking monetary damages from a non-tribal entity for tortious interference with a since-terminated contract. [8]

VI. CONCLUSION

Plaintiff has stated a claim for tortious interference with contract against Defendants sufficient to defeat a motion to dismiss. Accordingly, Defendants' motion to dismiss under Rule 12 is HEREBY DENIED. In addition, this Court GRANTS the application of the Guidiville Band of Pomo Indians to participate as amicus curiae in accordance with the parameters set out herein.

IT IS SO ORDERED.

All Citations

355 F.Supp.2d 1061

Footnotes

1 On a motion to dismiss under Rule 12, the Court decides based on the pleadings. Fed.R.Civ.P. 12(b)(6). To the extent the parties support their arguments with reference to points and authorities or other non-evidentiary materials, we will disregard their statements.

2 The Transaction Agreements include a "Development Agreement and Personal Property Lease," which creates "Pre–Development" and "Development" Periods, during which land is identified, purchased, transferred into trust and construction commenced.

3 *See* 25 U.S.C. § 2704.

4 25 U.S.C. § 2711.

5 Courts are especially reluctant to grant a motion to dismiss when "the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions." *Electrical Constr. & Maintenance Co. v. Maeda Pacific Corp.,* 764 F.2d 619, 623 (9th Cir.1985) (*quoting* Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1357, at 601–603 (1969)).

6 The Court is aware that Plaintiff has filed affidavits in support of this legal theory; however, the Court has not considered such filings as it declines to convert this motion to one for summary judgment and instead urges the parties to provide evidentiary support for their positions according to the Federal Rules of Procedure.

7 Plaintiff also argues that the Transaction Agreements would not implicate § 415 because they did not contemplate a lease of tribal land by the Tribe to NGV. Because we decline to grant Defendants' motion on the basis of a lack of approval under § 415, we express no opinion as to the ultimate applicability of § 415 to the Transaction Agreements.

8 Because the Court declines to find the Tribe a necessary party at this time, it does not proceed to the questions of indispensability under Fed.R.Civ.P. 19(b) or the Tribe's immunity from suit.

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801 F.2d 1120
United States Court of Appeals,
Ninth Circuit.

FUNBUS SYSTEMS, INC., Plaintiff-Appellant,
v.
STATE OF CALIFORNIA PUBLIC UTILITIES COMMISSION, Defendant-Appellee,
Airport Service, Inc., Real Party In Interest.
Interstate Commerce Commission,
Applicant for Intervention-Appellant.
FUNBUS SYSTEMS, INC., Plaintiff-Appellant,
v.
STATE OF CALIFORNIA PUBLIC UTILITIES COMMISSION, Defendant-Appellee,
Airport Service, Inc., Real Party In Interest.
Interstate Commerce Commission,
Applicant for Intervention-Appellant.
AIRPORT SERVICE, INCORPORATED, Petitioner,
State of California and Public Utilities Commission of the State of California, Intervenors-Petitioners,
v.
INTERSTATE COMMERCE COMMISSION, Respondent,
Funbus Systems, Inc., Real Party-Intervenor.
AIRPORT SERVICE, INCORPORATED, Petitioner,
State of California and Public Utilities Commission of the State of California, Intervenors-Petitioners,
v.
INTERSTATE COMMERCE COMMISSION, Respondent,
Lounge Car Tours Charter Company, Inc., Real Party-Intervenor.

Nos. 84–6170, 84–6171, 85–7104 and 85–7105.
|
Argued and Submitted Feb. 7, 1986.
|
Sept. 30, 1986.

Synopsis
Petitions were filed seeking review of two final orders of the Interstate Commerce Commission on petitions for declaratory order regarding the propriety of the bus operator's intrastate airport operations under a previously issued ICC certificate and on the ICC's denial of the petitioner's protest against another bus operator's application for operating authority to conduct intrastate operations. Additionally, appeals were taken from an order of the U.S. District Court for the Central District of California, Robert M. Takasugi, J., which dismissed bus operator's complaint to enjoin California Public Utilities Commission from interfering with operator's intrastate bus operations conducted under the authority of a certificate of public convenience and necessity issued by the ICC, and to grant declaratory relief. After consolidation, the Court of Appeals, Alarcon, Circuit Judge, held that: (1) Bus Regulatory Reform Act requires a showing of a connection between proposed intrastate services and preexisting or simultaneously approved interstate service which are or will be in actual operation as a prerequisite to a grant of operating authority by the Interstate Commerce Commission for intrastate services, and (2) case would be remanded to ICC for further factual findings.

Order in accordance with opinion.

Kennedy, Circuit Judge, filed an opinion concurring in part and dissenting in part.

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Paul Rodgers, Gen. Counsel, Charles D. Gray, Asst. Gen. Counsel, Genevieve Morelli, Dep. Asst. Gen. Counsel, National Ass'n of Regulatory Utility Commissioners, Washington, D.C., for The National Asso. of Regulatory Utility Comm.

Appeal from the United States District Court for the Central District of California; Nos. 84–6170, 84–6171.
***1122** Petition to Review a Decision of the Interstate Commerce Commission; Nos. 85–7104, 85–7105.

Before KENNEDY, SKOPIL and ALARCON, Circuit Judges.

Opinion

ALARCON, Circuit Judge:

These consolidated cases present a common novel issue: Does section 6 of the Bus Regulatory Reform Act, 49 U.S.C. § 10922 (partial rev. 1985) (hereinafter Bus Act) authorize the Interstate Commerce Commission (hereinafter ICC) to issue certificates permitting motor carriers to conduct intrastate services which operate independently of their interstate operations?

In appeal nos. 85–7104 and 85–7105, petitioner Airport Service, Inc. (hereinafter ASI) seeks review of two final orders of the ICC: the first (no. 85–7104) on Funbus Systems, Inc.'s (hereinafter Funbus) and the California Public Utilities Commission's (hereinafter CPUC) petitions for a declaratory order regarding the propriety of Funbus' intrastate airporter operations under a previously issued ICC certificate (in which proceedings ASI was granted leave to intervene); and the second (no. 85–7105) on the ICC's denial of ASI's protest against Lounge Car Tours Charter Co., Inc.'s (hereinafter Lounge Car) application for operating authority to conduct intrastate operations from Los Angeles International Airport (hereinafter LAX) to Anaheim. The State of California and the CPUC join as intervenors in ASI's petitions for review.

Amicus briefs were filed in nos. 85–7104 and 85–7105 by (1) the State of Washington and the Washington Utilities and Transportation Commission (hereinafter Washington), and (2) the State of New Jersey and the New Jersey Department of Transportation, the Public Utility Commission of the Commonwealth of Pennsylvania and the National Association of Regulatory Utility Commissioners (hereinafter NARUC) (hereinafter collectively referred to as joint amici). The United States filed a position statement.

In appeal nos. 84–6170 and 84–6171, Funbus and the ICC appeal from the district court's dismissal of Funbus' complaint to enjoin the CPUC from interfering with Funbus' intrastate bus operations conducted under the authority of a certificate of public convenience and necessity issued by the ICC, and to grant declaratory relief. ASI opposes the appeal as the real party in interest. Funbus and the ICC also appeal from the district court's ruling that the ICC's motion to intervene was moot.

We conclude that the Bus Act requires a showing of a connection between proposed intrastate services and pre-existing or simultaneously approved interstate services which are or will be in actual operation as a prerequisite to a grant of operating authority by the ICC for intrastate services. Therefore, we reverse the ICC's determinations in the matters of the certificates issued to Funbus and Lounge Car. In light of our decision, we remand the cases for further factual findings. Because appellants in the related district court action have already obtained the relief sought in that case and because our resolution of the statutory interpretation issue renders repetition unlikely, we dismiss the appeals from the district court action as moot.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

For the past 25 years, ASI has operated an intrastate airport shuttle service from LAX to various points in Orange County, California, pursuant to a certificate issued by the CPUC. In March of 1984, Funbus began operating a bus service between LAX and two Orange County cities: Anaheim, California, and Buena Park, California. Funbus also offers interstate service from Southern California to Las Vegas, Nevada. Funbus' operations are conducted pursuant to a certificate of operating authority issued by the ICC; Funbus did not apply for a certificate from the CPUC.

On April 17, 1984, ASI filed an action with the CPUC for an immediate cease and desist order preventing Funbus from continuing its intrastate services because it had failed to comply with CPUC certification procedures. (*Airport Services, Inc. v.* ***1123** *Funbus Systems, Inc.,* CPUC No. 84–04–068). On April 18, 1984, the CPUC issued an *ex parte* interim cease and desist order and calendared the matter for a full hearing for April 30, 1984. The hearing before the CPUC did not take place on April 30 because Funbus attempted to remove the case to the district court. After allowing the ICC to intervene in the proceedings, the district court remanded the action to the CPUC.

The CPUC hearings on ASI's complaint for a cease and desist order were held on June 13 and 14, 1984. On June 20, 1984, without conceding that it lacked jurisdiction, the CPUC issued an interim opinion directing its General Counsel to seek an opinion from the ICC concerning the extent of the operations authorized by Funbus' certificate of public convenience and necessity, and suspending the cease and desist order. The CPUC's opinion stated that a decision on the merits would be rendered after receipt of the ICC's opinion. Funbus has continued to operate its intrastate services throughout these proceedings.

A. *District Court Proceedings (Appeal Nos. 84–6170 and 84–6171)*

On April 24, 1984, Funbus filed an action for declaratory and injunctive relief in the district court, and an *ex parte* request for a temporary restraining order (hereinafter TRO) enjoining the CPUC proceedings. The district court denied the request for a TRO and scheduled a hearing on the motion for a preliminary injunction. On May 16, 1984, ASI moved to dismiss Funbus' complaint in the district court, and on May 17, 1984, the ICC moved to intervene in the district court action. The district court issued a decision on June 19, 1984, dismissing Funbus' complaint and ruling that in light of the dismissal, the ICC's motion to intervene was moot. Funbus and the ICC appeal from the district court's rulings in case nos. 84–6170 and 84–6171, respectively. By order dated September 24, 1984, this court denied the ICC's motion to intervene in Funbus' appeal.

B. *ICC Proceedings (Appeal Nos. 85–7104 and 85–7105)*

On May 8, 1984, Funbus filed a complaint with the ICC seeking vacation of the CPUC's cease and desist order and dismissal of ASI's complaint against Funbus, then pending before the CPUC. On July 6th, the CPUC's General Counsel requested an opinion from the ICC concerning the scope of the intrastate operating authority granted to Funbus under its ICC certificate. The ICC consolidated Funbus' complaint with the CPUC's request for an opinion and issued a declaratory ruling on December 28, 1984. *Funbus Systems, Inc.,* 133 M.C.C. 406 (1984). The ICC determined that the Bus Act preempted state jurisdiction to certify intrastate transportation conducted on interstate routes, and found that the ICC had exclusive jurisdiction to determine whether Funbus, an ICC-certified carrier, was operating within the scope of its certificate. *Id.* at 414–15. The ICC determined that the Bus Act does not require the actual conduct of interstate operations over a route in order to support an application for intrastate authority over that route, and stated that its rules therefore do not require a carrier seeking intrastate operating authority to certify the extent to which intrastate operations are or will be conducted over an interstate route. *Id.* at 423–24. The ICC summarized:

> Thus, while intrastate authority may be granted only over an underlying interstate route, an applicant to obtain it need show only that it holds authority to provide interstate transportation over the underlying route, and not that it performs such services.... The intrastate rights are not authorized incidental to, or supplementary of, interstate regular-route operations, so there need not be a “mutuality” between the two.

Id. at 424. The ICC concluded that Funbus had authority under its ICC certificate to operate the LAX-Anaheim-Buena Park route. *Id.* at 425–27. The ICC further determined that Funbus' operations were not in the nature of “special operations” nor were they “incidental to air transportation,” so as to divest the ICC of jurisdiction ***1124** to issue a certificate covering the operations. *Id.* at 421–22. ASI and the CPUC appeal from the ICC's ruling. (Appeal no. 85–7104).

Appeal no. 85–7105 began with Lounge Car's application to the ICC for authority to conduct both intrastate and interstate operations. ASI protested and sought an evidentiary hearing. On July 13, 1984, the ICC denied ASI's protests without granting an evidentiary hearing. Lounge Car's application was granted by the ICC's review board, with the stipulation that Lounge Car not operate a service to or from LAX that is incidental to transportation by air. On December 11, 1984, the ICC's administrative appeals board affirmed the granting of the application, and removed the incidental to air restriction on the service. ASI's petition for review by the entire Commission was denied, and Lounge Car began operating a service from LAX to Anaheim. ASI seeks review of the ICC's decision. (Appeal no. 85–7105). In November of 1984, after Lounge Car had begun operations, ASI filed an action with the ICC asserting that the Lounge Car application and bus service were a sham disguised to circumvent state regulation. (*Airport Services, Inc. v. Lounge Car Tours Charter Co.,* ICC No. MC–C 10943). That proceeding is dormant pending the outcome of this appeal.

II. JURISDICTION

A. *Petitions for Review of ICC Decisions (Nos. 85–7104 and 85–7105)*

We have jurisdiction to review final orders of the ICC under 28 U.S.C. § 2342(5) (1982). In appeal no. 85–7104, ASI seeks review of an ICC order entered January 8, 1985. The petition for review was timely filed on February 25, 1985, well within 60 days of the entry of the ICC order. *See* 28 U.S.C. § 2344 (1982).

In appeal no. 85–7105, ASI seeks review of an ICC order entered December 26, 1984. The ICC argues that the petition for review in that case was not filed until the 61st day—Monday, February 25, 1985—and thus was untimely. This argument is meritless.

Fed.R.App.P. 26(a) extends the period for timely filing of a notice of appeal where the last day for timely filing falls on a weekend or holiday. Rule 26(a) is applicable to appellate review of agency orders. Fed.R.App.P. 20; *Miller v. United States Postal Service,* 685 F.2d 148, 149 (5th Cir.1982), *cert. denied,* 461 U.S. 916, 103 S.Ct. 1898, 77 L.Ed.2d 286 (1983). Because the last day for the timely filing of appeal no. 85–7105 fell on a Sunday, Fed.R.App.P. 26(a) applies to extend the filing period until Monday, February 25, 1985. The appeal is timely.

B. *Appeals from District Court Decisions (Nos. 84–6170 and 85–6171)*

ASI and the CPUC argue that Funbus' appeal and the ICC's appeal are untimely; that the district court's ruling was not a decision on the motion to intervene and thus was not a final, appealable order; and that the ICC lacks standing to bring this appeal because it was never made a party to the district court action. Funbus claims that even if its appeal is untimely, the appeal is at worst premature because the district court failed to enter a judgment as required by Fed.R.Civ.P. 58. We do not reach these questions because, as discussed *infra,* Part IV, we dismiss as moot the appeals from the district court rulings.

III. PROPRIETY OF AMICI BRIEFING IN APPEAL NOS. 85–7104 AND 85–7105

The ICC urges us to exercise caution in considering the arguments of the amici because of the amici's direct interest in the outcome of this litigation: the preservation of their bureaucratic regulatory power. The ICC argues that a true amicus is one who gives information of some matter of law for the assistance of the court, rather than one who gives a "highly partisan ... account of the facts." *New England Patriots Football Club, Inc. v. University of Colorado,* 592 F.2d 1196, 1198 n. 3 (1st Cir.1979). We find the ICC's warning ***1125** inapposite. These amici do not present "highly partisan ... account[s] of the facts," or indeed, *any* account of the facts; they take a legal position and present legal arguments in support of it, a perfectly permissible role for an amicus. *See Miller-Wohl Co. v. Commissioner of Labor & Industry,* 694 F.2d 203, 204 (9th Cir.1982) (amici fulfill the classic role of amicus curiae by assisting in a case of general public interest, supplementing the assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that might otherwise escape consideration). Moreover, we have stated that there is no rule that amici must be totally disinterested. *See Hoptowit v. Ray,* 682 F.2d 1237, 1260 (9th Cir.1982).

The ICC also moves to strike Washington's recitation of the facts in *Evergreen Trails, Inc.,* No. MC–107638 (Sub-No. 10). The ICC's contention that Washington's presentation of such facts is jurisdictionally precluded because no judicial review of that license was sought, misses the mark. Washington does not seek to obtain judicial review of the *Evergreen* decision in this proceeding. Instead it has presented the facts of that matter, which it contends presents issues identical to those raised by the instant case, "[i]n order for this court to be fully advised as to the substantial interests of the State of Washington and the WUTC [Washington Utilities and Transportation Commission] in these proceedings." Amicus Curiae Brief for Washington at 4. Similarly, the ICC's assertion that Washington's use of extra-record facts is improper because an amicus may not raise an issue of fact in an appeal is misdirected. Washington does not seek to raise issues of fact, nor does it raise any legal question not urged by the parties themselves. Therefore, the ICC's motion to strike Washington's argument is denied.

Finally, the ICC attacks NARUC's attempt to participate as an amicus without leave of court. *See* Fed.R.App.P. 29. The ICC asks the court to "make it clear that NARUC's conduct will not be condoned, and that NARUC is not before the Court." Brief of Respondent ICC at 16 n. 10. While the ICC is technically correct and NARUC is not properly before this court, NARUC's only apparent participation in this case was as a co-signator on the joint brief of amici filed by Pennsylvania and New Jersey, whose participation is not challenged. Thus, the joint brief and the arguments made therein are properly before us.

IV. ICC AUTHORITY TO REGULATE MOTOR CARRIERS' INTRASTATE OPERATIONS

We may set aside an agency's ruling if the agency's findings or conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (C), (E) (1982).

The dispositive issue in appeal nos. 85–7104 and 85–7105 is whether section 10922(c)(2)(B) of the Bus Act authorizes the ICC to issue certificates approving intrastate motor carrier services which are conducted independent of interstate services. The ICC ruled that section 10922(c)(2)(B) of the Bus Act does not require the actual conduct of interstate operations over a route in order to support an application for intrastate authority over that route. 133 M.C.C. at 424. In the ICC's view, "[t]he exact nature and extent of a carrier's existing or proposed operations over an interstate route is not a factor in determining an intrastate request for authority, so long as the carrier holds or will hold authority to perform over the route in a regular-route operation." *Lounge Car Tours Charter Co.,* No. MC–153325 (ICC Dec. 10, 1984) (unpublished decision). ASI and the CPUC contend that the Bus Act does not preempt state authority to regulate intrastate routes which have no relationship to interstate routes.

"In construing a statute in a case of first impression, we look to the traditional ***1126** signposts of statutory construction: first, the language of the statute itself; second, its legislative history, and as an aid in interpreting Congress' intent, the interpretation given to it by its administering agency." *Brock v. Writers Guild of America, West, Inc.,* 762 F.2d 1349, 1353 (9th Cir.1985) (citations omitted).

A. *The Plain Language of Section 10922(c)(2)(B)*

In reviewing an ICC decision which purports to interpret a statute, we focus first on the statute's plain language. *Hudson Transit Lines, Inc. v. United States I.C.C.,* 765 F.2d 329, 341 (2d Cir.1985); *see Brock v. Writers Guild of America, West, Inc.,* 762 F.2d at 1353. Section 10922(c)(2)(B) provides:

> The Commission shall issue a certificate to a person authorizing that person to provide regular-route transportation entirely in one State as a motor common carrier of passengers if such intrastate transportation is to be *provided on a route* over which the carrier has been granted authority, or will be granted authority, after the effective date of this section to provide interstate transportation of passengers....

(emphasis added).

ASI and the CPUC argue that the phrase "provided on a route" is ambiguous, and that if Congress had intended to preempt state authority to regulate purely intrastate operations, it would have said so. We agree. The ICC's construction of the statute would effectively preempt state authority over the initiation of new intrastate bus operations, a field traditionally occupied by the states. *See, e.g.,* Cal.Pub.Util.Code §§ 1031–1040 (West 1975 & Supp.1986) (requiring common carriers operating on California state highways to obtain a certificate of public convenience and necessity from the CPUC). Therefore, we must " 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

We are persuaded that the phrase "provided on a route" in section 10922(c)(2)(B) is not such "explicit pre-emptive language" as to end our inquiry with the language of the statute. *See Pacific Gas & Electric Co.,* 461 U.S. at 203, 103 S.Ct. at 1721. Therefore, we turn to the legislative history for aid in ascertaining Congress' intent. *See Lewis v. Hegstrom,* 767 F.2d 1371, 1376 (9th Cir.1985).

B. *Congressional Intent*

Because the ICC is charged with the duty to administer the Bus Act, its interpretation of the Act is entitled to considerable deference unless it is contrary to the clear aim of Congress. *Hudson Transit Lines,* 765 F.2d at 341–42. The judiciary is the final authority on issues of statutory construction, however, and must reject administrative constructions which are contrary to clear Congressional intent or which frustrate the policy which Congress sought to implement. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 2782 n. 9, 81 L.Ed.2d 694 (1984); *accord Southern California Edison Co. v. FERC,* 770 F.2d 779, 782 (9th Cir.1985); *United States v. Louisiana-Pacific Corp.,* 754 F.2d 1445, 1447 (9th Cir.1985). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron,* 467 U.S. at 843, 104 S.Ct. at 2782.

The Bus Act was intended to strengthen the bus industry in interstate commerce by lessening unreasonable burdens imposed by state entry barriers. S.Rep. No. 411, 97th Cong., 2d Sess. 7–8, *reprinted in* 1982 U.S.Code Cong. & Ad.News 2308, 2314–15. The Senate Committee on Commerce, Science and Transportation noted that regular route passenger miles had declined substantially on interstate bus routes under ***1127** ICC jurisdiction because state regulatory schemes prohibited discontinuance of many unprofitable intrastate routes forcing carriers to raise rates for interstate travelers in order to subsidize the low prices paid by intrastate travelers. *Id.* at 8, 1982 U.S.Code Cong. & Ad.News at 2315. The new Act was designed to promote increased price and service competition by decreasing burdensome regulation. *Id.* at 13, 1982 U.S.Code Cong. & Ad.News at 2320.

The Bus Act, however, was not intended to accomplish the total deregulation and preemption of state authority, but instead to effect a case-by-case preemption which was a compromise between the desires of industry and those of the states. *See* 127 Cong.Rec. 28,180 (1981) (statement of co-sponsor Rep. Schuster) ("This is a far cry from deregulation. In fact, this is a far cry from the extent to which Federal preemption was provided in the airline regulatory reform bill."); *id.* at 28,178 (statement of Rep. Clausen) ("[T]he limited, case-by-case preemption in H.R. 3663 does not go as far as most witnesses that appeared before the committee wanted. Industry, obviously, wanted total preemption."); *id.* at 28,175 (statement of Rep. Howard) ("This bill ... is regulatory reform and not total deregulation.").[1] With specific regard to the entry provisions in section 10922(c)(2)(B), the jurisdiction afforded to the ICC to issue intrastate certificates governing interstate operations was

> not intended to reach beyond the point necessary to enhance the competitiveness of interstate carriers moving pursuant to interstate certificates. *While the states might justifiably consider removing closed door restrictions on solely intrastate traffic not along an interstate route, this matter has been left to them, and for that reason, [the entry provision] does not totally preempt closed door restrictions.*
>
> H.R.Rep. No. 334, 97th Cong., 1st Sess. 34 (1981) (emphasis added).

Congress made clear that the Bus Act was designed to ease entry standards for those carriers actually operating interstate routes. In explaining the impact of section 10922(c)(2)(A) and (B), the Committee stated:

> The bill also substantially eases intrastate entry for interstate carriers. Sections (2)(A) and (B) are intended to remove the problem of "closed door" intrastate policies on interstate operations. Historically, some States have refused to authorize carriers to provide service between points in that State *as part of an interstate operation being conducted between those two points and points beyond*.... [S]uch closed door policies are contrary to the policies of the act favoring increased competition and improved operational and energy efficiency.

S.Rep. No. 411, 97th Cong.2d Sess. at 16, *reprinted in* 1982 U.S.Code Cong. & Ad.News at 2323 (emphasis added).

***1128** Implicit in Congress' explanation was the assumption that there would be a connection between the interstate services actually in operation and the intrastate portions of a route over which the ICC would have jurisdiction. For example, the Committee noted that state regulatory restrictions on "[a]n individual bus moving in interstate commerce [which] often will pick up and carry many passengers who are strictly intrastate" imposed an unreasonable burden on interstate commerce and must be preempted. *Id.* at 7–8, 1982 U.S.Code Cong. & Ad.News at 2314–15. Representative Anderson, the co-sponsor of H.R. 3663, stated during the debates that "[i]f a State decision pertains only to intrastate transportation, the State has the final authority. *The ICC may only be involved in those matters that are interstate in nature, including intrastate segments of interstate routes.*" 127 Cong.Rec. 28,185 (1981) (emphasis added). [2]

The exit provisions of the Bus Act provide further support for the CPUC's contention that the entry provisions of the Bus Act require a nexus between a carrier's intrastate and interstate operations as a predicate to exercise of the ICC's jurisdiction over the intrastate operations. In an effort to override onerous state regulations which obligated carriers to continue to provide intrastate service even when they had been permitted to discontinue related interstate operations, Congress provided that the ICC could permit discontinuance of an intrastate route, but *only* if the ICC has granted or will grant authority to discontinue the interstate portion of the service. 49 U.S.C. § 10935 (1982); S.Rep. No. 411, 97th Cong.2d Sess. at 25–26, 1982 U.S.Code Cong. & Ad.News at 2332–33.

Again, implicit in the Senate Committee's analysis of the exit provisions is the assumption that the carrier is actually providing interstate service, and that the interstate and intrastate portions of the route will be closely related. The Senate Report states:

> The exit policy of the [Bus Act] is grounded on the premise that interstate carriers should be permitted to discontinue service over routes that do not cover their variable costs. If easier exit were not assured, the Congressional policy of providing for freer entry would be frustrated. *In most cases, transportation of intrastate and interstate passengers in the same bus is required for a successful operation.*

Id. at 25–26, 1982 U.S.Code Cong. & Ad.News at 2332–33 (emphasis added). Further, the Report specifically defines the limits of the ICC's certification authority:

> If the ICC finds that continuing the [intrastate] transportation is not an unreasonable burden on interstate commerce, it is not authorized to preempt the State decision. In this situation, the carrier would have to continue providing the intrastate service as required by the State.

Id. at 27, 1982 U.S.Code Cong. & Ad.News at 2334.

Finally, as the D.C. Circuit pointed out when it analyzed the extent of deregulation accomplished by section 7 of the Bus Act in *Trailways, Inc. v. ICC,* 727 F.2d 1284, 1288 (D.C.Cir.1984), the legislative history makes clear that Congress intended itself to establish the compromise between total deregulation and case-by-case preemption, and did not intend to leave that judgment to the ICC. The court stated:

> [A]ll evidence indicates that Congress thought it was delineating for itself the scope of deregulation, which was the primary issue it faced in considering [the Bus Act]....
>
> Given Congress' focus on the extent of deregulation and on the precise structure of the new regulatory scheme, we do not believe that Congress intended to delegate ***1129** to the Commission any significant responsibility to decide the bounds of its own power in deregulating the industry.... [B]ecause this case raises issues concerning the scope of deregulation and the structure of the regulatory scheme for which there is no evidence of intended congressional delegation to the Commission, we believe that it is for the courts to resolve questions about the content of the decisions Congress made. Although the agency's opinion

on this point is useful, we do not accord it controlling weight.

Id.; see also Vanguard Interstate Tours, Inc. v. ICC, 735 F.2d 591, 596 (D.C.Cir.1984) (when Congress has not delegated the function of supplying the meaning of a statutory standard to the agency, court must undertake full interpretive responsibility; agency view is relevant, but not controlling principle).

If we were to adopt the ICC's construction of section 10922(c)(2)(B), the ICC would effectively have the power to draw the boundaries of its own authority to regulate the bus industry. Such a construction of section 10922(c)(2)(B) would be tantamount to complete preemption of state regulatory authority over intrastate routes which lie between points on the map on an interstate route over which the carrier has authority to operate. The legislative history clearly indicates that Congress did not intend to preempt the authority of the states to regulate intrastate bus service which is unrelated to interstate operations actually being conducted. The ICC's interpretation of section 10922(c)(2)(B) would accomplish exactly that: under the ICC's construction of the statute, a carrier could apply for and be granted operating authority over an interstate route between Los Angeles and New York City, and actually proceed to operate only a service between Los Angeles and Riverside, California. We refuse to countenance this type of an "end run" around the compromise negotiated in the Bus Act. *See Trailways, Inc.,* 727 F.2d at 1292 (authority to operate a deviation route under Bus Act § 7 is entirely parasitic on the underlying certified route; if rule were otherwise, carrier could take a certified route it no longer wants to serve, gain a certificate for a deviation route, and then cease service on the underlying certified route).

Accordingly, we conclude that the ICC abused its discretion by acting outside its statutory authority in granting the certificates of operating authority to Funbus and Lounge Cars.

V. REMAND TO THE ICC FOR FURTHER FACTUAL FINDINGS

A. *Funbus (Appeal No. 85–7104)*

Because of the ICC's incorrect interpretation of section 10922(c)(2)(B), it failed to make specific factual findings concerning the nexus, if any, between the interstate services which Funbus actually operates and its intrastate services. The ICC has primary jurisdiction to determine whether operations conducted by an ICC-certified carrier are within the scope of its certificate. *Service Storage & Transfer Co. v. Virginia,* 359 U.S. 171, 177–78, 79 S.Ct. 714, 718–19, 3 L.Ed.2d 717 (1959) ("[I]nterpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action."); *accord Jones Motor Co. v. Pennsylvania Public Utility Commission,* 361 U.S. 11, 805 S.Ct. 69, 4 L.Ed.2d 50 (1959). The primary jurisdiction doctrine is applicable when an action " 'requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.' " *United States v. Yellow Freight System, Inc.,* 762 F.2d 737, 739 (9th Cir.1985) (quoting *United States v. Western Pacific Railroad,* 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956)).

Resolution of the question whether the requisite nexus exists between a carrier's interstate operations actually being conducted and its intrastate services " 'raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration ***1130** of the regulatory scheme laid down by th[e] Act.' " *Id.* (quoting *Western Pacific,* 352 U.S. at 65, 77 S.Ct. at 166). We remand this matter to the ICC for further factual findings in light of our ruling that the ICC has authority to issue a certificate authorizing intrastate operations only where the intrastate operations are conducted as a part of existing interstate services.

B. *Lounge Car (Appeal No. 85–7105)*

The effect of the ICC's legal error on its ability to make factual findings regarding the scope of a carrier's interstate route and its connection to the carrier's intrastate operations is underscored by the posture of the Lounge Car proceeding on this appeal. The ICC denied ASI's request for an evidentiary hearing concerning the scope of Lounge Cars' intended operations. The ICC ruled that such information was irrelevant to the question whether a carrier is entitled to operating authority over an intrastate route which is physically located on a road over which the carrier has interstate operating authority. The ICC's construction of section 10922(c)(2)(B) thus prevented it from making any factual findings regarding the relationship between Lounge Cars' interstate and intrastate operations.

The ICC's denial of ASI's request for an evidentiary hearing effectively deprived ASI of its statutory right to protest the issuance of an ICC certificate. Under 49 U.S.C. § 10922(c)(2)(B), a person may object to the issuance of an ICC certificate by producing evidence which establishes that the issuance of the certificate would not be "consistent with the public interest." *See also* 49 C.F.R. § 1160.90 (1985). ASI speculates that the issuance of the Lounge Car certificate might be inconsistent with the public interest because its ultimate result could be to reduce total service to the public; ASI asserts that it would be forced to reduce its service to the smaller communities which it currently serves in order to compensate for the predicted loss of revenues which it would suffer as a result of Lounge Car's entry into the airporter shuttle market. *See* 49 C.F.R. § 1160.95(a)(4) (1985) (one factor to be considered in determining whether authorization to operate would be consistent with the public interest is whether operation would "impair the ability of any other motor common carrier of passengers to provide a substantial portion of the regular-route passenger service which such carrier provides over its entire regular-route system"); *Vanguard Interstate Tours,* 735 F.2d at 598 (public interest inquiry should focus upon whether a new competitor's entry into a particular market will adversely affect an existing carrier in the market in such a way that overall service to the public will be diminished).

Under the ICC's regulations, a request for an oral hearing on a protest will be granted only "where use of modified procedures [permitting a decision on written pleadings] would prejudice a party, material issues of decisional fact cannot adequately be resolved without an oral hearing, or assignment of an application for oral hearing is otherwise required by the public interest." 49 C.F.R. § 1160.68(c) (1985). As ASI points out, the ICC's refusal to grant ASI's request for an oral hearing was prejudicial because ASI was precluded from obtaining the information necessary to exercise its statutory right to protest the issuance of the certificate.

The D.C. Circuit recently addressed this question in *Cross-Sound Ferry Services, Inc. v. ICC,* 738 F.2d 481 (D.C.Cir.1984). In *Cross-Sound,* the court held that the ICC acted unreasonably in refusing to permit Cross-Sound to unearth the information necessary to evaluate Cross-Sound's protest, and then in dismissing that protest as speculative. *Id.* at 487. The court reasoned that the ICC's failure to require specificity in routes prevented it from reaching a reasoned decision as to whether the proposed service would be in the public interest. *Id.* at 485–86. The court noted that the right to protest, and the burden to show that entry would not be in the public interest, presuppose the disclosure of the type of service which an applicant intends to provide. *Id.* at 485–86; *see also Vanguard Interstate Tours,* 735 F.2d at 598 ***1131** ("existing carriers will be in the position to, and have the most motivation to, demonstrate the potential adverse effects of a new carrier's proposed service on a particular route").

We agree with the D.C. Circuit that the ICC's construction of the entry provisions of the Bus Act frustrates Congress' intent in enacting the statute. The fact that ASI failed to pursue an alternative means of gathering information—i.e., requesting discovery—does not alter the fact the ICC's failure to grant ASI's request for a hearing prevented the ICC from obtaining a full record and reaching a reasoned decision. Consequently, we reverse the ICC's decision in no. 85–7105 and remand the case to the ICC for an evidentiary hearing. The ICC is instructed to consider consolidating this case with the proceedings pending in *Airport Services, Inc. v. Lounge Cars Tours Charter Co.,* ICC No. MC–C 10943.

VI. DISTRICT COURT ACTION

In the district court action, Funbus sought a declaratory judgment stating that the ICC has primary jurisdiction to interpret the scope of its certificates of operating authority, an interpretation by the ICC of its certificate, and an injunction against the CPUC's cease and desist order. Subsequent to the entry of the district court's judgment dismissing the complaint, Funbus obtained all of the relief which it sought in the district court. The CPUC vacated its cease and desist order on June 20, 1984, and the ICC conducted the initial review of Funbus' certificate and issued an opinion interpreting it on December 28, 1984. Our disposition of the appeals taken from that decision reaffirms the validity of the principle that the ICC has primary jurisdiction to interpret the scope of operations conducted pursuant to a validly-issued certificate. Because the issues in the district court are thus no longer live and the parties now lack a legally cognizable interest in the outcome of this case, the appeal from the district court's order is moot. *See Lee v. Schmidt-Wenzel,* 766 F.2d 1387, 1389 (9th Cir.1985) (quoting *Murphy v. Hunt,* 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982)).

The ICC argues that these appeals are not moot because they fall within the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception is applicable, however, only in exceptional situations where the plaintiff can show that *he* will again be subject to the same injury. *Sample v. Johnson,* 771 F.2d 1335, 1339 (9th Cir.1985), *cert. denied,* 475 U.S. 1019, 106 S.Ct. 1206, 89 L.Ed.2d 319 (1986) (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 108, 103 S.Ct. 1660, 1668, 75 L.Ed.2d 675 (1983)). That other persons may litigate a similar claim does not save a case from mootness. *Id.* The plaintiff has the burden to show the likelihood of recurrence. *Id.* at 1342–43. Funbus and the ICC have failed to carry that burden in the instant case.

The Supreme Court has held and we have reiterated here that the ICC has the primary jurisdiction to review and interpret the scope of operating authority granted by its certificates. Our remand of appeal nos. 85–7104 and 85–7105 to the ICC for further factual findings and our holding that the ICC exceeded its jurisdictional grant under section 10922(c)(2)(B) by failing to require a showing of a nexus between intrastate operations and actual interstate operations dispose of the issues raised in appeals nos. 84–6170 and 84–6171. We decline to speculate as to the CPUC's likely conduct on the remand of appeal no. 85–7104; any questions which might be raised thereby are not yet ripe for review.

We thus follow the Supreme Court's established practice in dealing with a civil case from a court in the federal system which "has become moot while on its way here or pending our decision on the merits": we dismiss the appeal as moot, vacate the judgment below and remand with a direction to dismiss the complaint. *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950); *Enrico's, Inc. v. Rice,* 730 F.2d 1250, 1255 (9th Cir.1984).

*1132 VII. CONCLUSION

The ICC's rulings in appeal nos. 85–7104 and 85–7105 are reversed and the cases are remanded for further factual findings concerning the relationship, if any, between the intrastate services provided by Funbus and Lounge Cars and their interstate operations.

The appeals from the district court's rulings in appeal nos. 84–6170 and 84–6171 are dismissed as moot. The district court's orders are vacated and the case is remanded with a direction to dismiss the complaint.

KENNEDY, Circuit Judge, concurring in part and dissenting in part:

In my view, the words of the statute support the Commission's findings rather than the principal holding of my colleagues. With all respect, I dissent from the holding that the Commission had no authority to grant the intrastate certificates based on the underlying interstate routes.

The Bus Act permits the Commission to grant a certificate to a motor common carrier of passengers if the carrier's "intrastate transportation is to be provided on a route over which the carrier has authority ... to provide interstate transportation of passengers." 49 U.S.C. § 10922(c)(2)(A). The statute sustains the Commission's interpretation, for the only word that links intrastate transportation and interstate transportation is "route." The majority's holding refines the statutory scheme considerably, and, I suggest, quite impermissibly, by substituting a different concept. The majority holds that there must be a demonstrated connection between intrastate "services" and preexisting or simultaneously approved interstate "services." At other points in the opinion, in lieu of the word "services," the majority uses the term "operations." The terms "route," on the one hand, and "services" or "operations" on the other, are not correlatives, as a matter either of ordinary semantics or motor carrier regulation. The court's importation of the concept of services and operations into a statute in which the key term is "route" seems contradicted both by the plain language of the statute and the analytic structure of the Act as a whole.

The statute provides for an intrastate certificate where the carrier "has been granted authority" or "will be granted authority" to provide interstate transportation over a route. 49 U.S.C. § 10922(c)(2)(B). This grant of plenary authority is quite different from the mere conduct of operations. Indeed, there is no evidence that Congress intended to define a route differently for intrastate and interstate purposes. Under the majority's test, the Commission must depart substantially from the clear statutory scheme to make a finding that the intrastate services are somehow connected to the interstate services. There is so little guidance in the statute for the majority's mandated equivalency that the court returns the case to the Commission to articulate new standards. It is doubtful the Commission can do so without reaching far beyond the statute.

The Act's entry and exit provisions demonstrate the analytic problems the majority creates by equating "operations" or "services" with "routes." The entry provisions impose no requirement upon a carrier to begin full operations immediately over all authorized intrastate and interstate routes upon obtaining authority from the Commission. *See* 49 U.S.C. § 10922(c)(2)(A), (B). Similarly, the Commission has authority to require a carrier to maintain intrastate services over intrastate routes while allowing it to cease its interstate operations over interstate routes. *See* 49 U.S.C. § 10935(e)(3). These provisions require no connection between intrastate and interstate services, and it undermines the integrity of the Act to read into it the nexus the majority postulates. It is the concept of a route, not service, which is integral to the Act.

The majority is correct that the paradigmatic example used by congressional sponsors to explain the Act was the case where a route and services were coextensive, so that the same bus made local stops on an interstate journey. *See, e.g.,* ***1133** S.Rep. No. 411, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code Cong. & Ad.News 2308, 2314–15. The example neatly fits the majority's test. But the language of the statute controls the statute's interpretation, not the principal example given to recommend its enactment. Even assuming that we should turn to legislative history for an explanation of the statute, an approach I reject given the statute's unambiguous terms, the point that emerges from the history is that carriers holding interstate certificates were impeded in their operations by severe regulatory costs and delays resulting from concurrent federal and state regulation, and that Congress intended to foster competition by removing a good deal of state jurisdiction and control. *See, e.g., id.* The words of the statute mirror that purpose; the holding of the majority does not.

In the case of the certificates here in question, local transportation was on a route or routes for which the carrier had authority from the Commission. The Commission issued a certificate to Funbus authorizing Funbus "to conduct regular-route transportation in intrastate, interstate, or foreign commerce at all intermediate points over twelve routes that form a network connecting points in Southern California and Las Vegas." *Funbus Systems, Inc.,* ICC No. MC–C–10917, at 10–11 (Dec. 28, 1984). Funbus then began operating a bus service between Los Angeles International Airport, Buena Park, and Anaheim, all within the state of California. The Commission granted Lounge Car's application "to transport passengers in intrastate, interstate, and foreign commerce over nine routes ... [that] extend between Los Angeles, CA, or points in the vicinity, on the one hand, and, on the other, San Francisco, CA; San Ysidro, CA; Phoenix, AZ; and Las Vegas, NV." *Lounge Car Tours Charter Company, Inc.,* ICC No. MC–153325 (Sub-No. 2), at 1 (Oct. 4, 1984). Lounge Car had been operating a regular-route bus operation between Los Angeles International Airport and Anaheim. While the parties objecting to the Commission's holding claim that the Lounge Car certificate in particular was a subterfuge to avoid state regulation, the facts in the record do not compel that inference. The ordinary processes and discretion of the agency are sufficient to ensure that it will not allow the integrity of the Act to be undermined in this regard.

I agree with the holding of the majority on all of the procedural aspects of this case, Parts I through III of the majority opinion, and the court's holding regarding mootness in Part VI of its opinion. I further agree, for the reasons given by the Commission, that the service here is not a special operation under 49 U.S.C. § 10922(c)(2)(H), and that the incidental to air exception, 49 U.S.C. § 10526(a)(8)(A), is not applicable. On the principal issue of the Commission's jurisdiction and authority to issue the intrastate certificates, I must tender this dissent.

All Citations

801 F.2d 1120, 8 Fed.R.Serv.3d 822

Footnotes

1 The House debates concerned H.R. 3663, a predecessor bill which was ultimately rejected by the Senate, *see* 127 Cong.Rec. 27, 185–93 (1981); the Senate substituted a new bill which became the Bus Act. S.Rep. No. 411, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S.Code Cong. & Ad.News 2308. The ICC and Funbus argue that references to the House Report are improper because H.R. 3663 was not ultimately enacted. We disagree. The Representatives' comments with respect to the entry provisions in H.R. 3663 *are* relevant because the operative language of section 10922(c)(2)(B) of the Bus Act mirrors that contained in H.R.

3663. *See United States v. Enmons,* 410 U.S. 396, 404–05 n. 14, 93 S.Ct. 1007, 1011–12 n. 14, 35 L.Ed.2d 379 (1973) (remarks of Representatives, particularly of sponsor, with respect to House bill which passed only in the House are relevant to an understanding of Act ultimately passed by different Congress where operative language of original bill was substantially carried forward into the Act); *see also Hudson Transit Lines,* 765 F.2d at 342–43 (citing House reports in support of its construction of Bus Act § 6); *Commissioner of Transportation of New York v. United States,* 750 F.2d 163, 168 (2d Cir.1984) (citing House reports in support of its construction of 49 U.S.C. § 11501(e)(2)), *cert. denied,* 471 U.S. 1015, 105 S.Ct. 2019, 85 L.Ed.2d 301 (1985); *Trailways, Inc. v. ICC,* 727 F.2d 1284, 1288 (D.C.Cir.1984) (citing House debates on H.R. 3663 in support of its construction of Bus Act § 7). Therefore, reference to the House reports and debates pertaining to H.R. 3663 for guidance as to Congress' intent in enacting section 10922(c)(2)(B) is appropriate.

2 As a statement by the bill's sponsor, Representative Anderson's interpretation of the ICC's role is entitled to great weight. *Enmons,* 410 U.S. at 404–05 n. 14, 93 S.Ct. at 1011–12 n. 14; *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612, 640, 87 S.Ct. 1250, 1266, 18 L.Ed.2d 357 (1967); *accord City of New York v. Train,* 494 F.2d 1033, 1039 (D.C.Cir.1974), *aff'd,* 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

End of Document

EXHIBIT A

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18046-3 SEA BRIEF FOR THE STATE OF OREGON AS AMICUS CURIAE IN SUPPORT OF THE STATE OF WASHINGTON'S COMPLAINT FOR INJUNCTION

INTRODUCTION AND INTEREST OF AMICUS

The State of Oregon, by and through Attorney General Ellen F. Rosenblum, files this amicus brief in support of the State of Washington's Complaint for a Preliminary Injunction. Oregon files this brief to protect competition in its markets and Oregon consumers that will be harmed if Albertsons proceeds with its proposed Special Dividend before the lawfulness of the

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merger can be fully litigated. The State of Oregon urges this Court to grant plaintiff State of Washington's Complaint for a Preliminary Injunction.

ARGUMENT

I. Attorneys General Have Unique Understanding of Antitrust Impacts of Defendants' Actions

Like the Washington Attorney General, the Oregon Attorney General is duty-bound to uphold Oregon's Antitrust Act for the benefit of commerce and for the benefit of the public. The Legislative Assembly of Oregon declared the purpose of Oregon's antitrust laws "to encourage free and open competition in the interest of the general welfare and economy of the state, by preventing monopolistic and unfair practices, combination and conspiracies in restraint of trade and commerce, and for that purpose to provide means to enjoin such practices and provide remedies for those injured by them." Or. Rev. Stat. §646.715. State Attorneys General are uniquely situated to bring cases with uniquely local impacts such as a transaction like this- involving full-service grocery retailers. While this merger is subject to review by Federal enforcers, the Oregon Attorney General has unique knowledge regarding the potential effects the proposed transaction could have on local markets due to an understanding of the unique geography, communities, travel patterns, and various socioeconomic factors present in Oregon and the Northwest. The Oregon Attorney General is reviewing and will continue to review the proposed merger of Defendants for impacts on competition and consumers in Oregon.

II. The Proposed Dividend and Merger Create Substantial Competition Concerns in Both Oregon and Washington

Albertsons operates over 121 stores in Oregon. Kroger has 51 Fred Meyer and 4 QFC stores in Oregon. The companies compete against each other throughout Oregon. Of Fred Meyer's stores, 41 stores operate in the same city as an Albertsons store. In some Oregon cities such as The Dalles, Sandy, Tillamook, and Florence Defendants appear to be the only major

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grocery retailers and head-to-head competitors. Common ownership would remove the head-to-head competition these defendants currently face.

Similar to what occurred in Washington, Albertsons' acquisition of Safeway Inc. resulted in reduced competition in Oregon. Pursuant to the FTC's divestment order in the Safeway-Albertsons merger, Albertsons was ordered to divest 20 Oregon stores.[1] As a result, Haggen purchased these stores. Haggen no longer operates any stores in Oregon. Following Haggen's bankruptcy filing, Albertsons repurchased seven Oregon stores it had divested to operate them under the Albertsons banner, and shuttered stores as well, showing the divestitures failed, and competition suffered.[2] In the words of the Haggen bankruptcy court, "Haggen's demise was swift, began immediately, and continued unabated for seven months, ending in its September 2015 bankruptcy filing and complete liquidation." *In re HH Liquidation,* 590 B.R. 211, 237 (2018).

III. The Court Should Grant a Preliminary Injunction to Prevent Irreparable Injury

Oregon supports the well-founded arguments of the State of Washington in seeking an injunction. Further, the Court's Findings of Fact and Conclusions of Law as to the Temporary Restraining Order are equally applicable to the Oregon Attorney General's authority to enforce Oregon's antitrust laws to prevent harm to competition. Entry of an injunction by the court will maintain the existing competitive status quo, and avoid injury to Oregon consumers, while the Oregon Attorney General's investigation is conducted.

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[1] Decl. Of Amy Hanson in Support of Temporary Restraining Order, Exhibit L, at 222, 247-249 (*Federal Trade Commission Decision and Order In the Matter of Cereberus, et. Al and Safeway Inc,, Docket No. C-4504, 141 0108).*

[2] "Albertsons buys Haggen, and will continue to operate 15 stores under Haggen brand." *Puget Sound Business Journal*, March 14, 2016. https://www.bizjournals.com/seattle/news/2016/03/14/albertsons-buys-haggen-will-continue-to-operate-15.html.

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For efficiency, Oregon will not repeat Washington's arguments, but, the Defendants' responses demonstrate that equity does not lie in Defendants favor. On one side of the balance, the Special Dividend, in conjunction with the merger, presents risk of irreparable harm. On the other side of the balance, Defendants and in particular Albertsons have not provided justification for the need to strip the company of cash and to take on debt, other than to assert it is consistent with a strategy to return capital. No evidence has been submitted that the very large Special Dividend is consistent with past business practices or that the amount was decided prior to negotiations with Kroger. Defendants' arguments that the merger agreement is not expressly contingent upon the Special Dividend fails to address whether the Special Dividend was integral to the parties' agreement, or how it will not impact Albertsons' competitiveness going forward. Furthermore, if and when a dividend issues, the cash is no longer available for Albertsons' operations; it is gone forever. The Special Dividend at issue will not only have a long-term negative effect for Washington consumers, but Oregon consumers as well. None of Defendants' arguments go to the equities the Attorneys General raise.

In contrast, the CFO of Albertsons admits that a reason for the Special Dividend was the merger agreement, as it was made "...with the understanding that the sale of the Company may be the subject of a potentially lengthy antitrust review of the Proposed Merger by the relevant antitrust authorities." Declaration of Sharon McCollam in Support of Albertsons Companies Opposition to Wash. Motion for Temporary Restraining Order, at 5. This statement both confirms that the Special Dividend does in fact arise due to the proposed merger, and shows it may not have occurred but for the parties reaching an agreement to merge. The fact that Albertsons Board had sole authority to approve the Special Dividend does not alleviate the Attorneys General's competition concerns or immunize the parties conduct from the antitrust laws. Kroger and Albertsons were negotiating the merger agreement, and the information and specifics regarding the dividend were discussed with Kroger during that time: "Since Kroger would be buying Albertsons shares from Albertsons' stockholders, Kroger expected the Special

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Dividend payment to reduce the price it was willing to pay for Albertsons shares." Declaration of McCollam at 7. Furthermore, "In its initial offer, Kroger stated: 'To the extent Albertsons announces a special dividend, the Albertsons stock price would be reduced, as would our offer price, by that special dividend per share.' Declaration of McCollam at 7. And the amount and specifics as to the dividend appears to have changed as the negotiations and discussed between the competitors continued.[3]

Defendants emphasize that the merger agreement is not *contingent* on the issuance of the Special Dividend. While the merger might not be explicitly conditional on the Special Dividend it is certainly *connected*. The gutting of cash reserves is in furtherance of the anticompetitive effort by making Albertsons a better – easier to purchase – suitor to Kroger, now tied to being acquired. It clearly reduces Albertsons' ability to aggressively compete with Kroger during the pendency of the proposed merger.

Defendants also emphasize that the Special Dividend was a unilateral business decision. But a unilateral business decision, or an agreement between competitors, can evidence a conspiracy to restrain trade, depending on the circumstances. The Supreme Court has long held that business behavior may provide circumstantial evidence of a tacit or express agreement. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S. Ct. 257, 259, 98 L. Ed. 273 (1954). Indeed, "circumstantial evidence is the lifeblood of antitrust law." *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973). Even assuming an entirely unilateral decision to issue the Special Dividend, such conduct nevertheless may provide circumstantial evidence from which a factfinder could infer an agreement to restrain trade in these circumstances. The Supreme Court's decision in *F.T.C. v. Actavis, Inc.*, 570 U.S. 136 (2013) demonstrates the importance of considering a business decision beyond face value. In *Actavis*, the Court considered whether an "unusual" settlement

[3] ACI_DCCID-00000194 at -197, Document Produced to the State of Oregon by the Office of the Attorney General for the District of Columbia, which is permitted to receive it pursuant to the Oregon Antitrust Act and is the subject of a contemporaneous motion to seal.

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agreement between brand name and generic drug manufacturers consisting of a reverse payment scheme violated antitrust laws. 570 U.S. at 145, 147. There, the Circuit Court dismissed the complaint and held the agreement immune from antitrust scrutiny because the anticompetitive effects fell within the bounds allowed by the patent. Id. at 141. But the Supreme Court disagreed. Although the Court assumed the anticompetitive effect fell within the patent, that did not answer "the antitrust question." Id. at 147. The Court then weighed settlement policies against antitrust policies, and held in favor of antitrust policies. Id. at 153. Among them, the potential for genuine adverse effect on competition, the justification for the decision, and whether the goal of the decision could be achieved another way. Id. at 153-158 ("Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement."). The Special Dividend raises similar concerns. Simply claiming the decision was made unilaterally does not foreclose the inference of a conspiracy or address and alleviate anticompetitive concerns.

CONCLUSION

The Court should grant the preliminary injunction sought by the State of Washington.

DATED: this 9th day of November, 2022.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18046-3 SEA NON-WASHINGTON AUTHORITIES RELIED UPON IN SUPPORT OF AMICUS CURIAE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The State of Oregon hereby provides copies of the non-Washington authorities relied on in support of its Amicus Curiae.

1. *F.T.C. v. Actavis, Inc.*, 570 U.S. 136 (2013).

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2. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

3. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

4. *In re HH Liquidation*, 590 B.R. 211, 237 (2011).

5. Federal Trade Commission Decision and Order, *In the Matter of Cereberus, et. al. and Safeway Inc,*, Docket No. C-4504, 141 0108.

6. Or. Rev. Stat. § 646.715.

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133 S.Ct. 2223
Supreme Court of the United States

FEDERAL TRADE COMMISSION, Petitioner
v.
ACTAVIS, INC., et al.

No. 12–416
|
Argued March 25, 2013.
|
Decided June 17, 2013.

Synopsis
Background: Federal Trade Commission (FTC) filed complaint alleging that reverse payment settlements between holder of drug patent and two generic manufacturers of drug were unfair restraints on trade that violated federal antitrust laws. The United States District Court for the Northern District of Georgia, No. 1:09–CV–00955–TWT, Thomas W. Thrash, J., dismissed the action for failure to state a claim, and the FTC appealed. The United States Court of Appeals for the Eleventh Circuit, Carnes, Circuit Judge, 677 F.3d 1298, affirmed, and certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

reverse payment settlements in patent infringement litigation can sometimes violate the antitrust laws, abrogating *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 544 F.3d 1323, and *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, and

the settlement was not immune from antitrust attack, even if the agreement's anticompetitive effects fell within the scope of the exclusionary potential of the patent.

Reversed and remanded.

Chief Justice Roberts filed dissenting opinion in which Justices Scalia and Thomas joined.

Justice Alito took no part in the consideration or decision of the case.

Procedural Posture(s): On Appeal; Motion to Dismiss.

****2224** *Syllabus* *

***136** The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch–Waxman Act or Act) creates special procedures for identifying and resolving patent disputes between brand-name and generic drug manufacturers, one of which requires a prospective generic manufacturer to assure the Food and Drug Administration (FDA) that it will not infringe the brand-name's patents. One way to provide such assurance (the "paragraph IV" route) is by certifying that any listed, relevant patent "is invalid or will not be infringed by the manufacture, use, or sale" of the generic drug. 21 U.S.C. § 355(j)(2)(A)(vii)(IV).

Respondent Solvay Pharmaceuticals obtained a patent for its approved brand-name drug AndroGel. Subsequently, respondents Actavis and Paddock filed applications for generic drugs modeled after ****2225** AndroGel and certified under paragraph IV that Solvay's patent was invalid and that their drugs did not infringe it. Solvay sued Actavis and Paddock, claiming patent infringement. See 35 U.S.C. § 271(e)(2)(A). The FDA eventually approved Actavis' generic product, but instead of bringing its drug to market, Actavis entered into a "reverse payment" settlement agreement with Solvay, agreeing not to bring its generic to market for a specified number of years and agreeing to promote AndroGel to doctors in exchange for millions of dollars. Paddock made a similar agreement with Solvay, as did respondent Par, another manufacturer aligned in the patent litigation with Paddock.

The Federal Trade Commission (FTC) filed suit, alleging that respondents violated § 5 of the Federal Trade Commission Act by unlawfully agreeing to abandon their patent challenges, to refrain from launching their low-cost generic drugs, and to share in Solvay's monopoly profits. The District Court dismissed the complaint. The Eleventh Circuit concluded that as long as the anticompetitive effects of a settlement fall within the scope of the patent's exclusionary potential, the settlement is immune from antitrust attack. Noting that the FTC had not alleged that the challenged agreements excluded competition to a greater extent than would the patent, if valid, it affirmed the complaint's dismissal. It further recognized that if parties to this sort of case do ***137** not settle, a court might declare a patent invalid. But since public policy favors the settlement of disputes, it held that courts could not require parties to continue to litigate in order to avoid antitrust liability.

Held : The Eleventh Circuit erred in affirming the dismissal of the FTC's complaint. Pp. 2230 – 2238.

(a) Although the anticompetitive effects of the reverse settlement agreement might fall within the scope of the exclusionary potential of Solvay's patent, this does not immunize the agreement from antitrust attack. For one thing, to refer simply to what the holder of a valid patent could do does not by itself answer the antitrust question. Here, the paragraph IV litigation put the patent's validity and preclusive scope at issue, and the parties' settlement—in which, the FTC alleges, the plaintiff agreed to pay the defendants millions to stay out of its market, even though the defendants had no monetary claim against the plaintiff—ended that litigation. That form of settlement is unusual, and there is reason for concern that such settlements tend to have significant adverse effects on competition. It would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, and not against procompetitive antitrust policies as well. Both are relevant in determining the scope of monopoly and antitrust immunity conferred by a patent, see, *e.g., United States v. Line Material Co.,* 333 U.S. 287, 310, 311, 68 S.Ct. 550, 92 L.Ed. 701, and the antitrust question should be answered by considering traditional antitrust factors. For another thing, this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws. See, *e.g., United States v. Singer Mfg. Co.,* 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823; *United States v. New Wrinkle, Inc.,* 342 U.S. 371, 72 S.Ct. 350, 96 L.Ed. 417; *Standard Oil Co. (Indiana) v. United States,* 283 U.S. 163, 51 S.Ct. 421, 75 L.Ed. 926. Finally, the Hatch–Waxman Act's general procompetitive thrust—facilitating challenges to a patent's validity and requiring parties to a paragraph IV dispute to report settlement terms to federal antitrust ****2226** regulators—suggests a view contrary to the Eleventh Circuit's. Pp. 2230 – 2234.

(b) While the Eleventh Circuit's conclusion finds some support in a general legal policy favoring the settlement of disputes, its related underlying practical concern consists of its fear that antitrust scrutiny of a reverse payment agreement would require the parties to engage in time-consuming, complex, and expensive litigation to demonstrate what would have happened to competition absent the settlement. However, five sets of considerations lead to the conclusion that this concern should not determine the result here and that the FTC should have been given the opportunity to prove its antitrust claim. First, the specific restraint ***138** at issue has the "potential for genuine adverse effects on competition." *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 460–461, 106 S.Ct. 2009, 90 L.Ed.2d 445. Payment for staying out of the market keeps prices at patentee-set levels and divides the benefit between the patentee and the challenger, while the consumer loses. And two Hatch–Waxman Act features—the 180–day exclusive-right-to-sell advantage given to the first paragraph IV challenger to win FDA approval, § 355(j)(5) (B)(iv), and the roughly 30–month period that the subsequent manufacturers would be required to wait out before winning FDA approval, § 355(j)(5)(B) (iii)—mean that a reverse settlement agreement with the first filer removes from consideration the manufacturer most likely to introduce competition quickly. Second, these anticompetitive consequences will at least sometimes prove unjustified. There may be justifications for reverse payment that are not the result of having sought or brought about anticompetitive consequences, but that does not justify dismissing the FTC's complaint without examining the potential justifications. Third, where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely has the power to bring about that harm in practice. The size of the payment from a branded drug manufacturer to a generic challenger is a strong indicator of such power. Fourth, an antitrust action is likely to prove more feasible administratively than the Eleventh Circuit believed. It is normally not necessary to litigate patent validity to answer the antitrust question. A large, unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the patent's validity. Fifth, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuits. As in other industries, they may settle in other ways, *e.g.,* by allowing the generic manufacturer to enter the patentee's market before the patent expires without the patentee's paying the challenger to stay out prior to that point. Pp. 2234 – 2237.

(c) This Court declines to hold that reverse payment settlement agreements are presumptively unlawful. Courts reviewing such agreements should proceed by applying the "rule of reason," rather than under a "quick look" approach. See *California Dental Assn. v. FTC,* 526 U.S. 756, 775, n. 12, 119 S.Ct. 1604, 143 L.Ed.2d 935. Pp. 2237 – 2238.

677 F.3d 1298, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C.J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. ALITO, J., took no part in the consideration or decision of the case.

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Opinion

Justice BREYER delivered the opinion of the Court.

***140** Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars. Because ***141** the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement agreement is often called a "reverse payment" settlement agreement. And the basic question here is whether such an agreement can sometimes unreasonably diminish competition in violation of the antitrust laws. See, *e.g.,* 15 U.S.C. § 1 (Sherman Act prohibition of " restraint[s] of trade or commerce"). Cf. *Palmer v. BRG of Ga., Inc.,* 498 U.S. 46, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990) (*per curiam*) (invalidating agreement not to compete).

In this case, the Eleventh Circuit dismissed a Federal Trade Commission (FTC) complaint claiming that a particular reverse payment settlement agreement violated the antitrust laws. In doing so, the Circuit stated that a reverse payment settlement agreement generally is "immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." *FTC v. Watson Pharmaceuticals, Inc.*, 677 F.3d 1298, 1312 (2012). And since the alleged infringer's promise not to enter the patentee's market expired before the patent's term ended, the Circuit found the agreement legal and dismissed the FTC complaint. *Id.,* at 1315. In our view, however, reverse payment settlements such as the agreement alleged in the complaint before us can sometimes violate the antitrust laws. We consequently hold that the Eleventh Circuit should have allowed the FTC's lawsuit to proceed.

I

A

Apparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already-approved brand-name drug owner. See Brief for Petitioner 29; 12 P. Areeda & ***142** H. Hovenkamp, Antitrust Law ¶ 2046, p. 338 (3d ed. 2012) (hereinafter Areeda); Hovenkamp, Sensible Antitrust Rules for Pharmaceutical Competition, 39 U.S.F.L.Rev. 11, 24 (2004). We consequently describe four key features of the relevant drug-regulatory framework established ****2228** by the Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, as amended. That Act is commonly known as the Hatch–Waxman Act.

First, a drug manufacturer, wishing to market a new prescription drug, must submit a New Drug Application to the federal Food and Drug Administration (FDA) and undergo a long, comprehensive, and costly testing process, after which, if successful, the manufacturer will receive marketing approval from the FDA. See 21 U.S.C. § 355(b)(1) (requiring, among other things, "full reports of investigations" into safety and effectiveness; "a full list of the articles used as components"; and a "full description" of how the drug is manufactured, processed, and packed).

Second, once the FDA has approved a brand-name drug for marketing, a manufacturer of a generic drug can obtain similar marketing approval through use of abbreviated procedures. The Hatch–Waxman Act permits a generic manufacturer to file an Abbreviated New Drug Application specifying that the generic has the "same active ingredients as," and is "biologically equivalent" to, the already-approved brand-name drug. *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S,* 566 U.S. ––––, ––––, 132 S.Ct. 1670, 1676, 182 L.Ed.2d 678 (2012) (citing 21 U.S.C. §§ 355(j)(2)(A)(ii), (iv)). In this way the generic manufacturer can obtain approval while avoiding the "costly and time-consuming studies" needed to obtain approval "for a pioneer drug." See *Eli Lilly & Co. v. Medtronic, Inc.,* 496 U.S. 661, 676, 110 S.Ct. 2683, 110 L.Ed.2d 605 (1990). The Hatch–Waxman process, by allowing the generic to piggy-back on the pioneer's approval efforts, "speed[s] the introduction of low-cost generic drugs to market," *Caraco, supra,* at ––––, 132 S.Ct., at 1676, thereby furthering drug competition.

***143** Third, the Hatch–Waxman Act sets forth special procedures for identifying, and resolving, related patent disputes. It requires the pioneer brand-name manufacturer to list in its New Drug Application the "number and the expiration date" of any relevant patent. See 21 U.S.C. § 355(b)(1). And it requires the generic manufacturer in its Abbreviated New Drug Application to " assure the FDA" that the generic "will not infringe" the brand-name's patents. See*Caraco, supra,* at ––––, 132 S.Ct., at 1676.

The generic can provide this assurance in one of several ways. See 21 U.S.C. § 355(j)(2)(A)(vii). It can certify that the brand-name manufacturer has not listed any relevant patents. It can certify that any relevant patents have expired. It can request approval to market beginning when any still-in-force patents expire. Or, it can certify that any listed, relevant patent "is invalid or will not be infringed by the manufacture, use, or sale" of the drug described in the Abbreviated New Drug Application. See § 355(j)(2)(A)(vii)(IV). Taking this last-mentioned route (called the "paragraph IV" route), automatically counts as patent infringement, see 35 U.S.C. § 271(e)(2)(A) (2006 ed., Supp. V), and often "means provoking litigation." *Caraco, supra,* at ––––, 132 S.Ct., at 1677. If the brand-name patentee brings an infringement suit within 45 days, the FDA then must withhold approving the generic, usually for a 30–month period, while the parties litigate patent validity (or infringement) in court. If the courts decide the matter within that period, the FDA follows that determination; if they do not, the FDA may go forward and give approval to market the generic product. See 21 U.S.C. § 355(j)(5)(B)(iii).

Fourth, Hatch–Waxman provides a special incentive for a generic to be the first to file an Abbreviated New Drug Application ****2229** taking the paragraph IV route. That applicant will enjoy a period of 180 days of exclusivity (from the first commercial marketing of its drug). See § 355(j)(5)(B)(iv) (establishing exclusivity period). During that period of exclusivity ***144** no other generic can compete with the brand-name drug. If the first-to-file generic manufacturer can overcome any patent obstacle and bring the generic to market, this 180–day period of exclusivity can prove valuable, possibly "worth several hundred million dollars." Hemphill, Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, 81 N.Y.U. L.Rev. 1553, 1579 (2006). Indeed, the Generic Pharmaceutical Association said in 2006 that the " 'vast majority of potential profits for a generic drug manufacturer materialize during the 180–day exclusivity period.' " Brief for Petitioner 6 (quoting statement). The 180–day exclusivity period, however, can belong only to the first generic to file. Should that first-to-file generic forfeit the exclusivity right in one of the ways specified by statute, no other generic can obtain it. See § 355(j)(5)(D).

B

1

In 1999, Solvay Pharmaceuticals, a respondent here, filed a New Drug Application for a brand-name drug called AndroGel. The FDA approved the application in 2000. In 2003, Solvay obtained a relevant patent and disclosed that fact to the FDA, 677 F.3d, at 1308, as Hatch–Waxman requires. See § 355(c)(2) (requiring, in addition, that FDA must publish new patent information upon submission).

Later the same year another respondent, Actavis, Inc. (then known as Watson Pharmaceuticals), filed an Abbreviated New Drug Application for a generic drug modeled after AndroGel. Subsequently, Paddock Laboratories, also a respondent, separately filed an Abbreviated New Drug Application for its own generic product. Both Actavis and Paddock certified under paragraph IV that Solvay's listed patent was invalid and their drugs did not infringe it. A fourth manufacturer, Par Pharmaceutical, likewise a respondent, did not file an application of its own but joined forces with Paddock, agreeing to share the patent litigation costs in return ***145** for a share of profits if Paddock obtained approval for its generic drug.

Solvay initiated paragraph IV patent litigation against Actavis and Paddock. Thirty months later the FDA approved Actavis' first-to-file generic product, but, in 2006, the patent-litigation parties all settled. Under the terms of the settlement Actavis agreed that it would not bring its generic to market until August 31, 2015, 65 months before Solvay's patent expired (unless someone else marketed a generic sooner). Actavis also agreed to promote AndroGel to urologists. The other generic manufacturers made roughly similar promises. And Solvay agreed to pay millions of dollars to each generic—$12 million in total to Paddock; $60 million in total to Par; and an estimated $19–$30 million annually, for nine years, to Actavis. See App. 46, 49–50, Complaint ¶¶ 66, 77. The companies described these payments as compensation for other services the generics promised to perform, but the FTC contends the other services had little value. According to the FTC the true point of the payments was to compensate the generics for agreeing not to compete against AndroGel until 2015. See *id*., at 50–53, Complaint ¶¶ 81–85.

2

On January 29, 2009, the FTC filed this lawsuit against all the settling parties, namely, Solvay, Actavis, Paddock, and Par. The FTC's complaint (as since amended) ****2230** alleged that respondents violated § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by unlawfully agreeing "to share in Solvay's monopoly profits, abandon their patent challenges, and refrain from launching their low-cost generic products to compete with AndroGel for nine years." App. 29, Complaint ¶ 5. See generally *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 454, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) (Section 5 "encompass[es] ... practices that violate the Sherman Act and the other antitrust laws"). The District Court held that these allegations did not set forth an antitrust law violation. ***146** *In re Androgel Antitrust Litigation (No. II),* 687 F.Supp.2d 1371, 1379 (N.D.Ga.2010). It accordingly dismissed the FTC's complaint. The FTC appealed.

The Court of Appeals for the Eleventh Circuit affirmed the District Court. It wrote that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." 677 F.3d, at 1312. The court recognized that "antitrust laws typically prohibit agreements where one company pays a potential competitor not to enter the market." *Id.,* at 1307 (citing *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.,* 344 F.3d 1294, 1304 (C.A.11 2003)). See also *Palmer,* 498 U.S., at 50, 111 S.Ct. 401 (agreement to divide territorial markets held "unlawful on its face"). But, the court found that "reverse payment settlements of patent litigation presen[t] atypical cases because one of the parties owns a patent." 677 F.3d, at 1307 (internal quotation marks and second alteration omitted). Patent holders have a "lawful right to exclude others from the market," *ibid.* (internal quotation marks omitted); thus a patent "conveys the right to cripple competition." *Id.,* at 1310 (internal quotation marks omitted). The court recognized that, if the parties to this sort of case do not settle, a court might declare the patent invalid. *Id.,* at 1305. But, in light of the public policy favoring settlement of disputes (among other considerations) it held that the courts could not require the parties to continue to litigate in order to avoid antitrust liability. *Id.,* at 1313–1314.

The FTC sought certiorari. Because different courts have reached different conclusions about the application of the antitrust laws to Hatch–Waxman–related patent settlements, we granted the FTC's petition. Compare, *e.g., id.,* at 1312 (case below) (settlements generally "immune from antitrust attack"); *In re Ciprofloxacin Hydrochloride Antitrust Litigation,* 544 F.3d 1323, 1332–1337 (C.A.Fed.2008) ***147** (similar); *In re Tamoxifen Citrate Antitrust Litigation,* 466 F.3d 187, 212–213 (C.A.2 2006) (similar), with *In re K–Dur Antitrust Litigation,* 686 F.3d 197, 214–218 (C.A.3 2012) (settlements presumptively unlawful).

II

A

Solvay's patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors. And we are willing to take this fact as evidence that the agreement's "anticompetitive effects fall within the scope of the exclusionary potential of the patent." 677 F.3d, at 1312. But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack.

For one thing, to refer, as the Circuit referred, simply to what the holder of a valid patent could do does not by itself ****2231** answer the antitrust question. The patent here may or may not be valid, and may or may not be infringed. "[A] *valid* patent excludes all except its owner from the use of the protected process or product," *United States v. Line Material Co.,* 333 U.S. 287, 308, 68 S.Ct. 550, 92 L.Ed. 701 (1948) (emphasis added). And that exclusion may permit the patent owner to charge a higher-than-competitive price for the patented product. But an *invalidated* patent carries with it no such right. And even a valid patent confers no right to exclude products or processes that do not actually infringe. The paragraph IV litigation in this case put the patent's validity at issue, as well as its actual preclusive scope. The parties' settlement ended that litigation. The FTC alleges that in substance, the plaintiff agreed to pay the defendants many millions of dollars to stay out of its market, even though the defendants did not have any claim that the plaintiff was liable to them for damages. That form of settlement is unusual. And, for ***148** reasons discussed in Part II–B, *infra,* there is reason for concern that settlements taking this form tend to have significant adverse effects on competition.

Given these factors, it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well. And indeed, contrary to the Circuit's view that the only pertinent question is whether "the settlement agreement ... fall[s] within" the legitimate "scope" of the patent's "exclusionary potential," 677 F.3d, at 1309, 1312, this Court has indicated that patent and antitrust policies are both relevant in determining the "scope of the patent monopoly"—and consequently antitrust law immunity—that is conferred by a patent.

Thus, the Court in *Line Material* explained that "the improper use of [a patent] monopoly," is "invalid" under the antitrust laws and resolved the antitrust question in that case by seeking an accommodation "between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act." 333 U.S., at 310, 68 S.Ct. 550. To strike that balance, the Court asked questions such as whether "the patent statute specifically gives a right" to restrain competition in the manner challenged; and whether "competition is impeded to a greater degree" by the restraint at issue than other restraints previously approved as reasonable. *Id.,* at 311, 68 S.Ct. 550. See also *United States v. United States Gypsum Co.,* 333 U.S. 364, 390–391, 68 S.Ct. 525, 92 L.Ed. 746 (1948) (courts must "balance the privileges of [the patent holder] and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize"); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 174, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965) ("[E]nforcement of a patent procured by fraud" may violate the Sherman Act). In short, rather than measure the length or amount of a restriction solely against the length of the patent's term or ***149** its earning potential, as the Court of Appeals apparently did here, this Court answered the antitrust question by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents. See Part II–B, *infra*. Whether a particular restraint lies "beyond the limits of the patent monopoly" is a *conclusion* that flows from that analysis and not, as THE CHIEF JUSTICE suggests, ****2232** its starting point. *Post,* at 2239, 2241 – 2242 (dissenting opinion).

For another thing, this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws. In *United States v. Singer Mfg. Co.,* 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963), for example, two sewing machine companies possessed competing patent claims; a third company sought a patent under circumstances where doing so might lead to the disclosure of information that would invalidate the other two firms' patents. All three firms settled their patent-related disagreements while assigning the broadest claims to the firm best able to enforce the patent against yet other potential competitors. *Id.,* at 190–192, 83 S.Ct. 1773. The Court did not examine whether, on the assumption that all three patents were valid, patent law would have allowed the patents' holders to do the same. Rather, emphasizing that the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage," *id.,* at 197, 83 S.Ct. 1773, it held that the agreements, although settling patent disputes, violated the antitrust laws. *Id.,* at 195, 197, 83 S.Ct. 1773. And that, in important part, was because "the public interest in granting patent monopolies" exists only to the extent that "the public is given a novel and useful invention" in "consideration for its grant." *Id.,* at 199, 83 S.Ct. 1773 (White, J., concurring). See also *United States v. New Wrinkle, Inc.,* 342 U.S. 371, 378, 72 S.Ct. 350, 96 L.Ed. 417 (1952) (applying antitrust scrutiny to patent settlement); *Standard Oil Co. (Indiana) v. United States,* 283 U.S. 163, 51 S.Ct. 421, 75 L.Ed. 926 (1931) (same).

***150** Similarly, both within the settlement context and without, the Court has struck down overly restrictive patent licensing agreements—irrespective of whether those agreements produced supra-patent-permitted revenues. We concede that in *United States v. General Elec. Co.,* 272 U.S. 476, 489, 47 S.Ct. 192, 71 L.Ed. 362 (1926), the Court permitted a single patentee to grant to a single licensee a license containing a minimum resale price requirement. But in *Line Material, supra,* at 308, 310–311, 68 S.Ct. 550, the Court held that the antitrust laws forbid a group of patentees, each owning one or more patents, to cross-license each other, and, in doing so, to insist that each licensee maintain retail prices set collectively by the patent holders. The Court was willing to presume that the single-patentee practice approved in *General Electric* was a "reasonable restraint" that "accords with the patent monopoly granted by the patent law," 333 U.S., at 312, 68 S.Ct. 550, but declined to extend that conclusion to multiple-patentee agreements: "As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly." *Ibid.* In *New Wrinkle,* 342 U.S., at 378, 72 S.Ct. 350, the Court held roughly the same, this time in respect to a similar arrangement in settlement of a litigation between two patentees, each of which contended that its own patent gave it the exclusive right to control production. That one or the other company (we may presume) was right about its patent did not lead the Court to confer antitrust immunity. Far from it, the agreement was found to violate the Sherman Act. *Id.,* at 380, 72 S.Ct. 350.

Finally in *Standard Oil Co. (Indiana),* the Court upheld cross-licensing agreements among patentees that settled actual and impending patent litigation, 283 U.S., at 168, 51 S.Ct. 421, which agreements set royalty rates to be charged third parties for a license to practice all the patents at issue (and which divided resulting revenues). ****2233** But, in doing so, Justice Brandeis, writing for the Court, warned that such an arrangement would have violated the Sherman Act had the patent ***151** holders thereby "dominate [d]" the industry and "curtail[ed] the manufacture and supply of an unpatented product." *Id.,* at 174, 51 S.Ct. 421. These cases do not simply ask whether a hypothetically valid patent's holder would be able to charge, *e.g.,* the high prices that the challenged patent-related term allowed. Rather, they seek to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the antitrust law policy strongly favoring competition.

Thus, contrary to the dissent's suggestion, *post,* at 2239 – 2241, there is nothing novel about our approach. What *does* appear novel are the dissent's suggestions that a patent holder may simply "pa[y] a competitor to respect its patent" and quit its patent invalidity or noninfringement claim without any antitrust scrutiny whatever, *post,* at 2239, and that "such settlements ... are a well-known feature of intellectual property litigation," *post,* at 2243. Closer examination casts doubt on these claims. The dissent does not identify any patent statute that it understands to grant such a right to a patentee, whether expressly or by fair implication. It would be difficult to reconcile the proposed right with the patent-related policy of eliminating unwarranted patent grants so the public will not "continually be required to pay tribute to would-be monopolists without need or justification." *Lear, Inc. v. Adkins,* 395 U.S. 653, 670, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969). And the authorities cited for this proposition (none from this Court, and none an antitrust case) are not on point. Some of them say that when Company A sues Company B for patent infringement and demands, say, $100 million in damages, it is not uncommon for B (the defendant) to pay A (the plaintiff) some amount less than the full demand as part of the settlement—$40 million, for example. See Schildkraut, Patent–Splitting Settlements and the Reverse Payment Fallacy, 71 Antitrust L.J. 1033, 1046 (2004) (suggesting that this hypothetical settlement includes "an implicit net payment" from A to B of $60 million —*i.e.,* the amount of the settlement discount). ***152** The cited authorities also indicate that if B has a counterclaim for damages against A, the original infringement plaintiff, A might end up paying B to settle B's counterclaim. Cf. *Metro–Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.,* 183 F.3d 10, 13 (C.A.1 1999) (describing trademark dispute and settlement). Insofar as the dissent urges that settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding. But the dissent appears also to suggest that reverse payment settlements—*e.g.,* in which A, the plaintiff, pays money to defendant B purely so B will give up the patent fight—should be viewed for antitrust purposes in the same light as these familiar settlement forms. See *post,* at 2242 – 2243. We cannot agree. In the traditional examples cited above, a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim. In reverse payment settlements, in contrast, a party with no claim for damages (something that is usually true of a paragraph IV litigation defendant) walks away with money simply so it will stay away from the patentee's market. That, we think, is something quite different. Cf. *Verizon*

Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004) ("[C]ollusion" is "the supreme evil of antitrust").

****2234** Finally, the Hatch–Waxman Act itself does not embody a statutory policy that supports the Eleventh Circuit's view. Rather, the general procompetitive thrust of the statute, its specific provisions facilitating challenges to a patent's validity, see Part I–A, *supra,* and its later-added provisions requiring parties to a patent dispute triggered by a paragraph IV filing to report settlement terms to the FTC and the Antitrust Division of the Department of Justice, all suggest the contrary. See §§ 1112–1113, 117 Stat. 2461–2462. Those interested in legislative history may also wish to examine the statements of individual Members of Congress condemning reverse payment settlements in advance of the 2003 amendments. ***153** See, *e.g.,* 148 Cong. Rec. 14437 (2002) (remarks of Sen. Hatch) ("It was and is very clear that the [Hatch–Waxman Act] was not designed to allow deals between brand and generic companies to delay competition"); 146 Cong. Rec. 18774 (2000) (remarks of Rep. Waxman) (introducing bill to deter companies from "strik[ing] collusive agreements to trade multimillion dollar payoffs by the brand company for delays in the introduction of lower cost, generic alternatives").

B

The Eleventh Circuit's conclusion finds some degree of support in a general legal policy favoring the settlement of disputes. 677 F.3d, at 1313–1314. See also *Schering–Plough Corp. v. FTC,* 402 F.3d 1056, 1074–1075 (C.A.11 2005) (same); *In re Tamoxifen Citrate,* 466 F.3d, at 202 (noting public's " 'strong interest in settlement' " of complex and expensive cases). The Circuit's related underlying practical concern consists of its fear that antitrust scrutiny of a reverse payment agreement would require the parties to litigate the validity of the patent in order to demonstrate what would have happened to competition in the absence of the settlement. Any such litigation will prove time consuming, complex, and expensive. The antitrust game, the Circuit may believe, would not be worth that litigation candle.

We recognize the value of settlements and the patent litigation problem. But we nonetheless conclude that this patent-related factor should not determine the result here. Rather, five sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.

First, the specific restraint at issue has the "potential for genuine adverse effects on competition." *Indiana Federation of Dentists,* 476 U.S., at 460–461, 106 S.Ct. 2009 (citing 7 Areeda ¶ 1511, at 429 (1986)). The payment in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation ***154** were to continue and the patent were held invalid or not infringed by the generic product. Suppose, for example, that the exclusive right to sell produces $50 million in supracompetitive profits per year for the patentee. And suppose further that the patent has 10 more years to run. Continued litigation, if it results in patent invalidation or a finding of noninfringement, could cost the patentee $500 million in lost revenues, a sum that then would flow in large part to consumers in the form of lower prices.

We concede that settlement on terms permitting the patent challenger to enter the market before the patent expires would also bring about competition, again to the consumer's benefit. But settlement on the terms said by the FTC to be at issue here —payment in return for staying out of the market—simply keeps prices at patentee-set levels, potentially producing the full patent-related $500 million monopoly return while dividing that return between ****2235** the challenged patentee and the patent challenger. The patentee and the challenger gain; the consumer loses. Indeed, there are indications that patentees sometimes pay a generic challenger a sum even larger than what the generic would gain in profits if it won the paragraph IV litigation and entered the market. See Hemphill, 81 N.Y.U. L.Rev., at 1581. See also Brief for 118 Law, Economics, and Business Professors et al. as *Amici Curiae* 25 (estimating that this is true of the settlement challenged here). The rationale behind a payment of this size cannot in every case be supported by traditional settlement considerations. The payment may instead provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market.

But, one might ask, as a practical matter would the parties be able to enter into such an anticompetitive agreement? Would not a high reverse payment signal to other potential challengers that the patentee lacks confidence in its patent, ***155** thereby provoking additional challenges, perhaps too many for the patentee to "buy off?" Two special features of Hatch–Waxman mean that the answer to this question is "not necessarily so." First, under Hatch–Waxman only the first challenger gains the special advantage of 180 days of an exclusive right to sell a generic version of the brand-name product. See Part I–A, *supra*. And as noted, that right has proved valuable—indeed, it can be worth several hundred million dollars. See Hemphill, *supra,* at 1579; Brief for Petitioner 6. Subsequent challengers cannot secure that exclusivity period, and thus stand to win significantly less than the first if they bring a successful paragraph IV challenge. That is, if subsequent litigation results in invalidation of the patent, or a ruling that the patent is not infringed, that litigation victory will free not just the challenger to compete, but all other potential competitors too (once they obtain FDA approval). The potential reward available to a subsequent challenger being significantly less, the patentee's payment to the initial challenger (in return for not pressing the patent challenge) will not necessarily provoke subsequent challenges. Second, a generic that files a paragraph IV after learning that the first filer has settled will (if sued by the brand-name) have to wait out a stay period of (roughly) 30 months before the FDA may approve its application, just as the first filer did. See 21 U.S.C. § 355(j)(5)(B)(iii). These features together mean that a reverse payment settlement with the first filer (or, as in this case, *all* of the initial filers) "removes from consideration the most motivated challenger, and the one closest to introducing competition." Hemphill, *supra,* at 1586. The dissent may doubt these provisions matter, *post,* at 2234 – 2236, but scholars in the field tell us that "where only one party owns a patent, it is virtually unheard of outside of pharmaceuticals for that party to pay an accused infringer to settle the lawsuit." 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 15.3, p. 15–45, n. 161 (2d ed. Supp. 2011). It may well be that Hatch–Waxman's ***156** unique regulatory framework, including the special advantage that the 180–day exclusivity period gives to first filers, does much to explain why in this context, but not others, the patentee's ordinary incentives to resist paying off challengers (*i.e.,* the fear of provoking myriad other challengers) appear to be more frequently overcome. See 12 Areeda ¶ 2046, at 341 (3d ed. 2010) (noting that these provisions, no doubt unintentionally, have created special incentives for collusion).

Second, these anticompetitive consequences will at least sometimes prove ****2236** unjustified. See 7 *id*., ¶ 1504, at 410–415 (3d ed. 2010); *California Dental Assn. v. FTC,* 526 U.S. 756, 786–787, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) (BREYER, J., concurring in part and dissenting in part). As the FTC admits, offsetting or redeeming virtues are sometimes present. Brief for Petitioner 37–39. The reverse payment, for example, may amount to no more than a rough approximation of the litigation expenses saved through the settlement. That payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item. There may be other justifications. Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about the anticompetitive consequences we mentioned above. But that possibility does not justify dismissing the FTC's complaint. An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason. See, *e.g., Indiana Federation of Dentists, supra,* at 459, 106 S.Ct. 2009; 7 Areeda ¶¶ 1504a–1504b, at 401–404 (3d ed. 2010).

***157** *Third,* where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice. See *id.,* ¶ 1503, at 392–393. At least, the "size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power"—namely, the power to charge prices higher than the competitive level. 12 *id.,* ¶ 2046, at 351. An important patent itself helps to assure such power. Neither is a firm without that power likely to pay "large sums" to induce "others to stay out of its market." *Ibid.* In any event, the Commission has referred to studies showing that reverse payment agreements are associated with the presence of higher-than-competitive profits—a strong indication of market power. See Brief for Petitioner 45.

Fourth, an antitrust action is likely to prove more feasible administratively than the Eleventh Circuit believed. The Circuit's holding does avoid the need to litigate the patent's validity (and also, any question of infringement). But to do so, it throws the baby out with the bath water, and there is no need to take that drastic step. That is because it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham, see 677 F.3d, at 1312). An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm. ***158** In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's ****2237** weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself. 12 Areeda¶ 2046, at 350–352.

Fifth, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. They may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point. Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement.

In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent; a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without the use of reverse payments. In our view, these considerations, taken together, outweigh the single strong consideration—the desirability of settlements—that led the Eleventh Circuit to provide near-automatic antitrust immunity to reverse payment settlements.

III

The FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing ***159** such agreements should proceed via a "quick look" approach, rather than applying a "rule of reason." See *California Dental,* 526 U.S., at 775, n. 12, 119 S.Ct. 1604 ("Quick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects"); 7 Areeda ¶ 1508, at 435–440 (3d ed. 2010). We decline to do so. In *California Dental,* we held (unanimously) that abandonment of the "rule of reason" in favor of presumptive rules (or a "quick-look" approach) is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." 526 U.S., at 770, 119 S.Ct. 1604; *id.,* at 781, 119 S.Ct. 1604 (BREYER, J., concurring in part and dissenting in part). We do not believe that reverse payment settlements, in the context we here discuss, meet this criterion.

That is because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.

To say this is not to require the courts to insist, contrary to what we have said, that the Commission need litigate the patent's validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible pro-defense theory. As a leading antitrust scholar has pointed out, " '[t]here is always something of a sliding scale in appraising reasonableness,' ****2238** " and as such " 'the quality of proof required should vary with the circumstances.' " *California Dental, supra,* at 780, 119 S.Ct. 1604 (quoting with approval 7 Areeda ¶ 1507, at 402 (1986)).

As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of ***160** antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. See 7 *id.,* ¶ 1508c, at 438–440. We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation. We reverse the judgment of the Eleventh Circuit. And we remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO took no part in the consideration or decision of this case.

Chief Justice ROBERTS, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Solvay Pharmaceuticals holds a patent. It sued two generic drug manufacturers that it alleged were infringing that patent. Those companies counterclaimed, contending the patent was invalid and that, in any event, their products did not infringe. The parties litigated for three years before settling on these terms: Solvay agreed to pay the generics millions of dollars and to allow them into the market five years before the patent was set to expire; in exchange, the generics agreed to provide certain services (help with marketing and manufacturing) and to honor Solvay's patent. The Federal Trade Commission alleges that such a settlement violates the antitrust laws. The question is how to assess that claim.

A patent carves out an exception to the applicability of antitrust laws. The correct approach should therefore be to ask whether the settlement gives Solvay monopoly power beyond what the patent already gave it. The Court, however, departs from this approach, and would instead use antitrust law's amorphous rule of reason to inquire into the anticompetitive effects of such settlements. This novel approach ***161** is without support in any statute, and will discourage the settlement of patent litigation. I respectfully dissent.

I

The point of antitrust law is to encourage competitive markets to promote consumer welfare. The point of patent law is to grant limited monopolies as a way of encouraging innovation. Thus, a patent grants "the right to exclude others from profiting by the patented invention." *Dawson Chemical Co. v. Rohm & Haas Co.,* 448 U.S. 176, 215, 100 S.Ct. 2601, 65 L.Ed.2d 696 (1980). In doing so it provides an exception to antitrust law, and the scope of the patent—*i.e.*, the rights conferred by the patent—forms the zone within which the patent holder may operate without facing antitrust liability.

This should go without saying, in part because we've said it so many times. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965) (" 'A patent ... is an exception to the general rule against monopolies' "); *United States v. Line Material Co.,* 333 U.S. 287, 300, 68 S.Ct. 550, 92 L.Ed. 701 (1948) ("[T]he precise terms of the grant define the limits of a patentee's monopoly and the area in which the patentee is freed from competition"); ****2239** *United States v. General Elec. Co.,* 272 U.S. 476, 485, 47 S.Ct. 192, 71 L.Ed. 362 (1926) ("It is only when ... [the patentee] steps out of the scope of his patent rights" that he comes within the operation of the Sherman Act); *Simpson v. Union Oil Co. of Cal.,* 377 U.S. 13, 24, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964) (similar). Thus, although it is *per se* unlawful to fix prices under antitrust law, we have long recognized that a patent holder is entitled to license a competitor to sell its product on the condition that the competitor charge a certain, fixed price. See, *e.g., General Elec. Co., supra,* at 488–490, 47 S.Ct. 192.

We have never held that it violates antitrust law for a competitor to refrain from challenging a patent. And by extension, we have long recognized that the settlement of patent litigation does not by itself violate the antitrust laws. ***162** *Standard Oil Co. (Indiana) v. United States,* 283 U.S. 163, 171, 51 S.Ct. 421, 75 L.Ed. 926 (1931) ("Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act"). Like most litigation, patent litigation is settled all the time, and such settlements—which can include agreements that clearly violate antitrust law, such as licenses that fix prices, or agreements among competitors to divide territory—do not ordinarily subject the litigants to antitrust liability. See 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 7.3, pp. 7–13 to 7–15 (2d ed. 2003) (hereinafter Hovenkamp).

The key, of course, is that the patent holder—when doing anything, including settling—must act within the scope of the patent. If its actions go beyond the monopoly powers conferred by the patent, we have held that such actions are subject to antitrust scrutiny. See, *e.g., United States v. Singer Mfg. Co.,* 374 U.S. 174, 196–197, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963). If its actions are within the scope of the patent, they are not subject to antitrust scrutiny, with two exceptions concededly not applicable here: (1) when the parties settle sham litigation, cf. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 60–61, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993); and (2) when the litigation involves a patent obtained through fraud on the Patent and Trademark Office. *Walker Process Equipment, supra,* at 177, 86 S.Ct. 347.

Thus, under our precedent, this is a fairly straight-forward case. Solvay paid a competitor to respect its patent—conduct which did not exceed the scope of its patent. No one alleges that there was sham litigation, or that Solvay's patent was obtained through fraud on the PTO. As in any settlement, Solvay gave its competitors something of value (money) and, in exchange, its competitors gave it something of value (dropping their legal claims). In doing so, they put an end to litigation that had been dragging on for three years. Ordinarily, we would think this a good thing.

***163** II

Today, however, the Court announces a new rule. It is willing to accept that Solvay's actions did not exceed the scope of its patent. *Ante,* at 2230 – 2231. But it does not agree that this is enough to "immunize the agreement from antitrust attack." *Ibid.* According to the majority, if a patent holder settles litigation by paying an alleged infringer a "large and unjustified" payment, in exchange for having the alleged infringer honor the patent, a court should employ the antitrust rule of reason to determine whether the settlement violates antitrust law. *Ante,* at 2236 – 2237.

The Court's justifications for this holding are unpersuasive. First, the majority explains that "the patent here may or may ****2240** not be valid, and may or may not be infringed." *Ante,* at 2231. Because there is "uncertainty" about whether the patent is actually valid, the Court says that any questions regarding the legality of the settlement should be "measur[ed]" by "procompetitive antitrust policies," rather than "patent law policy." *Ante,* at 2231. This simply states the conclusion. The difficulty with such an approach is that a patent holder acting within the scope of its patent has an obvious defense to any antitrust suit: that its patent allows it to engage in conduct that would otherwise violate the antitrust laws. But again, that's the whole point of a patent: to confer a limited monopoly. The problem, as the Court correctly recognizes, is that we're not quite certain if the patent is actually valid, or if the competitor is infringing it. But that is always the case, and is plainly a question of patent law.

The majority, however, would assess those patent law issues according to "antitrust policies." According to the majority, this is what the Court did in *Line Material*—*i.e.,* it "accommodat[ed]" antitrust principles and struck a "balance" between patent and antitrust law. *Ante,* at 2231. But the Court in *Line Material* did no such thing. Rather, it explained ***164** that it is "well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act *beyond the limits of the patent monopoly*." 333 U.S., at 308, 68 S.Ct. 550 (emphasis added). It then, in the very next sentence, stated that "[b]y aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act." *Ibid.* That second sentence follows only if such conduct —the aggregation of multiple patents—goes "beyond the limits of the patent monopoly," which is precisely what the Court concluded. See *id.,* at 312, 68 S.Ct. 550 ("There is *no suggestion in the patent statutes* of authority to combine with other patent owners to fix prices on articles covered by the respective patents" (emphasis added)). The Court stressed, over and over, that a patent holder does not violate the antitrust laws when it acts within the scope of its patent. See *id.,* at 305, 68 S.Ct. 550 ("Within the limits of the patentee's rights under his patent, monopoly of the process or product by him is authorized by the patent statutes"); *id.,* at 310, 68 S.Ct. 550 ("price limitations on patented devices *beyond the limits of a patent monopoly* violate the Sherman Act" (emphasis added)).

The majority suggests that "[w]hether a particular restraint lies 'beyond the limits of the patent monopoly' is a *conclusion* that flows from" applying traditional antitrust principles. *Ante,* at 2231. It seems to have in mind a regime where courts ignore the patent, and simply conduct an antitrust analysis of the settlement without regard to the validity of the patent. But a patent holder acting within the scope of its patent does not engage in any unlawful anticompetitive behavior; it is simply exercising the monopoly rights granted to it by the Government. Its behavior would be unlawful only if its patent were invalid or not infringed. And the scope of the patent—i.e., what rights are conferred by the *patent*—should be determined by reference to *patent law*. While it is conceivable to set up a legal system where you assess the validity of patents or questions of infringement ***165** by bringing an antitrust suit, neither the majority nor the Government suggests that Congress has done so.

Second, the majority contends that "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws." *Ante,* at 2232. For this carefully worded proposition, it cites *Singer Manufacturing*

Co., ****2241** *United States v. New Wrinkle, Inc.,* 342 U.S. 371, 72 S.Ct. 350, 96 L.Ed. 417 (1952), and *Standard Oil Co. (Indiana).* But each of those cases stands for the same, uncontroversial point: that when a patent holder acts *outside* the scope of its patent, it is no longer protected from antitrust scrutiny by the patent.

To begin, the majority's description of *Singer* is inaccurate. In *Singer,* several patent holders with competing claims entered into a settlement agreement in which they cross-licensed their patents to each other, and did so in order to disadvantage Japanese competition. See 374 U.S., at 194–195, 83 S.Ct. 1773 (finding that the agreement had "a common purpose to suppress the Japanese machine competition in the United States" (footnote omitted)). According to the majority, the Court in *Singer* "did not examine whether, on the assumption that all three patents were valid, patent law would have allowed the patents' holders to do the same." *Ante,* at 2232. Rather, the majority contends, *Singer* held that this agreement violated the anti-trust laws because "in important part ... 'the public interest in granting patent monopolies' exists only to the extent that 'the public is given a novel and useful invention' in 'consideration for its grant.' " *Ibid.* (quoting *Singer,* 374 U.S., at 199, 83 S.Ct. 1773 (White, J., concurring)). But the majority in *Singer* certainly *did* ask whether patent law permitted such an arrangement, concluding that it did not. See *id.,* at 196–197, 83 S.Ct. 1773 (reiterating that it "is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act *beyond the limits of the patent monopoly* " and holding that "those limitations have been exceeded in this case" (emphasis added; internal quotation marks omitted)); ***166** see also Hovenkamp § 7.2b, at 7–8, n. 15 (citing *Singer* as a quintessential case in which patent holders were subject to antitrust liability *because* their settlement agreement went beyond the scope of their patents and thus conferred monopoly power beyond what the patent lawfully authorized). Even Justice White's concurrence, on which the majority relies, emphasized that the conduct at issue in *Singer*—collusion between patent holders to exclude Japanese competition and to prevent disclosure of prior art—was not authorized by the patent laws. 374 U.S., at 197, 200, 83 S.Ct. 1773.

New Wrinkle is to the same effect. There, the Court explained that because "[p]rice control through cross-licensing [is] *barred as beyond the patent monopoly,*" an "arrangement ... made between patent holders to pool their patents and fix prices on the products for themselves and their licensees ... plainly violate[s] the Sherman Act." 342 U.S., at 379, 380, 72 S.Ct. 350 (emphasis added). As the Court further explained, a patent holder may not, " 'acting in concert with all members of an industry ... issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.' " *Id.,* at 379–380, 72 S.Ct. 350 (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 400, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). The majority here, however, ignores this discussion, and instead categorizes the case as "applying antitrust scrutiny to [a] patent settlement." *Ante,* at 2232.

Again, in *Standard Oil Co. (Indiana),* the parties settled claims regarding "competing patented processes for manufacturing an unpatented product," which threatened to create a monopoly over the unpatented product. 283 U.S., at 175, 51 S.Ct. 421. The Court explained that "an ****2242** exchange of licenses for the purpose of curtailing the ... supply of an unpatented product, is beyond the privileges conferred by the patents." *Id.,* at 174, 51 S.Ct. 421.

***167** The majority is therefore right to suggest that these "precedents make clear that patent-related settlement agreements can *sometimes* violate the antitrust laws." *Ante,* at 2232 (emphasis added). The key word is sometimes. And those some times are spelled out in our precedents. Those cases have made very clear that patent settlements—and for that matter, any agreements relating to patents—are subject to antitrust scrutiny if they confer benefits beyond the scope of the patent. This makes sense. A patent exempts its holder from the antitrust laws only insofar as the holder operates within the scope of the patent. When the holder steps outside the scope of the patent, he can no longer use the patent as his defense. The majority points to *no* case where a patent settlement was subject to antitrust scrutiny merely because the validity of the patent was uncertain. Not one. It is remarkable, and surely worth something, that in the 123 years since the Sherman Act was passed, we have never let antitrust law cross that Rubicon.

Next, the majority points to the "general procompetitive thrust" of the Hatch–Waxman Act, the fact that Hatch–Waxman "facilitat[es] challenges to a patent's validity," and its "provisions requiring parties to [such] patent dispute [s] ... to report settlement terms to the FTC and the Antitrust

Division of the Department of Justice." *Ante,* at 2234. The Hatch–Waxman Act surely seeks to encourage competition in the drug market. And, like every law, it accomplishes its ends through specific provisions. These provisions, for example, allow generic manufacturers to enter the market without undergoing a duplicative application process; they also grant a 180–day monopoly to the first qualifying generic to commercially market a competing product. See 21 U.S.C. §§ 355(j)(2)(A)(ii), (iv), 355(j)(5)(B)(iv). So yes, the point of these provisions is to encourage competition. But it should by now be trite—and unnecessary—to say that "no legislation pursues its purposes at all costs" and that "it frustrates rather than effectuates legislative intent simplistically ***168** to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States,* 480 U.S. 522, 525–526, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) (*per curiam*). It is especially disturbing here, where the Court discerns from specific provisions a very broad policy—a "general procompetitive thrust," in its words—and uses that policy to unsettle the established relationship between patent and antitrust law. *Ante,* at 2234. Indeed, for whatever it may be worth, Congress has repeatedly declined to enact legislation addressing the issue the Court takes on today. See Brief for Actavis, Inc. 57 (citing 11 such bills introduced in the House or Senate since 2006).

In addition, it is of no consequence that settlement terms must be reported to the FTC and the Department of Justice. Such a requirement does not increase the role of antitrust law in scrutinizing patent settlements. Rather, it ensures that such terms are scrutinized consistent with existing antitrust law. In other words, it ensures that the FTC and Antitrust Division can review the settlements to make sure that they do not confer monopoly power beyond the scope of the patent.

The majority suggests that "[a]pparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation." *Ante,* at 2227. This claim is not supported empirically by anything the majority cites, and ****2243** seems unlikely. The term "reverse payment agreement"—coined to create the impression that such settlements are unique—simply highlights the fact that the party suing ends up paying. But this is no anomaly, nor is it evidence of a nefarious plot; it simply results from the fact that the patent holder plaintiff is a defendant against an invalidity counterclaim—not a rare situation in intellectual property litigation. Whatever one might call them, such settlements —paying an alleged infringer to drop its invalidity claim— are a well-known feature of intellectual property litigation, and reflect an intuitive way to settle such disputes. ***169** See *Metro–Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.,* 183 F.3d 10, 13 (C.A.1 1999); see also Schildkraut, Patent–Splitting Settlements and the Reverse Payment Fallacy, 71 Antitrust L.J. 1033, 1033, 1046–1049 (2004); Brief for Actavis 54, n. 20 (citing examples). To the extent there are not scores and scores of these settlements to point to, this is because such settlements—outside the context of Hatch–Waxman—are private agreements that for obvious reasons are generally not appealed, nor publicly available.

The majority suggests that reverse-payment agreements are distinct because "a party with no claim for damages ... walks away with money simply so it will stay away from the patentee's market." *Ante,* at 2233. Again a distinction without a difference. While the alleged infringer may not be suing for the patent holder's *money,* it is suing for the right to use and market the (intellectual) property, which is worth money.

Finally, the majority complains that nothing in "any patent statute" gives patent-holders the right to settle when faced with allegations of invalidity. *Ante,* at 2233. But the right to settle generally accompanies the right to litigate in the first place; no one contends that drivers in an automobile accident may not settle their competing claims merely because no statute grants them that authority. The majority suggests that such a right makes it harder to "eliminat[e] unwarranted patent grants." *Ibid.* That may be so, but such a result—true of all patent settlements—is no reason to adjudicate questions of patent law under antitrust principles. Our cases establish that antitrust law has no business prying into a patent settlement so long as that settlement confers to the patent holder no monopoly power beyond what the patent itself conferred— unless, of course, the patent was invalid, but that again is a question of patent law, not antitrust law.

In sum, none of the Court's reasons supports its conclusion that a patent holder, when settling a claim that its patent is ***170** invalid, is not immunized by the fact that it is acting within the scope of its patent. And I fear the Court's attempt to limit its holding to the context of patent settlements under Hatch–Waxman will not long hold.

III

The majority's rule will discourage settlement of patent litigation. Simply put, there would be no incentive to settle if, immediately after settling, the parties would have to litigate the same issue—the question of patent validity—as part of a defense against an antitrust suit. In that suit, the alleged infringer would be in the especially awkward position of being for the patent after being against it.

This is unfortunate because patent litigation is particularly complex, and particularly costly. As one treatise noted, "[t]he median patent case that goes to trial costs each side $1.5 million in legal fees" alone. Hovenkamp § 7.1c, at 7–5, n. 6. One study found that the cost of litigation in this specific context—a generic challenging ****2244** a brand name pharmaceutical patent—was about $10 million per suit. See Herman, Note, The Stay Dilemma: Examining Brand and Generic Incentives for Delaying the Resolution of Pharmaceutical Patent Litigation, 111 Colum. L.Rev. 1788, 1795, n. 41 (2011) (citing M. Goodman, G. Nachman, & L. Chen, Morgan Stanley Equity Research, Quantifying the Impact from Authorized Generics 9 (2004)).

The Court acknowledges these problems but nonetheless offers "five sets of considerations" that it tells us overcome these concerns: (1) sometimes patent settlements will have " 'genuine adverse effects on competition' "; (2) "these anticompetitive consequences will at least sometimes prove unjustified"; (3) "where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice"; (4) "it is normally not necessary to litigate patent validity to answer the antitrust question" because "[a]n unexplained ***171** large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival," and using a "payment ... to prevent *the risk* of competition ... constitutes the relevant anticompetitive harm"; and (5) parties may still "settle in other ways" such as "by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point." *Ante,* at 2237 (emphasis added).

Almost all of these are unresponsive to the basic problem that settling a patent claim *cannot possibly* impose unlawful anticompetitive harm if the patent holder is acting within the scope of a valid patent and therefore permitted to do precisely what the antitrust suit claims is unlawful. This means that in any such antitrust suit, the defendant (patent holder) will want to use the validity of his patent as a defense—in other words, he'll want to say "I can do this because I have a valid patent that lets me do this." I therefore don't see how the majority can conclude that it won't normally be "necessary to litigate patent validity to answer the antitrust question," *ante,* at 2236, unless it means to suggest that the defendant (patent holder) cannot raise his patent as a defense in an antitrust suit. But depriving him of such a defense—if that's what the majority means to do—defeats the point of the patent, which is to confer a *lawful* monopoly on its holder.

The majority seems to think that *even if* the patent is valid, a patent holder violates the antitrust laws merely because the settlement took away some chance that his patent would be declared invalid by a court. See *ante,* at 2236 ("payment ... to prevent *the risk* of competition ... constitutes the relevant anticompetitive harm" (emphasis added)). This is flawed for several reasons.

First, a patent is either valid or invalid. The parties of course don't know the answer with certainty at the outset of litigation; hence the litigation. But the same is true of any ***172** hard legal question that is yet to be adjudicated. Just because people don't know the answer doesn't mean there is no answer until a court declares one. Yet the majority would impose antitrust liability based on the parties' subjective uncertainty about that legal conclusion.

The Court does so on the assumption that offering a "large" sum is reliable evidence that the patent holder has serious doubts about the patent. Not true. A patent holder may be 95% sure about the validity of its patent, but particularly risk averse or litigation averse, and willing to pay a good deal of money to rid itself of the 5% chance of a finding of invalidity. What is actually motivating a patent holder ****2245** is apparently a question district courts will have to resolve on a case-by-case basis. The task of trying to discern whether a patent holder is motivated by uncertainty about its patent, or other legitimate factors like risk aversion, will be made all the more difficult by the fact that much of the evidence about the party's motivation may be embedded in legal advice from its attorney, which would presumably be shielded from discovery.

Second, the majority's position leads to absurd results. Let's say in 2005, a patent holder sues a competitor for infringement and faces a counterclaim that its patent is invalid. The patent holder determines that the risk of losing on the question of validity is low, but after a year of litigating, grows increasingly risk averse, tired of litigation, and concerned about the company's image, so it pays the competitor a "large" payment, *ante,* at 2236, in exchange for having the competitor honor its patent. Then let's say in 2006, a different competitor, inspired by the first competitor's success, sues the patent holder and seeks a similar payment. The patent holder, recognizing that this dynamic is unsustainable, litigates this suit to conclusion, all the way to the Supreme Court, which unanimously decides the patent was valid. According to the majority, the first settlement would violate the antitrust laws even though the patent was ultimately ***173** declared valid, because that first settlement took away some chance that the patent would be invalidated in the first go around. Under this approach, a patent holder may be found liable under antitrust law for doing what its perfectly valid patent allowed it to do in the first place; its sin was to settle, rather than prove the correctness of its position by litigating until the bitter end.

Third, this logic—that taking away any *chance* that a patent will be invalidated is itself an antitrust problem—cannot possibly be limited to reverse-payment agreements, or those that are "large." *Ibid.* The Government's brief acknowledges as much, suggesting that if antitrust scrutiny is invited for such cash payments, it may also be required for "other consideration" and "alternative arrangements." Brief for Petitioner 36, n. 7. For example, when a patent holder licenses its product to a licensee at a fixed monopoly price, surely it takes away some chance that its patent will be challenged by that licensee. According to the majority's reasoning, that's an antitrust problem that must be analyzed under the rule of reason. But see *General Elec. Co.,* 272 U.S., at 488, 47 S.Ct. 192 (holding that a patent holder may license its invention at a fixed price). Indeed, the Court's own solution—that patent holders should negotiate to allow generics into the market sooner, rather than paying them money—also takes away some chance that the generic would have litigated until the patent was invalidated.

Thus, although the question posed by this case is fundamentally a question of patent law—*i.e*., whether Solvay's patent was valid and therefore permitted Solvay to pay competitors to honor the scope of its patent—the majority declares that such questions should henceforth be scrutinized by antitrust law's unruly rule of reason. Good luck to the district courts that must, when faced with a patent settlement, weigh the "likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances." *Ante,* at 2231; ***174** but see*Pacific Bell Telephone Co. v. Linkline Communications, Inc.,* 555 U.S. 438, 452, 129 S.Ct. 1109, 172 L.Ed.2d 836 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust law").

IV

The majority invokes "procompetitive antitrust policies," *ante,* at 2231, but misses ****2246** the basic point that patent laws promote consumer interests in a different way, by providing protection against competition. As one treatise explains:

> "The purpose of the rule of reason is to determine whether, on balance, a practice is reasonably likely to be anticompetitive or competitively harmless—that is, whether it yields lower or higher marketwide output. By contrast, patent policy encompasses a set of judgments about the proper tradeoff between competition and the incentive to innovate over the *long* run. Antitrust's rule of reason was not designed for such judgments and is not adept at making them." Hovenkamp § 7.3, at 7–13 (footnote omitted).

The majority recognizes that "a high reverse payment" may "signal to other potential challengers that the patentee lacks confidence in its patent, thereby provoking additional challenges." *Ante,* at 2235. It brushes this off, however, because of two features of Hatch–Waxman that make it " 'not necessarily so.' " *Ibid.* First, it points out that the first challenger gets a 180–day exclusive period to market a generic version of the brand name drug, and that subsequent challengers cannot secure that exclusivity period—meaning when the patent holder buys off the first challenger, it has bought off its most motivated competitor. There are two problems with this argument. First, according to the Food and Drug Administration, all manufacturers who file on the first day are considered "first applicants" who share the exclusivity period. Thus, if ten generics file an application to market a generic drug on the first day, all will ***175** be considered "first applicants." See21 U.S.C. § 355(j)(5)(B)(iv)(II)(bb); see also FDA, Guidance for Industry: 180–Day Exclusivity When Multiple ANDAs Are Submitted on the Same Day 4 (July 2003). This is not an unusual occurrence. See Brief for Generic Pharmaceutical Association as *Amicus Curiae* 23–24 (citing FTC data indicating that some drugs "have been subject to as many as *sixteen* first-day" generic applications; that in 2005, the average number of first-day applications per drug was 11; and that between 2002 and 2008, the yearly average never dropped below three first-day applications per drug).

Second, and more fundamentally, the 180 days of exclusivity simply provides *more* incentive for generic challenges. Even if a subsequent generic would not be entitled to this additional incentive, it will have as much or nearly as much incentive to challenge the patent as a potential challenger would in any other context outside of Hatch–Waxman, where there is no 180–day exclusivity period. And a patent holder who gives away notably large sums of money because it is, as the majority surmises, concerned about the strength of its patent, would be putting blood in water where sharks are always near.

The majority also points to the fact that, under Hatch–Waxman, the FDA is enjoined from approving a generic's application to market a drug for 30 months if the brand name sues the generic for patent infringement within 45 days of that application being filed. *Ante,* at 2235 (citing 21 U.S.C. § 355(j)(5)(B)(iii)). According to the majority, this provision will chill subsequent generics from challenging the patent (because they will have to wait 30 months before receiving FDA approval to market their drug). But this overlooks an important feature of the law: the FDA may approve the application before the 30 months are up "if before the expiration of [the 30 months,] the district court decides that the patent is invalid or not infringed." § 355(j)(5)(B)(iii)(I). And even if the FDA did not have to wait 30 months, it ***176** is far ****2247** from clear that a generic would want to market a drug prior to obtaining a judgment of invalidity or noninfringement. Doing so may expose it to ruinous liability for infringement.

The irony of all this is that the majority's decision may very well discourage generics from challenging pharmaceutical patents in the first place. Patent litigation is costly, time consuming, and uncertain. See *Cybor Corp. v. FAS Techs., Inc.,* 138 F.3d 1448, 1476, n. 4 (C.A.Fed.1998) (opinion of Rader, J.) (en banc) (discussing study showing that the Federal Circuit wholly or partially reversed in almost 40 percent of claim construction appeals in a 30–month period); Brief for Generic Pharmaceutical Association as *Amicus Curiae* 16 (citing a 2010 study analyzing the prior decade's cases and showing that generics prevailed in 82 cases and lost in 89 cases). Generics "enter this risky terrain only after careful analysis of the potential gains if they prevail and the potential exposure if they lose." *Id*., at 19. Taking the prospect of settlements off the table—or limiting settlements to an earlier entry date for the generic, which may still be many years in the future—puts a damper on the generic's expected value going into litigation, and decreases its incentive to sue in the first place. The majority assures us, with no support, that everything will be okay because the parties can settle by simply negotiating an earlier entry date for the generic drug manufacturer, rather than settling with money. *Ante,* at 2246 – 2247. But it's a matter of common sense, confirmed by experience, that parties are more likely to settle when they have a broader set of valuable things to trade. See Brief for Mediation and Negotiation Professionals as *Amici Curiae* 6–8.

V

The majority today departs from the settled approach separating patent and antitrust law, weakens the protections afforded to innovators by patents, frustrates the public policy in favor of settling, and likely undermines the very policy it seeks to promote by forcing generics who step into the litigation ***177** ring to do so without the prospect of cash settlements. I would keep things as they were and not subject basic questions of patent law to an unbounded inquiry under antitrust law, with its treble damages and famously burdensome discovery. See 15 U.S.C. § 15; *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 558–559, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). I respectfully dissent.

All Citations

570 U.S. 136, 133 S.Ct. 2223, 186 L.Ed.2d 343, 81 USLW 4455, 2013-1 Trade Cases P 78,419, 106 U.S.P.Q.2d 1953, 13 Cal. Daily Op. Serv. 6152, 2013 Daily Journal D.A.R. 7655, 24 Fla. L. Weekly Fed. S 300

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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93 S.Ct. 1096
Supreme Court of the United States

UNITED STATES, Appellant,
v.
FALSTAFF BREWING CORPORATION et al.

No. 71—873.
|
Argued Oct. 17, 1972.
|
Decided Feb. 28, 1973.

Synopsis
The Government brought action under the Clayton Act to enjoin acquisition. The United States District Court for the District of Rhode Island rendered judgment for defendant, 332 F.Supp. 970, and the Government appealed. The Supreme Court, Mr. Justice White, held that fact that brewer and its management had no intent to enter New England market de novo, rather than by acquisition, and would not have done so did not preclude consideration of such brewer as a 'potential competitor' such that its acquisition of an existing major local brewery in said market would violate section of the Clayton Act which forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly; separate consideration should have been given to whether brewer was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market.

Reversed and remanded.

Mr. Justice Douglas concurred in part and filed opinion; Mr. Justice Marshall concurred in the result and filed opinion.

Mr. Justice Rehnquist, with whom Mr. Justice Stewart concurred, dissented and filed opinion.

Mr. Justice Brennan took no part in the decision; Mr. Justice Powell took no part in the consideration or decision.

Procedural Posture(s): On Appeal.

****1097** ***526** Syllabus [*]

Respondent Falstaff, the Nation's fourth largest beer producer, which was desirous of achieving national status, agreed to acquire the largest seller of beer in the New England market rather than enter de novo. The District Court dismissed the Government's resultant suit charging violation of s 7 of the Clayton Act, finding that entry by acquisition, which the court found was the only way that respondent intended to penetrate the New England market, would not result in a substantial lessening of competition. Held: The District Court erred in assuming that, because respondent would not have entered the market de novo, it could not be considered a potential competitor. The court should have considered whether respondent was a potential competitor in the sense that its position on the edge of the market exerted a beneficial infuence on the market's competitive conditions. Pp. 1100—1103.

332 F.Supp. 970, reversed and remanded.

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Matthew W. Goring, Providence, R.I., for appellees.

Opinion

***527** Mr. Justice WHITE, delivered the opinion of the Court.

****1098** Alleging that Falstaff Brewing Corp.'s acquisition of the Narragansett Brewing Co., in 1965 violated s 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. s 18, [1] the United States brought this antitrust suit under the theory that potential competition in the New England beer market may be substantially lessened by the acquisition. The District Court held to the contrary, 332 F.Supp. 970 (1971), and we noted probable jurisdiction [2] to determine whether the trial court applied an erroneous legal standard in so deciding, 405 U.S. 952, 92 S.Ct. 1175, 31 L.Ed.2d 229 (1972). We remand to the District Court for a proper assessment of Falstaff as a potential competitor.

As stipulated by the parties, the relevant product market is the production and sale of beer, and the six New England States [3] compose the geographic market. While beer sales in New England increased approximately 9.5% in the four years preceding the acquisition, the eight largest sellers increased their share of these sales from approximately 74% to 81.2%.

In 1960, approximately 50% of the sales were made by the four largest sellers; by 1964, their share of the market was 54%; and ***528** by 1965, the year of acquisition, their share was 61.3%. The number of brewers operating plants in the geographic market decreased from 32 in 1935, to 11 in 1957, to six in 1964.[4]

Of the Nation's 10 largest brewers in 1964, only Falstaff and two others did not sell beer in New England; Falstaff was the largest of the three and had the closest brewery.[5] In relation to the New England market, Falstaff sold its product in western Ohio, to the west and in Washington, D.C., to the south.

The acquired firm, Narragansett, was the largest seller of beer in New England at the time of its acquisition, with approximately 20% of the market; had been the largest seller for the five preceding years; had constantly expanded its brewery capacity between 1960 and 1965; and had acquired either the assets or the trademarks of several smaller brewers in and around the geographic market.

The fourth largest producer of beer in the United States at the time of acquisition, Falstaff was a regional brewer[6] with 5.9% of the Nation's production in 1964, having grown steadily since its beginning as a brewer in 1933 through acquisition and expansion of other breweries. As of January 1965, Falstaff sold beer in 32 States, but did not sell in the Northeast, an area composed of New England and States such as New York and New Jersey; the area ****1099** being the highest beer consumption region in the ***529** United States. Between 1955 and 1966, the company's net sales and net income almost doubled, and in 1964 it was planning a 10-year, $35 million program to expand its existing plants.

Falstaff met increasingly strong competition in the 1960's from four brewers who sold in all of the significant markets. National brewers possess competitive advantages since they are able to advertise on a nationwide basis, their beers have greater prestige than regional or local beers, and they are less affected by the weather or labor problems in a particular region. Thus Falstaff concluded that it must convert from ‘regional’ to ‘national’ status, if it was to compete effectively with the national producers.[7] For several years Falstaff publicly expressed its desire for national distribution[8] and after making several efforts in the early 1960's to enter the Northeast by acquisition, agreed to acquire Narragansett in 1965.

Before the acquisition was accomplished, the United States brought suit[9] alleging that the acquisition would violate s 7 because its effect may be to substantially lessen competition in the production and sale of beer in the New England market. This contention was based on two grounds: because Falstaff was a potential entrant ***530** and because the acquisition eliminated competition that would have existed had Falstaff entered the market de novo or by acquisition and expansion of a smaller firm, a so-called ‘toe-hold’ acquisition.[10] The acquisition was completed after the Government's motions for injunctive relief were denied, and Falstaff agreed to operate Narragansett as a separate subsidiary until otherwise ordered by the court.

After a trial on the merits, the District Court found that the geographic market was highly competitive; that Falstaff was desirous of becoming a national brewer by entering the Northeast; that its management was committed against de novo entry; and that competition had not diminished since the acquisition.[11] The District Court then held:
‘The Government's contentions that Falstaff at the time of said acquisition was a potential entrant into said New England market, and that said acquisition deprived the New England market of additional competition are not supported by the evidence. On the contrary, the credible evidence establishes beyond a reasonable doubt that the executive management of Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett. Said executives had carefully considered such possible alternatives as (1) acquisition of a small brewery on the east coast, (2) the shipping of beer from its ***531** existing breweries, the nearest of which was located in Ft. Wayne, ****1100** Indiana, (3) the building of a new brewery on the east coast and other possible alternatives, but concluded that none of said alternatives would have effected a reasonable probability of a profitable entry for it in said New England market. In my considered opinion the plaintiff has failed to establish by a fair preponderance of the evidence that Falstaff was a potential competitor in said New England market at the time it acquired Narragansett. The credible evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition. Consequently it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein.’ 332 F.Supp., at 972.

Also finding that the Government had failed to establish that the acquisition would result in a substantial lessening of competition, the District Court entered judgment for Falstaff and dismissed the complaint.

I

Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly. The section proscribes many mergers between competitors in a market, United States v. Continental Can Co., 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); it also bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of Competition, FTC v. Procter & Gamble Co., 386 U.S. 568, 578—580, 87 S.Ct. 1224, 1230—1231, 18 L.Ed.2d 303 (1967). Suspect also is the acquisition by a company not competing in the market but so situated ***532** as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate s 7 because the entry eliminates a potential competitor exercising present influence on the market. Id., 386 U.S., at 580—581, 87 S.Ct., at 1231—1232; United States v. Penn-Olin Chemical Co., 378 U.S. 158, 173—174, 84 S.Ct. 1710, 1718—1719, 12 L.Ed.2d 775 (1964). As the Court stated in United States v. Penn-Olin Chemical Co., supra, at 174, 84 S.Ct., at 1719, 'The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.'

In the case before us, Falstaff was not a competitor in the New England market, nor is it contended that its merger with Narragansett represented an entry by a dominant market force. It was urged, however, that Falstaff was a potential competitor so situated that its entry by merger rather than de novo violated s 7. The District Court, however, relying heavily on testimony of Falstaff officers, concluded that the company had no intent to enter the New England market except through acquisition and that it therefore could not be considered a potential competitor in that market. Having put aside Falstaff as a potential de novo competitor, it followed for the District Court that entry by a merger would not adversely affect competition in New England.

The District Court erred as a matter of law. The error lay in the assumption that because Falstaff, as a matter of fact, would never have entered the market de novo, it could in no sense be considered a potential competitor. More specifically, the District Court failed to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned ***533** on the edge of the market that it exerted ****1101** beneficial influence on competitive conditions in that market.

A similar error was committed by the Court of Appeals in FTC v. Procter & Gamble Co., supra, where one of the reasons for the Commission's finding the acquisition in violation of s 7 was that the merger eliminated Procter as a potential entrant, not because Procter would have entered independently, but because the acquisition eliminated the procompetitive effect Procter exerted from the fringe of the market. Id., 386 U.S., at 575, 87 S.Ct., at 1228—1229. The Court of Appeals struck down this finding because there was no evidence that Procter ever intended de novo entry, but we held the Commission's finding was 'amply supported by the evidence,' id., at 581, 87 S.Ct., at 1231—1232, because the evidence 'clearly show(ed) that Procter was the most likely entrant,' id., at 580, 87 S.Ct., at 1231, and it was 'clear that the existence of Procter at the edge of the industry exerted considerable influence on the market,' id., at 581, 87 S.Ct., at 1231. Thus, the fact that Falstaff and its management had no intent to enter de novo, and would not have done so, does not ipso facto dispose of the potential-competition issue.

The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown; [12] and if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under s 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market ***534** in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition. [13] This does not mean that the ****1103** testimony ***535** of company officials about actual intentions of the company is irrelevant or is to be looked upon with suspicion; but it does mean that theirs is not necessarily the last ***536** word in arriving at a conclusion about how Falstaff should be considered in terms of its status as a potential entrant into the market in issue.

***537** Since it appears that the District Court entertained too narrow a view of Falstaff as a potential competitor and since it appears that the District Court's conclusion that the merger posed no probable threat to competition followed automatically from the finding that Falstaff had no intent to enter de novo, we remand this case for the District Court to make the proper assessment of Falstaff as a potential competitor.

II

Because we remand for proper assessment of Falstaff as an on-the-fringe potential competitor, it is not necessary to reach the question of whether s 7 bars a market-extension merger by a company whose entry into the market would have no influence whatsoever on the present state of competition in the market—that is, the entrant will not be a dominant force in the market and has no current influence in the marketplace. We leave for another day the question of the applicability of s 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under s 7 only on grounds that the company could, but did not, enter de novo or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner. There are traces of this view in our cases, see Ford Motor Co. v. United States, 405 U.S. 562, 567, 92 S.Ct. 1142, 1146, 31 L.Ed.2d 492 (1972); id., at 587, 92 S.Ct. at 1156 (Burger, C.J., concurring in part and dissenting in part); FTC v. Procter & Gamble Co., 386 U.S., at 580, 87 S.Ct., at 1231; Id., at 586, 87 S.Ct., at 1234 (Harlan, J., concurring); United States v. Penn-Olin Chemical Co., 378 U.S., at 173, 84 S.Ct., at 1718, but the Court has not squarely faced the qestion, [14] if for no other reason than because there has ***538** been no necessity to consider it. See Ford Motor Co. v. United States, supra; FTC v. Procter & Gamble Co., supra; United States v. Penn-Olin Chemical Co., supra; United States v. El Paso Natural Gas Co., 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964).

The judgment of the District Court dismissing the complaint against Falstaff is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Reversed and remanded.

Mr. Justice BRENNAN took no part in the decision of this case. Mr. Justice POWELL took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, concurring in part.

Although I join Part I of the Court's opinion and its judgment remanding the ****1104** case to the District Court for further proceedings consistent with the opinion, I offer the following observations with respect to the question which the Court does not reach.

There can be no question that it would be sufficient for the Government to prove its case to show that Falstaff would have made a de novo entry but for the acquisition of Narragansett, or that Falstaff was a potential competitor exercising present influence on the market. See Ford Motor Co. v. United States, 405 U.S. 562, 92 S.Ct. 1142, 31 L.Ed.2d 492; FTC v. Procter & Gamble Co., 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303; United States v. Penn-Olin Chemical Co., 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775; United States v. El Paso Natural Gas Co., 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12. But, I do not be-lieve that it was a prerequisite to the Government's ***539** case to prove that the acquisition had marked immediate, i.e., present, anticompetitive effects.

Section 7 evidences a definite concern for protecting competitive markets. It does not require 'merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future . . ..' United States v. Philadelphia National Bank, 374 U.S. 321, 362, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915. In United States v. Penn-Olin Chemical Co., supra, 378 U.S., at 170—171, 84 S.Ct., at 1717, the Court said:

> 'The grand design of the original s 7, as to stock acquisitions, as well as the Celler-Kefauver Amendment, as to the acquisition of assets, was to arrest incipient threats to competition which the Sherman Act did not ordinarily

> reach. It follows that actual restraints need not be proved. The requirements of the amendment are satisfied when a 'tendency' toward monopoly or the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown.'

Moreover, we are concerned with probabilities, not certainties. See Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S.Ct. 1502, 1522—1523, 8 L.Ed.2d 510.

Falstaff acquired Narragansett in 1965. Prior to that time, Falstaff was the largest brewer in the country that did not sell in the New England market. It had stated publicly that it wanted to become a national brewer to allow it to compete more effectively with the existing national brewers. Falstaff has conceded in its brief that 'given an acceptable level of profit it had the financial capability and the interest to enter the New England beer market.'

During the four years preceding 1965, beer sales in New England had increased approximately 9.5%. Nevertheless, the market had become more concentrated. In 1960, the eight largest sellers accounted for approximately ***540** 74% of the beer sales; by 1964, they accounted for 81.2%. From 1957 to 1964, the number of breweries decreased from 11 to 6. In addition, there is evidence that two of the remaining breweries were interested in being acquired. And, by Falstaff's own admissin, '(a)t the time of the acquisition, the substantial growth in the market shares of the national brewers was just beginning to occur.'

One of the principal purposes of s 7 was to stem the "rising tide' of concentration in American business.' United States v. Pabst Brewing Co., 384 U.S. 546, 552, 86 S.Ct. 1665, 1669, 16 L.Ed.2d 765. When an industry or a market evidences signs of decreasing competition, we cannot allow an acquisition which may 'tend to accelerate concentration.' Ibid.; Brown Shoe Co. v. United States, supra, 370 U.S., at 346, 82 S.Ct., at 1535.

The implications of the Clayton Act, as amended by the Celler-Kefauver Act, 15 U.S.C. s 18, are much, much broader than the customary restraints of competition and the power of monopoly. Louis D. Brandeis testified in favor of the bill that became the Clayton Act in 1914. 'You cannot have true American citizenship, you cannot preserve political liberty, you cannot secure American standards of living unless some degree ****1105** of industrial liberty accompanies it.'[1] He went on to say[2] in answer to George W. Perkins, who testified against the bill:

'Mr. Perkins' argument in favor of the efficiency of monopoly proceeds upon the assumption, in the first place, and mainly upon the assumption, that with increase of size comes increase of efficiency. If any general proposition could be laid down on that subject, it would, in my opinion, be the opposite. It is, of course, true that a business unit may be too small to be efficient, but it is equally ***541** true that a unit may be too large to be efficient. And the circumstances attending business today are such that the temptation is toward the creation of too large units of efficiency rather than too small. The tendency to create large units is great, not because larger units tend to greater efficiency, but because the owner of a business may make a great deal more money if he increases the volume of his business ten-fold, even if the unit profit is in the process reduced one-half. It may, therefore, be for the interest of an owner of a business who has capital, or who can obtain capital at a reasonable cost, to forfeit efficiency to a certain degree, because the result to him, in profits, may be greater by reason of the volume of the business. Now, not only may that be so, but in very many cases it is so.

'And the reason why . . . increasing the size of a business may tend to inefficiency is perfectly obvious when one stops to consider. Anyone who critically analyzes a business learns this: That success or failure of an enterprise depends usually upon one man; upon the quality of one man's judgment, and, above all things, his capacity to see what is needed and his capacity to direct others.'

That is why the Celler Committee reporting in 1971 on conglomerates and other types of mergers[3] said that 'Preservation of a competitive system was seen as essential to avoid the concentration of economic power that was thought to be a threat to the Nation's political and social system.'[4] Control of American business is being transferred from local communities to distant cities ***542** where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. As a result of mergers and other acquisitions, some States are losing major corporate headquarters and their local communities are becoming satellites of a distant corporate control.[5] The antitrust laws favored a wide diffusion of corporate control; and that aim has been largely defeated with serious consequences. Thus, a recent Wisconsin study shows that '(t)he growth of aggregate Wisconsin employment of companies acquired by out-of-state corporations declined substantially more than that of those acquired by in-state corporations.'[6] In this connection, the Celler Report states:[7]

'The Wisconsin study found, also, that 53 percent of acquired companies after the merger had a slower rate of payroll growth. Payroll growth, notably in large firms acquired by out-of-State corporations, was depressed by mergers. Inflation in recent years has markedly raised wages and salaries. It would be reasonable to expect that payrolls in acquired companies, ****1106** because of the inflation, would have advanced more than employment. In this connection, the report states: 'The fact that this frequently did not happen in companies acquired by out-of-state firms would lead one to believe that their acquirers have transferred a portion of the higher salaried employees to a location outside Wisconsin. Such transfers mean a loss of talent, retail expenditures, and personal income taxes in the economies of Wisconsin's communities and the state.''

***543** The adverse influence on local affairs of out-of-state acquisitions has not gone unnoticed in our opinions. Thus 'the desirability of retaining 'local control' over industry and the protection of small businesses' was our comment in Brown Shoe Co. v. United States, 370 U.S., at 315—316, 82 S.Ct., at 1518—1519, on one of the purposes of strengthening s 7 of the Clayton Act through passage of the Celler-Kefauver Act.

By reason of the antitrust laws, efficiency in terms of the accounting of dollar costs and profits is not the measure of the public interest nor is growth in size where no substantial competition is curtailed. The antitrust laws look with suspicion on the acquisition of local business units by out-of-state companies. For then local employment is apt to suffer, local payrolls are likely to drop off, and responsible entrepreneurs in counties and States are replaced by clerks.

A case in point is Goldendale in my State of Washington. It was a thriving community—an ideal place to raise a family—until the company that owned the sawmill was bought by an out-of-state giant. In a year or so, auditors in faraway New York City, who never knew the glories of Goldendale, decided to close the local mill and truck all the logs to Yakima. Goldendale became greatly crippled. It is Exhibit A to the Brandeis concern, which became part of the Clayton Act concern, with the effects that the impact of monopoly often has on a community, as contrasted with the beneficient effect of competition.

A nation of clerks is anathema to the American antitrust dream. So is the spawning of federal regulatory agencies to police the mounting economic power. For the path of those who want the concentration of power to develop unhindered leads predictably to socialism that is antagonistic to our system. See Blake & Jones, The Goals of Antitrust: A Dialogue on Policy—In Defense of Antitrust, 65 Col.L.Rev. 377 (1965).

***544** It is against this background that we must assess the acquisition by Falstaff, the largest producer of beer in the United States that did not sell in the New England market, of the leading seller in that market.

In United States v. El Paso Natural Gas Co., 376 U.S., at 660, 84 S.Ct., at 1049, we indicated that '(t)he effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on.' Falstaff's president testified below that Falstaff for some time had wanted to enter the New England market as part of its interest in becoming a national brewer. And Falstaff has conceded in its brief before this Court that 'given an acceptable level of profit it had the financial capability and the interest to enter the New England beer market.' With both the interest and the capability to enter the market, Falstaff was 'the most likely entrant.' FTC v. Procter & Gamble Co., 386 U.S., at 581, 87 S.Ct., at 1231. Thus, although Falstaff might not have made a de novo entry if it had not been allowed to acquire Narragansett,[8] we cannot say that it would be unwilling ****1107** to make such an entry in the future when the New England market might be ripe for an infusion of new competition. At this point in time, it is the most likely new competitor. Moreover, there can be no question that replacing the leading seller in the market, a regional brewer, with a seller ***545** with national capabilities increased the trend toward concentration.

I conclude that there is 'reasonable likelihood' that the acquisition in question 'may be substantially to lessen competition.' Accordingly, I would be inclined to reverse and direct the District Judge to enter judgment for the Government and afford appropriate relief. Nevertheless, since the Court will not reach this question and I agree with the legal principles set forth in Part I of its opinion, I join the judgment remanding the case for further proceedings.

Mr. Justice MARSHALL, concurring in the result.

I share the majority's view that the District Judge erred as a matter of law and that the case must be remanded for further proceedings. I cannot agree, however, with the theory upon which the majority bases the remand.

The majority accuses the District Judge of neglecting to assess the present procompetitive effect which Falstaff exerted by remaining on the fringe of the market. The explanation for this failing is rather simple. The Government never alleged in its complaint that Falstaff was exerting a present procompetitive influence, [1] it introduced not a scrap of evidence to support this view, [2] and ***546** even at this stage of the proceedings, it seemingly disclaims reliance on this theory. [3]

****1108** Thus, our remand leaves the hapless District Judge with the unenviable taks of reassessing nonexistent evidence under a theory advanced by neither of the parties. I submit that civil antitrust litigation is complicated enough when the trial judge confines his attention to the legal arguments and evidence offered by the parties and avoids investigation of hypothetical lawsuits which might have been brought.

***547** The majority's departure from this self-evident proposition is all the more startling when one realizes that the Court eschews reliance on a well-established, plainly applicable body of law in order to reach questions not properly before it. As Mr. Justice DOUBLAS ably domonstrates, see ante, at 1104, many decisions of this Court hold that s 7 is violated when a merger is reasonably likely to eliminate future or potential competition. See also infra, at 1114—1116. I know of no case suggesting that this principle is only applicable when the plaintiff can show that the merger will have present anticompetitive consequences, and the majority cites no authority for this proposition.

In the course of a nine-day trial, the Government introduced voluminous evidence to support its potential competition theory. But at the conclusion of the trial, the District Judge dismissed the Government's action in an opinion covering a scant two and one-half pages in the Federal Supplement [4] and without making any findings of fact or conclusions of law. [5] See United States v. Falstaff Brewing Corp., 332 F.Supp. 970 (RI 1971).

The court held that Falstaff 'was not a potential entrant into said market by any means or way other than by said acquisition. Consequently, it cannot be ***548** said that its acquisition of Narragansett eliminated it as a potential competitor therein.' Id., at 972. The District Judge based this conclusion on testimony by Falstaff executive personnel that 'Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett.' Ibid.

Inasmuch as the District Court grounded its dismissal on these conclusions, I think we have a responsibility to assess the validity of the legal standard from which they are derived. I would hold that where, as here, strong objective evidence indicates that a firm is a potential entrant into a market, it is error for the trial judge to rely solely on the firm's subjective prediction of its own future conduct. While such subjective evidence is probative on the issue of potential entry, it is inherently unreliable and must be used with great care. Ordinarily, the district court should presume that objectively measurable market forces will govern a firm's future conduct. Only when there is a compelling demonstration that a firm will not follow its economic self-interest may the district court consider subjective evidence in predicting that conduct. Even then, subjective evidence should be preferred only when the objective evidence is weak or contradictory. Because the District Court failed to apply these standards, I ****1109** would remand the case for further consideration.

I

Although this case ultimately turns on a point of law, it cannot be satisfactorily understood without some appreciation of the factual context in which it arises. A somewhat more detailed description of the relevant line of commerce, the relevant geographic market, and the market structure than that provided by the majority is therefore in order.

***549** *A. The Product Market*

The relevant product market is the production and sale of beer. The firms competing for this market can be divided into three categories: national, regional, and local. The national firms, Anheuser-Busch, Schlitz, Pabst, and Miller, sell their product throughout the country and advertise on a national basis. In contrast, the regional firms, the largest of which are Hamm's, Carling, Coors, Falstaff, and National Bohemian, market their beer in narrower geographical areas of varying size. Local brewers sell their product in a small area, sometimes no larger than a single State.

Originally, most of the market was held by a large number of small local and regional brewers. The high cost of transporting beer favored the local distributor in early years. But more recently, the national brewers have been able to overcome this difficulty to some extent by decentralizing their production facilities. Moreover, any remaining extra transportation costs associated with national distribution are now outweighed by the advantages of centralized management and, especially, national advertising. Thus, in recent years, while the beer market as a whole has expanded, the number of breweries has declined dramatically. See United States v. Pabst Brewing Co., 384 U.S. 546, 550, 86 S.Ct. 1665, 1668, 16 L.Ed.2d 765 (1966). Whereas in 1935 there were 684 brewing plants operating in the United States, by 1965 the number had been reduced to 178. Economies of scale, a relatively low profit margin, and significant barriers to market entry have all led to a concentration of beer production among the few national and large regional brewers.

B. The Geographic Market

These national trends are reflected in the six New England States, which constitute the relevant geographic market. In the four years preceding Falstaff's acquisition ***550** of Narragansett, New England beer sales increased 9.5%—a substantial gain, although somewhat below the increase in national sales for the same period. At the same time, however, the number of brewers operating plants in the region declined precipitately. Thus, in 1957, there were 11 breweries in the New England States, but by 1964 the number had declined to six, and of those six, two of the three smallest had publicly expressed an interest in merging with a larger competitor.

Not surprisingly, this decline in the number of breweries in New England was accompanied by an increase in the market shares of those selling in the region. In 1960, the eight largest participants in the New England market claimed 74% of all beer sales, and by 1964 this figure had risen to 81.2%. Examination of the four largest brewers shows that their share of the market rose from about 50% in 1960 to 54% in 1964, to 61.3% in 1965. In large part, these figures are probably explicable in terms of the nationwide trend in favor of the large national and regional brewers. Seven of the Nation's 10 largest breweries, including, of course, all the national breweries, sell beer in New England, and their share of the market has increased as the small, local brewers disappeared.

At the same time, however, the concentration of the market does not yet seem to have produced blatantly anti-competitive effects. In recent years, prices have remained fairly stable despite rising costs, and competition seems relatively intense among the few large firms which dominate the market. Still, ****1110** there is no doubt that the seeds of anti-competitive conduct are present, since '(a)s (an oligopolistic) condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge.' United States v. Aluminum Co. of America, 377 U.S. 271, 280, 84 S.Ct. 1283, 1289, 12 L.Ed.2d 314 (1964). One commentator's description of the national beer market aptly characterizes the situation in New England: 'The ***551** increasing concentration . . . and the unlikely entrance of new rivals poses a threat to the future level of competition in this industry. Thus far, there is no evidence of collusion in the beer industry. But as the industry becomes populated by fewer and fewer companies, the possibility and likelihood will be enhanced of their engaging in tacit or direct collusion —given the inelastic nature of demand—to establish a joint profit maximizing price and output. Similarly, the chances will become slimmer that individual firms in the industry will follow a truly independent price and production strategy, vigorously striving to take sales away from rival brewers. With only a few sellers will come the increasing awareness that parallel business behavior might be feasible.' Elzinga, The Beer Industry, in W. Adams, The Structure of American Industry 189, 213 (4th ed. 1971).

C. Narragansett—The Acquired Firm

Narragansett is a regional brewery with only miniscule sales outside of New England. Within the New England market, however, the firm has been highly successful. Although only twenty-first in national sales and accounting for only 1.4% of the beer sales in the United States, Narragansett was the largest seller of beer in New England for the five years preceding its acquisition. In recent years, the firm has expanded steadily until, in 1964, the year before acquisition, it sold 1.275 million barrels, which was about 20% of the New England market. Net profits had increased from $417,284 in 1960 to a record level of $713,083 in 1964.

Notwithstanding this growth, Narragansett felt itself under some pressure from the national brewers.[6] The ***552** corporation was closely held by the Haffenreffer family, and the stockholders apparently concluded that it was in their interest to diversify their personal holdings by selling Narragansett.

D. Falstaff—The Acquiring Firm

Like Narragansett, Falstaff has been highly successful in recent years. Beginning with a 100,000-barrel plant in St. Louis shortly after the repeal of Prohibition, the firm has steadily grown. By 1964, it was the Nation's fourth largest producer, marketing 5.8 million barrels, or 5.9% of the total national production.

Throughout its history, Falstaff has followed a pattern of acquiring weak breweries and expanding them so as to extend its influence to new markets. Although still a regional brewer, by 1965 the company had expanded its network of plants and distributorships over an area far larger than that in which Narragansett competed. In that year, Falstaff operated eight plants and sold its product in 32 States in the West, Midwest, and South. Sixteen of these States were added in the period after 1950. However, as of 1965, Falstaff sold virtually no beer in any of the Northeastern States, including the six composing the New England area. Falstaff marketed its product both through company-owned branches and through some 600 independent distributorships. [7]

****1111** ***553** In the years immediately prior to its acquisition of Narragansett, Falstaff's steady pattern of growth had continued. Between 1955 and 1964, its sales increased from $77 million to $139.5 million and its net profits grew from $4.3 million to $7 million. In the year before acquisition, the company announced a 10-year expansion program in which it was prepared to invest $35 million.

Yet, despite this encouraging trend, Falstaff, like Narragansett, was to some extent handicapped by the competitive advantages—in particular, national advertising—enjoyed by national distributors. For years, the company had publicly expressed the desire to become a national brewer, and the logical region for market extension was the Northeast. New England seemed a particularly appropriate area to initiate expansion. As indicated above, seven of the 10 largest manufacturers already sold beer in New England, and Falstaff was the largest of the three remaining outside the market. The New England market was expanding at a healthy rate, and it appeared to be a fertile area for growth.

In 1958, Falstaff commissioned a study from Arthur D. Little, Inc., to determine the feasibility of future expansion. The Little Report, two years in the making, concluded that Falstaff should enter the northeastern market sometime within the next five years. But although it was clear that Falstaff should move into the northeast market, the method of entry was less obvious. After a careful review of cost estimates and the ratio of earnings to net worth, the Little Report recommended de novo entry through the construction of a new plant to serve the Northeast. The report concluded that '(t)here appears to be ample reason . . . for building rather than buying . . . (and) that major new market entrances need ***554** not be predicated on the availability of a brewery Falstaff could purchase.'

Despite this analysis, Falstaff's own management personnel apparently concluded that the profit return on a de novo entry would be inordinately low. [8] Falstaff argued at trial that it needed a strong, pre-existing distribution system to make a profitable entry. But cf. n. 7, supra. An independent economist, Dr. Ira Horowitz, testified on behalf of Falstaff that de novo entry would result in a 6.7% return which he characterized as 'a very, very poor investment indeed.' However, it should be noted that the 6.7% figure failed to account for the increment in Falstaff's profit margin which would result from its newly gained status as a national brewer with modern plants to serve the eastern part of the Nation—the very increment which provided the primary motivation for expansion in the first place. While Dr. Horowitz apparently recognized that such an increment might materialize, he stated that he was unable to estimate its size. [9] ****1112** Moreover, even the 6.7% return rate compares favorably with Falstaff's actual rate of return on its Narragansett purchase, which was a mere 3.7%.

In any event, whatever the abstract merits of this dispute, it is clear that Falstaff's management personnel determined that entry by acquisition offered the preferable avenue for expansion. Beginning in 1962, the company held discussions with Liebmann, P. Ballantine ***555** & Sons, [10] Piel Brothers, and Dawsons, all of which did a significant percentage of their business in the New England market. All of these possibilities were eventually rejected, and in 1965, Falstaff finally settled on Narragansett as the most promising available brewery.

II

With this factual background, it becomes possible to articulate the legal standards which should govern the resolution of this case.

A. The Purposes of s 7

As is clear from its face, s 7 was designed to deal with the anticompetitive effects of excessive industrial concentration caused by the corporate marriage of two competitors. 'It is the basic premise of (s 7) that competition will be most vital 'when there are many sellers, none of which has any significant market share.'' United States v. Aluminum Co. of America, 377 U.S., at 280, 84 S.Ct., at 1289.

But s 7 does more than prohibit mergers with immediate anticompetitive effects. The Act by its terms prohibits acquisitions which 'may . . . substantially . . . lessen competition, or . . . tend to create a monopoly.' The use of the subjunctive indicates that Congress was concerned with the potential effects of mergers even though, at the time they occur, they may cause no present anticompetitive consequences. See, e.g., FTC v. Procter & Gamble Co., 386 U.S. 568, 577, 87 S.Ct. 1224, 1229—1230, 18 L.Ed.2d 303 (1967). To be sure, remote possibilities are not sufficient to satisfy the test set forth in s 7. Despite substantial concern with halting a trend toward concentration in its incipiency, Congress did not intend to prohibit all expansion and growth through acquisition ***556** and merger. The predictive judgment often required under s 7 involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger without unjustifiable, speculative interference with traditional market freedoms. As we stated in Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S.Ct. 1502, 1522, 8 L.Ed.2d 510 (1962): 'Congress used the words 'may be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.' See also United States v. Pabst Brewing Co., 384 U.S., at 552, 86 S.Ct., at 1669; United States v. Penn-Olin Chemical Co., 378 U.S. 158, 171, 84 S.Ct. 1710, 1717, 12 L.Ed.2d 775 (1964).

The legislative history of s 7 makes plain that this was the intent of Congress. Before 1950, s 7 prohibited only those mergers which lessened competition 'between the corporation whose stock is so acquired and the corporation making the acquisition.'[11] The Celler- ****1113** Kefauver Amendment, added in 1950, deleted these words and provided instead that all mergers which substantially lessened competition 'in any line of commerce in any section of the country' were to be outlawed. See 64 Stat. 1126. Thus, whereas before 1950, s 7 proscribed only ***557** those mergers which eliminated present, actual competition between the merging firms, the Celler-Kefauver Amendment reached cases where future or potential competition in the entire relevant market might be adversely affected by the merger.[12] 'Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with probabilities, not with certainties. . . . And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive ***558** action before s 7 can be called into play. If the enforcement of s 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated.' FTC v. Procter & Gamble Co., 386 U.S., at 577, 87 S.Ct., at 1229.

Since 1950, we have repeatedly applied s 7 to cases where the merging firms competed in the same line of commerce, and we have been willing to define the line of commerce liberally so as to reach anticompetitive practices in their 'incipiency.' See, e.g., United States v. Phillipsburg National Bank & Trust Co., 399 U.S. 350, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970); United States v. Pabst Brewing Co., 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966); United States v. Aluminum Co. of America, 377 U.S. 271, 84 S.Ct. 1903, 12 L.Ed.2d 314 (1964); United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). But in keeping with the spirit of the Celler-Kefauver Amendment, we have also applied s 7 to cases where the acquiring firm is outside the market in which the acquired firm competes. These cases fall into three broad categories which, while frequently overlapping, can be dealt with separately for analytical purposes.

1. The Dominant Entrant.—In some situations, a firm outside the market ****1114** may have overpowering resources which, if brought to bear within the market, could ultimately have a substantial anticompetitive effect. If such a firm were to acquire a company within the relevant market, it might drive other marginal companies out of business, thus creating an oligopoly, or it might raise entry barriers to such an extent that potential new entrants would be discouraged from entering the market. Cf. Ford Motor Co. v. United States, 405 U.S. 562, 567—568, 92 S.Ct. 1142, 1146—1147, 31 L.Ed.2d 492 (1972); ***559** FTC v. Procter & Gamble Co., 386 U.S., at 575, 87 S.Ct., at 1228—1229.[13] Such a danger is especially intense when the market is already highly concentrated or entry barriers are already unusually high before the dominant firm enters the market.

2. The Perceived Potential Entrant.—Even if the entry of a firm does not upset the competitive balance within the market, it may be that the removal of the firm from the fringe of the market has a present anticompetitive effect. In a concentrated oligopolistic market, the presence of a large potential competitor on the edge of the market, apparently ready to enter if entry barriers are lowered, may deter anticompetitive conduct within the market. As we pointed out in United States v. Penn-Olin Chemical Co., 378 U.S., at 174, 84 S.Ct., at 1718—1719: 'The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market (is) a substantial incentive to competition which cannot be underestimated.' From the perspective of the firms already in the market, the possibility of entry by such a lingering firm may be an important consideration in their pricing and marketing decisions. When the lingering firm enters the market by acquisition, the competitive influence exerted by the firm is lost with no offsetting gain through an increase in the number of companies seeking a share of the relevant market. The result is a net decrease ***560** in competitive pressure. [14] Cf. United States v. El Paso Natural Gas Co., 376 U.S. 651, 659—660, 84 S.Ct. 1044, 1048—1049, 12 L.Ed.2d 12 (1964).

3. The Actual Potential Entrant.—Since the effect of a perceived potential entrant depends upon the perception of those already in the market, it may in some cases be difficult to prove. Moreover, in a market which is already competitive, the existence of a perceived potential entrant will have no present effect at all. [15] The entry by acquisition of ****1115** such a firm may nonetheless have an anticompetitive effect by eliminating an actual potential competitor. When a firm enters the market by acquiring a strong company within the market, it merely assumes the position of that company without necessarily increasing competitive pressures. Had such a firm not entered by acquisition, it might at some point have entered de ***561** novo. An entry de novo would increase competitive pressures within the market, and an entry by acquisition eliminates the possibility that such an increase will take place in the future. Thus, even if a firm at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at some future date.

Obviously, the anticompetitive effect of such an acquisition depends on the possibility that the firm would have entered de novo had it not entered by acquisition. If the company would have remained outside the market but for the possibility of entry by acquisition, and if it is exerting no influence as a perceived potential entrant, then there will normally be no competitive loss when it enters by acquisition. Indeed, there may even be a competitive gain to the extent that it strengthens the market position of the acquired firm. [16] Thus, mere entry by acquisition would not prima facie establish a firm's status as an actual potential entrant. For example, a firm, although able to enter the market by acquisition, might, because of inability to shoulder the de novo start-up costs, be unable to enter de novo. But where a powerful firm is engaging in a related line of commerce at the fringe of the relevant market, where it has a strong incentive to enter the market de novo, and where it has the financial capabilities to do so, we have not hesitated to ascribe to it the role of an actual potential entrant. In such cases, we have held that s 7 prohibits an entry by acquisition since such an entry eliminates the possibility of future actual competition which would occur if there were an entry de novo.

***562** In light of the many decisions to this effect, the majority's assertion that 'the Court has not squarely faced (this) question' is inexplicable. In United States v. Continental Can Co., 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964), for example, the defendant argued that 'the types of containers produced by Continental and Hazel-Atlas (the acquired firm) at the time of the merger were for the most part not in competition with each other and hence the merger could have no effect on competition.' Id., at 462, 84 S.Ct., at 1749. But Mr. Justice White, writing for the Court, rejected that argument, holding that '(i)t is not at all self-evident that the lack of current competition between Continental and Hazel-Atlas for some important end uses of metal and glass containers significantly diminished the adverse effect of the merger on competition. Continental might have concluded that it could effectively insulate itself from competition by acquiring a major firm not presently directing its market acquisition efforts toward the same end uses as Continental, but possessing the potential to do so.' Id., at 464, 84 S.Ct., at 1751. (Emphasis added). The majority says it is 'only arbitrary' to read this language as not referring to Hazel-Atlas' present procompetitive influence on the market. But the Continental Can Court said not a word about present procompetitive effects, and, indeed, made clear that it was relying on ****1116** the future anticompetitive impact of the merger. The Court held, for example, that 'the fact that Continental and Hazel-Atlas were not substantial competitors of each other for certain end uses at the time of the merger may actually enhance the long-run tendency of the merger to lessen competition.' Id., at 465, 84 S.Ct., at 1751 (emphasis added). See also Ford Motor Co. v. United States, 405 U.S. 562, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967); United States v. Penn-Olin Chemical Co., 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964).

***563** *C. Problems of Proof—The Role of Subjective Evidence*

Although s 7 deals with probabilities, not ephemeral possibilities, all forms of potential competition involve future events and all of them are, therefore, to some extent speculative and uncertain. Whether future competition will be reduced by a present merger is clearly 'not the kind of question which is suspectible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended s 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'' United States v. Philadelphia National Bank, 374 U.S., at 362, 83 S.Ct., at 1741.

The unavoidable problems of proof are compounded in some cases by the relevance of subjective statements of future intent by the managers of the acquiring firm. Although not susceptible of precise analysis, the objective conditions of the market may at least be measured and quantified. But there exists no very good way of evaluating a subjective statement by the manager of a firm that the firm does or does not intend to enter a given market at some future date.

Fortunately, in two of the three forms of potential competition, such subjective evidence has no role to play. Clearly, in the case of a dominant entrant, the only issue is whether the firm's entry by acquisition will so upset objective market forces as to substantially reduce future competition. Since the firm will have already taken steps to enter the market by the time a s 7 action is filed, its statements of subjective intent are irrelevant.

***564** Similarly, when the Government proceeds on the theory that the acquiring firm is a perceived potential entrant, testimony as to the subjective intent of the acquiring firm is not probative. The perceived potential entrant exerts a procompetitive effect because companies in the market perceive it as a potential entrant. The companies in the market may entertain this perception whether the perceived potential entrant is in fact a potential entrant or not. Thus, a firm on the fringe of the market may exert a procompetitive effect even if it has no intention of entering the market, so long as it seems to those within the market that it may have such an intention. [17] It follows that subjective testimony by the ****1117** managers of the perceived potential entrant is irrelevant. [18]

However, subjective statements of management are probative in cases where the acquiring firm is alleged to be an actual potential entrant. First, management's statements that it does not intend to make a de novo market entry, together with its associated reasons, provide an expert judgment on the conclusions to be drawn ***565** by the trier of fact from the objective market forces. Just as the Government may introduce expert testimony to inform and guide the trial court with respect to the appropriate business judgments to be derived from the objective data, so too the defendant is entitled to present the evaluation of its own 'experts' who may include its management personnel. Although such evidence from management is obviously biased and self-serving, it is nonetheless admissible to prove that the objective market pressures do not favor a de novo entry.

More significantly, management's statement of subjective intent, if believed, affects the firm's status as an actual potential entrant. As indicated above, the actual potential entrant's entry by acquisition is anticompetitive only if it eliminates some future possibility that it might have entered de novo. An unequivocal statement by management that it has absolutely no intention of entering the market de novo at any time in the future is relevant to the issue of whether the possibility of such an entry exists. After all, the character of management is itself essentially an objective factor in determining whether the acquiring firm is an actual potential entrant.

But although subjective evidence is probative and admissible in actual potential-entry cases, its utility is sharply limited. We have certainly never suggested that subjective evidence of likely future entry is required to make out a s 7 case. On the contrary, in United States v. Penn-Olin Chemical Co., 378 U.S., at 175, 84 S.Ct., at 1719, where the objective evidence of potential entry was strong, we said, 'Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do.' (Emphasis added.)

***566** Nor do our prior cases hold that the district courts are bound by subjective statements of company officials that they have no intention of making a de novo entry. We have emphasized that the decision whether the acquiring firm is an actual potential entrant is, in the last analysis, an independent one to be made by the trial court on the basis of all relevant evidence properly weighted according to its credibility. Thus, in FTC v. Procter & Gamble Co., for example, managers of Procter & Gamble testified that they had no intention of making a de novo entry, and the Court of Appeals thought itself bound by that testimony. See 386 U.S., at 580, 87 S.Ct., at 1231, and id., at 585, 87 S.Ct., at 1233 (Harlan, J., concurring). We reversed, holding that '(t)he evidence . . . clearly shows that Procter was the most likely entrant.' Id., at 580, 87 S.Ct., at 1231.

As these cases indicate, subjective evidence has, at best, only a marginal role to play in actual potential-entry cases. In order to make out a prima facie case, the Government need only show that objectively measurable market data favor a de novo entry and that the alleged potential entrant has the economic capability to make such an entry. To be sure, the **1118 defendant may then introduce subjective testimony in rebuttal, and in the rare case where the objective evidence is evenly divided, it is conceivable that extremely credible subjective evidence might tip the balance. But where objectively measurable market forces make clear that it is in a firm's economic self-interest to make a de novo entry and that the firm has the economic capability to do so, I would hold that it is error for the District Court to conclude that the firm is not an actual potential entrant on the basis of testimony by company officials as to the firm's future intent. [19]

*567 The reasons for so limiting the role of subjective evidence are not difficult to discern. Such evidence should obviously be given no weight if it is not credible. But it is in the very nature of such evidence that in the *568 usual case it is not worthy of credit. [20] First, any statement of future intent will be inherently self-serving. A defendant in a s 7 case such as this wishes to enter the market by acquisition and its managers know that its ability to do so depends upon whether it can convince a court that it would not have entered de novo if entry by acquisition were prevented. It is thus strongly in management's interest to represent that it has no intention of entering de novo—a representation which is not subject to external verification and which is so speculative in nature that it could virtually never serve as the predicate for a perjury charge.

Moreover, in a case where the objective evidence strongly favors entry de **1119 novo, a firm which asks us to believe that it does not intend to enter de novo by implication asks us to believe that it does not intend to act in its own economic self-interest. But corporations are, after all, profit-making institutions, and, absent special circumstances, they can be expected to follow courses of action most likely to maximize profits. [21] The *569 trier of fact should, therefore, look with great suspicion upon a suggestion that a company with an opportunity to expand its market and the means to seize upon that opportunity will follow a deliberate policy of self-abnegation if the route of expansion first selected is legally foreclosed to it.

Thus, in most cases, subjective statements contrary to the objective evidence simply should not be believed. But even if the threshold credibility gap is breached, it still does not follow that subjective statements of future intent should outweigh strong objective evidence to the contrary. Even if it is true that management has no present intent of entering the market de novo, the possibility remains that it may change its mind as the objective factors favoring such entry are more clearly perceived. Of course, it is possible that management will adamantly continue to close its eyes to the company's own self-interest. But in that event, the chance remains that the stockholders will install new, more competent officers who will better serve their interests. All of these possibilities are abruptly and irrevocably aborted when the firm is allowed to enter the market by acquisition. And while it is conceivable that none of the possibilities will materialize if entry by acquisition *570 is prevented, it is absolutely certain that they will not materialize if such entry is permitted. All that is necessary to trigger a s 7 violation is a finding by the trial court of a reasonable chance of future competition. In most cases, strong objective evidence will be sufficient to create such a chance despite even credible subjective statements to the contrary. [22]

To summarize, then, I would not hold that subjective evidence may never be considered in the context of an actual potential-entry case. Such evidence should always be admissible as expert, although biased, commentary on the nature **1120 of the objective evidence. And in a rare case, the subjective evidence may serve as a counterweight to weak or inconclusive objective data. But when the district court can point to no compelling reason why the subjective testimony should be believed or when the objective evidence strongly points to the feasibility of entry de novo, I would hold that it is error for the court to rely in any way upon management's subjective statements as to its own future intent.

III

As indicated above, the Government failed to press the argument that Falstaff was a dominant or perceived potential entrant. Since there is virtually no evidence in the record to support either of these theories, I cannot ***571** say that the District Judge erred in rejecting them. It does appear, however, that he applied an erroneous standard in evaluating the subjective evidence relevant to Falstaff's position as an actual potential entrant and that this error infected the court's factual determinations. I would therefore remand the cause so that a proper factfinding can be made.

The record shows that the New England market is highly concentrated with a few large firms gaining a greater and greater share of the market. Although this market structure has yet to produce overtly anticompetitive behavior, there is a real danger that parallel pricing and marketing policies will soon emerge if new competitors do not enter the field.

The objective evidence in the record strongly suggests that Falstaff had both the capability and the incentive to enter the New England market de novo. It is undisputed that it was in Falstaff's interest to gain the status of a national brewer in the near future and that New England was a logical area to begin its expansion. Indeed, Falstaff's own actions in entering the New England market support this conclusion. Nor can it be doubted that Falstaff had the economic capability to enter New England. Falstaff is the Nation's fourth largest brewer and the largest still outside of New England. It has been consistently profitable in recent years, has an excellant credit rating, and had, in 1964, enough excess capital to finance a 10-year, $35 million expansion project. The Little Report concluded that de novo entry into the Northeast was feasible and, although Falstaff attacks these findings, the trier of fact might well have accepted them had he relied upon the objective evidence.

To be sure, Falstaff introduced a great deal of evidence tending to show that entry de novo would have been less profitable for it than entry by acquisition. ***572** I have no doubt that this is true. Indeed, if it can be assumed that Falstaff is a rational, profit-maximizing corporation, its own decision offers strong proof that entry by acquisition was the preferable alternative. But the test in s 7 cases is not whether anticompetitive conduct is profit maximizing. The very purpose of s 7 is to direct the profit incentive into channels which are procompetitive. Thus, the proper test is whether Falstaff would have entered the market de novo if the preferable alternative of entry by acquisition had been denied it. The objective evidence strongly suggests that such an entry would have occurred.

The District Court, however, chose to ignore this objective evidence almost totally. Instead, the trial judge seems to have considered himself bound by Falstaff's subjective representations that it had no intention of entering the market de novo. As noted above, even if these subjective statements are credible, they appear to be insufficient to outweigh the strong objective evidence to the contrary.

Findings of fact are, of course, for the trial judge in the first instance, and even in antitrust cases where the evidence is largely documentary, appellate courts should be reluctant to set them aside. But when the facts are found under a standard which is legally deficient, ****1121** the situation is fundamentally different. It is the duty of appellate courts to establish the legal standards by which the facts are to be judged. The facts in this case were judged by a wrong standard, and the cause should therefore be remanded for a new, error-free determination.

Mr. Justice REHNQUIST, with whom Mr. Justice STEWART concurs, dissenting.

Civil litigation in our common-law system is conducted within the framework of the time-honored principle that the plaintiff must introduce sufficient evidence to convince ***573** the trier of fact that his claim for relief is factually meritorious. However large the societal interest in the area of antitrust law, so long as Congress assigns the vindication of those interests to civil litigation in the federal courts, antitrust litigation is no exception to that rule. The plaintiff, whether public or private, must prove to the satisfaction of the judge or jury that the defendant violated the antitrust laws. United States v. Yellow Cab Co., 338 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150, (1949). It is the exclusive responsibility of the trier of fact to weigh, as he sees fit, all admissible evidence in resolving disputed issues of fact, ibid., and his findings of fact cannot be overturned on appeal unless 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Cf. FTC v. Procter & Gamble Co., 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967). The Court today simply disregards these principles.

The Court remands this case to the District Court to consider 'whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market.' Ante, at 1100—1101. The antitrust theory underlying the remand is that the competitors in the relative geographic market, aware of Falstaff's presence on the periphery, would not exercise their ostensible market power to raise prices because of the possibility that Falstaff, sufficiently tempted by the high prices in that market, would enter. A Government suit challenging a merger or acquisition can, of course, be premised on this theory, and, if sufficient evidence to convince the trier of fact is introduced, the determination that the merger or acquisition violated s 7 would not be reversed on appeal.

As my Brother MARSHALL convincingly demonstrates, however, in this case the Government neither proceeded on the theory advanced by the Court nor introduced any ***574** evidence that would support that theory. The theory that the Government did advance, and upon which it offered its evidence, is concisely summarized in the Government's statement in opposition to Falstaff's motion to dismiss.

'In our opening statement we attempted to show that the Government would prove—and I believe we have—that Falstaff, the fourth largest brewing corporation in the nation, had a continuous intensive interest in entering New England; that it carried on negotiations for five years with companies serving New England; that alternative methods of entry other than the acquisition of the largest New England brewer were available to Falstaff; and that it was in fact one of a few and the most likely entrant into this market; that its entrance into this market was especially important because the market is concentrated; that is, the sales of beer in New England are highly concentrated in the hands of the relatively few number of brewers.

'The entry by Falstaff by building a brewery, by shipping into this market, and opening it up, by the acquisition of a company less than number 1, thereby eliminating its most significant potential competitor, were all available to it. Because of the concentration ****1122** in the market and because of Falstaff's being the most potential entrant, the acquisition by Falstaff of the leading firm in this market eliminated what we consider to be one of a few potential competitive effects that this market could expect for years.' Transcript, Vol. 3, p. 7.

For this Court to reverse and to remand for consideration of a possible factual basis for a theory never advanced by the plaintiff is a drastic and unwarranted departure from the most basic principles of civil litigation ***575** and appellate review. In this case, the Government originally advanced one theory, but failed to introduce sufficient evidence to convince the trier of fact. That failure is 'a not uncommon form of litigation casualty, from which the Government is no more immune than others.' United States v. Yellow Cab Co., 338 U.S., at 341, 70 S.Ct., at 179. The Court now resuscitates this 'casualty' by use of a theory transplant, allowing the Government a second opportunity to vindicate its position by arguing a different theory not originally propounded before the District Court or on appeal. I cannot join in the Court's rescue operation for this 'litigation casualty,' an operation which succeeds only by flagrantly disregarding some of the axioms upon which our judicial system is founded.

Although agreeing with my Brother MARSHALL'S criticism of the Court's reason for remanding this case, I cannot agree with his grounds for remanding to the District Court for reconsideration. That theory is based, erroneously I believe, on the notion that there is an identifiable difference between 'objective' and 'subjective' evidence in an antitrust case such as this. My Brother MARSHALL would have the District Court weigh 'objective' evidence more heavily than 'subjective' evidence. In the field of economic forecasting in general, and in the area of potential competition in particular, however, the distinction between 'objective' and 'subjective' evidence is largely illusory. It is, I believe, incorrect to state that a trier of fact can determine 'objectively' what 'is in a firm's economic self-interest.' Such a determination is guesswork. The term 'economic self-interest' is a convenient shorthand for describing the economic decision reached by an individual or firm, but does not connote some simple, mechanical formula which determines the input values, or their assigned weight, in the process of economic decisionmaking. The simple fact is that any economic decision is largely subjective. ***576** In the instant case, Falstaff sought to prove why it was not in the 'economic self-interest' of that firm to enter a new geographic market without an established distribution system. Its explanation is as 'objective' as any of the evidence offered by the Government to show why a hypothetical Falstaff should enter the market. The question of who is an 'actual potential competitor' is entirely factual. In deciding questions of fact, it is the province of the trier to weigh all of the evidence; but it is peculiarly his province to determine questions of credibility.

'Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. . . .

'. . . There is no exception (to the 'clearly erroneous' rule of appellate review) which permits (the Government), even in an antitrust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design.' United States v. Yellow Cab Co., 338 U.S., at 341—342, 70 S.Ct., at 179.

I would not ignore our prior decisions or rewrite the rules of evidence simply to afford the Government a second chance, which is uniformly denied to other litigants, to convince the trier of fact.

All Citations

410 U.S. 526, 93 S.Ct. 1096, 35 L.Ed.2d 475, 1973-1 Trade Cases P 74,377

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 7 provides in relevant part:

'No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.' 15 U.S.C. s 18.

For the legislative history of the amendment in 1950 that greatly expanded the section's scope, 64 Stat. 1125, see Brown Shoe Co. v. United States, 370 U.S. 294, 311—323, 82 S.Ct. 1502, 1516—1523, 8 L.Ed.2d 510 (1962).

2 Jurisdiction lies under s 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. s 29.

3 Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island.

4 Nationally, the number of brewers decreased from 663 in 1935 to 140 in 1965.

5 Of the three 'top ten' brewers that were not selling in New England, Falstaff ranked fourth nationally, the other two ranking eighth and ninth. From Boston, Massachusetts, the distance to Falstaff's closest brewery was 844 miles, while the distance to the eighth and ninth largest sellers' breweries was 1,385 and 2,000 miles respectively.

6 A 'regional,' as contrasted with a 'national' brewer, is one that is not selling in all the significant national markets.

7 In 1958, Falstaff commissioned a study of actions it should take to maximize profits. The study recommended, inter alia, that Alstaff become a national brewer by entering those areas where it was not then marketing its product, especially the Northeast, and that Falstaff should build a brewery on the East Coast rather than buy.

8 For example, Falstaff in several press releases and in the company publication expressed its desires for national distribution, and at a panel discussion in October 1964 the president of Falstaff, in response to a

question as to Falstaff's reaction to industry trends in beer sales, stated: 'For long range planning we are aiming for national distribution. Naturally this involves coming East.' App. 82.

9 Suit was filed against both Falstaff and Narragansett, but as to the later, the complaint was dismissed shortly after it was filed.

10 Hereinafter, reference to de novo entry includes 'toe-hold' acquisition as well.

11 Over the objections of the Government, the District Court allowed post-acquisition evidence and noted in the opinion that the market share of Narragansett dropped from 21.5% in 1964 to 15.5% in 1969, while the shares of the two leading national brewers increased from 16.5% to 35.8%.

12 See n. 8, supra, and accompanying text.

13 In FTC v. Procter & Gamble Co., 386 U.S. 568, 581, 87 S.Ct. 1224, 1231—1232, 18 L.Ed.2d 303 (1967), we found the acquiring company at the edge of the market exerted 'considerable influence' on the market because 'market behavior . . . was influenced by each firm's predictions of the market behavior of its competitors, actual and potential'; because 'barriers to entry . . . were not significant' as to the acquiring company; because 'the number of potential entrants was not so large that the elimination of one would be insignificant'; and because the acquiring firm was the most likely entrant.

It is suggested that the District Court failed to consider whether Falstaff was an on-the-fringe potential competitor with influence on existing competition because the Government never alleged in its complaint that Falstaff was exerting a present procompetitive influence, never proceeded under this theory, and further failed to introduce any evidence to support this view. But this position merely ascribes an arbitrary meaning to the language of the complaint. The Government in its complaint alleged that the acquisition violated s 7 because it elimininated potential competition; since potential competition may stimulate a present procompetitive influence, the allegation certainly encompassed the 'on-the-fringe influence' that the District Court failed to consider, and the Government was not required to be more specific in its allegation.

The Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff, but circumstantial evidence is the lifeblood of antitrust law, see Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221, 59 S.Ct. 467, 472, 83 L.Ed. 610 (1939); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210, 41 S.Ct. 451, 452, 65 L.Ed. 892 (1921), especially for s 7 which is concerned 'with probabilities, not certainties,' Brown Shoe Co. v. United States, 370 U.S., at 323, 82 S.Ct., at 1522—1523. As was stated in United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174, 84 S.Ct. 1710, 1718—1719, 12 L.Ed.2d 775 (1964), '(p)otential competition cannot be put to a subjective test. It is not 'susceptible of a ready and precise answer.''

Nor was there any lack of circumstantial evidence of Falstaff's on-the-fringe competitive impact. As the record shows, Fastaff was in the relevant line of commerce, was admittedly interested in entering the Northeast, and had, among other ways, see n. 8, supra, made its interest known by prior-acquisition discussions. Moreover, there were, as my Brother Marshall would put it, objective economic facts as to Falstaff's capability to enter the New England market; and the same facts which he would have the District Court look to in determining whether the particular theory of potential competition we do not reach has been violated, would be probative of violation of s 7 through loss of a procompetitive on-the-fringe influence. See FTC v. Procter & Gamble Co., supra, 386 U.S., at 580—581, 87 S.Ct., at 1231—1232; United States v. Penn-Olin Chemical Co., supra, 378 U.S., at 173—177, 84 S.Ct., at 1718—1720; United States v. El Paso Natural Gas Co., 376 U.S. 651, 660, 84 S.Ct. 1044, 1049, 12 L.Ed.2d 12 (1964).

And as for the contention that the Government did not proceed under this on-the-fringe influence view, the record is to the contrary. At one point in the trial, the Government informed the trial judge that a deposition was being introduced into evidence 'to establish that Falstaff was a company that was on the wings or at the edge of the New England market. . . . What I mean by that is that Falstaff was capable and interested in entering the New England market and would be waiting for the opportunity to develop, but that Falstaff, over the long term, would eventually or could eventually or was a likely entrant into the New England market, to use the terminology in FTC v. Procter & Gamble Company.' App. 124. Further into its presentation of proof, the Government was introducing evidence of the trend toward concentration in the market, and stated: 'It is this concentration, your Honor, which, as we attempted to point out in our pretrial brief, makes potential competition. . . . The concentration of sales within a small number of firms in New England. This is what makes the potential competition . . . so very, very important to this market. . . . In such a situation the potential entry of a fresh competitive factor is of extreme importance.' App. 170.

That the on-the-fringe influence theory was one of the theories the Government was proceeding under was apparent to Falstaff. In its opening statement, Falstaff stated:

'Now, the Government has a theory which is, so far as the judicial determinations on the point are concerned, comparatively new. You were handed the other day a portion of the record in FTC against Bendix-Fram Corporation, and you were handed at the same time a typed or otherwise reproduced copy of the opinion of Commissioner Elman of the FTC in that case.

'That opinion is not yet officially reported. The case is on its way to an appeal . . .. The Commissioner announced a theory upon which the Government relies and which they say lies within the ambit of this vague, undefined creature, potential competition. What that decision, on appeal as I say, what that decision announces is the doctrine which is called the toe-hold doctrine, and it goes like this:

'If a producer of Product A is standing in the wings, as the Commissioner says, outside the market, merely standing there, but in a position to move into the market if he chooses. He must remain there in the wings and forbear acquiring the producer of a like product within the market area.

'The Commissioner fancies that the mere presence of such a manufacturer or seller close to the market area had some effect which could fall within his ill-defined concept of potential competition. And he found in Bendix-Fram that Bendix was in such a position. He found that Bendix could have acquired a small company rather than Fram, a relatively larger one, beefed it up by expenditures of money which Bendix could afford, and develop it into a full-blown competitor within the market area. I do not know whether that notion will gain substantial acceptance in the theory of antitrust law. I do not know that it will have the approval of the Supreme Court if and when it ever reaches it. I do know, however, that that is an entirely different situation (than) we have here.

'If there is any sense to this total theory at all it must be that the acquiring company was in fact so closely located to the market served by the acquired company that its entrance into the market unilaterally, under its own steam, without motivation was a distinct threat to those who were competing in the market.' App. 182—183 (Emphasis added.) Falstaff then proceeded to state why it felt that the on-the-fringe influence theory did not apply in this case.

During its proof, Falstaff had both its expert witness on economics, App. 257, and an officer of Narragansett, App. 376, testify as to whether Falstaff's presence had a procompetitive effect, both stating that it did not.

14 It is suggested that certain language in the Court's opinion in United States v. Continental Can Co., 378 U.S. 441, 464, 84 S.Ct. 1738, 1750, 1751, 12 L.Ed.2d 953 (1964), is to the contrary. But there the merger was held proved prima facie anticompetitive because the acquiring and acquired companies were engaged in the

same overall line of commerce in the same geographic market. This notwithstanding, it is again only arbitrary to assume that the quoted language was not referring to the acquired company's on-the-fringe in-fluence as a potential competitor for certain end uses for containers.

1 Hearings on S.Res. 98 before the Senate Committee on Interstate Commerce, 62d Cong., Vol. 1, p. 1155.

2 Id., at 1147.

3 Investigation of Conglomerate Corporations, Report by the Staff of Antitrust Subcommittee of the House Committee on the Judiciary on H.Res. 161, 92d Cong., 1st Sess. (Comm.Print).

4 Id., at 18.

5 Id., at 52—53.

6 Id., at 53.

7 Id., at 54.

8 Falstaff contended below that a de novo entry would not be profitable. Management stated that an established distribution system was a prerequisite to entry. The District Judge concluded that '(t)he credible evidence establishes that (Falstaff) was not a potential entrant into said market by any means or way other than by said acquisition.' 332 F.Supp. 970, 972.

1 The Government's complaint alleged that the merger violated s 7 because '(p)otential competition in the production and sale of beer between Falstaff and Narragansett will be eliminated.' (Emphasis added.) While it is true, as the majority asserts, that 'potential competition may stimulate a present procompetitive influence,' see ante, at 1101 n. 13, the complaint nowhere alleges that such a procompetitive influence occurred in this case.

2 Significantly, the majority cites no evidence at all from the record indicating that firms within the New England market were deterred from anticompetitive practices by Falstaff's presence at the market fringe. Indeed, my Brethren concede that '(t)he Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff,' ibid. While the majority contends that there was 'circumstantial evidence' relevant to determining whether there was a loss of procompetitive influence, the evidence it points to suggests only that Falstaff might have been perceived as a potential entrant—not that this perception produced a present procompetitive effect. In fact, the little evidence on the question which does appear in the record strongly suggests that Falstaff was exerting no procompetitive influence. Thus, an economist testifying for the defense stated that, in his expert judgment, Falstaff's presence on the fringe of the market 'had no effect' on the practices of firms within the market (App. 257). Similarly, the director of marketing for Narragansett testified that those within the market did not view Falstaff as a threat and that it never occurred to them that Falstaff would attempt a de novo entry (App. 376).

To be sure, this testimony may well have been biased and might properly have been discounted by the trier of fact. But it is harder to dismiss the documentary evidence showing continued vigorous competition after Falstaff's entry by acquisition. If Falstaff was exerting a substantial procompetitive influence by threating entry, it would seem to follow that anticompetitive practices should have emerged when this threat was removed. The majority nowhere accounts for the continuing absence of such practices.

3 In its brief before this Court, the Government characterizes its cause of action as follows:

'The theory of the suit was that potential competition in the New England beer market may be substantially lessened by the acquisition.' Brief for United States 2—3.

4 Cf. United States v. El Paso Natural Gas Co., 376 U.S. 651, 663, 84 S.Ct. 1044, 1050, 12 L.Ed.2d 12 (1964) (opinion of Harlan, J.):

'Both as a practitioner and as a judge I have more than once felt that a closely contested government antitrust case, decided below in favor of the defendant, has foundered in this Court for lack of an illuminating opinion by the District Court. District Courts should not forget that such cases, the trials of which usually result in long and complex factual records, come here without the benefit of any sifting by the Courts of Appeals. The absence of an opinion by the District Court has been a handicap in this instance.'

5 See Fed.Rule Civ.Proc. 52(a). Cf. United States v. El Paso Natural Gas Co., supra, 376 U.S., at 656—657, 84 S.Ct., at 1047—1048.

6 This pressure continued during the post-acquisition period. From 1964 to 1969, Narragansett's share of the market slipped from 21.5% to 15.5%, while Anheuser-Busch and Schlitz, two large national firms, increased their combined share from 16.5% to 35.8%.

7 At trial, Falstaff argued that it was unlikely to make a de novo entry into the New England market since it had learned through experience that a strong, pre-existing organization of distributors was essential to success. It is true that Falstaff sold most of its beer through independent distributors. However, it should be noted that between 20% and 25% of its sales were made through company branches which Falstaff had established itself. As might be expected, Falstaff's profit margin was significantly higher in areas where it used its own distribution facilities. Moreover, Falstaff's assertion is belied by its own prior history. As noted above, for years Falstaff had successfully expanded by purchasing failing breweries with weak distribution facilities and turning them into effective competitors.

8 At trial, Falstaff also argued that the other Little recommendations which Falstaff did follow led to disastrous consequences, that Little's estimate of construction costs were unrealistic, and that the Little Report was premised on Falstaff's penetration of the mid-Atlantic as well as the New England market.

9 Dr. Horowitz' estimates were based on the assumption that Falstaff's profit margin would be $1.16 per barrel, which was the margin currently enjoyed by the company. However, Anheuser-Busch and Pabst, two of the larger national breweries, both earned more than $2.50 per barrel in their modern plants.

10 Ultimately, on March 6, 1972, Falstaff announced plans to acquire Ballantine's trademarks and tradename.

11 The original s 7 provided in relevant part: '(N)o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.' 38 Stat. 731.

12 The legislative history of the 1950 amendment was traced in detail in our opinion in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). 'The deletion of the 'acquiring-acquired' test was the direct result of an amendment offered by the Federal Trade Commission. In presenting the proposed change, Commission Counsel Kelley made the following points: this Court's decisions had implied that the effect on competition between the parties to the merger was not the only test of the illegality of a stock merger; the Court had applied Sherman Act tests to Clayton Act cases and thus judged the effect of a merger on the industry as a whole; this incorporation of Sherman Act tests, with the accompanying 'rule of reason,' was inadequate for reaching some mergers which the Commission felt were not in the public interest; and the

new amendment proposed a middle ground between what appeared to be an overly restrictive test insofar as mergers between competitors were concerned, and what appeared to the Commission to be an overly lenient test insofar as all other mergers were concerned. Congressman Kefauver supported this amendment and the Commission's proposal was then incorporated into the bill which was eventually adopted by the Congress. See Hearings (before Subcommittee No. 2 of the House Committee on the Judiciary) on H.R. 515, (80th Cong., 1st Sess.) at 23, 117—119, 238—240, 259; Hearings before a Subcommittee of the Senate Judiciary Committee on H.R. 2734, 81st Cong., 1st Sess. . . .147.' 370 U.S., at 317 n. 30, 82 S.Ct., at 1519. CI B. Modes of Potential Competition

13 To be sure, in terms of anticompetitive effects, the dominant firm's acquisition of another firm within the market might be functionally indistinguishable from a de novo entry, which s 7 does not forbid. But 'surely one premise of an antimerger statute such as s 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition.' United States v. Philadelphia National Bank, 374 U.S. 321, 370, 83 S.Ct. 1715, 1745, 10 L.Ed.2d 915 (1963). Moreover, entry by acquisition has the added evil of eliminating one firm in the market and thus increasing the burden on the remaining firms which must compete with the dominant entering firm.

14 Thus, whereas the practical difference between entry by acquisition and entry de novo may be marginal in the case of a dominant entrant, see n. 13, supra, it is crucial in the case of a perceived potential entrant. If the perceived potential entrant enters de novo, its deterrent effect on anticompetitive practices remains and the total number of firms competing for market shares increases. But when such a firm enters by acquisition, it merely steps into the shoes of the acquired firm. The result is no net increase in the actual competition for market shares and the removal of a threat exerting procompetitive influence from outside the market.

15 Still, even if the market is presently competitive, it is possible that it might grow less competitive in the future. For example, a market might be so concentrated that even though it is presently competitive, there is a serious risk that parallel pricing policies might emerge sometime in the near future. In such a situation, an effective competitor lingering on the fringe of the market—what might be called a potential perceived potential entrant—could exert a deterrent force when anti-competitive conduct is about to emerge. As its very name suggests, however, such a firm would be still a further step removed from the exertion of actual, present competitive influence, and the problems of proof are compounded accordingly—particularly in light of the showing of reasonable probability required under s 7.

16 However, if the acquired firm is strengthened to such an extent that it upsets the market balance and drives its competitors out of the market, the acquiring firm takes on the characteristics of a dominent entrant, and the merger may therefore violate s 7 under that theory. See supra, at 1113—1115 and n. 14.

17 Thus, in United States v. Penn-Olin Chemical Co., 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964), for example, management testified that the company had no intention of making a de novo, a nonacquisitive entry. Id., at 166, 84 S.Ct. at 1714—1715, and in part on the basis of this testimony, the District Court found that such an entry was unlikely, id., at 173, 84 S.Ct. at 1718. But we rejected this finding as irrelevant to the company's status as a perceived potential entrant since 'the corporation . . . might have remained at the edge of the market, continually threatening to enter,' ibid., and so affected competition within the market.

18 Public statements by management that the firm does not intend to enter the market may be relevant. To the extent that such statements are believed by the firms within the market, they affect their perception of the firm outside the market as a potential entrant. But in that event, the statements of intent are admissible, not to show subjective state of mind, but, rather, as one of the objective factors controlling the perception of the firms within the market.

19 It might be argued that economic decisions are 'inherently subjective' and that any attempt to derive objective conclusions from economic data is futile. If this observation means that different people reach different

conclusions from the same objective data, then the point must, of course, be conceded. Similarly, if the point is that economic predictions are difficult and fraught with uncertainty, it is well taken. As we recognized in United States v. Philadelphia National Bank, such questions are 'not . . . susceptible of a ready and precise answer in most cases.' 374 U.S., at 362, 83 S.Ct., at 1741. But although the factual controversies in s 7 cases may prove difficult to resolve, the statutory scheme clearly demands their resolution. As this Court held years ago, in response to a similar argument: 'So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that . . . it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this, their final meaning, makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning.' Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 69—70, 31 S.Ct. 502, 519, 55 L.Ed. 619 (1911). Section 7 by its terms requires the trial judge to make a prediction, and it is entirely possible that others may reasonably disagree with the conclusion he reaches. But a holding that the fact of such disagreement requires the judge to delegate his decision-making authority to one of the parties would strike at the heart of the very notion of judicial conflict resolution. While it may be true that different people see economic facts in different light, s 7 gives federal judges and juries the responsibility to reach their conclusions as to the economic facts. And '(i)f justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try.' O. Holmes, The Common Law 48.

20 The Government directs our attention to a case which dramatically illustrates the unreliable character of such evidence. When the Government challenged Bethlehem Steel's acquisition of Youngstown Steel in a s 7 proceeding, Bethlehem vigorously argued that it would never enter the Midwestern steel market de novo. But when the merger was disallowed, see United States v. Bethlehem Steel Corp., 168 F.Supp. 576 (SDNY 1958), Bethlehem nonetheless elected to make a de novo entry. See Moody's Industrial Manual 2861 (1966).

21 It is possible to imagine a small, closely held corporation which is not solely concerned with profit maximization and which through excessive conservatism or inertia would not seize upon an opportunity to expand its profits. But such a corporation is exceedingly unlikely to become the defendant in a s 7 lawsuit. Section 7 suits of this type are triggered when a firm tries to expand its market by entering hitherto foreign territory by acquisition. A firm caught in the act of expanding by acquisition can hardly be heard to say that it is uninterested in expansion.

It is also possible that a firm might make a good-faith error as to the nature of objective market forces. Thus, even though the objective factors favor entry de novo, the firm's managers might think that the same factors are unfavorable. But as the objective evidence favoring entry becomes stronger, the possibility of good-faith error correspondingly decreases, so that if the objective forces favoring entry are clear, the chance of good-faith error becomes de minimis. Moreover, the mere fact that a firm is presently making a good-faith error does not demonstrate that it will continue to do so in the future. See supra, this page.

22 The distinction between subjective statements of intent and objectively verifiable facts is not unknown in other areas of the law. See, e.g., Wright v. Council of City of Emporia, 407 U.S. 451, 460—462, 92 S.Ct. 2196, 2202, 33 L.Ed.2d 51 (1972); NLRB v. Erie Resistor Corp., 373 U.S. 221, 227—228, 83 S.Ct. 1139, 1144—1145, 10 L.Ed.2d 308 (1963). Indeed, perhaps the oldest rule of evidence—that a man is presumed to intend the natural and probable consequences of his acts—is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent. Nor have we hesitated to apply this principle to antitrust law. See, e.g., Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 702—703, 87

S.Ct. 1326, 1335—1336, 18 L.Ed.2d 406 (1967); United States v. United States Gypsum Co., 333 U.S. 364, 394, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948).

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74 S.Ct. 257
Supreme Court of the United States

THEATRE ENTERPRISES, Inc.
v.
PARAMOUNT FILM DISTRIBUTING CORP. et al.

No. 19
|
Argues Nov. 30 and Dec. 1, 1953.
|
Decided Jan. 4, 1954.

Synopsis

Action by suburben theater owner against motion picture producers and distributors for treble damages and injunction for alleged violation of anti-trust laws by conspiring to restrict 'first run' pictures to downtown area to exclusion of suburban areas. The United States District Court for the District of Maryland entered judgment from which plaintiff appealed. The Court of Appeals for the Fourth Circuit affirmed, 201 F.2d 306, and plaintiff was granted certiorari. The Supreme Court, Mr. Justice Clark, held that evidence made case for jury on issue of existence of conspiracy among the defendants, notwithstanding consideration of prior antitrust decrees entered against them.

Judgment affirmed.

Mr. Justice Black dissented.

Attorneys and Law Firms

****258** Messrs. ***538** Philip B. Perlman, Holmes Baldridge, Washington, D.C., for petitioner.

Messrs. Bruce Bromley, Ferdinand Pecora, New York City, for respondents.

Opinion

Mr. Justice CLARK delivered the opinion of the Court.

Petitioner brought this suit for treble damages and an injunction under ss 4 and 16 of the Clayton Act,[1] alleging that respondent motion picture producers and distributors[2] had violated the antitrust laws[3] by conspiring to restrict 'first-run'[4] pictures to downtown Baltimore theatres, thus confining its suburban theatre to subsequent runs and unreasonable 'clearances.'[5] After hearing ***539** the evidence a jury returned a general verdict for respondents. The Court of Appeals for the Fourth Circuit affirmed the judgment based on the verdict. 201 F.2d 306. We granted certiorari. 345 U.S. 963, 73 S.Ct. 948.

Petitioner now urges, as it did in the Court of Appeals, that the trial judge should have directed a verdict in its favor and submitted to the jury only the question of the amount of damages. Alternatively, petitioner claims that the trial judge erred by inadequately instructing the jury as to the scope and effect of the decrees in United States v. Paramount Pictures, Inc., the Government's prior equity suit against respondents.[6] We think both contentions are untenable.

The opinion of the Court of Appeals ****259** contains a complete summary of the evidence presented to the jury. We need not recite that evidence again. It is sufficient to note that petitioner owns and operates the Crest Theatre, located in a neighborhood shopping district some six miles from the downtown shopping center in Baltimore, Maryland. The Crest, possessing the most modern improvements and appointments, opened on February 26, 1949. Before and after the opening, petitioner, through its president, respeatedly sought to obtain first-run features for the theatre. Petitioner approached each respondent separately, initially requesting exclusive first-runs, later asking for first-runs on a 'day and date' basis.[7] But respondents uniformly rebuffed petitioner's efforts and adhered to an established policy of restricting first-runs in Baltimore to the eight downtown theatres. Admittedly there is no direct evidence of illegal agreement ***540** between the respondents and no conspiracy is charged as to the independent exhibitors in Baltimore, who account for 63% of first-run exhibitions. The various respondents advanced much the same reasons for denying petitioner's offers. Among other reasons they asserted that day and date first-runs are normally granted only to noncompeting theatres. Since the Crest is in 'substantial competition' with the downtown theatres, a day and date arrangment would be economically unfeasible. And even if respondents wished to grant petitioner such a license, no downtown exhibitor would waive his clearance rights over the Crest and agree to a simultaneous showing. As a result, if petitioner were to receive first-runs, the license would have to be an exclusive one. However, an exclusive license would be economically unsound because the Crest is a suburban theatre, located in a small shopping center, and served by limited public transportation facilities; and, with a drawing area of less than one-tenth that of a downtown theatre, it cannot compare with those easily accessible theatres in the power to draw patrons. Hence the downtown theatres offer far greater opportunities for the widespread advertisement and exploitation of newly released features, which is thought necessary to maximize the overall return from subsequent runs as well as first-runs. The respondents, in the light of these conditions, attacked the guaranteed offers of petitioner, one of which occurred during the trial, as not being made in good faith. Respondents Loew's and Warner refused petitioner an exclusive license because they owned the three downtown theatres receiving their first-run product.

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. ***541** Interstate Circuit, Inc. v. United States, 1939, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610; United States v. Masonite Corp., 1942, 316 U.S. 265, 62 S.Ct. 1070, 86 L.Ed. 1461; United States v. Bausch & Lomb Optical Co., 1944, 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024; American Tobacco Co. v. United States, 1946, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575; United States v. Paramount Pictures, Inc., 1948, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260. But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made beavy inroads into the traditional judicial attitude toward ****260** conspiracy; [8] but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely. Realizing this, petitioner attempts to bolster its argument for a directed verdict by urging that the conscious unanimity of action by respondents should be 'measured against the background and findings in the Paramount case.' In other words, since the same respondents had conspired in the Paramount case to impose a uniform system of runs and clearances without adequate explanation to sustain them as reasonable restraints of trade, use of the same device in the present case should be legally equated to conspiracy. But the Paramount decrees, even if admissible, were only prima facie evidence of a conspiracy covering the area and existing during the period there involved. Alone or in conjunction with the other proof of the petitioner, they would form no basis for a directed verdict. Here each of the respondents had denied the existence of any collaboration and in addition had introduced evidence of the local conditions surrounding the Crest operation which, they contended, precluded it from being a successful first-run house. They also attacked the good faith of the guaranteed offers of the ***542** petitioner for first-run pictures and attributed uniform action to individual business judgment motivated by the desire for maximum revenue. This evidence, together with other testimony of an explanatory nature, raised fact issues requiring the trial judge to submit the issue of conspiracy to the jury.

Petitioner next contends that the trial judge, when instructing the jury, failed to give sufficient weight to the Paramount decrees. The decrees were admitted in evidence pursuant to s 5 of the Clayton Act, [9] which provides that a final judgment or decree rendered against a defendant in an equity suit brought by the United States under the antitrust laws 'shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto * * *.' Exercising his discretion to choose the precise manner of explaining a decree to the jury, [10] the trial judge instructed that:

'* * * (T)hese same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima ***543** facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credibel evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict ****261** plaintiff to clearances which are unreasonable.

These instructions, petitioner argues, were 'so superficial and so limited as to deprive petitioner of any of the benefits conferred upon it' by s 5.

We cannot agree. The trial judge instructed, in effect, that the Paramount decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed Paramount conspiracy to Baltimore and to the claimed damage period. The reasons for this are clear. The Paramount decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the nub of plaintiff's claim. The Paramount case involved a conspiracy found to exist as of 195, which was enjoined no later than June 25, 1948; [11] but ***544** the conspiracy alleged here involves a claimed damage period running from February 1949 to March 1950. Indeed, the relevancy of Paramount to the instant case is slight. We need not pass on respondents' contention that petitioner was entitled to no benefit at all from the earlier decrees. We merely hold that petitioner was entitled to no greater benefit than the trial judge gave it.

Affirmed.

Mr. Justice BLACK would reverse, being of opinion that the trial judge's charge to the jury as to the burden of proof resting on petitioner deprived it of a large part of the benefits intended to be afforded by the prima facie evidence provision of s 5 of the Clayton Act.

Mr. Justice DOUGLAS withdrew from the case after its submission and took no part in this decision.

All Citations

346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273

Footnotes

1 38 Stat. 731, 737, 15 U.S.C. ss 15, 26, 15 U.S.C.A. ss 15, 26.

2 Respondents are: Paramount Film Distributing Corp., Loew's Inc., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corp., Universal Film Exchanges, Inc., United Artists Corp., Warner Bros. Pictures Distributing Corp., Warner Bros. Circuit Management Corp., Columbia Pictures Corp.

3 Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. ss 1, 2, 15 U.S.C.A. ss 1, 2, and s 2 of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. ss 13, 15 U.S.C.A. s 13. Petitioner has dropped the allegation of a Clayton Act violation.

4 'Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that arear, second-run being the next subsequent, and so on * * *.' United States v. Paramount Pictures, Inc., 1948, 334 U.S. 131, 144—145, note 6, 68 S.Ct. 915, 923, 92 L.Ed. 1260.

5 'A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.' United States v. Paramount Pictures, Inc., 1948, 334 U.S. 131, 144, note 6, 68 S.Ct. 915, 923, 92 L.Ed. 1260.

6 D.C.1946, 66 F.Supp. 323; Ic., D.C.1946, 70 F.Supp. 53, reversed and remanded in part, 1948, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260; Id., D.C.1949, 85 F.Supp. 881, affirmed Twentieth Century-Fox Fox Film Corp. v. United States, 1950, 339 U.S. 974, 70 S.Ct. 1032, 94 L.Ed. 1380.

7 A first-run 'day-and-date' means that two theatres exhibit a first-run at the same time. Had petitioner's request for a day and date first-run been granted, the Crest and a downtown theatre would have exhibited the same features simultaneously.

8 Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill.L.Rev. 743 (1950).

9 38 Stat. 731, 15 U.S.C. s 16, 15 U.S.C.A. s 16; Note, 65 Harv.L.Rev. 1400 (1952).

10 Emich Motors Corp. v. General Motors Corp., 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534; 61 Yale L.J. 417 (1952).

11 The 1946 decree of the three-judge District Court enjoined the defendants, inter alia, from conspiring with respect to runs and clearances. The decree was stayed by Mr. Justice Reed pending the appeal to this Court. The stay expired, by its own terms, when the Court rendered its decision on May 3, 1948. But this decision, remanding the case to the District Court for further consideration, in no way altered the lower court's findings as to runs and clearances. 334 U.S. 131, 144—148, 68 S.Ct. 915, 92 L.Ed. 1260; 85 F.Supp. 881, 885, 897. Hence, the injunctive provisions of the 1946 decree concerning runs and clearances were left intact. Following this Court's decision, the order on mandate was entered in the District Court on June 25, 1948.

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590 B.R. 211
United States Bankruptcy Court, D. Delaware.

IN RE: HH LIQUIDATION, LLC, et al., Debtors.
Official Committee of Unsecured Creditors of HH Liquidation, LLC, et al., Plaintiffs,
v.
Comvest Group Holdings, LLC, Comvest Investment Partners III, L.P., Comvest Investment Partners IV, L.P., Comvest Haggen Holdings III, LLC, Comvest Haggen Holdings IV, LLC, Comvest Advisors, LLC, Haggen Property Holdings, LLC, Haggen Property South, LLC, Haggen Property North, LLC, Haggen Property Holdings II, LLC, Haggen SLB, LLC, John Caple, Cecilio Rodriguez, Michael Niegsch, John Clougher, Blake Barnett, William Shaner and Derrick Anderson, Defendants.

Case No.: 15-11874 (KG) (Jointly Administered)
|
Adv. No. 16-51204 (KG)
|
Signed January 26, 2018

Synopsis
Background: Official committee of unsecured creditors in jointly administered Chapter 11 cases of bankrupt limited liability company (LLC) and its affiliated debtors filed adversary complaint alleging, inter alia, fraudulent transfers, breach of fiduciary duties, and unjust enrichment. The case proceeded to trial.

Holdings: The Bankruptcy Court, Kevin Gross, J., held that:

substantive consolidation was not appropriate;

committee lacked standing to pursue fraudulent transfer claims;

controlling shareholder's decision to acquire new stores was an arm's length transaction protected by business judgment rule;

exculpatory clause that precluded claims for breach of duty of care against managers of company also applied to claims asserted against an officer who was also a manager;

committee was judicially estopped from challenging decision to enter leases and pay rent thereunder as breach of fiduciary duty, as leases were assumed in the bankruptcy;

express written contracts precluded unjust enrichment claims;

recharacterization of $25 million loan into equity was not appropriate; and

equitable subordination of $25 million loan to the claims of unsecured creditors was not appropriate.

Ordered accordingly.

Procedural Posture(s): Judgment.

Attorneys and Law Firms

***218** Ian J. Bambrick, Robert F. Poppiti, Jr., Young Conaway Stargatt & Taylor, LLP, Wilmington, DE, for Debtors.

Alan J. Kornfeld, Pachulski Stang Ziehl & Jones LLP, Los Angeles, CA, Beth E. Levine, Pachulski Stang Ziehl & Jones LLP, New York, NY, Colin R. Robinson, Bradford J. Sandler, Pachulski Stang Ziehl & Jones LLP, Wilmington, DE, for Plaintiffs.

Mark L. Desgrosseilliers, Ericka Fredricks Johnson, Kevin J. Mangan, Womble Bond Dickinson (US) LLP, Wilmington, DE, Yates M. French, Stephen C. Hackney, Richard U.S. Howell, Jeffery Lula, Brendan Ryan, Kirkland & Ellis LLP, Chicago, IL, Philip J. Mohr, Womble Carlyle Sandridge & Rice, PLLC, Greensboro, NC, for Defendants.

Re: D.I. 142

CORRECTED [1] FINDINGS OF FACT AND CONCLUSIONS OF LAW [2]

KEVIN GROSS, U.S.B.J.

*219 INTRODUCTION

On September 8, 2015, Haggen filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* The filing took place a few months after Haggen, an 18 grocery store operation, purchased 146 stores from Albertsons and Safeway (the "Project"). The bankruptcy resulted in the loss of thousands of jobs and creditors losing tens of millions of dollars. The Committee filed an adversary proceeding with a 78 count Complaint alleging fraudulent transfers, breach of fiduciary duties, unjust enrichment and more.

The Court conducted a five day trial and received hundreds of exhibits, numerous deposition transcripts and over 300 pages of the parties' proposed findings of fact and conclusions of law. The parties involved in the adversary proceeding are: the Plaintiffs, which is the Committee acting on behalf of the Debtors; and the Defendants, Comvest Group Holdings, LLC; Comvest Investment Partners III, L.P; Comvest Haggen Holdings III, LLC; Comvest Haggen Holdings IV, LLC; Comvest Advisors, LLC; Haggen Property Holdings, LLC; Haggen Property South, LLC; Haggen Property North, LLC; Haggen Property Holdings, LLC; Haggen Property Holdings II, LLC; Haggen SLB, LLC; and individual defendants John Caple, Michael Niegsch, Cecilio Rodriquez, John Clougher, William Shaner, Blake Barnett and Derrick Anderson.

The Committee and the Defendants litigated the adversary proceeding earnestly and thoroughly, but civilly and courteously. Both sides were very well represented by their lawyers, whose advocacy was outstanding. The Court nonetheless must name the winner and the loser based upon the evidence presented and applicable law.

The Defendants argue that the Individual Defendants made every effort to make the Project a success and that the risk they took is what a capitalist society encourages and its legal system protects. The Defendants also argue that the Committee's legal theories shifted and that the Committee did not bring a single creditor to the trial to support its case.

The Committee argues that there is nothing wrong with risk-taking but here the Defendants structured the Project to place all of the risk on the OpCo creditors while, at the same time, protecting their investment. The Defendants did so by structuring the Project using OpCo's and PropCo's. The OpCo's were the operating stores which filed for bankruptcy, and the PropCo's held the real estate assets and they did not file. As a result, the OpCo's ***220** sustained all of the injuries and their creditors will be unpaid, while the PropCo's were left largely unscathed.

The Committee formulated a strong case that (1) Haggen was unprepared for the Project, (2) the OpCo were undercapitalized, and (3) Comvest structured the Project to provide for all of the risk at OpCo, while PropCo would succeed regardless of the success of the Project.

The Project failed for a number of reasons which the Court discusses below. However, the Court does not share the Committee's view that the Defendants were so cavalier in planning and effecting the Project that they were grossly negligent or that there was anything inherently wrong with the OpCo-PropCo structure. Indeed, no creditor of the OpCo's appeared in court or gave deposition testimony complaining about the debacle. The Project failed but not because the Defendants did not care if it succeeded. Moreover, it is not uncommon for parties who are planning a transaction to make certain that they are protected in the event the transaction fails. Such protection from adverse results is one of the reasons for forming a corporation or other entity – to limit personal liability.

It is unnerving that the Project failed in a matter of months and certainly the Court had questions about how it happened. It turns out that the people in charge, the Individual Defendants, to some degree were not prepared. They were not, however, grossly negligent and they certainly meant for Haggen, Holdings and the OpCo to succeed. The Committee made a strong case but, at the end of the day failed to establish gross negligence or self-dealing or the existence of any fraudulent transfers. The Committee did establish that the leases between Spirit and GIG, and the OpCo's, were above the market rate, but there is no liability. The Committee failed however, to establish the remaining counts of the Complaint.

A brilliant jurist once wrote:

> Thus, to allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary acting in a good faith pursuit of corporate purposes, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear in retrospect.

Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996). The case involved allegations of mismanagement and, as the quoted material makes clear, the Court of Chancery, under the helm of Chancellor William T. Allen, dismissed the complaint. *TriFoods* stands for the proposition that fiduciaries who enter into "foolish" transactions but who are acting in good faith are protected. The facts in the Haggen's case illustrate managers and companies who in retrospect acted foolishly but who the Court finds are not liable.

FINDINGS OF FACT

I. Jurisdiction And Venue

1. This is an action for avoidance of fraudulent transfers, monetary damages for breach of fiduciary duty and for unjust enrichment, equitable subordination, the transfer of liens and security interests, recharacterization, substantive consolidation, and the disallowance of claims. PTO ¶ A.

2. The jurisdiction of the Court over this action is not disputed. The bases for jurisdiction over this action are 28 U.S.C. §§ 157(a) and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012. Venue is proper in the Court pursuant to 28 U.S.C. §§ 1408 and 1409. This action is ***221** a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). PTO ¶¶ B-C.

II. The Parties

A. The Debtors

3. Holdings, one of the Debtors on whose behalf the Committee brings this proceeding, is a limited liability company formed under the laws of Delaware. Prior to the Petition Date, certain Comvest entities owned an interest in Holdings. Holdings directly or indirectly owned and operated approximately 18 supermarkets and one pharmacy in Oregon and Washington before contracting to purchase 146 stores from Albertson's. PTO ¶ 5.

4. Operations, one of the Debtors on whose behalf the Committee brings these causes of action, is a limited liability company formed under the laws of Delaware. Operations was formed prior to the Albertson's Acquisition. Prior to the Petition Date, Operations was owned and managed by its sole member, Holdings. PTO ¶ 6.

5. OpCo South, one of the Debtors on whose behalf the Committee brings these causes of action, is a limited liability company formed under the laws of Delaware. OpCo South was formed prior to the Albertson's Acquisition. Prior to the Petition Date, OpCo South was owned and managed by its sole member, Operations. PTO ¶ 7.

6. OpCo North, one of the Debtors on whose behalf the Committee brings these causes of action, is a limited liability company formed under the laws of Delaware. OpCo North was formed prior to the Albertson's Acquisition. Prior to the Petition Date, OpCo North was owned and managed by its sole member, Operations. PTO ¶ 8.

7. Acquisition, one of the Debtors on whose behalf the Committee brings these causes of action, is a limited liability company formed under the laws of Delaware. Acquisition was formed prior to the Albertson's Acquisition. Prior to the Petition Date, Acquisition was owned and managed by its sole member, Operations. PTO ¶ 9.

8. Haggen, Inc., one of the Debtors on whose behalf the Committee brings these causes of action, is a corporation formed under the laws of the State of Washington. From 2011 through the Petition Date, Haggen, Inc. was owned by Acquisition. PTO ¶ 10.

B. The Non-Debtor Affiliate and Corporate Defendants [3]

9. Defendant CGH is a limited liability company. PTO ¶ 11. Defendant CIP III is a limited partnership and is owned and/or controlled, directly or indirectly, by CGH. PTO ¶ 12. Defendant CIP IV is a limited partnership and is owned and/or controlled, directly or indirectly, by CGH. PTO ¶ 13. Defendant CHH III is a limited liability company and is owned and/or controlled, directly or indirectly, by CGH. CHH III holds 458,489 Class A Units in Holdings. PTO ¶¶ 14-15. Defendant CHH IV is a limited liability company and is owned and/or controlled, directly or indirectly, by CGH. CHH IV holds 1,724,792 Class A Units of Holdings. PTO ¶¶ 16-17. Defendant Comvest Advisors is a limited liability company and is owned and/or controlled, directly or indirectly, by CGH. PTO ¶ 18. Defendant Property Holdings is a limited liability company formed at the time of the Albertson's transaction. At all relevant times prior to the Petition Date, Property Holdings was owned and managed by its sole member, Holdings. PTO ¶ 19. Defendant PropCo South is a limited liability company formed at the time of the

***222** Albertson's transaction. At all relevant times prior to the Petition Date, PropCo South was owned and managed by its sole member, non-Debtor Defendant Property Holdings. PTO ¶ 20. Defendant PropCo North is a limited liability company formed at the time of the Albertson's transaction. At all relevant times prior to the Petition Date, PropCo North was owned and managed by its sole member, non-Debtor Defendant Property Holdings. PTO ¶ 21.

10. From the time of their formation in December 2014 through the Petition Date, PropCo South and PropCo North were managed by their sole member, Property Holdings. PTO ¶ 60-61. Defendant Property Holdings II, is a limited liability company formed at the time of the Albertson's transaction. At all relevant times prior to the Petition Date, Property Holdings II was owned and managed by its sole member, Debtor Holdings. PTO ¶ 22. Defendant Haggen SLB is a limited liability company formed at the time of the Albertson's transaction. At all relevant times prior to the Petition Date, Haggen SLB was owned and managed by its sole member, Debtor Acquisition. PTO ¶ 23. From the time of their formation through the Petition Date, the SLB Entities had no creditors, did not create or maintain any board minutes, did not utilize or maintain their own business forms or domain name, and maintained their business addresses, books and record and email servers at the Debtors' location. PTO ¶ 63.

C. The Individual Defendants

11. John Caple. Caple is an individual residing in the state of Florida. Caple was a Partner at Comvest Partners until January 31, 2016. In addition, Caple served as (a) a Manager of Holdings since at least January 1, 2014 through at least the Petition Date, as well as President and Chief Executive Officer for the period beginning no later than January 1, 2014 through January 30, 2015, and (b) a Director of Haggen, Inc. since at least January 1, 2014 through at least the Petition Date. PTO ¶ 24. Caple joined Comvest in 2010, as a managing director and later became a partner. Caple was responsible for managing Comvest's investment in Haggen, and was the leader of the Deal Team; he was asked to leave the firm less than six months after Haggen filed for bankruptcy relief. Trial Tr. (10/16) at 101:22-102:6, 103:1-18, 183:7-21.

Michael Niegsch. Niegsch is an individual residing in the state of Florida. At all relevant times, Niegsch was a Vice President of Comvest Partners. In addition, Niegsch has served as a Manager of Holdings since January 30, 2015. PTO ¶ 26. Niegsch joined Comvest in 2010. He graduated from the University of Michigan four years earlier, spent about seven months at UBS, two years at Morgan Joseph, and one year as an independent consultant before joining Comvest. Trial Tr. (10/17) at 5:13-6:16. In the summer of 2014, Niegsch was designated the "quarterback" of the Deal Team. As such, Niegsch was responsible for overseeing third party due diligence streams, managing third party experts, interfacing with Caple and the IC, working with financing counterparties to arrange financing for the transaction, and interfacing with management concerning the store conversions. Niegsch participated in the negotiation of the APA, the ABL, and the Sale Leaseback Transactions, and was also responsible for negotiating with UBS about a possible loan against the PropCo Entities' real property, and ultimately with Citibank in August 2015 concerning the PropCo Advance. Trial Tr. (10/17) at 6:17-8:10.

Cecilio Rodriguez. Rodriguez is an individual residing in the state of Florida. At all relevant times, Rodriguez was the Chief ***223** Financial Officer of Comvest Partners. In addition, Rodriguez has served as (a) Secretary and Chief Financial Officer of Holdings for the period November 24, 2014 through January 30, 2015, as well as a Manager of Holdings since November 24, 2014, and (b) a Director of Haggen, Inc. for the period beginning no later than September 1, 2014 through December 6, 2014. PTO ¶ 25.

John Clougher. Clougher is an individual residing in the state of Washington. Clougher served as Chief Executive Officer of (a) Holdings since January 30, 2015 through at least the Petition Date, as well as a Manager of Holdings during that time, (b) Acquisition since December 6, 2014 through at least the Petition Date, (c) Haggen, Inc. since September 8, 2014 through at least the Petition Date, as well as President during that time, Treasurer for the period September 8, 2014 through January 1, 2015, and Director since December 6, 2014 through at least the Petition Date, (d) Operations since December 22, 2014 through at least the Petition Date, (e) OpCo North since December 2, 2014 through at least the Petition Date, as well as President during that time, (f) Haggen SLB since December 2, 2014 through at least the Petition Date, as well as President during that time, (g) Property Holdings for the period December 2, 2014 through October 8, 2015, (h) Property Holdings II for the period December 2, 2014 through October 8, 2015, (i) Property Holdings III, for the period December 2, 2014 through October 8, 2015, and (j) PropCo North for the period December 2, 2014 through October 8, 2015. PTO ¶ 27.

William Shaner. Shaner is an individual residing in the state of Washington. Shaner served as (a) a Manager and President of Holdings from January 30, 2015 to September 2, 2015 (b) President of Acquisition from January 30, 2015 to September 2, 2015; President of Operations from December 22, 2014 to September 2, 2015, and (d) President and Chief Executive Officer of OpCo South from December 2, 2014 to September 2, 2015. PTO ¶ 29.

Blake Barnett. Barnett is an individual residing in the state of Washington. Barnett has served as the Chief Financial Officer of (a) Holdings since January 30, 2015 through at least the Petition Date, (b) Acquisition since January 30, 2015 through at least the Petition Date, (c) Haggen, Inc. since January 1, 2015 through at least the Petition Date, Operations since December 22, 2014 through at least the Petition Date, (e) OpCo North since December 2, 2015 through at least the Petition Date, (f) Property Holdings from December 2, 2014 through October 8, 2015, (g) Property Holdings II from December 2, 2014 through October 8, 2015, (h) Property Holdings III from December 2, 2014 through October 8, 2015, (i) Haggen SLB since December 2, 2015 through at least the Petition Date, (j) OpCo South since December 2, 2014 through at least the Petition Date (as well as Vice President since October 29, 2015 through at least the Petition Date), (k) PropCo South from December 2, 2014 through October 8, 2015, and (l) PropCo North from December 2, 2014 through October 8, 2015. PTO ¶ 28.

Derrick Anderson. Anderson is an individual residing in the state of Washington. Anderson served as the Secretary of (a) Holdings since January 30, 2015 through at least the Petition Date, (b) Acquisition since December 6, 2014 through at least the Petition Date, (c) Haggen, Inc. since September 8, 2014 through at least the Petition Date, (d) Operations since December 22, 2014 through at least the Petition Date, (e) OpCo South since December 2, 2014 through at least the Petition Date (as well as Vice President since October 29, 2015 through at least the Petition Date), (f) ***224** OpCo North since December 2, 2014 through at least the Petition Date, (g) Haggen SLB since December 2, 2014 through at least the Petition Date, (h) Property Holdings from December 2, 2014 through October 8, 2015, (i) Property Holdings II from December 2, 2014 through October 8, 2015, (j) Property Holdings III from December 2, 2014 through October 8, 2015, (k) PropCo North from December 2, 2014 through October 8, 2015, and (l) PropCo South from December 2, 2014 through October 8, 2015. PTO ¶ 30.

III. Relevant Procedural History

12. On the Petition Date, the Debtors filed with the Court voluntary petitions for relief under the Bankruptcy Code. These cases are being jointly administered for procedural purposes pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure. No trustee or examiner has been appointed in the Debtors' cases. PTO ¶ 1. The United States Trustee for Region 3 appointed the Committee on September 21, 2015, to represent the interests of all general unsecured creditors in these cases pursuant to Section 1102 of the Bankruptcy Code. PTO ¶ 2.

13. On January 14, 2016, the Committee, the Debtors, Comvest, the PropCo Entities, and Property Holdings II executed and filed that certain Stipulation and Order (1) Granting Derivative Standing to the Official Committee of Unsecured Creditors to Commence Litigation Against Haggen Property Holdings, LLC, Haggen Property South, LLC, Haggen Property North, LLC, Haggen Property Holdings II, LLC, Haggen Property Holdings III, LLC, Comvest Partners and/or Directors and Officers Thereof; and (2) Providing for a Litigation Standstill, at Docket No. 1216 (the "Initial Standing Stipulation"). On January 15, 2016, the Court approved the Initial Standing Stipulation. PTO ¶ 3.

14. On April 29, 2016, the Committee and the Debtors executed and filed that certain Stipulation and Order Granting Derivative Standing to the Official Committee of Unsecured Creditors to Commence Litigation Against Haggen SLB, and/or its Past and/or Present Directors and Officers, at Docket No. 1858 (the "Second Standing Stipulation" and together with the Initial Stipulation, the "Standing Stipulations"). On May 2, 2016, the Court approved the Second Standing Stipulation. PTO ¶ 4.

15. On September 7, 2016, the Committee filed its Complaint and Objection to Claims at Docket No. 1 (the "Complaint").

16. Defendants filed their Answer to the Complaint on December 9, 2016. Docket No. 16 (the "Answer").

17. The Court conducted a trial on five consecutive days from October 16-20, 2017, during which it heard live testimony from each of the seven Individual Defendants, Todd Hooper (a representative of ATK), and the following expert witnesses: David MacGreevey, Carol Flaton, and James Howard on behalf of the Committee; and Kevin Montague and John Satter on behalf of the Defendants. The Court also admitted into evidence numerous exhibits

and deposition designations of 26 witnesses as well as the videotaped deposition of Thomas Clark, a non-defendant managing director of Comvest who sat on the IC during the relevant time.

IV. Comvest Acquires A Controlling Interest In Haggen

18. Haggen was founded in 1933 as a single grocery store. In the ensuing decades, the Haggen family operated the company and opened additional stores. In 1962, the Haggen family concentrated all ***225** of their business activities in a single corporate entity, Haggen, Inc. By 2011, Haggen, Inc. operated a 30-store chain of grocery stores in the states of Washington and Oregon. PTO ¶ 31. [4]

19. In 2011, the Haggen family sold an 80% equity interest in Haggen, Inc. to Comvest. Specifically, defendant CGH, a Comvest entity, purchased its majority stake in Haggen, Inc. through two newly-formed limited liability companies, Holdings and Acquisition, which it formed for that purpose. Thus, in January 2011, CGH formed Holdings and acquired 80% of the membership interests of that entity with the Haggen family obtaining the balance of the membership interests, and at about the same time, CGH also formed Acquisition. Holdings solely owned the membership interests in Acquisition, and Acquisition owned all of the stock of Haggen, Inc. PTO ¶ 32.

20. Over the next four years, under Comvest's direction, Haggen closed a number of unprofitable stores. As of the end of 2014, Haggen operated 18 grocery stores and one pharmacy on a profitable basis. PTO ¶ 33.

V. The Albertson's Transaction – The Project

A. Comvest Learns Of The Albertson's Opportunity

21. In the summer of 2014, Caple learned that the FTC required Albertson's and Safeway to divest a substantial number of stores as a condition to the closing of their proposed merger and identified this as an opportunity for Comvest. On August 13, 2014, Comvest submitted its initial indication of interest to acquire 22 stores in Washington and Oregon. Trial Tr. (10/16) at 104:25-105:18; PX 4; PTO ¶¶ 34, 46. Comvest originally focused on Washington and Oregon because those were the states in which Haggen operated.

22. On September 15, 2014, the Deal Team informed the IC that the number of stores being considered had increased from 22 to approximately 43, and all were located in Washington and Oregon. *Compare* PX 4.004 *with* PX 8.002. The IC was also informed that the appraised value of the real estate associated with those 43 stores exceeded the proposed purchase price by $56 million. The Deal Team described the proposed transaction as "transformational" but noted that it also "provide[d] integration execution risk (i.e., Haggen's current infrastructure will need to absorb 43 additional stores)." Trial Tr. (10/16) at 106:2-8; 106:25-112:17; PX 8.

23. Several weeks later, Comvest was informed by Albertson's representatives that Comvest would also have to bid on stores located in California to remain competitive. The Deal Team informed the IC of this development and noted that, although the execution risk would increase as Haggen entered new markets, they believed the proposed transaction was "too juicy" to pass up, in part, because of the value of the owned real estate associated with the stores. Trial Tr. (10/16) at 117:7-119:21; PX 6; PX 7.

***226** B. Comvest Focuses On The Real Estate.

24. On November 3, 2014, the Deal Team informed the IC that, among other things, "Albertson's has asked us to take 16 additional stores in Nevada and Arizona," nine of which were situated on fee-owned real estate and two of which were subject to ground leases. The IC was also told that Albertson's was "adding these stores to our deal for no additional purchase price because it makes their lives easier," and that the appraised value of the real estate associated with the stores in Nevada and Arizona was $56 million.

25. The Deal Team also included certain projections described as "downside scenarios." Clark and Marrero focused their attention on the value of the real estate. In particular, both Clark and Marrero sought assurances from Caple about the value of the "underlying real estate (in downside scenarios)" because, according to Marrero, "that affects [the] decision tree more than anything." Trial Tr. (10/16) at 119:22-123:6, 296:9-298:6; Clark Tr. at 116:20-117:10, 117:20-119:2; DX 79; PX 9. Indeed, Clark acknowledged that the "potential to acquire real estate with underlying value" was one of the "key components" to Comvest's deal thesis. Clark Tr. at 109:25-111:14; PX 26.005.

26. A month after Clark and Marrero sought assurances as to the value of the real estate, the Deal Team requested authority from the IC to submit Haggen's final bid, and submitted a "deck" in advance of the meeting. Trial Tr. (10/16) at 123:12-15; PX 30. In the deck, and at the meeting, the Deal Team told the IC that the "all-in purchase price of $430M"

would be funded with the proceeds from the Sale Lease Back Transactions and the ABL, and would yield, among other things, residual real estate with an appraised value of $118 million, all of which would be transferred to the PropCo Entities. Trial Tr. (10/16) at 123:16-126:19; PX 19.004.

27. Several weeks later, before Haggen closed on the first store, Falk and Niegsch conferred on, among other things, the economic benefits that Comvest expected to reap from the real property. Specifically, and consistent with the representations set forth in the December deck, Niegsch confirmed for Falk that the PropCo Entities would have (a) unencumbered real estate appraised at $117 million, and (b) annual rental income of $13 million from the OpCo Entities (pursuant to the PropCo Leases), all for Comvest's ultimate benefit. Trial Tr. (10/17) at 49:4-51:17; PX 33.

VI. Execution Risks

A. Risks Are Identified Pre-Closing

28. Comvest knew in September that the initial proposal to acquire just 43 stores in Washington and Oregon states where it was already operating presented significant integration risks because Haggen was going to need to integrate the Albertson's and Safeway stores "into our chain and rebrand them. So there was an awful lot to do to get that done." According to Caple, "infrastructure," included employees, software and IT systems, union and vendor relationships, purchasing and distribution processes, and back office operations. Trial Tr. (10/16) at 112:18- 114:4; PX 8.003. Caple knew that these integration risks would increase as stores continued to be added. *Id.* at 119:10-17.

29. Less than six weeks before the signing of the APA, certain of the Individual Defendants and Comvest's advisors identified substantial transaction risks and potential downside scenarios, including:

- "sales growth/banner conversion would have no benefit at all"

- "no labor savings at all, ever"

***227** • "store expenses are up some, 5%, 10% from base case"

- While the Haggen brand may bring positives, it "isn't going to overwhelm the customer at first."

- "We are fighting headwinds like eliminating the Von's card and fuel programs; not small takeaways."

- "We are eliminating banners that have a presence for years, and while somewhat tarnished, still maintain a loyal customer base."

PX 157.

30. Separately, in December, SuperValu raised concerns to Comvest and Haggen about "logistics/slotting," the process whereby decisions are made concerning the assortment of products that would be put on the shelves. SuperValu advised them that "[a]ssortment decisions must be made by Haggen immediately" or there would be "[r]isk to customer experience and out of stocks." PX 273.004.

B. Pricing Risks Were Identified

31. The pricing risks were among the most significant risks that were identified to the Defendants. The evidence establishes that Defendants were specifically advised prior to the execution of the APA that if Haggen failed to execute its pricing strategy, it would likely suffer a loss of customers.

32. On October 6, 2014, shortly after ATK was hired, Caple told Hooper that there "seems to be a huge capability gap around pricing at Haggen." Trial Tr. (10/20) at 149:12-21; PX 206.

33. On October 15, 2014, after having been alerted to the issue, ATK identified "pricing" as one of the "Key Decisions/ Issues To Be Addressed" and advised Comvest and Haggen to "maintain" existing prices in the short-term in order to "minimize changes for [the] consumer." PX 211.010. Hooper advised Haggen that if Haggen did not maintain existing prices, particularly for "like items," Haggen was likely to lose customers. Trial Tr. (10/20) at 146:22-147:17.

34. ATK was terminated by early December. According to Hooper, Caple informed him that he did not want to pay ATK $500,000 per month for services. Trial Tr. (10/20) at 152:10-153-10.

35. Comvest and Haggen apparently thought they could "outsource" the pricing logistics to SuperValu. Trial Tr. (10/19) Tr. at 35:16-25; PX 72-0027. This assumption proved problematic because, among other reasons, (a) SuperValu had no prior relationship with Safeway, and (b) Comvest and

Haggen decided to keep the legacy stores running on their own independent platform thereby preventing the integration of all three parts of the newly-formed enterprise. SuperValu (Collison) Tr. at 40:9-13, 41:21-42:6.

36. The logistics of training everyone on the various information systems created additional risks. SuperValu, for example, had to train all of the Safeway employees as well as approximately 130 merchants (the corporate-level managers that make "item and price and promotion decisions and assortment decisions."). *Id.* at 43:7-44:25. SuperValu knew "early on" that it would take "months" to fully train everyone, a point that it asserts was conveyed to Haggen but nevertheless caused considerable concern due to the closing cadence schedule. *Id.* at 47:24-49:19.

37. Concerning pricing and merchandising, SuperValu asserted that "we did not believe that there was adequate time for Haggen to make all the merchandising decisions that they needed to make in order to have the right prices, the right assortment in their stores." SuperValu (Collison) Tr. at 91:18-93:12; PX 273.003 ***228** (identifying the impact and associated risks for pricing and merchandising issues caused by the accelerated conversion commencement date).

38. Haggen was dismissive of the risks that had been identified, with Clougher telling Barnett and Genser that "[t]here is a large level of b...s..." in SuperValu's risk analysis. PX 273.001. When the very first store opened, there were considerable pricing problems that resulted in multiple "shelf tags" for the same items; this created a laborious, complex set of issues that required determinations to be made as to which tag was the correct one, and then match that tag with the "point of sale system." *Id.* at 51:9-54:11. As a consequence, there were inventory shortages and a loss of customers, just as SuperValu had warned back in December. *Id.* at 111:3-112:2; PX 273.

<u>Certain Third-Parties' Roles With Projections</u>

39. Defendants contend that their proposal to acquire 146 stores from Albertson's was "vetted by multiple third parties who were incentivized to rigorously inspect the deal" and all "believed it would work." *See, e.g.,* Def. Trial Br. at 4-5, 15, 32-33. Defendants also contend that these third parties validated Haggen's corporate structure and found Comvest's projections to be reasonable. Trial Tr. (10/16) at 47:3-10; 66:24-25, 69:7-12. The evidence shows that Defendants' claims are somewhat overstated.

A. <u>FTC</u>

40. The FTC is a governmental agency that ordered Albertson's and Safeway to divest certain stores as a condition to approving the Albertson's/Safeway merger, and that approved Haggen as a qualified bidder of 146 of those stores. PTO ¶¶ 46, 48. The evidence shows that Haggen and Comvest (a) provided the FTC with a business plan and a set of projections (that did not include a "downside case" or a "real bad downside case" showing Haggen with barely any liquidity), and (b) participated in one in-person meeting with the FTC that lasted two to three hours. Trial Tr. (10/16) at 224:3-22; DX 72, PX 318. The FTC apparently relied on these materials and meeting in approving Haggen as a qualified bidder.

B. <u>PNC</u>

41. Defendants also contend that by agreeing to the terms of the ABL, PNC implicitly or explicitly validated or approved Haggen's new corporate structure, including the transfer of assets to bankruptcy remote entities, Comvest's projections, and the Albertson's Acquisition generally. *See, e.g.,* Trial Tr. (10/16) at 60:15-21; Answer ¶ 82; Def. Trial Br. at 4, 11. The evidence somewhat contradicts Defendants' contentions concerning PNC.

42. Comvest and PNC had a long-standing relationship that preceded the Albertson's Acquisition, with PNC already having extended credit to "five or six" of Comvest's portfolio companies. PNC (Goldstein) Tr. at 39:11-22, 40:19-24; PX 369.003 (listing the entities PNC has provided financing to, including specific Comvest funds, companies to which Comvest provided debt financing, and Comvest portfolio companies). On August 30, 2014, Niegsch wrote to PNC about Haggen's potential acquisition of stores from Albertson's and Safeway and emphasized that "[g]iven the dynamics, we are going to be able to pick up the stores and some valuable real estate for a very attractive price." Niegsch expressed interest in "upsizing our current ABL facility and putting some leverage on the real estate." PX 366.004.

43. By October 2014, the Albertson's deal had expanded to include certain California stores and PNC was asked to lead a ***229** $150 million underwriting for a revolving, asset- based loan. PNC was advised that Comvest planned to take out a $61 million term loan against the fee-owned real estate, with $50 million of the proceeds used to finance a "Comvest Dividend payable at closing." PX 367.

44. On December 1, 2014, PNC sought approval from its Credit Risk Management Committee and Executive Credit Risk Management Committee for a proposed $180 million revolving line of credit to Haggen. PNC (Goldstein) Tr. at 74:3-77:3; PX 369. These Committees approved the proposed transaction and provided six "business justifications" for the loan including the profitable nature of the deal to PNC, PNC's "extensive history with Comvest," and the fact that the loan was to be a "fully-secured, fully-monitored, revolver-only facility." PX 369.004.

45. Although PNC ultimately approved the loan, PNC's underwriters considered Haggen's proposed $180 million ABL risky and assigned it a "risk rating" of 12B. According to PNC, the numerical part of the risk rating is an assessment of the probability of the prospective borrower's default with "1" being the least likely and "14" being the most likely to default. The alphabetical part of the risk rating is an assessment of PNC's loss in the event of default or, stated another way, PNC's perception of the quality of collateral, with "A" being the most secure (*i.e.*, cash collateral) and "G" being the least secure (*i.e.*, unsecured). PNC (Goldstein) Tr. at 80:11-84:11, 85:11-20; PX 369.003. Thus, in assigning a risk rating of 12B to the proposed ABL, PNC determined that there was a very substantial risk of default, but concluded that the risk was mitigated by the strength of the collateral securing the ABL. PX 369.005-006.

46. On February 12, 2015, Haggen, Inc., OpCo South, and OpCo North entered into the ABL. PNC (Goldstein) Tr. at 100:7-101:9; PX 370. The ABL was projected to be, and initially was, for a maximum revolving advance amount of $180 million. *Id.* at 101:10-13, 104:20-23; PX 370.038.

47. Based on the foregoing, the Court concludes PNC identified risks, but justified extending the loan based on the quality of the collateral, the nature of the loan, and its long-standing relationship with Comvest.

C. Garrison

48. Garrison is a sale leaseback counterparty. Defendants contend that by entering into the Sale Leaseback Transactions, Garrison validated Haggen's new corporate structure, Comvest's projections, and the Albertson's Acquisition generally. Trial Tr. (10/16) at 60:22-61:4; Def. Trial Br. at 4, 12. The evidence is to the contrary.

49. Prior to entering into the Sale Leaseback Transaction, a team at Garrison prepared a "Confidential Information Memorandum" ("CIM"). The CIM was presented to Garrison's Management Committee, the body charged with the responsibility of approving the transaction on behalf of Garrison. Garrison (Rosenthal) Tr. at 41:5-44:21; PX 178. The CIM detailed, among other things, the many risks identified by Garrison as well as Garrison's overall strategy. PX 178.

50. The CIM and Garrison's testimony establish that Garrison entered into the Sale Leaseback Transactions because it believed it was acquiring real estate at a substantial discount to market, and that its business strategy would allow it to avoid the substantial transactional risks that it identified including, but not limited to, the risk that Haggen would run out of liquidity.

***230** 51. Prior to entering into the transaction, Garrison and its industry consultant, Food Partners, identified numerous and substantial risks presented by the proposed Albertson's Acquisition. Garrison (Rosenthal) Tr. at 38:16-39:6, 74:17-25; PX 178.016. Among the risks identified by Garrison were:

a. Haggen was deemed to be a "non-investment grade credit"

b. Comvest planned to contribute insignificant new equity

c. Haggen was taking on higher than average risk with this "complicated endeavor" due to the "size of the transaction; the amount of stores that were being acquired."

d. Garrison was concerned that Haggen lacked the capability to successfully convert all the stores

e. Haggen lacked brand recognition in the new markets it was entering

f. Albertson's and Safeway were to remain direct competitors

g. Short term liquidity risk due to the possibility that corporate cash flows could be impaired

h. Possible delays in the conversion schedule; higher than expected costs; higher CAPEX; sales declines

Garrison (Rosenthal) Tr. at 75:2-76:11, 80:24-90:23; PX 178.016.

52. Food Partners also prepared its own independent risk assessment that was presented to Garrison's Management Committee as part of the CIM. Among the risks Food Partners identified were:

a. "This type of transaction [*i.e.,* the size and scale] has never been done before"

b. "Haggen brand and format is not portable for other markets."

c. "Leveraged acquisition with Comvest not investing equity"

d. Albertson's and Safeway "will be direct competitors and will know the markets (and customers) better than Haggen"

e. "Closing and conversion schedule highly risky, especially licenses and permits and executing SLB"

f. "Management team has not operated a traditional format in these markets"

g. "Transaction complexity and size may overwhelm Haggen"

h. "Haggen runs out of liquidity"

Garrison (Rosenthal) Tr. at 92:18-104:5; PX 178.093.

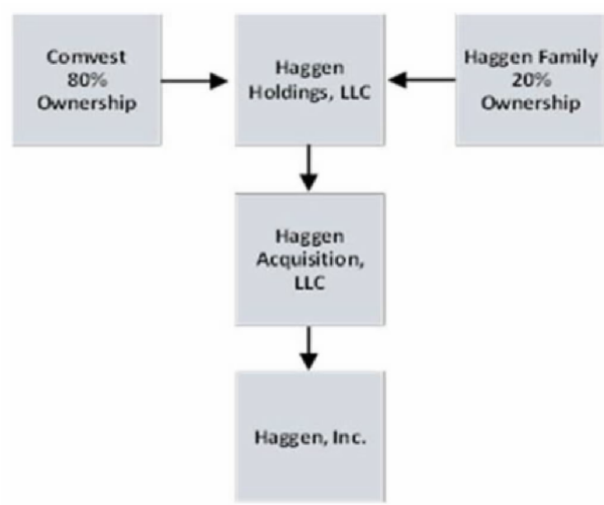
53. The opportunity to purchase the real property at such a substantial discount to market provided Garrison with the financial incentive to proceed, and the strategy of selling the real property individually over a nine-month period mitigated substantially all of the risks identified.

VII. Comvest's New Corporate Structure

54. The Committee contends that all of the claims at issue arise, in the first instance, from Comvest's decision to create a "PropCo/OpCo" structure in connection with the Albertson's Acquisition. To be clear, there is nothing illegal, improper or unfair about the utilization of a PropCo/OpCo structure.

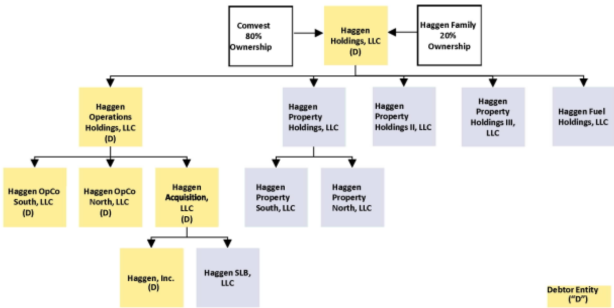
55. The Committee contends that Comvest's adoption of the PropCo/OpCo structure in this case was problematic for at least the following reasons: (a) the structure was adopted on the eve of, and in connection with, a "transformative" transaction (b) the transaction involved an eight-fold increase in the number of Haggen's stores, including Haggen's expansion into three new states where Haggen had no prior name recognition, customer affinity, or reputation, (c) the transaction was fraught with substantial execution risks, ***231** (d) the OpCo Entities were inadequately capitalized from the outset and remained so, and (e) Comvest devised the PropCo/OpCo structure with the specific intent of securing the economic benefits of the real estate for itself, whether the transaction succeeded (by leveraging the real estate to pay dividends to Comvest, and creating $13 million in annual cash flow from the rent due under the PropCo Leases and subleases), or failed (by placing the real estate beyond the reach of the OpCo Entities' creditors, Comvest intended to provide itself with "downside protection" in the event of a "disaster" or "liquidation" scenario).

56. The parties agree on certain basic facts. From the time of Comvest's investment in Haggen in 2011 through December 1, 2014, the equity owners of the enterprise (*i.e.*, Comvest and members of the Haggen family, through HHI) owned the membership interests in Holdings, which owned all of the membership interests in Acquisition, which owned all of the common stock in Haggen, Inc. as follows:



PTO ¶ 55.

57. On the eve of the Albertson's Acquisition, Comvest caused Haggen to create ten new entities within a new "PropCo/OpCo" structure:



***232** 58. The evidence establishes that Comvest created this structure with the intent of keeping the assets and liabilities of the PropCo Entities separate from the assets and liabilities of the OpCo Entities. Trial Tr. (10/16) at 147:19-148:6. Caple admitted that the effect of the PropCo/OpCo structure was to prevent the PropCo Entities' assets (*i.e.*, the real estate) from being used to satisfy claims made against the OpCo Entities. Trial Tr. (10/16) at 292:17-294:4. Clark expressed the same view, testifying that he knew the real estate assets would be transferred to the PropCo Entities and would be unencumbered, and that there would be "no link directly between" the PropCo Entities and the OpCo Entities. Clark Tr. at 122:10-123:14, 125:11-126:6, 127:2-128:21.

59. Comvest was intent on placing as much of the real estate as possible into an entity or entities that creditors of the operations could not reach. This topic came up on November 20, 2014, when Barnett, who needed to know the names of the entities for purposes of executing various contracts, asked Niegsch about the status of the "legal entity structure." Trial Tr. (10/17) at 163:16-24; PX 29. Niegsch told Barnett that he was unsure, but if "we have to take the [BofA deal advocated by Albertson's/Cerberus], we could probably keep this structure, but it would mean nothing from a silo-'ing' of assets and liabilities perspective." PX 29.

60. At trial, Niegsch admitted that (a) the "structure" he was referring to was the PropCo/OpCo structure, (b) his reference to the "siloing" of assets and liabilities "was to the structure that [Comvest] was pursuing that would have separated the operating assets and liabilities from the real estate assets and liabilities," (c) if Comvest took the BofA deal it "wouldn't have a structure where the operating company had the operating assets and liabilities, and the real estate company had the real estate assets and liabilities," and (d) the effect of the PropCo/OpCo structure was that "the property assets couldn't be used to satisfy the OpCo liabilities and the OpCo assets couldn't be used to satisfy the PropCo liabilities." Trial Tr. (10/17) at 44:7-46:2, 164:19-165:11 (cross-collateralization would permit the lender to foreclose on all assets in the event of default); PX 29.

VIII. The Transactions Were Interrelated And Dependent

A. Holdings' Rights to Acquire Real Estate Were Transferred to PropCo Entities and SLB Entities Through the Contribution Agreements

61. With the corporate structure in place, Comvest executed on its strategy of the transfer of real estate assets from Holdings to the PropCo Entities and the SLB Entities through the use of the Contribution Agreements. Trial Tr. (10/17) at 62:20-63:8; PTO ¶ 65.

62. Holdings was the sole Haggen party to the APA and had the exclusive right to acquire, among other things, the real property assets, including fee-owned property and ground leases. PX 263. Haggen acquired the stores on a rolling basis. As the stores were acquired, Anderson signed Contribution Agreements whereby Holdings transferred its right to acquire specified stores to a PropCo Entity (if it was a fee owned property that was not included in an SLB transaction) or to an SLB Entity (if it was a fee owned property that was included in an SLB transaction). Trial Tr. (10/17) at 258:21-260:4; PTO ¶¶ 64-65; PX 263; PX 89-PX 103.

63. Holdings received nothing in exchange for the transfers of its right to acquire the real property assets to the PropCo Entities and the SLB Entities. ***233** Trial Tr. (10/16) at 126:20-127:25; Trial Tr. (10/17) at 260:16-20; 261:6-8.

B. The SLB Transactions

64. Haggen financed the Albertson's Acquisition by using a substantial portion of the acquired real estate in two sale leaseback transactions pursuant to which (a) Holdings transferred its right to acquire certain fee owned properties to one of the SLB Entities pursuant to the Contribution Agreements (b) the SLB Entities then sold those fee-owned properties to the SLB counterparties (*i.e.,* Garrison and Spirit) and (c) the sales proceeds were initially paid to the SLB Entities and most was then used to pay Albertson's purchase price; and the financial obligations under the SLB Leases were not assumed by the SLB Entities that received the money, but were placed on the OpCo Entities. Thus Haggen affiliates (the SLB Entities) received the proceeds from the SLB transactions. Another group (the OpCo Entities) assumed the obligations in the form of the SLB Leases.

1. The SLB Transactions with Spirit

65. Holdings signed the "Purchase and Sale Agreement and Joint Escrow Instructions" with Spirit, dated as of November 24, 2014 (together with any amendments thereto, the "Spirit SLB Agreement"). PTO ¶ 70.

66. Pursuant to the Spirit SLB Agreement, the SLB Entities sold 20 parcels of real estate (and improvements) to Spirit located in Arizona, California, Nevada, Oregon, and Washington (the "Spirit SLB Properties") for approximately $224.4 million. PTO ¶¶ 71-74.

67. An affiliate of Spirit, Spirit SPE HG 2015-1, LLC, as landlord, entered into a Master Lease Agreement with Operations, as tenant, as of February 12, 2015, with respect to certain of the other Spirit SLB Properties (together with any amendments thereto, and the Spirit Lease, the "Spirit Master Leases"). PTO ¶ 86.

2. The SLB Transactions with Garrison

68. Haggen also entered into a Sale Leaseback Transaction with Garrison. [5] Garrison understood that Comvest was the majority equity owner of Haggen and negotiated the Sale Leaseback Transaction with Niegsch. Garrison (Rosenthal) Tr. at 13:3-11. Garrison also understood that completion of the Sale Leaseback Transaction was dependent on Haggen's closing on the APA with Albertson's. Garrison (Rosenthal) Tr. at 23:11-25:5.

69. On December 4, 2014, Holdings and Garrison executed a "Purchase and Sale Agreement and Joint Escrow Instructions" (together with any amendments thereto, the "Garrison SLB Agreement"). PTO ¶ 75; Garrison (Rosenthal) Tr. at 25:6-18; PX 481. The Garrison SLB Agreement governed the "sale" part of the SLB transaction. Garrison (Rosenthal) Tr. at 108:22-109:3.

70. Pursuant to the Garrison SLB Agreement, the SLB Entities sold 19 parcels of real estate (and improvements) located in Arizona, California, Nevada, Oregon, and Washington (the "Garrison SLB Properties") for approximately $134.4 million. PTO ¶¶ 76. According to Garrison, Haggen determined which specific properties were included in the set. Garrison (Rosenthal) Tr. at 36:21-37:8.

***234** 71. On February 17, 2015, Garrison, as landlord, and OpCo South and OpCo North, as tenants, entered into the Garrison Lease, as amended. The Garrison Lease set forth the terms by which the OpCo Entities leased each of the Garrison SLB Properties following Garrison's acquisition of them from the SLB Entities. PTO ¶¶ 82-84; Garrison (Rosenthal) Tr. at 107:13-109:3, PX 482.

72. The SLB Transactions yielded $358.8 million. As intended, the proceeds were used to pay Albertson's (which included payment for all of the fee owned properties subject to the SLB Transactions as well as the twenty-eight remaining fee owned properties that were transferred free and clear to the PropCo Entities), with the residual proceeds of $50 million going to the OpCo Entities. PTO ¶¶ 66-67, 87.

73. In exchange for the $50 million in SLB proceeds, the OpCo Entities assumed all of the massive long-term obligations under the SLB Leases. PTO ¶ 68.

3. The SLB Leases Were Above Market

74. James Howard offered expert testimony on the Committee's behalf concerning whether the SLB Leases were above market. Howard's ultimate conclusion was that the lease rates in the SLB Leases were above market. Trial Tr. (10/19) at 218:25-220:12. For the reasons set forth below, the Court finds that Howard was a credible witness, his methodology is generally accepted, and the bases for his opinions were reasonable. The Court therefore credits Howard's opinions as set forth herein and finds that the SLB Leases were above market.

75. Howard is well-qualified to offer expert opinions concerning commercial real estate leases, particularly those concerning supermarkets. Howard has over 35 years of relevant experience, including 27 years working on behalf of lenders in the real estate and special assets/workouts fields. As the market manager for Wachovia Bank's West Florida lending division, Howard oversaw loans of over $500 million to retail developers related to grocery stores. Since 2008, Howard has been advising retail developers as a Senior Managing Director of GlassRatner Advisory & Capital Group LLC. Based on his knowledge and experience, the Court concludes that Howard is qualified to offer his expert opinions concerning fair market rent. Trial Tr. (10/19) at 215:6-17, 216:9-217:1; PX 166.080-089.

76. Howard was first retained in April 2017 and was asked to examine the master leases related to the SLB Transactions and compare them to what he "would expect to see in the market at the time that the transaction transpired." Trial Tr. (10/19) at 214:19-24, 217:16. Howard assembled a team to assist him, and together they gathered and reviewed documents in connection with the preparation of a written report. *Id.* at 217:20-218:18.

77. Howard's methodology was a classic "comparable transaction" analysis. After reviewing the Garrison CIM and Spirit confidential memorandum, Howard and his team used various databases to establish a "market rent" in each relevant geographic market. Howard and his team also visited each of the properties that was subject to the SLB transactions and conducted physical inspections to assess particular characteristics. Trial Tr. (10/19) at 220:13-221:13.

78. Howard compiled various schedules that included his "comparable transactions." The primary sources for Howard's comparable transactions were Duff & Phelps (commissioned by Spirit), Garrison, and CoStar. Howard focused on supermarkets (excluding all non-grocer tenants), eliminated smaller stores, and broke his ***235** "comps" down by geographical area. Trial Tr. (10/19) at 221:17-227:3.

79. Howard's ultimate conclusions are that the SLB Leases were, in the aggregate, (a) $3.55 million above market on an annual basis, and (b) $17 million above market over the life of the leases. Trial Tr. (10/19) at 227:4-229:15; PX 166 (tables 11 and 11(a)).

80. Defendants offered the expert testimony of John Satter to rebut Howard's conclusions. Satter's principal criticism was that Howard did not provide for an annual rent escalation clause. This is a significant point because all of the SLB Leases were subject to annual rent increases. On cross-examination, however, Satter was forced to admit that Howard had reviewed each of the 79 third-party leases that Albertson's assigned to Haggen as part of the Albertson's Acquisition, and not a single one contained an annual rent escalation clause. Trial Tr. (10/20) at 266:14-268:1.

81. In light of the sound methodology employed, and the reasonableness of Howard's decision not to include an annual rent escalation clause, the Court finds that Howard's opinions are credible, and the SLB Leases were above market to the extent determined by Howard.

C. The PropCo Leases/Rents

82. Simultaneous with the transfer of the fee-owned real estate to the PropCo Entities pursuant to the Contribution Agreements, Comvest caused the PropCo Leases to be executed pursuant to which the OpCo Entities were required to pay rent to their corporate cousins, the PropCo Entities. Notably, when the stores subject to the PropCo Leases were owned by Albertson's, they paid "nominal rent" of about $100 per store per year – a peppercorn – "[j]ust enough so that we have some consideration." Albertson's (Beckstrom) Tr. at 16:8-18:22, 22:23-23:7.

83. The Court finds, as a matter of fact, that the PropCo Leases did not result from arm's length negotiations. Comvest unilaterally decided the terms of the PropCo Leases and directed Akerman to prepare them, and Anderson signed all of the PropCo Leases on behalf of both the "landlords" and the "tenants." Trial Tr. (10/17) at 63:9-21, 261:13-24; PX 692-703. Trial Tr. (10/17) at 253:14-20, 254:14-21, 262:22-264:1. However, the Committee stipulated that the rental rates were not above market.

D. The Subleases (Ground Leases)

84. As with the Contribution Agreements and the PropCo Leases, Comvest also dictated the terms of the subleases between the PropCo Entities and the OpCo Entities pertaining to the ground leases.

85. According to Niegsch, at the time of the Albertson's Acquisition, Albertson's had a number of third-party ground leases. Comvest transferred the ground leases to the PropCo Entities and caused the OpCo Entities to enter into "subleases" at "market rates" with the PropCo Entities, pocketing the difference between the actual rent due under the ground leases and what Comvest determined the market rent to be. Trial Tr. (10/17) at 64:10-65:12. Each of the stores subject to a ground lease was forced to take a rent increase. Prior to the Albertson's Acquisition, the stores subject to the ground leases did not pay any additional "rent" to any Albertson's affiliate. Albertson's (Beckstrom) Tr. at 25:4-22, 27:7-31:25. Here, again, the Committee stipulated that the leases were at market rates.

E. Comvest's Domination Of The Transactions And Terms

86. Caple admitted that Comvest: (a) controlled the Haggen enterprise, (b) ***236** structured the Albertson's Acquisition,

(c) determined to pursue the SLB transactions, (d) made the decision to enter into each applicable agreement, (e) authorized Caple, as Manager, to enter into the APA, (f) approved the PropCo Advance in August 2015, (g) approved the commencement of these bankruptcy cases, and (h) decided which Haggen entities would file for bankruptcy and which would not. Trial Tr. (10/16) at 146:3-147:18.

X. Comvest's "Investment" In Haggen

87. Defendants have repeatedly asserted that Comvest contributed nearly $200 million into the Albertson's Acquisition, comprised of the legacy stores with an alleged value of $100 to $140 million and an "equity investment" of $50 million. *See*, e.g., Hearing Tr. (9/26/17) at 26:24-27:2; Def. Trial Br. at 1, 2, 4, 29-30.

A. The Value Of Comvest's Interest In The Legacy Stores Was $26.5 million

88. As part of the Albertson's Acquisition, Comvest "contributed" the legacy stores by placing Haggen, Inc. on the "OpCo" side of the new corporate structure. Defendants contend that the value of the legacy stores was $100 million. Trial Tr. (10/16) at 50:21-51:7, 96:20-97:2; Def. Trial Br. at 1, 4, 29. At trial, Caple asserted that the Haggen legacy stores were worth between $100 to 140 million. Trial Tr. (10/16) at 269:17-21.

89. The best evidence of the value of Comvest's equity interest in the legacy stores is Comvest's contemporaneous communications to its investors. Comvest reported to its investors that as of December 31, 2014 (the time of the Albertson's Acquisition) Comvest's equity interest in Haggen was worth $26.5 million. Trial Tr. (10/16) at 274:20- 276:7; PX 636.

B. Comvest Never Intended To Make An "Equity Investment"

90. Comvest contends that it made an "equity contribution" of $50 million in the OpCo Entities in connection with the Albertson's Acquisition.[6] Trial Tr. (10/16) at 67:9-10; Def. Trial Br. at 1, 29. While Comvest "invested" (and lost) $50 million, the evidence conclusively establishes that Comvest did not intend to make an "equity investment" of any kind; rather, Comvest believed it was really making a short-term "bridge loan" at the insistence of the sellers.

91. Comvest did not believe that Haggen needed a $50 million "equity investment" to capitalize the OpCo Entities; rather, Albertson's and Cerberus insisted that Comvest put the money in and keep it there until Albertson's was paid in full, which Comvest expected to occur within 30 days after the closing of the last store in June. Trial Tr. (10/16) at 128:21-129:14, 131:6-12.

92. On December 3, 2014, when seeking approval of the Haggen bid, the Deal Team told the IC that even though Comvest was putting in $50 million, it would "have no risk outside its basis" because (a) half the money would be used to pay back an existing Haggen loan that Comvest had guaranteed (thereby eliminating a potential $25 million obligation), (b) the balance was expected to be repaid to Comvest in the form of a tax distribution later in the SLB and conversion processes, and (c) Comvest was also contemplating making ***237** dividend distributions equal to its "investment" by selling ground leases and leveraging the PropCo Entities' real estate. Trial Tr. (10/16) at 129:15-133:13, Trial Tr. (10/17) at 142:10-18; PX 19.004, 19.012 (setting forth Comvest's "Real Estate Strategy Between Sign and Close/Comvest Dividend").

93. At trial, Caple admitted that $20 million from the proceeds of Haggen's preexisting loan was used to pay Comvest a dividend. Trial Tr. (10/16) at 129:15-130:25; PX 19.004. In other words, half of Comvest's $50 million "equity investment" was used to pay off a $25 million loan previously taken out by Haggen, Inc. that was guaranteed by Comvest, and where most of the proceeds ($20 million) was previously used to pay Comvest a dividend.

94. On January 27, 2015, before Haggen closed on the first Albertson's store, Falk sought confirmation that its "investment" would be risk-free and quickly recovered. Niegsch assured Falk that Haggen did not need Comvest's $50 million "to fund this transaction," but the Deal Team agreed to it because Cerberus required it. Trial Tr. (10/17) at 46:3-13 PX 33.001. Comvest characterized the so-called "equity investment" as a "bridge loan" because as the Deal Team told the IC in December Comvest intended to quickly recover the $50 million as soon as it could. Trial Tr. (10/17) at 47:18-23; 48:7-49:3; PX 33.

95. Comvest devised other methods by which it planned to quickly recover its "investment." The ABL that Comvest negotiated with PNC enabled it to use up to $50 million of the OpCo Entities' ABL credit line for purposes of paying

Comvest dividends. Thus, the ABL provided that a $50 million dividend could be paid to Comvest (a) after Haggen received at least $300 million of SLB transaction proceeds (which Haggen was already under contract to receive), (b) after the store conversion process was complete, (c) as long as Haggen was not in default, and (d) as long as Haggen would still have 15% of the maximum availability after paying the dividend. PNC (Goldstein) Tr. at 126:21-130:12; PX 370.070. *See also* Trial Tr. (10/17) at 204:4-206:21.

XI. Haggen Suffers An Immediate Meltdown Post-Closing

96. On December 10, 2014, Albertson's, as sellers, and Holdings, as the buyer, entered into the APA. PTO ¶¶ 35-36, 47. On January 27, 2015, the FTC issued an order directing Albertson's and Safeway to, among other things, divest the 146 stores to Holdings. PX 314.006. Thereafter, Haggen closed on the stores on a rolling basis starting in February 2015. Haggen's demise was swift, began immediately, and continued unabated for seven months, ending in its September 2015 bankruptcy filing and complete liquidation.

97. Among the more significant issues that Haggen confronted was the pricing of their products. ATK and others had identified pricing issues as substantial risks.

98. Haggen's pricing strategy was simple – do not change any prices. Trial Tr. (10/19) at 30:13-17. Haggen did not execute this basic strategy. According to Barnett, "very early on in the process we became aware that our pricing was not where we wanted it to be" because the prices were too high. Trial Tr. (10/17) at 198:1-8. Shaner also knew that pricing problems emerged with the opening of OpCo South's very first store and believed they would be catastrophic if not corrected. Thus, Shaner called for a "SKU by SKU analysis and action plan ... ASAP before we go well down the [acquisition and conversion path]. We can't have some 12 week systemic program to fix. Needs urgent attention now." PX 159.

***238** 99. Shaner conceded that the pricing problems were "very serious," stating they could cause customers to "get angry" and never return; further, Haggen would "never get a second chance to make a first impression." Nevertheless, Haggen continued to open stores knowing that these pricing problems persisted. Trial Tr. (10/19) at 33:7-34:1. *See also id.* at 30:18-32:15, 36:21-25.

100. Shaner was not alone. Clougher, the CEO of OpCo South, also knew about pricing issues on the very first day and admitted that Haggen continued to acquire, convert, and open stores knowing that the pricing issues – including over 4,000 pricing errors -- had not been solved. Trial Tr. (10/19) at 118:20-22, 119:7-9, 120:7-121:15, 124:6-8; *see also* Trial Tr. (10/16) at 298:25-300:3 (showing Comvest knew of the pricing issues "early on" but never raised the issue with the Monitor and had no knowledge that anyone had done so on Haggen's behalf). Shaner claimed that Haggen hired SuperValu as the pricing manager because Albertson's was using their system and they assumed it would "work effectively" for Haggen. Shaner was forced to admit that Haggen and Comvest were "totally and completely wrong" about their assessment of SuperValu's capabilities. Trial Tr. (10/19) at 35:16- 36:2.

101. Even though the initial plan was to maintain prices, Caple, after learning of the pricing issues that were antagonizing its customers, directed Haggen to raise its prices – a strategy with which Shaner disagreed. Trial Tr. (10/19) at 37:21-38:15; PX 159.

102. Haggen's "partner," SuperValu, saw other mistakes and deficiencies that it believed contributed to Haggen's demise. For example, SuperValu did not believe that Haggen's marketing and merchandising capabilities were sufficient to handle the enormous expansion that was contemplated, asserting that Haggen "did not have the – both the talent nor the numbers of people in merchandising to adequately negotiate, make decisions, set up pricing, and manage a large chain," assertions that SuperValu contends were repeatedly conveyed to Haggen. SuperValu (Collison) Tr. at 166:12-167:12.

103. The consequences of these decisions and deficiencies were immediate and catastrophic. By April 2015, just a few weeks after closing on the first store, Haggen was already falling well short of projections across all converted stores. Trial Tr. (10/16) at 151:25-152:3; PX 11.003. By June 2015, the IC was informed that same store sales were "down 20-25% since Haggen took ownership of the stores." Trial Tr. (10/16) at 155:8-11; PX 16.004.

104. On June 16, 2015, the Deal Team presented a "deck" to the IC in which it disclosed that while 10% of the stores had yet to be acquired and converted, Haggen was going to face a liquidity shortfall in July 2015. Trial Tr. (10/16) at 154:2-155:7; PX 16.004.

105. As of July 13, 2015, Haggen had only $25 million of liquidity, but owed approximately $10 million to contractors

and was "disputing the $43M in inventory payments to Albertson's." Trial Tr. (10/16) at 161:25-162:22; PX 18.003.

106. On July 28, 2015, PNC declared a default and a "springing event" under the ABL. PNC (Goldstein) Tr. at 150:16, 182:2-10; PX 375. A "springing event" occurs when a borrower's availability falls below a specified threshold and, from PNC's perspective, it could be an indication that a borrower is in distress. PNC (Goldstein) Tr. at 189:2-15.

107. Caple testified that he did not believe PNC's notice of default to be "really terribly relevant." According to Caple, the ***239** event of default "wasn't as big an issue as the liquidity issues that we needed to work through" such that he could not even recall whether Haggen or Comvest ever disputed PNC's declarations of default (as established in the Forbearance Agreement (PX 254.002), where Haggen acknowledged that six separate events of default had occurred as of August 21, 2015, and were continuing). Trial Tr. (10/16) at 167:1-168:20.

XII. Comvest Tries To Find A Third-Party Lender

108. Beginning in June and continuing through early August of 2015, as the OpCo Entities faced plummeting sales and a liquidity shortfall, Comvest tried without success to arrange for third party financing. Notably, however, neither Comvest nor Haggen ever sought to obtain a loan from a third party to be extended directly to the OpCo Entities. Trial Tr. (10/17) at 22:24-23:11, 132:11-16. Caple testified at trial that he "didn't believe that anybody was going to make a loan to OpCo, given its current state." Trial Tr. (10/16) at 171:20-172:8.

109. Niegsch told Citibank that Comvest was not pursuing a loan on behalf of the OpCo Entities because it had no unencumbered assets and its financial performance struggled making a subordinated loan a "fairly risky loan." Trial Tr. (10/17) at 27:5-29:20; PX 113. Caple could not identify a person or entity who was asked to make a loan to OpCo in the Summer of 2015 besides the PropCo Entities. Trial Tr. (10/16) at 290:14-292:2. *See also* Trial Tr. (10/17) at 208:8-18.

A. UBS Is "Spooked" By Financial Performance And The Risk That The OpCo Entities Would File For Bankruptcy

110. By June 2015, with the OpCo Entities facing a liquidity shortfall, the situation was urgent and Niegsch's negotiations with UBS shifted from obtaining a loan to pay Comvest a dividend to obtaining a loan for the purpose of supporting the OpCo Entities. Trial Tr. (10/16) at 170:2-15; Trial Tr. (10/17) at 15:22-18:6; PX 36.

111. On June 16, 2015, the Deal Team provided an update to the IC and proposed the following solution to Haggen's liquidity shortfall: (a) a $55 million loan would be taken from UBS against the PropCo Entities' real estate, (b) the PropCo Entities would sell four ground leases for $16.4 million, (c) the resulting $71.4 million would be upstreamed to Holdings, and (d) Comvest would cause Holdings to distribute to the OpCo Entities amounts sufficient to address the liquidity shortfall, and the balance would be paid as a dividend to Comvest. Trial Tr. (10/16) at 157:22-160:10; PX 16.015.

112. During the course of the negotiations, Niegsch told UBS that the OpCo Entities were "underperforming." UBS demanded that Haggen represent and warrant that the OpCo Entities were not considering a bankruptcy filing. Comvest refused to give UBS the requested representation and warranty. Trial Tr. (10/16) at 174:24- 175:5; Trial Tr. (10/17) at 18:11-22:3. Consequently, UBS got "spooked" and refused to make a loan to the PropCo Entities secured by a lien on the PropCo Entities' unencumbered real estate. Trial Tr. (10/16) at 170:22-25, 174:13-23.

B. Comvest And Priddy Decline To Make A Loan Due To "Equitable Subordination" Concerns

113. On July 17, 2015, Caple reached out to Robert Priddy (a former Comvest partner) to gauge his interest in making a loan to the PropCo Entities secured by a first lien on the real estate. Trial Tr. (10/16) at 171:1-19; PX 1.

***240** 114. In his e-mail, Caple informed Priddy that: (1) the OpCo Entities were facing a liquidity shortfall, (2) Haggen had "lost all of the price focused customers" but had not "yet had the time to attract quality focused customers," (3) Haggen's sales were down 20 to 30%, (4) Haggen was expected to close stores, and (5) UBS got "spooked," terminated negotiations, and left Haggen and Comvest "at the altar." Trial Tr. (10/16) at 172:9-174:12; PX 1.

115. Caple also told Priddy that Comvest decided not to make a loan directly to the OpCo Entities because it had "concerns about equitable subordination given that [Comvest was] equity." PX 1. *See also* Clark Tr. at 44:21-45:14 (detailing whether he discussed issues of "equitable subordination" in the context of the contemplated PropCo Advance, Clark testified: "If I may answer your [question] in a different way. I think the discussion was more, how do we do this such that it

is a loan that we're making? So I know that might be semantics but that was the spirit of the discussion.”).

116. Caple described the “equitable subordination” issue and related internal discussions at Comvest as follows:

Q: Can you explain to the judge what concerns you had about equitable subordination for Comvest.

A: Yeah, I'm not a lawyer, but my understanding is any time you make a loan into a business where you also own equity, there's a chance albeit, my understanding is it's a very small one but there's a chance that you can become equitably subordinated. At the time here, my partners were not at all happy about how this deal was going, to say the least, and putting additional money in with additional risk was a big issue and, you know, any issue was something that they were concerned about, even a very small percentage-type issue.

Q: And you discussed that precise topic with your colleagues at Comvest, right?

A: Yes.

Q: In fact, you specifically discussed the risks associated with equitable subordination, right?

A: And I don't remember the exact conversation, but I remember them having concerns.

Q: And you while you don't have a specific recollection, you believe you discussed the issue of equitable subordination at the investment committee to try to understand the risk, correct?

A: Yeah, I certainly remember them having real concerns about anything that might, you know.

Trial Tr. (10/16) at 175:6-176:14; PX 1.

117. Due to his prior association with Comvest, Priddy expressed concerns that he might also be implicated by issues of “equitable subordination if he chose to act as a lender.” Priddy, nevertheless, proposed onerous terms for a loan. There is, however, no evidence that Comvest ever responded or otherwise pursued a loan with Priddy. *See* PX 1.

C. PNC Refused to Provide an Overadvance

118. After UBS and terminated negotiations, Comvest asked PNC to provide an overadvance to the OpCo Entities. But PNC knew at the time that the OpCo Entities had no unencumbered assets, were running out of liquidity, losing money, and had laid off hundreds of employees. PNC also knew that Haggen was looking to sell assets to generate liquidity and avoid running out of cash, that sales in the grocery stores were off by well more than 20% relative to projections, and that Haggen ***241** had fared poorly on other financial metrics. PNC (Goldstein) Tr. at 166:7-169:5; PX 377.

119. Consequently, PNC concluded that Haggen's request for an overadvance “didn't make sense from a lender's perspective,” and PNC decided not to even bring the request to the syndicate lenders for consideration. Trial Tr. (10/17) at 26:3-23; PNC (Goldstein) Tr. at 171:16-20, 173:17-174:18, 175:9-176:13; PX 39.002. On August 3, 2015, PNC imposed a $2.5 million “availability block” thereby restricting that portion of the borrowing base from being available to Haggen. PNC asserted a right to restrict availability under the circumstances and did so because it perceived Haggen to be in distress and sought to mitigate its own risks. PNC (Goldstein) Tr. at 179:2-183:25; PX 379.

XIII. The PropCo Advance

A. Citibank Refuses To Lend Against PropCo's Real Property

120. In early August 2015, after exhausting all other options, Comvest asked Citibank to provide a loan that would ultimately become the source of the funds used for the PropCo Advance. PX 113.009.

121. Citibank and a Comvest entity, CIP IV, had a pre-existing banking relationship dating back to at least 2010 when they first entered into a revolving credit line facility. On August 2, 2012, Citibank and CIP IV amended that credit facility and Citibank increased the line to $100 million (the “Fund IV Revolver”).[7] The Fund IV Revolver has been available to CIP IV on a continuous basis since 2010. Citibank (Raeburn) Tr. at 16:8-21, 17:5- 18:14, 19:6-20:14; PX 431.

122. In the end, the only loan Citibank would agree to make was a “qualified borrower loan” under the Fund IV Revolver to a to-be-formed, wholly-owned Comvest entity for which Comvest would provide a full guaranty. Trial Tr. (10/17) at 29:21-30:20; Citibank (Raeburn) Tr. at 76:21-77:25; PX 113.001-003. According to Citibank, the parties would “create a qualified borrower loan whereby Comvest designates an entity in which it has ownership as

a qualified borrower. That loan would be guaranteed by Comvest ... [T]o the extent that Comvest has to repay the facility under the terms of the guarantee, it can in turn seek repayment from the qualified borrower that it guaranteed the facility for." Citibank (Raeburn) at 75:20-76:7; PX 113.

B. The Multi-Step Process Employed To Fund The PropCo Advance

123. Like the Albertson's Acquisition itself, the funding of the PropCo Advance required a fair amount of financial engineering by Comvest and the creation of another new corporate entity.

124. In its simplest form, the PropCo Advance was funded as follows: (1) Citibank advanced $25 million to a newly-formed "qualified borrower" formed and owned by Comvest, Property Lender, and the loan was guaranteed by Comvest, (2) Property Lender then advanced $25 million to the PropCo Entities, secured by a lien on the PropCo Entities' real estate, and (3) the PropCo Entities in turn advanced $25 million to the OpCo Entities, purportedly secured by a second lien on the OpCo Entities' assets behind PNC (and ahead of the OpCo Entities' unsecured creditors).

***242** 125. On August 7, 2015, the PropCo Entities, as lenders, and the OpCo Entities, as borrowers, entered into the PropCo Agreement pursuant to which the PropCo Entities agreed to advance up to $25 million to the OpCo Entities. PX 244. Comvest caused the PropCo Agreement to be signed knowing that it did not have: (a) an agreement with Citibank with respect to a funding source for the PropCo Advance (the agreement with Citibank was not signed until August 12, 2015), or (b) as discussed in more detail below, PNC's consent to a subordinated lien on the OpCo Entities' assets (the Intercreditor Agreement was not signed until August 21, 2015).

126. The PropCo Agreement provided, among other things, that interest on the PropCo Advance was to begin on "____________,_____, 2015" and the loan would mature on "April ___, 2016." PX 244 §§ 3.1, 13.1 [sic]. The PropCo Agreement also purported to grant to the PropCo Entities "a continuing security interest in and to and Lien on all of its Collateral, whether now owned or existing or hereafter created, acquired or arising and wheresoever located." PX 244 § 4.1. "Collateral" was defined to include, among other things, "all" of the OpCo Entities' receivables, equipment and fixtures, general intangibles, inventory, contract rights, and the proceeds thereof. PX 244.007 (definition of "Collateral").

127. On August 7, 2015, the OpCo Entities issued the PropCo Notes, one in favor of PropCo North in the amount of $12,640,750, and one in favor of PropCo South in the amount of $12,359,250.

128. Comvest created Haggen Property Lender, LLC as a wholly-owned affiliate to serve as the qualified borrower under the Fund IV Revolver, so that it could act as the conduit between Citibank and the PropCo Entities. Citibank (Raeburn) Tr. at 79:4-18; 99:12-100:9, 100:18-101:3; PX 113, PX 438. On August 12, 2015, consistent with the negotiations, Citibank, Comvest, and its newly-formed entity, Property Lender, completed the Qualified Borrower loan (pursuant to which Citibank agreed to advance $25 million to Property Lender, guaranteed by Comvest) by executing the following documents: (a) the "Qualified Borrower's Representation Letter" (pursuant to which Property Lender made certain representations and warranties to Citibank and otherwise agreed to borrow up to $25 million from Citibank, subject to the terms of the "Credit Agreement"), (b) the "Qualified Borrower Promissory Note" (pursuant to which Property Lender and Comvest promised to pay $25 million to Citibank in accordance with the terms set forth therein), and (c) the "Notice of Advance" (pursuant to which Property Lender and Comvest asked Citibank to advance $3,792,225.01 to PropCo North, and $3,707,774.99 to PropCo South (or, $7.5 million in the aggregate), on August 12, 2015). Citibank (Raeburn) Tr. at 109:11-110:23, 112:13-20; 117:15-119:7; PX 439; PX 248; PX 247.

129. Also on August 12, 2015, Property Lender, as lender, and the PropCo Entities, as borrowers, entered into a "Loan Agreement" pursuant to which, among other things, Property Lender agreed to advance $25 million to the PropCo Entities on the Closing Date (*i.e.*, August 12, 2015). PX 251. Even though only $7.5 million was being advanced that day, the PropCo Entities also tendered a "Promissory Note" to Property Lender in the face amount of $25 million, purportedly secured by "the Security Instrument and the other Loan Documents." PX 252.

130. At the time it obtained the initial $7.5 million advance on August 12, 2015, Comvest knew that the OpCo Entities did not have PNC's consent to grant a second ***243** lien on the OpCo Entities' assets, but the IC nevertheless approved of the request for an initial advance of $7.5 million because the situation was desperate and Comvest needed to "ensure OpCo ha[d] the liquidity to meet its obligations [the following

day] and cover payroll later" in the week. Trial Tr. (10/17) at 31:2-34:18; PX 41.001 (Niegsch told the IC that "the PropCo loan to OpCo will not have a 2nd lien in OpCo until the forbearance agreement with the entire bank group is agreed on and executed," something that did not occur until August 21, 2015).

131. On August 21, 2015, the applicable parties executed the Forbearance Agreement and the Intercreditor Agreement. PX 254; PX 255.

132. As Comvest knew, the OpCo Entities could not grant a second lien on their assets without PNC's consent. Trial Tr. (10/17) at 32:7-34:17 ("We would not have the liens filed until the forbearance agreement was executed."). By amending the definitions of "Permitted Encumbrances" and "Permitted Indebtedness," PNC provided the requisite consent in the Forbearance Agreement on August 21, 2015. PX 254.005-006.

133. Comvest authorized Haggen to sign the Forbearance Agreement knowing that the Debtors were required to, among other things, acknowledge six existing events of default, and the indebtedness under the ABL in excess of $173 million. Trial Tr. (10/17) at 34:19-36:22; PX 254. The Forbearance Agreement also provided, among other things, that:

- The Borrowers (as defined) had to pay all of PNC's out-of-pocket expenses (including attorneys' and advisor fees) (Section 1(c));

- The Credit Agreement was amended to include Haggen's alleged claims against Albertson's in the definition of "Commercial Tort Claims" so that those claims would be included in PNC's collateral (Section 2 (c));

- PNC reduced substantially the Maximum Revolving Advance Amount and the Maximum Swing Loan Advance Amount (Section 2 (e)-(f));

- A more restrictive formula for calculating Revolving Advances was adopted (Section 2(j)); and

- The Borrowers had to adhere to a 13-week cash flow forecast and comply with other reporting obligations (Section 2 (o), (q)).

PX 254.

134. The PropCo Entities, the OpCo Entities, and PNC also entered into an Intercreditor Agreement as of August 21, 2015. PX 255. Pursuant to the Intercreditor Agreement, the PropCo Advance was "subordinated to the prior payment in full in cash" of all amounts owed under the ABL, and the PropCo Entities' liens against the OpCo Entities' assets were subordinated to PNC's liens against those assets. Trial Tr. (10/17) at 37:4-38:4; PX 255.004-.005. In other words, as conditions to the PropCo Advance, the PropCo Entities were forced to agree that they could not recover the principal and interest under the PropCo Advance on "April ___, 2016" [sic], until PNC was first fully repaid $173 million (plus interest) in cash.

135. On August 21, 2015, (a) the PropCo Entities filed UCC-1 Financing Statements against the OpCo Entities, taking a "blanket lien" against OpCo Entities' assets (although the PropCo Entities' liens were subordinated to PNC's liens pursuant to the Intercreditor Agreement), and (b) Property Lender and Comvest tendered two "Notices of Advance" to Citibank in the aggregate amount of $17.5 million (the balance of the $25 million advance); the funds bypassed Property Lender and were sent by Citibank directly to the PropCo ***244** Entities. Citibank (Raeburn) Tr. at 120:10-121:4, 122:4-14, 122:23-123:21; DX 772-774; PX 440-441; PX 254; PX 255.

D. The OpCo Entities Paid Wages In Excess Of $25 Million Between August 14, 2015 And The Petition Date

136. As described above, the PropCo Advance was disbursed in two parts, with $7.5 million being advanced on August 12, 2015, and $17.5 million being advanced on August 21, 2015. The record shows that the OpCo Entities paid employee wages of approximately $25 million from August 14, 2015, through the Petition Date, some of which was already in arrears when the advances were made.

137. The Court takes judicial notice of the Wage Motion. Fed. R. Evid. 201. The Wage Motion states that "historically, the Debtors' combined gross aggregate payroll liability is approximately $26.4 million per month." Wage Motion at ¶ 9. Haggen Inc. employees were paid approximately $2.1 million bi-weekly, Haggen OpCo North employees were paid approximately $1.9 million weekly, and Haggen OpCo South employees were paid approximately $3.6 million weekly.

138. The Wage Motion also stated that the most recent payroll before the Petition Date was made (i) to employees of Haggen OpCo North and Haggen OpCo South on September 4, 2015, for the period ending on August 29, 2015, and (ii) to employees of Haggen Inc. on August 28, 2015, for the period

ending August 22, 2015. *Id.* ¶ 10. Based on the foregoing, the Court finds, as a matter of fact, that the OpCo Entities paid wages as follows (stated in millions):

	PropCo South	PropCo North	Haggen, Inc.
August 14	$3.6	$1.9	$2.1
August 21	$3.6	$1.9	
August 28	$3.6	$1.9	$2.1
September 4	$3.6	$1.9	
TOTAL	**$14.4**	**$6.6**	**$4.2**

139. Based on the foregoing, the Court concludes that the OpCo Entities used the proceeds of the PropCo Advance to pay wages in arrears of approximately $25 million between August 14, 2015, and the Petition Date.

D. Flaton's Recharacterization Analysis

140. Carol Flaton offered expert testimony on behalf of the Committee with respect to its claim to recharacterize the PropCo Advance as an equity contribution (Count 71 of the Complaint) Defendants did not offer a rebuttal witness.

141. The Committee asked Flaton to assess the facts and circumstances surrounding the PropCo Advance and evaluate whether the transaction “looked more like a debt transaction or an equity transaction” and whether it was “inappropriately disguised as a loan and instead should be recharacterized and treated as an equity contribution.” Trial Tr. (10/18) at 144:8-12; PX 118 at 5.

142. Flaton has been a managing director at Zolfo Cooper, the Committee's financial advisor, for four years. During her time at Zolfo, Flaton has provided financial advisory and management services to debtors, creditors, and committees. Prior to joining Zolfo Cooper, Flaton spent approximately six years at Lazard Freres, where she served as a managing director advising public and private companies, creditors, and equity holders in ***245** complex restructurings. Before that, Flaton spent, collectively, approximately thirteen years at Credit Suisse/Credit Suisse First Boston (1995-2006) and Citibank (2006-2008), working in lending, finance, and risk management. In sum, Flaton has spent over thirty years in the fields of banking and finance, including positions in leveraged finance, lending, capital markets, and risk management, with a specialization in financial restructuring. Trial Tr. (10/18) at143:23-145:21, 149:15-21; PX 118 at 39 (Appendix A).

143. Based on the foregoing, the Court finds that Flaton is qualified to offer expert testimony on the questions presented to her.

144. Flaton's ultimate conclusion is that the PropCo Advance “looked more like an equity transaction than a debt transaction.” More particularly, Flaton stated that, in her opinion, based on her extensive experience in analyzing loans, debt exchanges, debt refinances, distressed company situations and equity/capital raises:

> [D]espite how the PropCo Loan was documented and recorded in OpCo's financial statements, I believe the facts and circumstances that existed at the time the PropCo Loan was made, including OpCo's financial condition, strongly indicate that an independent third party lender would not have provided additional financing to OpCo on the same or similar terms to the PropCo Loan such that the PropCo Loan was more representative of a equity contribution than a loan.

Trial Tr. (10/18) at 145:22-146:2; PX 118 at 10.

145. In reaching her conclusions, Flaton utilized the eleven-factor *Roth Steel* test and evaluated the facts and circumstances that existed at the time the PropCo Advance was made “from the perspective of a restructuring, finance and investment banking professional.” Trial Tr. (10/18) at 146:3-8; PX 118 at 5. *See Roth Steel Tube Co. v. Comm'r*, 800 F.2d 625 (6th Cir. 1986).

146. In order to analyze the PropCo Advance in context, Flaton reviewed certain documents and events, including: (a) “very early... internal memos and e-mails saying that there was a liquidity problem,” (b) the refusal by third parties, including UBS and PNC, to extend credit (UBS refused to lend against the PropCo real estate, and PNC refused to provide an “overadvance”), and (c) PNC's July 28, 2015, declaration of a default under the ABL and (d) Comvest's refusal to lend directly to the OpCo Entities due to concerns about “equitable subordination.” Trial Tr. (10/18) at 150:1-151:24; PX 118 at 16. Flaton explained how these events related to her opinions:

> A: Well, again, I was asked to look at a transaction which occurred in

> August [2015]. And the question really was, is this a transaction that a third party independent lender, would they make a loan, a piece of debt into this type of a situation. So it's important to understand the condition of the company that's being lent into and some of the facts around it and the trajectory. And it's all besides being, you know, not great, sales were down and I think they were substantially off their budget from EBITDA to the tune of I think $80 million in this July [2015] timeframe. It was all happening very quickly. So, you know, you've had an acquisition of stores, but it literally did not transpire from day one the way it was meant to.

Trial Tr. (10/18) at 151:25-152:15.

147. Flaton also analyzed the series of steps required to get the $25 million from Citibank to the OpCo Entities: (a) Citibank ***246** agreed to advance $25 million to a newly-formed entity, Property Lender (wholly-owned by Comvest, at Citibank's insistence), secured by a guaranty from Comvest, (b) Haggen Property Lender then agreed to advance $25 million to the PropCo Entities, taking a lien on the PropCo Entities' real estate, and (c) Comvest then caused the PropCo Entities to agree to advance $25 million to the OpCo Entities, taking a second lien on the OpCo Entities' assets in return. Trial Tr. (10/18) at 152:16-154:8; PX 118 at 17.

148. With that background, Flaton analyzed the PropCo Advance in the context of the eleven *Roth Steel* factors. The Court will discuss Flaton's testimony and opinion in the "Conclusions of Law" section.

XIV. <u>Comvest's IC Expected The Real Estate To Be Unencumbered And Available For Comvest's Benefit In A "Disaster Scenario"</u>

149. The IC members "were not happy about" having to use the PropCo Entities' real estate to fund the OpCo Entities' liquidity shortfall. Trial Tr. (10/16) at 177:1-19. The evidence shows, and the Court concludes, that when it approved the Albertson's Acquisition, the IC relied on, among other things, the Deal Team's assertions that the real estate assets would (a) be transferred to PropCo Entities and remain unencumbered; which (b) would, among other things, provide Comvest with substantial downside protection "even in complete disaster/ liquidation scenarios."

150. The Court's conclusions in this regard are based on PX 20, PX 45, PX 190 (collectively, the "Clark/Marrero E-mails"), and PX 189. During the relevant time, Clark was a managing director at Comvest and a member of the IC. Clark Tr. at 8:9-9:22. Clark was not named as a defendant in this action and did not testify live. The Court has, however, admitted into evidence and reviewed Clark's videotaped deposition. [8] 196.

151. From the outset, Comvest focused on the valuable real estate available in a potential deal with Albertson's. In that regard, prior to approving Haggen's entry into the Albertson's Acquisition, the IC was expressly informed that, among other things: (a) Haggen was acquiring substantial real assets significantly below the appraised value;(PX 23, PX 26, and PX 30) (b) the real estate would mitigate the operational risks (Trial Tr. (10/17) at 56:19-58:19; PX 30.006) (c) by transferring the real estate to the PropCo Entities and shielding it from the operational risks, Comvest would be protected in a "downside scenario" (PX 20.002) and (d) Comvest would make "multiples of [its] money" even in downside scenarios (PX 45.002, PX 190.001).

152. By June 2015, Haggen faced substantial challenges and the issues concerning the protection afforded by the real estate came to the fore. On June 16, 2015, the Deal Team informed the IC that, among other things, even though the conversion process was not complete, same stores sales were down 20 to 25% and Haggen faced a liquidity shortfall. At around that time, Clark believed that Haggen could fail. Clark Tr. at 40:8-41:6. To address Haggen's liquidity shortfall, the Deal Team proposed leveraging the PropCo Entities' real property to support the OpCo Entities. Clark Tr. at 23:18-24:7, 25:18-26:9, 30:4-31:4; PX 16.004, 015.

153. The Deal Team's proposal struck a nerve with the IC because it contradicted what they had been led to believe. Caple recalled that "a number" of IC members ***247** specifically told him that "they were under the impression that Comvest could still get its money back in Haggen through the real estate, even in a disaster scenario" with the OpCo Entities. Trial Tr. (10/16) at 177:20-24; *see also* Trial Tr. (10/16) at 177:25-179:7 (showing Caple recalled Clark telling him that

he was "under the belief that the underlying real estate value was money good in a disaster scenario"). Caple's recollections in this regard are consistent with an e-mail that Clark sent to Marrero on July 14, 2015. Clark's e-mail stated, among other things, that:

- PropCo/Downside
  - Under the impression/belief that the underlying real estate value was money-good in a disaster scenario
- News to Michael [Niegsch] and us that PropCo value seems encumbered
  - ABS payable
  - SLB guarantee
  - Relied on this downside protection when approving the deal

Clark Tr. at 97:24-98:15; PX 20.

154. A few weeks later, Clark and Marrero collaborated on a more expansive version of Clark's e-mail. On Sunday, August 2, 2015, Clark and Marrero took turns wordsmithing a set of "observations" concerning Caple. Clark Tr. 72:15-76:22, 77:25-79:10; PX 190. Marrero then reorganized certain of the issues and presented the final document to Falk the following day. The issues set forth in these documents were the subject of numerous discussions among IC members. Clark Tr. at 64:14-65:23, 67:8-68:4, 69:11-16, 69:19-71:6, 80:3-20. The version that Marrero presented to Falk stated, among other things, that:

- We must avoid IC discussion from being a "sell job"
  - IC relied on strong assertions that we would make multiples of our money on Haggen in even complete disaster/liquidation scenarios.

...

- We must carefully lay out [a] "likely case" as well as a "downside" case reflecting negative outcomes and the quantification of these financially
  - Guarantees and ABS Liabilities at Holdings not understood by the IC and/or Deal team.
  - We should not rely on [Deal] Team's "best thinking" but rather show sensitivities with thoughtful assumptions on both upside and down.

PX 45 (emphasis added).

155. Every member of the IC except Caple agreed with the substance of these communications. Nevertheless, after the Deal Team was unable to obtain a loan from unrelated third parties, Comvest's IC begrudgingly authorized the PropCo Entities to make the PropCo Advance, with certain IC members warning that they would not likely consent to the use of the PropCo Entities' assets again. PX 42.

A. Rodriguez's Failure to Recall is not Credible

156. At trial, Rodriguez was unable to recall participating in any discussions or communications concerning the Clark/Marrero e-mails. The Court is highly skeptical that Rodriguez was able to recall details of conversations that preceded the Albertson's Acquisition, but was unable to remember any aspect of the critical (and more recent) discussions that took place in the summer of 2015 while Haggen was melting down and the IC was being asked to leverage the PropCo Entities' real estate to support the OpCo Entities. Trial Tr. (10/18) at 114:5- 120:23.

***248** 157. Rodriguez's complete failure to recall anything about these discussions is particularly concerning because Clark testified that Rodriguez was directly involved in addressing the issues raised in the Clark/Marrero e-mails. According to Clark:

- The Clark/Marrero e-mails were "prepared in conjunction" with Falk and Rodriguez for the purpose of giving Caple "feedback" (Comvest (Clark) Tr. at 61:16-62:7)
- Clark believed that Falk and Rodriguez met with Caple to discuss the observations on PX 45. (*Id.* at 69:11-16)
- Rodriguez, Falk, Marrero, and Clark discussed the substance of PX 45 in various combinations and subsets of groups in August 2015 (*Id.* at 70:9-71:6) and
- Clark spoke with Rodriguez about the issues set forth in PX 190, and believed that "a version of this document was shared with [Rodriguez] as well." (*Id.* at 80:3-20).

158. Based on Clark's testimony, the Court finds that Rodriguez's failure to recall discussing any aspect of the Clark/Marrero e-mails was not credible. Consequently, the Court will draw a negative inference with respect to all of Rodriguez's testimony.

XV. Defendants' Blame Of Others

159. The Defendants contend that Haggen failed for three reasons: pricing issues, supply issues, and unfair competition. Defendants also contend that there were three -- and only three – culprits: Willard Bishop, SuperValu, and Albertson's. Trial Tr. (10/16) at 82:16-87:10; Trial Tr. (10/17) at 9:1-10; Def. Trial Br. at 21-25.

A. Willard Bishop Pricing Problems

160. Defendants contend that Willard Bishop contributed to the pricing problems that led to Haggen's demise. Neither Haggen nor Comvest took any steps to hold Willard Bishop accountable for the damage it allegedly did with respect to pricing issues other than to discontinue working with them. Trial Tr. (10/17) at 9:11-13, 9:24-10:13; Trial Tr. (10/19) at 193:19-20, 194:5-14, 195:13-17, 211:5-7.

B. SuperValu - Pricing And Supply Problems

161. Defendants contend that SuperValu contributed to the pricing and supply problems that led to Haggen's demise. Neither Haggen nor Comvest took any steps to hold SuperValu accountable for the damage it allegedly did with respect to the pricing and supply issues (other than to have "lots of discussions" with them). Trial Tr. (10/17) at 10:14-11:13. Indeed, as Barnett admitted, neither Haggen nor Comvest ever withheld payment from SuperValu, negotiated a reduction in the amounts due to SuperValu, or commenced an action against SuperValu. Trial Tr. (10/17) at 195:6-16; *see also* SuperValu (Collison) Tr. at 68:20-69:7 (highlighting Haggen timely paid all amounts due to SuperValu), 78:18-79:12 (showing Haggen never attempted to terminate the Transition Services Agreement (the "TSA") (PX 271), and never invoked the "Dispute Resolution Clause" in Section 6.2(c) of the TSA).

162. The Debtors, certain non-Debtor affiliates (including the PropCo Entities), Comvest, and the Committee entered into a Settlement Agreement with Albertson's and Cerberus that was filed at Docket No. 1312-2 in the main case on January 27, 2016 (the "Settlement Agreement"). PX 117. Pursuant to the Settlement Agreement, SuperValu was released from "any ***249** and all claims, demands, causes of action or sums owed, foreseeable or unforeseeable, which are based on conduct or inaction that occurred before" the closing of each store. Neither Comvest nor the Debtors received any monetary compensation in exchange for their release of SuperValu. *Id.* at .009-010.

C. Defendants Allegations Against Albertson's

163. Defendants contend that Albertson's engaged in unfair competition and contributed to the problems that led to Haggen's demise. Trial Tr. (10/16) at 84:19-85:1, 86:6- 87:10; Trial Tr. (10/17) at 9:19-22, 11:4-6; Def. Trial Br. at 3, 23-25.

164. On June 29, 2015, Haggen sent Albertson's a letter identifying certain allegedly wrongful conduct, and informing Albertson's that Haggen was withholding $43 million in inventory payments (the "Demand Letter"). PX 266. Prior to that time, Haggen had timely made all of the payments to Albertson's that it was required to make under the APA, but the OpCo Entities faced a liquidity shortfall at that time. Trial Tr. (10/17) at 11:4-18; Albertson's (Ewing) Tr. at 164:25-165:14; PX 16.004; PX 18.003.

165. In the Demand Letter, Haggen asserted that Albertson's had breached the APA and identified four specific instances of allegedly wrongful conduct. PX 266. Specifically, Haggen complained of (a) "Improper Transfer of Inventory out of Purchased Store(s)," (b) "Overstocking and Understocking of Inventory" (Haggen identified one store, acquired on February 26, 2015, where the inventory was allegedly so low that Haggen was forced to purchase approximately $208,000 of inventory to "help refill the store," and another store where a bakery manager was allegedly instructed to "purchase and/or bake 2 times her normal inventory levels" thereby causing Haggen to purchase unneeded baked goods at that store, as well as other similar issues concerning inventory), (c) "Failure to Advertise in the Ordinary Course of Business" (describing as "intentional misconduct" discrete problems relating to advertising that lasted a week. FTC (Frangie) Tr. at 142:3-23, 148:14-149:9); Albertson's (Cummins) Tr. at 38:21- 39:14, 40:25-45:14), and (d) "Misuse of Confidential Information and Failure to Use Commercially Reasonable Efforts to Preserve Existing Relationships" (alleging that Albertson's "substantially increased their advertising and marketing in the stores being acquired, and that Albertson's did so "based upon their knowledge of the Store Closing cadence" (Trial Tr. (10/16) at 301:1-20)). PX 266. Haggen also notified Albertson's for the first time that it would "not make further payments of the Inventory Purchase Price" under the APA until Haggen completed its investigation and the matters "have been satisfactorily resolved." Trial Tr. (10/16) at 163:12-22; PX 266.006. According to Albertson's, Haggen had therefore not

raised any issues concerning the pricing of inventory, and had not availed itself of the dispute resolution procedures in Section 6 of the APA, at any time prior to the date of the Demand Letter. Albertson's (Ewing) Tr. at 166:7-21.

166. Albertson's asserts that, far from engaging in "anti-competitive" conduct, Albertson's extended considerable courtesies to Haggen and made best efforts to cooperate during the store conversion process, including participating in weekly (or more frequent) meetings. Albertson's (Crandall) Tr. at 109:15-112:15, 161:13- 164:9, 60:17-62:12; Albertson's (Cummins) Tr. at 19:10-21:15, 45:25-47:20. The Court also notes that Albertson's met with the Monitor on a regular basis, and submitted "Compliance Reports" to the FTC, to report on the ***250** progress of the conversions and address all issues concerning Haggen. Albertson's (Williams) Tr. at 141:15-159:23, 136:4- 16, 136:25-137:22, 160:6-176:12, 177:18:183:2; PX 598-610.

167. The uncontroverted evidence shows that, at the time the Demand Letter was sent, Haggen faced a liquidity shortfall and knew that it would be unable to pay Albertson's approximately $43 million when it became due in July 2015. Trial Tr. (10/16) at 161:25-163:4, 164:3-24; PX 18.003. Indeed, the Deal Team virtually admitted that the Demand Letter was pretextual in their July 2015 report to the IC, writing:

> Assuming the [Albertson's] inventory payments and conversion capex payables can continue to be delayed, the latest daily liquidity model shows Haggen getting very close to negative liquidity at the beginning of August and then going negative on August 21. If Haggen misses its plan targets or needs to begin paying off its delayed one-time payables it will hit negative liquidity sooner.

PX 18.03.

168. The uncontroverted evidence also shows that (with the exception of the issue concerning the advertising described above) no one from Haggen or Comvest complained to the FTC or the Monitor about Albertson's allegedly anti-competitive conduct until mid-July, and even those complaints came as a result of inquires placed by the FTC that were prompted by news reports concerning employee layoffs at Haggen. Trial Tr. (10/17) at 12:20-13:18; Trial Tr. (10/19) at 38:21-39-24, 127:20-23, 128:21-129:2, 198:16-199:23; FTC (Frangie) Tr. at 137:25-146:12 (although Haggen's counsel identified numerous reasons for Haggen's struggles, including that "the Haggen brand and format did not seem to be catching on in California," only one of which was the "significant competitive response" from Albertson's).

169. On July 17, 2015, less than three weeks after receiving the Demand Letter, Albertson's sued Holdings in the Superior Court of the State of California, Case No. BC 588598 (the "Albertson's Action"). Trial Tr. (10/16) at 165:7-166:6; Trial Tr. (10/17) at 11:22-13:1; PX 306. Albertson's asserted claims for breach of contract, anticipatory breach of contract (repudiation), fraud, and breach of the implied covenant of good faith and fair dealing, all in an effort to recover the $43 million that was then due or about to become due. PX 306.

170. On September 1, 2015, just six days before the Petition Date, Haggen filed a responsive action against Albertson's in which it sought $1 billion in damages ("Haggen's Action"). PX 613.

171. Albertson's Action and Haggen's Action were resolved in the subsequent bankruptcy where the Court approved the Settlement Agreement. PX 117. The Settlement Agreement effectively embodied a "walk away." Pursuant to its terms (a) Albertson's was obligated to pay $5.75 million into a creditor trust, (b) Albertson's was to receive an unsecured claim against Holdings in the amount of $8.25 million, and assign such claim to the creditor trust, and (c) the parties exchanged mutual general releases. PX 117.004-009. Comvest acknowledged its belief that this was a "fair and equitable resolution to the billion dollar lawsuit that was brought." Trial Tr. (10/17) at 13:19-15:2.

172. Based on the foregoing, the Court concludes that the pricing, supply and anti-competitive issues allegedly caused by Willard Bishop, SuperValu, and Albertson's were not the primary cause of Haggen's demise.

***251** XVI. Comvest's Projections

A. Comvest's Projections Were Wrong

173. Prior to the Albertson's Acquisition, Comvest prepared projections of Haggen's future financial performance. These projections formed the predicate for determining the OpCo

Entities' liquidity needs and capitalization. In the final version of projections presented to the IC, Comvest's “base case” assumed that Haggen would enjoy same store sales growth of 4.9% in the first year leading to earnings of $78.2 million. Based on these projections, Comvest underestimated the OpCo Entities' liquidity needs. For the reasons set forth below, the Court concludes that Comvest's “base case” was wrong and the overly optimistic assumptions caused the OpCo Entities to be undercapitalized from their December 2014 inception.

174. Comvest's industry consultant, ATK, created the 4.9% same store sales growth rate that was incorporated into Comvest's base case. Trial Tr. (10/20) at 106:14-16.

175. During his direct examination, Hooper testified that ATK's same store sales growth rate was based on certain objective data, “net promoter scores” and “word clouds,” case studies, and the erroneous assumption that Haggen's supermarket “resets” would occur during or prior to store conversions. Trial Tr. (10/20) at 106:14-113:17. The data that ATK relied upon included factors such as industry growth, population growth, and inflation, and its own generalized belief “that the business could grow based on the strength of the brand and the strength of the proposition.” Trial Tr. (10/20) at 105:18-24, 106:23-107:3.

176. ATK also relied on “net promoter scores” that showed Haggen's customers in Washington and Oregon had a positive view of the grocery chain. According to ATK, a “net promoter score” is a consumer survey designed to measure the strength of a brand because it shows “the loyalty and the connection of the relationship that the consumer has with the brand.” Trial Tr. (10/20) at 107:12-14, 108:4-8.

177. Finally, Hooper testified that ATK's same store sales growth rate was also based, in part, on the assumption that Haggen's “resets” would occur during or prior to the conversions, an assumption that ATK specifically advised Haggen would have a significant impact on expected sales growth. PX 107.024. The Court heard considerable testimony about the meaning of “resets” and “conversions.” The Court need not determine the precise meaning of these terms because the evidence shows that Haggen did not complete any “resets” prior to store conversions.

178. At trial, Caple admitted that total store resets were not supposed to occur as part of the conversion process because the stores came stocked with inventory that Haggen had to sell before it could do resets. Trial Tr. (10/16) at 150:24-151:24. Shaner also admitted that the “decision was made to not do the reset” until later in 2015, and observed that resets “are extraordinary, literally moving tens of thousands of products takes about a week and that is in consideration of doing nothing else in the store.” Trial Tr. (10/19) at 13:22-15:15.

179. The evidence shows that the scope and timing of the Project had no precedent: an 18-store chain expanding eight-fold by acquiring 146 stores spread out over five states (including three where Haggen had no prior market presence), and where entrenched competition would remain. The entire transaction (the scope of which changed over time from an initial 22 stores in Washington and Oregon in ***252** late August 2014, to ultimately 146 stores in five states by November 2014) was negotiated in less than four months; Haggen had just several months to develop conversion plans, hire hundreds of workers and managers, and create the “infrastructure” necessary to run a business of this magnitude; and Comvest and Haggen willingly agreed to acquire and convert all of the stores in just 120 days (which the FTC extended to 150).

180. David MacGreevey, an expert who testified on behalf of the Committee, presented a compelling analysis of “comparable” transactions showing that the Albertson's Acquisition was far greater in size, and was to be completed in a substantially shorter time frame, than any recent “comparable” transaction. Trial Tr. (10/18) at 36:6-37:11; PX 106.018. Even Shaner admitted that he had never seen a transaction of this magnitude. Trial Tr. (10/19) at 39:25-40:6.

181. Based on Hooper's testimony, Comvest's projections failed to take into account and were inconsistent with the actual pre-Albertson's Acquisition results of the Haggen legacy stores and the stores being acquired from Albertson's and Safeway. The evidence shows that sales at the legacy stores contracted in each of the four years from 2010 through 2013, before growing, but by only 0.5% in 2014 (when Comvest claims it engineered a turnaround at Haggen). Sales for the targeted stores also contracted or rose modestly (less than 2%) until 2014. PX 19.017; PX 26.008; PX 632.011. Notably, these historical results were attained without any of the risks that Haggen faced. Trial Tr. (10/16) at 115:16-117:6; Trial Tr. (10/17) at 142:19- 145:24; DX 79.006; PX 8.004. The Court is unable to reconcile the historical sales results, achieved without any of the foreseeable transactional or execution risks that Haggen confronted, with Comvest's

projected base case 4.9% same store sales growth rate in the year immediately after the closing.

182. On October 31, 2015, ATK circulated another set of projections, including an "upside case," a base case, and a "downside case." The assumptions in the upside case were modified to assume even stronger same store sales growth in the second and third years. PX 157.005. On cross-examination, Shaner initially testified that he no longer had "heartburn" after receiving ATK's revised projections, and that he couldn't recall whether he agreed with the concerns expressed by Genser. Shaner was forced to recant that testimony after seeing that he, and Genser, and Barnett all expressed considerable concerns about ATK's later set of projections:

- Genser stated, among other things, that he did not "believe the downside case [was] draconian enough" and that "year one could be worse that [sic] what is presented and it never bounces back."

- Barnett expressed the view that "the downside is not a good representation of just how far 'down' could be, and therefore does not accurately represent both the Branding risk (SoCal) and Executional risk (both). My concern is that ATK presents, and therefore legitimizes the 'worst case,' which we know is not really the worst case."

- Shaner wrote: "I am strongly in Ira and Blake's camp. There are so many moving parts, and so much turmoil to manage through, that I think it's only prudent to be keenly aware of the potential downside risk scenarios ... [w]e are eliminating banners that have a presence for years, and while somewhat tarnished, still maintain a loyal customer base ... I believe in the Haggen ***253** brand's ability over time, [but] the challenges to sales and ebitda in years 1-2 are significant."

Trial Tr. (10/19) at 24:22-29:5; PX 157.

183. In essence, Shaner maintained the very same concerns that he told Barnett had caused "heartburn" just days before Shaner was forced to admit that (a) he believed Haggen faced "significant challenge[s]" to sales and EBITDA during the first two years, and (b) that what he "foresaw back in October [2014] was exactly what happened. Sales and EBITDA in year one were just a disaster." Trial Tr. (10/19) at 29:6-12.

184. In response to the concerns expressed by Genser, Shaner, and Barnett, Niegsch claimed to have prepared a "real bad downside case" showing the operating companies "barely" having any liquidity after "cutting down Capex and G & A and stretching payables for more breathing room in that scenario." PX 157.003. Niegsch relied on the "real bad downside case" to dismiss the substantial concerns that ATK's "downside scenarios" did not sufficiently take into account the transaction and execution risks, yet Niegsch could not identify the "real bad downside case," and could not recall ever presenting it to, or discussing it with, the IC (or anyone else). Trial Tr. (10/17) at 136:24-139:24; Trial Tr. (10/19) at 101:13-18; PX 625.

185. While the Court never saw Niegsch's "real bad downside case," the evidence shows that Comvest's downside scenarios never showed the OpCo Entities losing any money. Trial Tr. (10/16) at 295:11-296:1. Indeed, prior to the time it approved Haggen's bid, the IC was never presented with a scenario that showed the OpCo Entities earning less than $40 million per year. Trial Tr. (10/17) at 62:7-12. Thus, although the Deal Team's downside projections assumed same store sales would decline by 5% in the first year (PX 19.026), the Deal Team changed other assumptions that mitigated the impact of the projected loss of sales such that Haggen still showed profits of almost $50 million in the first year.

XVII. <u>The Court Accepts As Credible MacGreevey's Opinion That The OpCo Entities were Insolvent and Undercapitalized</u>

186. David MacGreevey offered expert testimony on the Committee's behalf concerning whether the OpCo Entities were insolvent and undercapitalized on the date of the APA (*i.e.*, December 10, 2014), and each day thereafter through the Petition Date. Trial Tr. (10/18) at 5:14-19. MacGreevey did not opine on the solvency of the PropCo Entitites or Holdings.

187. MacGreevey's ultimate conclusion is that the OpCo Entities were insolvent and undercapitalized as of the date of the APA and each day thereafter. Trial Tr. (10/18) at 7:19-8:2. For the reasons set forth below, while the Court finds that MacGreevey was an able witness, the Court does not credit his opinion and finds that the OpCo Entities were not insolvent and undercapitalized at the signing of the APA.

188. MacGreevey is well-qualified to offer his expert opinion on issues of insolvency. He has spent more than fifteen years in the restructuring and finance arenas, including more than seven years in the restructuring group at Duff & Phelps (and

its predecessor, Chanin Capital Partners), and two years in the Restructuring and Special Situations practice of Macquarie Capital, before joining Zolfo Cooper LLC ("Zolfo Cooper") in 2011. MacGreevey has represented creditors and creditors' committees in a wide variety of cases and industries and has advised stakeholders on strategic transactions, including restructurings, mergers and acquisitions, and capital ***254** raises. Trial Tr. (10/18) at 5:20-6:6; PX 106.064.

189. MacGreevey testified that working with projections and forecasts of future financial performance, including developing and critiquing projections, business plans, and liquidity forecasts, is one of his and Zolfo Cooper's "key competencies." MacGreevey has performed these services across a wide array of industries, including retail. While MacGreevey has some experience in the grocery sector (in particular, as advisor to the creditors' committee in A & P, a prior bankruptcy case), he does not hold himself out as an expert in that industry. Trial Tr. (10/18) at 6:7-7:5.

190. MacGreevey was asked to render his opinions in early 2017. A team of professionals at Zolfo Cooper assisted MacGreevey. Together, they gathered and reviewed information and spent "hundreds of hours" on the project. Trial Tr. (10/18) at 10:23-12:8; PX 106.067-71. Ultimately, MacGreevey prepared a written report setting forth his opinions, the methodologies utilized, and the bases for his opinions. Trial Tr. (10/18) at 8:12-9:4; PX 106.

191. Comvest's base case incorporated ATK's 4.9% same store sales growth rate. In contrast, MacGreevey's base case assumed that same store sales would contract by 8.6% in the first year.

192. Multiple parties reviewed OpCo's financials including the same store sales growth projections developed by ATK. These parties included the Deal Team, the Haggen management team, the IC, multiple lenders, the Sale Leaseback Counterparties, SuperValu, the FTC, and Unified Grocers. None of these parties ever argued that ATK's same store sales growth projections for OpCo were unreasonable. *See* Trial Tr. (10/16) at 218:9–25, 219:18–220:1, 223:4–24, 233:4–9 (Caple); Trial Tr. (10/17) at 89:21–90:7, 98:22–99:4, 99:20–100:15 (Niegsch).

193. The basis for MacGreevey's assertion that Haggen should have projected negative 8.6% same store sales growth as opposed to positive 4.9% same store sales growth is that MacGreevey believes that Haggen should have applied ATK's "pre-renovation" projection numbers rather than "post-renovation" projection numbers. Trial Tr. (10/17) at 56:19–57:10. MacGreevey did not develop his own numbers, but chose from a table in an ATK spreadsheet that had pre-renovation and post-renovation projections. *Id.* at 49:14–22. ATK used the post-renovation numbers rather than the pre-renovation numbers in developing their same store sales projections. *Id.* at 57:21–58:5. Hooper testified that, based on his conversations with Haggen and Comvest as well as his review of the capital expenditure budget, it was appropriate to project the post-renovation benefit for OpCo. Trial Tr. (10/20) at 119:6–24 (Hooper).

194. Hooper also testified as to multiple other reasons it was reasonable to project positive same store sales growth for OpCo. These reasons included, among others:

- Net Promoter Score: ATK performed a consumer survey of over 1,000 people to determine Haggen's net promoter score. Trial Tr. (10/20) at 109:20–21; 110:21–111:2 (Hooper); DX0072-0013. Haggen's high net promoter score in comparison to the net promoter score for Albertson's and Safeway gave ATK confidence that the brand could and would be successful. Trial Tr. (10/20) at 109:22–110:8 (Hooper);

- Word Cloud Surveys: ATK also performed a "word cloud" survey on over 1,000 people to see what words they associated with shopping at Haggen, Albertson's and Safeway. ***255** *Id.* at 112:16–18. The word cloud survey supported the thesis that Haggen could keep the Albertson's and Safeway customers who cared primarily about price and location while also attracting the Haggen customers who also cared about freshness, local products, organic products, and other key words. *Id.* at 111:16–112:15.

- Case Studies: ATK also analyzed prior grocery store conversions in the form of case studies to support their projection that OpCo would experience positive same store sales growth. i*d.* at 112:19–113:17. Based on a review of the case studies, ATK placed Haggen on the top half of its two-by-two grids signifying ATK's view that renovations were being performed prior to the banner conversion. *id.* at 119:6–24.

195. MacGreevey relied in significant part on a series of capital expenditure ranges contained in a chart provided in an ATK presentation indicating a certain capital expenditure range associated with a "refresh," a "minor remodel," and

a "major remodel." Trial Tr. (10/18) at 21:18–23:13, 63:24–64:10 (MacGreevey); DX0041-0002. Those ranges, however, were not produced by ATK. Hooper testified that instead those ranges were provided by "the storyteller" *i.e.* the people that ATK interviewed—from Winn Dixie who observed the store conversions in that case study. Trial Tr. (10/20) at 113:18–115:10 (Hooper); DX041-0002. And the Winn Dixie case study qualified as a "store reset/remodel" according to ATK's own analysis. DX0041-0009.

196. Hooper testified that the plans to "Haggenize" the stores would fit within his view of a renovation. Trial Tr. (10/20) at 119:6–24 (Hooper). Thus, Hooper disagreed with MacGreevey and believed that post-renovation rather than pre-renovation numbers should be used in projecting same store sales growth. *Id.*

197. The Court finds that it was reasonable for Haggen and Comvest to rely on the same store sales projections developed by ATK. The overwhelming weight of the evidence indicates that Haggen intended to and did perform renovations at the acquired stores prior to reopening those stores under the Haggen banner.

198. MacGreevey also made an adjustment to "fix" certain operating costs rather than leave those costs variable as in the Management Base Case. Trial Tr. (10/18) at 75:14–78:4 (MacGreevey). If MacGreevey's adjustment to projected same store sales growth is rejected, then MacGreevey admits there is no impact to his adjustment to "fix" certain costs. *Id.* at 75:14–76:23 (MacGreevey). One of the costs MacGreevey determined should be 100% fixed was labor costs. *Id.* at 76:24–78:4 (MacGreevey). Shaner, Clougher and Hooper, all of whom (unlike MacGreevey) have extensive grocery experience, each testified that labor costs are not fixed in the grocery industry. Trial Tr. (10/19) at 93:2–14 (Shaner), 188:5–189:12 (Clougher); Trial Tr. (10/20) at 103:19–104:11 (Hooper) ("Q. In grocery is labor a fixed cost or a variable cost? A. Labor is commonly understood to be very variable.").

199. MacGreevey also "corrected" the Management Base Case by adjusting the store cadence to match the actual cadence and by implementing a $10 million minimum cash requirement in his liquidity calculation. Trial Tr. (10/18) at 78:5–16 (MacGreevey). The PNC Credit Agreement does not require a $10 million minimum cash requirement when calculating liquidity and evaluating whether a springing event had occurred. *Id.* at 78:25–79:23 (MacGreevey). Further, the actual store cadence would not have been known or ***256** knowable as of the signing date of the APA. *Id.* at 79:24–80:17 (MacGreevey). The Court finds MacGreevey's "corrections" and "adjustments" to the Management Base Case unpersuasive.

200. Defendants elicited expert testimony from Montague in rebuttal to MacGreevey's testimony on solvency. Montague disagreed with the conclusions of MacGreevey and found MacGreevey's solvency analysis to be unreliable. Trial Tr. (10/20) Tr. at 204:18–22 (Montague). Montague testified that, under the management's base case assumptions, OpCo would pass all three solvency tests: the "Cash Flow Test," the "Capital Adequacy Test," and the "Balance Sheet Test." *Id.* at 191:15–17, 193:18–20, 194:11–195:2 (Montague).

201. The Court finds that OpCo was solvent and not undercapitalized as of the signing of the APA.

CONCLUSIONS OF LAW

I. THE COMMITTEE HAS FAILED TO PROVE ACTUAL FRAUD.

What would be an important claim in this case is one that the Committee did not bring, failed to prove, namely, that any Defendant committed fraud on any OpCo creditor. There was no allegation of any intent by the Defendants to actively mislead the OpCo creditors, there was no justifiable reliance by the OpCo creditors on a misrepresentation, and there were no damages to the OpCo creditors directly caused by a misrepresentation. The Committee cannot meet any element of common law fraud. *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 144 (Del. Ch. 2003).

The Committee's theory is nonetheless based on fraud. They seek to "avoid" transfers from Holdings to PropCo, but avoiding those transfers will not result in any additional money going to the OpCo creditors. The Committee alleges a breach of fiduciary duty claim, but the duties and the allegations do not match, especially when Holdings has always been solvent. The Committee seeks to add substantive consolidation (as a makeshift alter ego theory) on other claims to rearrange the corporate structure. Yes, the bankruptcy happened very quickly, despite Defendants' efforts and the rapidity of the business failure was shocking. The Committee challenged the events but fell short of proving fraud. One of the reasons for incorporating in Delaware is its well-established respect for the corporate form. As the Delaware Supreme Court recently explained, "Delaware courts take the corporate form and corporate formalities very seriously," because it would "upset the contractual expectations" of the parties to conflate separate entities. *Culverhouse v. Paulson & Co.*, 133 A.3d 195, 199–200 (Del. 2016) (internal quotation marks omitted). "It is only the exceptional case where a court will disregard the corporate form." *Sears, Roebuck & Co. v. Sears plc*, 744 F.Supp. 1297, 1305 (D. Del. 1990); *see also Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 49 (Del. Ch. 2012) ("Delaware courts take the corporate form and corporate formalities very seriously ... [and] will disregard the corporate form only in the exceptional case.").

The certainty allows businesses to determine which risks, and how much risk, they wish to take in new ventures. The Committee challenges these fundamental tenets of Delaware law, asking the Court to disregard Holdings' separate existence and distribute its assets to creditors of its subsidiaries, OpCo. This runs counter to the well-established rule that "parent and subsidiary corporations are separate entities, having separate assets and liabilities.... [H]ence, the parent's ***257** creditors have no claim to the subsidiary's assets, and vice versa." *In re Regency Holdings (Cayman), Inc.*, 216 B.R. 371, 375 (Bankr. S.D.N.Y. 1998) (citations omitted). If relief were granted on the present facts, disregard for the corporate form would be inconsistent with the expectations that businesses manifest in selecting Delaware as the site of incorporation.

II. THE CLAIM FOR SUBSTANTIVE CONSOLIDATION (COUNT 72)

The Court rejects the Committee's claim to substantively consolidate the PropCo Entities with Holdings and the OpCo Entities. To be entitled to substantive consolidation, the Committee has the burden of proving that the Debtors and the PropCo Entities disregarded their corporate separateness "so significantly" that "their creditors relied on the breakdown of entity borders and treated them as one legal entity." *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005). The Committee, however, offered no evidence that the OpCo Entities' creditors "actually or reasonably" relied on any breakdown of the entities' corporate separateness. *Id.* at 212. Even if the Committee could meet its burden, an opponent of substantive consolidation can still preclude application of the remedy by showing that other creditors "actually relied on debtors' separate existence," and would be "adversely affected" by substantively consolidating the various entities. *Id.* Here, it is undisputed that some of Holdings' creditors did actually rely on the Debtors' corporate separateness and would be adversely affected by substantive consolidation. Accordingly, substantive consolidation is inappropriate in this case.

A. Legal Standard For Substantive Consolidation

Substantive consolidation in the Third Circuit is governed by *Owens Corning*. There, the Third Circuit analyzed the approaches to substantive consolidation utilized by other circuits, and then adopted a straightforward approach that differs meaningfully from the approaches in those circuits. *See id.* For example, the court explicitly rejected the "*Auto-Train*" approach, which it described as "fail[ing] to capture completely the few times that substantive consolidation may be considered and then, when it does hit one chord, it allows a threshold not sufficiently egregious and too imprecise for easy measure." *Id.* at 210 (*citing In re Auto–Train Corp.*, 810 F.2d 270, 276 (D.C. Cir. 1987)). The court also rejected the "checklist" approach—utilized, for example, in the Second Circuit—because it "often results in rote following of a form containing factors where courts tally up and spit out a score without an eye on the principles that give the rationale for substantive consolidation (and why, as a result, it should so seldom be in play)." *Id.* at 210. The Court rejects the Committee's attempt to rely on non-Third-Circuit case law that does not apply the *Owens Corning* test.

The Committee relies on *Stop & Go of Am., Inc. v. Stop & Go Shops, Inc. (In re Stop & Go of America, Inc.)*, 49 B.R. 743 (Bankr. D. Mass. 1985). The test adopted by the Third Circuit in *Owens Corning* is exactly the opposite of the test used in *Stop & Go*. The *Owens Corning* court announced a hard and fast rule that substantive consolidation was never allowed where creditors were aware of and relied on the debtors' corporate separateness. 419 F.3d at 212 (holding that substantive consolidation is not available where creditors can prove "they are adversely affected and actually relied on debtors' separate existence."). The *Stop & Go* court, on the other hand, applied a very different standard, in which substantive consolidation was favored where the creditors understood the ***258** separate corporate nature of the debtors. 49 B.R. at 750 ("[T]he Court cannot find that the defendants were ignorant of the relationship of the companies."). These conflicting standards cannot be reconciled, and the Court is bound to follow the lead of the Third Circuit.

In crafting the Third Circuit test, the *Owens Corning* court identified several important principles. One "fundamental ground rule" is that courts must limit "the cross-creep of liability by respective entity separateness" because "the general expectation of state law and of the Bankruptcy Code, and thus of commercial markets, is that courts respect entity separateness absent compelling circumstances." *Id.* at 211. Another important principle is that substantive consolidation is "extreme" and "imprecise," and that this "rough justice remedy should be rare" and "one of last resort after considering and rejecting other remedies." *Id.* (emphasis added). Based on these principles, the Third Circuit concluded that substantive consolidation is available when "prepetition [the debtors] disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity." *Id.* The *Owens Corning* court also stated that substantive consolidation is available when "postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *Id.* at 211. The Committee, however, has stated that its alleged entitlement to substantive consolidation flows from the Debtors and Defendants supposed prepetition disregard for corporate separateness. *See* D.I. 111 at 19 ("Ultimately, for the PropCo Entities to be consolidated, the Committee must show that, prepetition, they disregarded corporate separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity."). The Committee has not offered any evidence to support a finding that the assets and liabilities are so scrambled that separating them would hurt all creditors.

The Third Circuit went on to break down the elements of a substantive consolidation claim. First, the Committee must prove that the "parties' prepetition dealings" revealed "corporate disregard creating contractual expectations of creditors that they were dealing with debtors as one indistinguishable entity." *Owens Corning*, 419 F.3d at 212. Second, a proponent of substantive consolidation must prove that "in their prepetition course of dealing, they actually and reasonably relied on debtors' supposed unity." *Id.* This prong has dual requirements: the creditor must not only prove actual reliance, but also that such reliance was "reasonable." *Id.* Simple ignorance of the debtors' corporate structure does not satisfy this test. *Id.* Third, if the first two prongs are met, an opponent of substantive consolidation can still preclude application of the remedy by showing that other creditors "actually relied on debtors' separate existence," and would be "adversely affected" by substantively consolidating the various entities. *Id.*

Finally, there is a split of authority regarding whether substantive consolidation is an appropriate remedy at all where, as here, the Committee seeks the consolidation of debtors and non-debtors. What is clear is that the burden on the Committee in establishing a right to this "extreme" and "rare" remedy is ratcheted up even further when seeking consolidation of a non-debtor entity. *See In re Howland*, 674 F. App'x 482, 488 (6th Cir. 2017) ("Substantive consolidation is an 'extreme' measure, only to be used 'sparingly,' especially when consolidating a non-debtor entity.") (*citing Owens Corning*, 419 F.3d at 208–09, 211).

***259** B. Creditor Reliance

It is important to consider the burden of proof for substantive consolidation. "Proponents of substantive consolidation have the burden of showing one or the other rationale for consolidation." *Owens Corning*, 419 F.3d at 212. As the proponent of substantive consolidation, the Committee has the burden of proving that creditors "actually and reasonably" relied on a belief that the OpCo, PropCo, and SLB Entities were the same entity. *Id.* ("Proponents who are creditors must also show that, in their prepetition course of dealing, they actually and reasonably relied on debtors' supposed unity."); *see also Howland*, 674 F. App'x at 489 (holding that "the trustee's proposed amended complaint is devoid of any factual allegations that any creditor relied on the debtors' disregard of corporate formalities in making a business decision in connection with either entity" and dismissing the trustee's substantive consolidation claim). The Committee does not even attempt to meet this burden. Instead, they argue that there "was no public disclosure of the PropCo/OpCo structure" and that in the absence of public disclosure, the OpCo creditors' "lack of knowledge was a foregone conclusion." Trial Tr. (10/16) at 11:12–18; 11:22–24 (Morris). This argument changes the standard from "reasonable reliance" to mere ignorance and improperly shifts the burden of proof from the Committee to Defendants.

There is a difference between mere ignorance of debtors' corporate structure and "actual and reasonable reliance" on the debtors' supposed unity. The Third Circuit in *Owens Corning* did not rule that substantive consolidation is appropriate whenever debtors fail to publicize their corporate structure. Privately held companies rarely, if ever, issue public announcements about their corporate legal structure; and the Committee's argument would change substantive consolidation from a "rare" and "extreme" remedy to one that would be available in many bankruptcies. *Owens Corning*, 419 F.3d at 211. Instead, the *Owens Corning* court set a standard of actual and reasonable reliance. *See id.* at 212. This requires a creditor to engage in some minimal level of inquiry, such as asking whether the OpCo Entities owned any real property. Creditors, if interested, also had the option of checking the publicly available real property records to see who owned the real property upon which the stores sat. Had the OpCo Entities' creditors been interested and checked the real property records, they would have discovered recorded deeds showing that Albertson's conveyed the real property at issue to Spirit, GIG, and the PropCo Entities, not the OpCo Entities. *See*, *e.g.,* DX0219; DX0232; DX0250; DX0251; DX0268. They also would have discovered the publicly recorded Memoranda of Lease disclosing that the OpCo Entities were tenants, and that they did not own the real property. *See*, *e.g.*, DX0265; DX0323. Publicly recorded deeds constitute constructive notice. *See*, *e.g.*, *Sixty-01 Ass'n of Apartment Owners v. Parsons*, 178 Wash.App. 228, 314 P.3d 1121, 1125 (2013) ("A recorded deed constitutes constructive notice of the interest acquired."). *See also* Ariz. Rev. Stat. § 33-416 ("The record of a grant, deed or instrument in writing authorized or required to be recorded, which has been duly acknowledged and recorded in the proper county, shall be notice to all persons of the existence of such grant, deed or instrument ....").

The Committee failed to prove any actual or reasonable creditor reliance. The Committee is arguing that Defendants must prove that not one of the OpCo Entities' thousands of unsecured creditors relied on the mistaken belief that the OpCo Entities owned the real property. This is ***260** logistically impossible and inconsistent with the *Owens Corning* test which places the burden of proving actual and reasonable creditor reliance squarely on the Committee's shoulders. *See* 419 F.3d at 212. The Committee has not even attempted to meet this burden, and this precludes substantive consolidation. *Id.*

Even though it was not their burden, Defendants did introduce evidence regarding four of the OpCo Entities' largest creditors —indeed, this was the only evidence regarding creditor reliance that was admitted at trial. The evidence shows that none of these creditors actually or reasonably relied on the Debtors' supposed unity with the PropCo and SLB Entities. Spirit, GIG, and Unified Grocers all knew that the OpCo Entities were separate companies that did not own any real property. Pepsi's corporate representative testified that they conducted no investigation and did not care whether or not the OpCo Entities owned any real property. *See* Trial Tr. (10/19) at 82:8–83:10 (Pepsi Stipulation). This is consistent with the experience of the Haggen management team, who all testified that (a) trade creditors never ask whether a grocery store owns real estate before extending credit, and (b) a trade creditor has never refused to extend credit to a grocery store on the basis that the grocery store does not own any real estate. *See* Trial Tr. (10/17) at 230:7–18 (Barnett); Trial Tr. (10/19) at 50:10–24, 80:8–81:17 (Shaner); Trial Tr. (10/19) at 148:18–149:7, 172:8–174:9 (Clougher). Unified Grocers, who ultimately did $13-14 million of business per week with the OpCo Entities, actively sought a guarantee from the PropCo Entities on its extension of credit to the OpCo Entities, was denied, and made the business decision to extend credit to the OpCo Entities anyway. In addition, some creditors such as Starbucks, MoneyGram, and TopCo extended credit after receiving a copy of the OpCo Entities' pro forma financial statements. *See* DX0217–DX0218 (Starbucks received OpCo pro forma); DX0177–DX0178 (TopCo received OpCo pro forma); DX0204–DX0205 (MoneyGram received OpCo pro forma). The pro forma financial statements do not identify any real property and have a substantial line item for "rent expense." As such, these creditors had in their possession financial statements from the OpCo Entities showing that "OpCo" did not own the real property upon which the stores operated.

In the Court's summary judgment ruling, it explained that "[t]he Committee will have the opportunity at trial to prove what creditors did not know and relied upon," and that "[a]fter trial, the Court will be in a better position to determine the creditors' recovery rights." D.I. 136 at 8. The trial has come and gone. Every single creditor that testified said that they either knew of or did not care about the Debtors' corporate structure. Not one creditor testified that they actually and reasonably relied on the Debtors' supposed unity with the PropCo and SLB Entities.

C. Harm From Substantive Consolidation.

In addition to failing the first prong of the *Owens Corning* test, substantive consolidation is unavailable here because the record is clear that Holdings' creditors "actually relied on debtors' separate existence" and would be "adversely affected" by substantive consolidation. *Owens Corning*, 419 F.3d at 212.

Spirit and GIG entered into leases with the OpCo Entities whereby the OpCo Entities agreed to pay rent to Spirit and GIG for use of the grocery stores. *See* DX0226; DX0235. Both Spirit and GIG negotiated for and received a guarantee on these rental payments from Holdings. *See* DX0242; DX0396. In doing so, Spirit and ***261** GIG understood the separate corporate existence between the OpCo Entities and Holdings, recognized that there was value in having an otherwise separate entity be liable for the rental payments, and understood that through the guarantees they would have access to assets that they (and other creditors of the OpCo Entities) would otherwise not have. As Spirit's corporate representative explained, having these guarantees provided a "feature that mitigates our risk in doing the transaction." D. Rosenberg Dep. at 52.18–53:6.

Substantive consolidation would be devastating on Holdings' creditors. These creditors would see their recovery drop from 100% to as little as 21%. *See* Trial Tr. (10/20) at 177:13–17; 178:6–13 (Montague). And the OpCo Entities' creditors would receive a windfall, as their recoveries would increase from 0% to over 20%. Trial Tr. (10/20) at 223:22–25 (Montague).

At that same hearing, the Committee's counsel argued that the prejudice to Holdings' creditors should be ignored because it was an "intercreditor" issue that could be addressed by a consensual plan. The Committee's counsel went so far as to promise such a consensual plan in a matter of days. See 9/26/17 Hr'g Tr. at 19:9–10 ("I hope to file the plan today, but I think it's just a matter of days ....") (Feinstein). It has been approximately four months, and no such plan has been filed.

III. THE HOLDINGS FRAUDULENT TRANSFER CLAIMS (COUNTS 1–19, 39–65).

Fraudulent transfer is a statutory remedy that allows creditors to avoid transfers and return property to a debtor that originally owned it. 11 U.S.C. § 548. Here, the Committee is seeking to avoid transfers from Holdings to PropCo and Holdings to Comvest. If successful, the result of these claims will be that the transferred property is returned to the Holdings estate. *Id.*

Holdings' creditors are already being paid in full. The Committee's ultimate goal is to take Holdings' property and distribute it to OpCo creditors who have never been Holdings creditors. The Committee is seeking a veil piercing remedy, but has not even attempted to satisfy the stringent requirements under Delaware law to pierce the corporate veil. *Sears,* 744 F.Supp. at 1305 ("It is only the exceptional case where a court will disregard the corporate form."). The Committee has argued that these legal defects in their fraudulent transfer claims can be overlooked because they "presuppose" the validity of the Debtor's corporate structure. This ignores that "Delaware courts take the corporate form and corporate formalities very seriously." The Court is bound to do the same in applying Delaware law. *Vichi v. Koninklijke Philips Elec. N.V.*, 62 A.3d 26, 48-49 (Del. Ch. 2012).

This is not a case of fraudulent transfer. Holdings, the only Debtor that has ever held the property at issue, is solvent, and is paying its creditors in full. The Committee is trying to seize property that never belonged to OpCo, and distribute it to OpCo creditors that have never had a claim against Holdings. But OpCo's creditors lack standing to sue on behalf of Holdings for fraudulent transfer, and any recovery would not benefit Holdings' creditors who are to be repaid in full. *See Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 80, 94 (S.D.N.Y. 2008); *see also In re New Life Adult Med. Day Care Ctr., Inc.*, 2014 WL 6851258, at *6 (Bankr. D.N.J. Dec. 3, 2014).

A. Legal Standard For Fraudulent Transfer

Fraudulent transfer is a legal, not an equitable, remedy. ***262** *Boston Trading Grp., Inc. v. Burnazos*, 835 F.2d 1504, 1508 (1st Cir. 1987). Whether alleged under state law under 11 U.S.C. § 544, or under 11 U.S.C. § 548, the claim arises under statute, and each of the statutory elements must be met to impose liability. *See* 11 U.S.C. § 548; *see also* 11 U.S.C. § 544. The remedies available are limited to those enumerated by statute. *Id.*

To allege a claim for fraudulent transfer under state law, the Committee must be a creditor of the transferor. *See, e.g. Fidelity Nat'l Title Ins. Co. v. Schroeder*, 179 Cal. App. 4th 834, 841, 101 Cal.Rptr.3d 854 (Cal. Ct. App. 2009). Likewise, "the Bankruptcy Code's avoidance provisions can only be asserted to benefit a creditor of the debtor in question." *Adelphia*, 390 B.R. at 94. "An obligation or transfer cannot be avoided as a fraudulent transfer or preference under sections 544, 547 and 548 of the Bankruptcy Code when doing so would not benefit any creditor of the particular debtor that incurred the obligation or made the transfer." *Id.* at 93.

Fraudulent transfer claims may not be brought where they offer no benefit to creditors of the transferor's estate. *Adelphia*, 390 B.R. at 95 ("Under the principles of federal jurisdiction, a party does not have standing to sue where the party is not able to allege an injury that is likely to be redressed by the relief sought."). No recovery is allowed if it would not provide any benefit to actual creditors of the transferor. *See In re Trans World Airlines, Inc.*, 163 B.R. 964, 969 (Bankr. D. Del. 1994); *Whiteford Plastics Co. v. Chase Nat'l Bank of New York City*, 179 F.2d 582, 584 (2d Cir. 1950) (" 'It would be mockery of justice to [avoid a transaction] in the right of non-existing creditors.") (internal citation omitted). This rule precludes recovery actions when the transferor is solvent and the transferor's creditors are all being paid in full. *See New Life*, 2014 WL 6851258, at *6.

Both the Bankruptcy Code and analogous state laws distinguish between claims for "actual" fraudulent transfer and "constructive" fraudulent transfer. Compare 11 U.S.C. § 548(a)(1)(A) with 11 U.S.C. § 548(a)(1)(B). To prove actual fraud, the plaintiff must show that the transfer was made with "actual intent to hinder, delay or defraud" the transferor's creditors. 11 U.S.C. § 548(a)(1)(A). Constructive fraud, on the other hand, occurs when an insolvent transferor makes a transfer for less than reasonably equivalent value. *See* 11 U.S.C. § 548(a)(1)(B). The plaintiff has the burden of proof under either theory of recovery. No claim for actual fraudulent transfer can succeed where the plaintiff fails to prove actual intent to hinder, delay or defraud the transferor's creditors. *See*, *e.g.*, *In re Fedders N. Am., Inc.*, 405 B.R. 527, 545 (Bankr. D. Del. 2009). And no claim for constructive fraudulent transfer can succeed where the plaintiff fails to prove both (i) insolvency at the time of transfer, and (ii) failure of the transferor to receive reasonably equivalent value. *See*, *e.g.*, *Burtch v. Opus LLC (In re Opus East, LLC)*, 528 B.R. 30, 51, 83 (Bankr. D. Del. 2015) ("The plaintiff bears the burden of proving insolvency by a preponderance of the evidence..." while "[t]he burden of proof is on the Trustee to establish that less than reasonably equivalent value was received by the Debtor for the allegedly fraudulent transfers.")

B. <u>Fraudulent Transfer Claims (Both Actual And Constructive) Involving Transfers By Holdings</u>

As a matter of law, the Committee is precluded from prosecuting a claim for fraudulent transfer against Holdings on behalf of persons who are not creditors of ***263** Holdings. *Adelphia*, 390 B.R. at 95. At bottom, the Committee is seeking to recover assets transferred from Holdings to the PropCo Entities used to pay OpCo creditors. This violates well-established rules of law and stops all of the fraudulent transfer claims directed at Holdings, including (i) the contribution to the PropCos, and (ii) the payment of the $1.5 million management fee from Holdings to Comvest.

Under state fraudulent transfer law, the Committee lacks standing to seek recovery on behalf of persons who are not creditors of Holdings. *In re Global Grounds Greenery, LLC*, 405 B.R. 659, 662 (Bankr. D. Ariz. 2009) (stating "[t]here is no dispute that the Uniform Fraudulent Transfer Act, as adopted in Arizona and elsewhere, only creates causes of action for creditors of the transferor"); *In re ShengdaTech, Inc.*, 519 B.R. 292, 303–04 (D. Nev. 2014) (holding that, under Nevada's Uniform Fraudulent Transfer Act, a creditor is the only party with standing to bring a claim); *Fidelity Nat'l Title*, 179 Cal. App. 4th at 841, 101 Cal.Rptr.3d 854 (holding that, under California's Uniform Fraudulent Transfer Act, a fraudulent transfer may only be attacked by the creditor injured from the transfer); *Douglas v. Hill*, 148 Wash. App. 760, 765, 199 P.3d 493 (Wash. Ct. App. 2009) (holding that "under the definitions provided in the UFTA, a creditor need only have a right to collect a payment to void a fraudulent transfer"); *Norris v. R & T Mfg., LLC*, 265 Or. App. 672, 676, 338 P.3d 150 (Or. Ct. App. 2014) (holding that, to establish a claim under the Oregon Uniform Fraudulent Transfers Act, a plaintiff must prove that it "has a claim as a creditor that arose before or after the transfer was made"); *Fisher v. Kelly*, 30 Or. 1, 46 P. 146, 149 (1896) ("[B]efore a person can attack a transfer of personal property, either actual or constructive, he must show himself to be a creditor ...."). This rule acts as an absolute bar to all of the Committee's state law claims alleging fraudulent transfer by Holdings.

Holdings has sufficient assets to pay all of its creditors in full but this is also a bar to fraudulent transfer claims under the Bankruptcy Code. *Adelphia*, 390 B.R. at 94 ("[T]he Bankruptcy Code's avoidance provisions can only be asserted to benefit a creditor of the debtor in question."). This case is highly analogous to *Adelphia*. The debtors in *Adelphia* included the parent company Adelphia Communications Corporation ("Adelphia") and several of its subsidiaries (the "Obligor Debtors"). *See id.* at 83–85. Like in this case, the creditors' committee asserted fraudulent transfer claims for transfers made by the Obligor Debtors in an attempt to increase the recovery for Adelphia's creditors.

In a detailed opinion, the court explained that fraudulent transfer claims could only proceed where they would generate a recovery for creditors of the specific transferor entities; it was not enough that the claims sought a recovery for creditors of a separate corporate affiliate. *See id.* at 94–95. "Given that the creditors of the Obligor Debtors have received full payment with interest under the Plans, it follows that these creditors do not stand to benefit from recovery on the Bankruptcy Claims at issue here, and the [Adelphia Recovery Trust] does not have standing to bring these claims on their behalf." *Id.* at 95. The court held that bankruptcy courts must look to the actual transferor entity, and determine whether any of the transferor's creditors have unpaid claims. *See id.* The court further concluded that where all transferor creditors are being paid in full, no party has standing to sue for fraudulent transfer, whether under state law or 11 U.S.C. § 548. *See id.* at 92–97

In *Adelphia*, as here, the Adelphia Recovery Trust sought to cure its lack of ***264** standing by arguing that the bankruptcy court had previously granted the creditors' committee procedural standing to commence its adversary proceeding, and by invoking its rights as a hypothetical lien creditor. *See id.* at 88–89, 96. The court rejected this argument, explaining that the bankruptcy court's order allowing the creditors' committee to pursue claims did not resolve "the question of whether the Creditors' Committee had standing to prosecute specific claims." *Id.* at 88–89. Further, the court noted that the rights of the creditors' committee as a hypothetical lien creditor were limited to asserting claims that would actually lead to an a recovery for the creditors of the transferor entity. *Id.* at 93 ("[A]n obligation or transfer cannot be avoided as a fraudulent transfer or preference under sections 544, 547 and 548 of the Bankruptcy Code when doing so would not benefit any creditor of the particular debtor that incurred the obligation or made the transfer.").

Many courts have held that fraudulent transfer claims are improper where, as here, the creditors of the transferor are being paid in full. *See New Life*, 2014 WL 6851258, at *6 ("[E]ven applying the broadest application of the 'benefit to the estate' requirement, there is no conceivable benefit to the estate, either directly or indirectly. The Plan provided for full payment of all creditor claims...."). Likewise, in *Adelphia*, the plaintiff argued that recovery would benefit creditors of the parent *Adelphia*. The court explained that this was insufficient, because there was no benefit to the creditors of the actual transferors:

> [N]o creditors of the Obligor Debtors, the specific debtors whose transfers and obligations the ART seeks to avoid, would benefit from recovery on these claims, as all creditors have been paid in full with interest under the Plans, and no creditors have been issued shares of the ART. It is therefore impossible to see how any recovery by the ART could result in any benefit, direct or indirect, to the creditors of the Obligor Debtors.

Adelphia, 390 B.R. at 97. Here, the solvent debtor is the parent company (Holdings), meaning that even if the Committee is successful in transferring property from the PropCo Entities to Holdings, it still would not benefit the creditors at Holdings' subsidiaries (the OpCo Entities) because the Committee has not sued to pierce the corporate veil. *Regency Holdings*, 216 B.R. at 375 ("As a rule, parent and subsidiary corporations are separate entities, having separate assets and liabilities.... [H]ence, the parent's creditors have no claim to the subsidiary's assets, and vice versa.") (citations omitted). To recover from Holdings after avoiding transfers from Holdings to the PropCo Entities, the Committee had to have separately pled a claim for veil piercing in the Complaint. The Committee did not. The Committee pled a claim for substantive consolidation but, as discussed, this claim fails because the Committee fails the *Owens Corning* test.

<u>The Intent to Delay, Hinder, or Defraud Creditors.</u>

The claims alleging actual fraudulent transfer by Holdings also fail because the Committee has failed to prove that Holdings actually intended to defraud any of its creditors. To the contrary, the record shows that Holdings kept all of the Haggen-related assets in wholly-owned subsidiaries and Holdings' creditors are estimated to recover 100 percent of their claims.

The Committee argues that Holdings intended to defraud the OpCo Entities' creditors. *See* D.I. 111 at 2 ("Comvest structured the transactions in a manner intended to hinder, delay or defraud the OpCo Entities' unsecured creditors."). ***265** This argument fails as a matter of fact and law.

The evidence showed that the OpCo Entities were capitalized as fully as Defendants believed necessary, and the testimony was that Comvest and its directors worked for OpCo Entities' success. In addition, almost none of the badges of fraud are present here. The transfers of the right to acquire real property to the PropCo Entities were not concealed. The deeds conveying the property from Albertson's property-holding companies to the PropCo Entities, Spirit, and GIG were publicly recorded. *See, e.g.*, DX0219; DX0232; DX0250; DX0251; DX0268. Holdings was not under threat of suit when the transfers were made. The transfers were not for substantially all of Holdings' assets, as it continued to own the valuable membership interests of its wholly-owned subsidiaries. Holdings did not "abscond" indeed, it is willing and able to pay all of its creditors. Holdings received equivalent value for the transfers because the property was placed in its wholly- owned subsidiaries. And finally, Holdings has at all times been solvent. Simply put, there is no evidence of an intent to defraud. The evidence showed Defendants intended to build and grow a business.

The Committee did not prove that the use of the OpCo/PropCo legal structure was intended to defraud creditors. The Committee has stated that the OpCo/PropCo structure "is what's on trial" here, but admitted that these OpCo/PropCo corporate structures are not themselves improper. Trial Tr. (10/16) at 8:9–10 ("This chart, Your Honor, is what's on trial.") (Morris); 9/26/17 Hr'g Tr. 50:6–7 ("There is nothing, per se, wrong about the PropCo and OpCo structure.") (Feinstein). Witnesses provided extensive testimony about the business and financial reasons for using this type of structure. *See* Trial Tr. (10/17) at 90:8–91:25 (Niegsch); *id.* at 161:1–25 (Barnett); *see also* Trial Tr. (10/18) at 184:14–19 (Flaton) (calling "OpCo/PropCo structures" "fairly common" in the "business world"). The Committee has not cited a single case in which maintaining a preexisting OpCo/PropCo structure amounted to a fraudulent transfer. The Court believes there are none.

But even if there was an actual attempt to defraud the OpCo Entities' creditors, that would still not provide the basis for a claim alleging fraudulent transfer by Holdings to the PropCo Entities. The statutory text is clear: 11 U.S.C. § 548 only allows courts to avoid transfers made with an intent to defraud the transferor's creditors, *i.e.*, Holdings. The Court may avoid a transfer if the debtor "made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." 11 U.S.C. § 548(a)(1)(A). The law could not be clearer: Section 548 limits claims for fraudulent transfer to transfers that harm the transferor's creditors, not the creditors of some other entity.

The Committee's case theory is ultimately that Comvest undercapitalized the OpCo Entities. Even if intentionally undercapitalized, that would not have given rise to a claim for fraudulent transfer. Intentional undercapitalization has a number of remedies at law and equity, but a legal claim for fraudulent transfer is not one of them. Section 548 requires a "transfer." There is no such thing as a claim for fraudulent non-transfer.

C. Holdings' Solvency at the Time of the Transfer.

It is the Committee's burden to prove that Holdings was insolvent at the ***266** time it made the transfer. *See In re EBC I, Inc.*, 380 B.R. 348, 354 (Bankr. D. Del. 2008). Here, there is no evidence that Holdings was insolvent. And the Committee cannot seriously contend that Holdings is insolvent now, as its whole theory of the case is premised on recovering value from Holdings' equity and using it to pay the OpCo Entities' creditors. Instead, in its Opposition Brief to Defendants' Motion for Partial Summary Judgment, the Committee argues that if the Court grants the separate relief of substantive consolidation, then Holdings would be rendered insolvent and its claims for constructive fraudulent transfer could proceed. *See* D.I. 111 at 28. This argument fails for three reasons.

First, substantive consolidation "eliminates constructively fraudulent transfer avoidance claims" among the consolidated entities. *In re Bauman*, 535 B.R. 289, 301 (Bankr. C.D. Ill. 2015) (This is because "the consolidated estate is augmented and diminished in equal amounts ...."). If the Court grants substantive consolidation, then the claims for constructive fraudulent transfer all fail. *Id.*

Second, for purposes of constructive fraudulent transfer, solvency is measured at the time of the transfer. *See In re R.M.L., Inc.*, 92 F.3d 139, 154 (3d Cir. 1996) (holding that "solvency is measured at the time the debtor transferred value, not at some later or earlier time"). Even if Holdings is rendered insolvent by some future ruling, that does not retroactively make Holdings insolvent at the time of transfer. *Id.*

Third, the Committee did not introduce any evidence that establishes that if the Court consolidated all of the entities together, then Holdings was insolvent at the time of the transfers in question. The Committee's expert has testified that the OpCo Entities may have been insolvent from the moment that the APA was signed, but the Committee's expert did not testify that if you consolidated the OpCo and PropCo Entities' assets and liabilities, then that hypothetical consolidated entity was insolvent when the new stores were acquired.

D. Holdings Received Reasonably Equivalent Value.

The Committee has the burden of establishing that Holdings did not receive reasonably equivalent value when it transferred the right to acquire the real property from Albertson's to the PropCo Entities. *See In re Key3Media Grp., Inc.*, 336 B.R. 87, 94 (Bankr. D. Del. 2005), *aff'd*, 2006 WL 2842462 (D. Del. Oct. 2, 2006) (*citing Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 646 (3d Cir. 1991)). The Committee failed to meet this burden because it is undisputed that the PropCo Entities are—and at all times were—solvent, wholly- owned subsidiaries of Holdings.

Courts recognize that a transfer to a solvent, wholly-owned subsidiary does not amount to a fraudulent transfer. *In re DVI, Inc.*, 326 B.R. 301, 306 (Bankr. D. Del. 2005) (concluding that where a debtor "made a contribution to a solvent wholly-owned entity, the Committee would not be able to state a fraudulent transfer claim."). The reasoning behind this rule is sound. It is not fraudulent to allocate property to a solvent, wholly-owned subsidiary because the transferor receives value equal to the transferred asset. *See Branch v. F.D.I.C.*, 825 F.Supp. 384, 399–400 (D. Mass. 1993) ("The Court is aware of no case in which transfers to a solvent subsidiary have been determined to be for less than equivalent value."). That is exactly what happened in this case where the transfer was to downstream wholly-owned subsidiaries.

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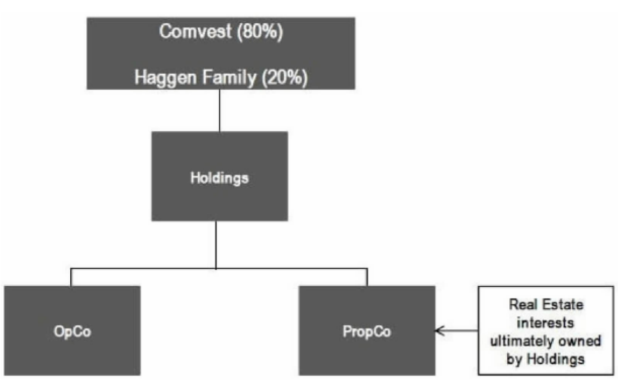

It is undisputed that the non-debtor PropCo Entities are solvent, meaning that the value of the transferred property is ultimately available to satisfy any claims made by Holdings' creditors. *See also In re First City Bancorporation of Tex., Inc.*, 1995 WL 710912, at *18 n.9 (Bankr. N.D. Tex. May 15, 1995) ("[A] transfer to a wholly-owned solvent subsidiary is often for reasonably equivalent value, because the value of the parent's stock interest in the subsidiary may be correspondingly increased ....").

E. This Case Is Distinguishable From *Mervyn's*.

Throughout these proceedings, the Committee has argued that this case is analogous to *Mervyn's*. Mervyn's was a longstanding department store chain owned by the Dayton Hudson Corporation. *See In re Mervyn's Holdings, LLC*, 426 B.R. 488, 492 (Bankr. D. Del. 2010). In 2003, in order to devote more resources and attention to its Target line of stores, Dayton Hudson Corporation spun off the entire Mervyn's business in an equity transaction, transferring the membership interest in Mervyn's LLC to Mervyn's Holdings LLC. *See id.* at 493. The private equity sponsors that owned Mervyn's Holdings thus acquired Mervyn's LLC as an ongoing enterprise with many preexisting creditors and liabilities. *Id.*

For decades, Mervyn's LLC and its predecessor corporation had owned both operating assets and valuable real property. *Id.* As part of the 2003 sale, the real property was "stripped" *i.e.*, transferred from Mervyn's LLC to "bankruptcy remote" entities outside of the Mervyn's ownership structure for "virtually no consideration." *Id.* at 500. The "MDS Companies" that received the real property were ultimately owned by the same private equity sponsors, but were not subsidiaries of Mervyn's Holdings. *Id.* at 498. The effect of this transaction was that the real estate assets were taken from the company and transferred to an entity outside the reach of Mervyn's LLC's creditors in a transaction that allegedly rendered Mervyn's LLC insolvent. *Id.* Mervyn's LLC's creditors went from holding claims against a solvent company with substantial real estate assets to holding claims against an insolvent shell company.

The central holding of *Mervyn's* was that it is improper to acquire an entity that has held real property and operating assets together for years, and then transfer ***268** the real property to a separate entity (PropCo) in a transaction that renders the predecessor entity (OpCo) insolvent and prejudices the predecessor entity's longstanding, preexisting creditors. That is not what happened here, because:

1. Albertson's held the real property and operating assets in an OpCo/PropCo structure prior to the Albertson's Acquisition;

2. The Albertson's Acquisition was an asset sale—not a stock sale—which means that Holdings did not acquire a preexisting entity with preexisting creditors;

3. The OpCo Entities themselves had no preexisting creditors, and at no time did they ever own any real estate;

4. Holdings transferred the real property downstream to wholly-owned subsidiaries;

5. There is no evidence that Holdings is, or ever was, insolvent;

6. The Committee is not seeking to collapse the entire transaction; and

7. The Court now has the benefit of the evidence presented at trial, whereas the Court in Mervyn's was bound to "accept as true all factual allegations" on what was a pending motion dismiss.

The Albertson's Acquisition was an asset sale—not a stock sale—which means that Holdings did not acquire a preexisting entity with preexisting creditors. In *Mervyn's*, the private equity sponsors bought an ongoing entity—with preexisting creditors—that had held the real property and operating assets together for years. *Id.* at 493. Here, the OpCo Entities' creditors extended credit to an entirely new entity that had never done business before the Albertson's Acquisition and that never owned real property.

In *Mervyn's*, the Court noted that the transfer of the real property from Mervyn's LLC to the MDS Companies had a "devastating" effect on Mervyn's LLC, the transferor. *Id.* at 498. Here, there was no devastating effect on the transferor, because Holdings—not the OpCo Entities—was the transferor and Holdings transferred the real property downstream to wholly-owned subsidiaries (the PropCo Entities). This means that the property was not transferred outside the reach of any Holdings creditor because the value of the real property sat at Holdings' wholly-owned subsidiaries. The property likewise was not transferred outside the reach of the OpCo Entities' creditors, because it was never available to them in the first place. The Committee has not and cannot show that Holdings was insolvent at any point in time.

This case is also distinguishable from *Mervyn's* because the Committee is not seeking to unwind all of the transfers. There is no claim asserting that any of the payments to Albertson's were fraudulent, and there is likewise no claim seeking to unwind rent payments to Spirit or GIG. The Committee alleges that the OpCo Entities paid above market rent to both Spirit and GIG, but has not sued them or sought to avoid the transfers.

The relief that the Committee seeks is thus simultaneously too broad and too narrow. It seeks to "unwind" transfers that never occurred and to recover property for the OpCo Entities' estates that they never owned in the first place. The Committee is also seeking to unwind only half of the transaction, collapsing and unwinding internal transfers to wholly-owned subsidiaries, while leaving the related payments and transfers to Albertson's, Spirit, and GIG in place. This has no support in the law and is unlike anything that took place in Mervyn's.

***269** In *Mervyn's*, the Court ruled that it was appropriate to "collapse" the transaction, so that Target could be treated as a transferee even though the transfer of the real property took place after Target sold Mervyn's Holdings. *Id.* at 497 ("Instead of focusing on one of several transactions, a court should consider the overall financial consequences these transactions have on the creditors."). Because the Committee is not asserting any claims against Albertson's, such collapse is not needed here. *Id.* But, importantly, even if the Court did collapse the transfers in this case, that does not mean that any of the claims for fraudulent transfer survive.

Collapsing a transaction is not the same thing as a finding of fraudulent transfer; it is merely a tool to allow the Court to view the overall economic effect of a transfer. *Id.* After a court collapses a transaction, it still needs to apply traditional fraudulent transfer rules to see if there was any fraudulent transfer. *Id.* If the transactions here are collapsed, the result is a simple transfer of real property from Albertson's (the original transferor) to PropCo (the ultimate transferee). Collapsing the transactions does not save the Committee's claims because at no intermediate step of any of the transactions did OpCo ever have any interest in the real property. That is a clear difference from *Mervyn's*, in which Mervyn's LLC had owned the real property for years.

In addition, the Court may only collapse the "transaction." The collapse doctrine does not allow the court to collapse separate entities, or pierce the corporate veil, or disregard the corporate form. *Id.* To collapse "entities" under Delaware law, a plaintiff must satisfy the stringent veil piercing elements, something the Committee has not even attempted to do here. *Sears, Roebuck & Co. v. Sears plc*, 744 F.Supp. at 1305.

This case is also different from *Mervyn's* because in *Mervyn's* the unpaid creditors were creditors of the transferor (Mervyn's

LLC) and had standing to sue, and because avoiding the transfer and returning the property to the transferor would actually benefit the transferor's creditors. As discussed above, the transferor in this case is Holdings. The OpCo Entities' creditors do not have standing to sue on behalf of Holdings and avoiding the transfers in question would provide no benefit to Holdings' creditors.

Finally, the procedural posture of this case is different from the procedural posture in *Mervyn's*. *Mervyn's* resolved a motion to dismiss filed by Target, the former owner of Mervyn's LLC. Here, the Court has the benefit of the evidence presented at trial. The evidence presented at trial shows that this case is not *Mervyn's*. [9]

IV. THE OPCO ENTITIES' FRAUDULENT TRANSFER CLAIMS (COUNTS 20–38).

The only fraudulent transfer claims for transfers made by the OpCo Entities are for rent payments made by OpCo North and South to the PropCo Entities to lease the 28 Retained Properties. D.I. 1 at Counts 20–38. [10] OpCo North ***270** and South did not own any real property, and therefore these leases were necessary for the operation of OpCo North and South's grocery stores. Moreover, the Committee has stipulated that the rental payments and obligations were market. Accordingly, the Committee has failed to show that these rental obligations under the PropCo Leases were constructively or actually fraudulent. In addition, the Committee has failed to provide any cognizable evidence of damages.

A. The PropCo Leases Were For Reasonably Equivalent Value.

The Committee cannot meet the burden to prove a constructive fraudulent transfer because the OpCo Entities' rental obligations under their leases with the PropCo Entities were at market rates. Under Section 548(a)(1)(B) and its state law analogues, it is an essential element of a constructive fraudulent transfer claim that the transfer is not for reasonably equivalent value. 11 U.S.C. § 548(a)(1)(B). The Committee bears the burden of establishing this element. *See In re Key3Media Grp.*, 336 B.R. at 94. Throughout its Complaint, the Committee alleged that these rent payments were "above-market," but discovery has not proved this theory. The Committee has now stipulated in the Pretrial Order that "Plaintiff will not offer any evidence that the rents paid by Operations and the OpCo Entities to the PropCo Entities were above-market." D.I. 142 at 21. Paying fair market rent for access to real property that the OpCo Entities needed to operate their business is a textbook example of reasonably equivalent value. That should be the end of the inquiry for the constructive fraudulent transfer claims.

In light of these facts, the Committee now argues that, while the rents were market, the OpCo Entities "did not receive reasonably equivalent value for their incurrence of long-term lease obligations as they were incapable of sustaining ordinary course business operations in the leased locations beyond a few months." D.I. 111 at 38. The Committee analogizes its argument to offering a dying patient a 10-year car lease. *See* 9/26/17 Hr'g. Tr. at 61:22–62:6. But this analogy shows the defect in the Committee's argument. The leasehold estate given to the OpCo Entities had value, just as the right to use a car has value. And the Committee has stipulated that the monthly rent due under the lease was reasonably equivalent to that value.

Further, the OpCo Entities assumed many of the PropCo Leases in the larger bankruptcy because the leases were in the best interest of the Debtors' estate. This assumption bars the Committee's fraudulent transfer claims with respect to these leases as a matter of law. *See In re Network Access Solutions., Corp.*, 330 B.R. 67, 76 (Bankr. D. Del. 2005). In order to approve this assumption, the Court found that the assumption of these leases was "in the best interest of the Debtors," and this finding is now the law of the case. *See*, *e.g.*, Order Authorizing The Debtors To Assume Certain Unexpired Leases, Case 15-11874, D.I. 1716 at 1 ("[T]he relief requested in the Motion and provided for herein is in the best interest of the Debtors."). It would not have been a "sound exercise of [debtors'] business judgment to assume the [leases] if it was not receiving equivalent value for the payments it was making under the agreements." *Network Access Solutions*, 330 B.R. at 76. Even if the Committee's claim is limited to the rejected ***271** leases, the Committee failed to offer evidence as to what the value of those leases was, and whether or not it was reasonably equivalent to the rent due under those leases. This evidentiary failure resolves these claims in Defendants' favor.

Finally, the Committee conflates its available remedies. The Committee is seeking to recoup the monthly rents actually paid by the OpCo Entities. D.I. 142 at 52 (Committee seeks to "recover all amounts paid under the PropCo Leases."). [11] But this cannot be the case, because in exchange for these payments the OpCo Entities actually received the right to operate, and did operate, on the real property. At most, the Committee's available remedy would be to avoid the future rent payments for the rejected leases. The future rent payments already form the basis of the PropCo Entities' lease rejection claim, which the Committee seeks to disallow in this case. *See* D.I. 1 at Count 76.

B. The Actual Fraudulent Transfer Claims.

To support a claim of actual fraudulent transfer, the Committee must prove that the PropCo Entities signed the PropCo Leases with an "actual intent to hinder, delay, or defraud" the OpCo Entities' creditors. 11 U.S.C. § 548. To be clear, the OpCo Entities did not own real estate so the PropCo Leases were necessary to operate their business for those 28 stores, and the Committee has stipulated that the PropCo Leases were at (or below) market. The Committee has failed to prove their constructive or actual fraudulent transfer claims based on rent payments owed under the PropCo Leases.

V. BREACH OF FIDUCIARY DUTY CLAIMS AT HOLDINGS (COUNTS 66 & 68).

The Committee alleges in Counts 66 and 68 that Comvest (as the controlling shareholder) breached its fiduciary duty to Holdings and that Holdings' Managers breached their fiduciary duty to Holdings. D.I. 1 at ¶¶ 669, 689–693. These are legally and factually unsupported. First, Holdings was solvent and therefore all the fiduciary duties were to act in the interest of Holdings' equity—not, as the Committee claims, its creditors and subsidiaries. Second, the Committee's allegations are, for the most part, challenging arm's length transactions with third parties, and such conduct is protected by the Business Judgment Rule. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Finally, the Committee is seeking damages sufficient to make every single creditor at every level of the Haggen corporate structure whole, yet it made no effort to present any evidence of this hypothetical amount. The Committee did not disclose any evidence of damages in discovery, it did not present any such evidence at trial, and now there is nothing in the record to support its damages request.

A. Legal Standard For Breach Of Fiduciary Duty

Delaware courts recognize that a parent company does not owe fiduciary duties to its direct or indirect subsidiaries. *See* ***272** *Trenwick Am. Litig. Tr. v. Ernst & Young, LLP*, 906 A.2d 168, 173–74 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007). Similarly, directors of a parent corporation do not owe fiduciary duties to subsidiary corporations. *Id.*

When analyzing breach of fiduciary duty claims, Delaware courts apply one of three standards of review: (a) the Business Judgment Rule, (b) enhanced scrutiny, or (c) entire fairness. *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011). "The business judgment rule is the default standard of review." *Id.* The Business Judgment Rule provides a "powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose.' " *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (*quoting Sinclair Oil*, 280 A.2d at 720).

The burden is on the plaintiff to show that the Business Judgment Rule is not applicable. *See Solomon v. Armstrong*, 747 A.2d 1098, 1111–12 (Del. Ch. 1999) ("Under the business judgment rule, the burden of pleading and proof is on the party challenging the decision to allege facts to rebut the presumption."). A plaintiff faces "an uphill battle" to carry this burden of proof. *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *9 (Del. Ch. Oct. 24, 2014); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) ("Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task.").

One circumstance that can trigger entire fairness review is when a controlling shareholder engages in a "conflicted transaction." *Crimson Expl.*, 2014 WL 5449419 at *12. The mere presence of a controlling shareholder, however, will not trigger the "entire fairness" review. *Id.* Instead, the plaintiff must show the controlling shareholder either: (a) stood on both sides of the transaction at issue, or (b) "compete[d] with the common [shareholder]" by obtaining a personal benefit that the other shareholders did not receive. *Id.* at *14 ("In sum, triggering entire fairness review requires the controller or control group to engage in a conflicted transaction. The conflicted transaction could involve standing on both sides of the transaction ... or receiving different consideration than other stockholders."); *In re Synthes Inc. S'holder Litig.*, 50 A.3d 1022, 1034 (Del. Ch. 2012) (recognizing that in order to trigger the "entire fairness standard," the plaintiff must prove that the controller derived a personal, financial benefit "to the exclusion of, and detriment to, the minority stockholders") (citations omitted).

Courts recognize contractual agreements where the fiduciary duties have been limited. *See Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *12 (Del. Ch. Sept. 4, 2014) ("Nonetheless, where such default rules have been clearly supplanted or modified, those contractual choices will be respected."). For example, Delaware law permits the members of a limited liability company to adopt provisions in its operating agreement that limit "any and all liabilities for breach of contract and breach of duties (including fiduciary duties)" with the exception of "any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing." 6 Del. C. § 18-1101(e). These "exculpatory clauses" immunize managers from claims for breach of the duty of care, but not claims for an act of bad faith or breach of loyalty. *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006). In addition, when an exculpatory clause immunizes ***273** the managers of a limited liability corporation from breach of fiduciary duty claims, a controlling equity holder is likewise immunized. *See Shandler v. DLJ Merch. Banking, Inc.*, 2010 WL 2929654, at *16 (Del. Ch. July 26, 2010) (recognizing, in dismissing a claim for breach of the duty of care based upon the exculpatory clause that mentioned only directors, that "a controlling stockholder cannot be held liable for a breach of the duty of care when the directors are exculpated.").

It is well settled that a plaintiff alleging a breach of fiduciary duty claim must prove its damages by a preponderance of the evidence. *See Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010). The Court cannot award damages that are based on mere speculation or conjecture where a plaintiff has failed to adequately prove damages. *See id*; *see also Cline v. Grelock*, 2010 WL 761142, at *2 (Del. Ch. Mar. 2, 2010) (holding that despite the fact that the defendant had breached its fiduciary duty the plaintiff recovered nothing because it had failed to prove any damages).

B. <u>The Committee Wrongly Asserts That A Solvent Holdings Should Act In The Interest Of Holdings' Subsidiaries Or Creditors</u>.

The Committee told the Court that Holdings' Managers owed the Debtors fiduciary obligations, implying that they owed duties to Holdings' subsidiaries such as the OpCo Entities. D.I. 1 ¶ 693. This is contrary to established law. "Under settled principles of Delaware law, a parent corporation does not owe fiduciary duties to its wholly-owned subsidiaries or their creditors." *Trenwick*, 906 A.2d at 191. Because Holdings does not owe any fiduciary duties to its subsidiaries, that means that "directors of a corporate parent" do not owe fiduciary duties to a subsidiary. *Id.* at 191–92. "Delaware law does not blithely ignore corporate formalities and the [plaintiff] has not explained how the [parent's] directors, as opposed to [the parent], can be deemed to be a 'controlling stockholder' group that owes fiduciary duties to a subsidiary." *Trenwick*, 906 A.2d at 194., Further, when dealing with multiple layers of parents and subsidiaries, the corporate veil likely must be pierced at each level. *See*, *e.g.*, *In re The Heritage Org.*, 413 B.R. 438, 514 (Bankr. N.D. Tex. 2009) (interpreting Delaware corporate law and holding that the veil piercing test must be applied to and satisfied at each level of ownership). The Committee did not assert a claim to pierce the corporate veil of any entity.

Separately, the Committee argues that its breach of fiduciary duty claim is that Holdings' Managers and Comvest (as a controlling shareholder) acted "for Comvest's benefit" "at the expense of the Debtors' unsecured creditors." D.I. 1 at ¶ 695 (emphasis added). However, Holdings is currently solvent and was solvent at the time of the Albertson's Acquisition and the Challenged Transactions. The Committee has presented no evidence or expert testimony to the contrary. This fact is crucial because it means that the controlling Managers at Holdings were "obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del. 1988); *Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 184 (Del. Ch. 2014) ("The fiduciary duties of the directors and officers require that the subsidiary be managed for the benefit of the controller [equity-holders], and the fiduciary duties imposed on the controller self- referentially require the same thing."). Solvent companies are not obligated to act for the benefit of creditors. The Committee is wrong when it tells the Court that its ***274** breach of fiduciary claim is based on Holdings' obligations to "unsecured creditors" or Holdings' subsidiaries rather than equity. Accordingly, to prove a breach of fiduciary duty to a solvent Holdings, the Committee must prove that Defendants acted contrary to the interests of Holdings' equity, and Comvest owns nearly all the equity in Holdings. The Committee's Complaint is clear that it is alleging a breach because Holdings should have been acting for the benefit of Holdings' creditors and its subsidiaries' creditors. D.I. 1 at ¶¶ 693, 695. Even though Holdings was owned by both Comvest (80%) and HHI, Corp. (20%), this does not change the analysis. The alleged benefits to Comvest were also benefits to HHI. Both had an indirect interest in the PropCo Entities. In addition, there was no dilution of HHI's shares in Holdings. *See* G. Hall Dep. at 36:20–23.

C. The Committee's Duty Of Care Claim Fails Due To An Enforceable Exculpatory Clause.

The Holdings' Operating Agreement contains an exculpatory provision. It states as follows: “Any fiduciary duties (including duties of care, disclosure or loyalty) that a Manager might otherwise have to the Company or Members of the Company are hereby eliminated, except to the extent as otherwise provided by law.” *See* DX0641 at ¶ 12.11. (hereinafter the “Exculpatory Clause”). The Exculpatory Clause immunizes Holdings' Managers from any claim for a breach of the duty of care. *See Stone*, 911 A.2d at 369–70. Additionally, because Holdings' Managers are immune from any claim for a breach of the duty of care, Comvest (as the controlling equity member) is also immune from liability for breach of the duty of care. *See Shandler*, 2010 WL 2929654, at *16. As a result, the Court need only examine, under the Business Judgment Rule, whether Comvest and Holdings' Managers breached their duty of loyalty or acted in bad faith with the Albertson's Acquisition. They did not.

D. Comvest and Holdings' Managers Fiduciary Duties to Holdings (Counts 66 and 68).

Delaware courts are clear that a breach of fiduciary duty analysis must occur on a company-by-company and director-by-director basis. *See In re Rural Metro Corp. S'holders Litig.*, 102 A.3d 205, 252 (Del. Ch. 2014) (“Liability is assessed on a director-by-director basis.”). Once the Court separates out the specific parties, the specific duties, and the specific breaches, it is clear that the Committee's claims fail.

1. The Committee Failed to Prove That Comvest Was on Both Sides of the Transaction.

The Committee alleges that both the “Albertson's Acquisition” and the “Challenged Transactions” violated Comvest's and Holdings' Managers' duties for essentially the same reasons. D.I. 1 ¶¶ 670, 695–96. The Albertson's Acquisition claims allege, in essence, that the company's business plan was unrealistic and that the business decision to acquire the new stores was grossly negligent. The Challenged Transaction claims assert that the use of an OpCo/PropCo structure deprived OpCo and its creditors of needed capital. *Id.* Both theories fail. It is undisputed that the “Albertson's Acquisition” was an arm's length transaction negotiated with Albertson's, protected by the Business Judgment Rule, and (ii) the “Challenged Transactions” did not cause any party any harm.

There is no evidence that Comvest stood on both sides of the Albertson's Acquisition. The plain language of the APA shows the agreement was between Albertson's—actually Albertson's LLC and Albertson's ***275** Holdings LLC—and Holdings. *See* DX0517. There is no evidence that Comvest had any financial interest in Albertson's such that Comvest could be accused of owning an interest in the entity that was on the other side of the transaction. The evidence shows that Cerberus—another private equity firm—owned Albertson's, and that Cerberus made several demands on Comvest in order to complete the deal, including requiring Comvest to make a $50 million infusion into Holdings. Trial Tr. (10/17) at 48:17–49:3 (Niegsch). Likewise, there is no evidence that Comvest (or any other party) stood on both sides of the leases between the OpCo Entities and Spirit/GIG. Spirit and GIG are both sophisticated third parties. The negotiations of rent payments with them are classic examples of conduct protected by the Business Judgment Rule.

There is also no evidence that Comvest derived a personal or financial benefit from the Albertson's Acquisition to the exclusion or detriment of the other shareholder, HHI. Prior to the Albertson's Acquisition, Comvest and HHI owned 80 percent and 20 percent of Holdings, respectively. *See* D.I. 1 at ¶ 77; D.I. 142 at ¶ 55. Although Comvest invested $50 million of equity into Holdings as part of the Albertson's Acquisition, HHI's interest in Holdings was not diminished at all. *See* D.I. 1 at ¶ 82; D.I. 142 at ¶ 58. HHI's representative confirmed that HHI was never asked to invest any additional funds into Holdings and yet its equity interest in Holdings never changed. *See* G. Hall Dep. at 36:20–23. Because Comvest was not on both sides of the Albertson's Acquisition and did not receive a benefit that HHI did not receive, the Committee has failed to prove that Comvest was conflicted in the Albertson's Acquisition.

As for the claims relating to the Challenged Transactions, these are essentially a repeat of the Committee's theory that the use of an OpCo/PropCo structure amounted to fraudulent transfer. The Committee argues that “Comvest” stood on both sides of (i) the contribution agreements to PropCo and (ii) the OpCo PropCo leases. D.I. 1 at ¶¶ 670, 695–96. But this is simply not true. It was Holdings and its wholly-owned subsidiaries that were parties to the contribution agreements and the OpCo/PropCo leases. The transfers among Holdings and its subsidiaries benefited Haggen's other shareholders, the Haggen family, to the exact same extent they benefitted Comvest. Because all of Haggen's shareholders, both Comvest and HHI, received the exact same treatment under all of the Challenged Transactions, there is no basis for applying the entire fairness standard and all of the Challenged Transactions are protected by the Business Judgment Rule. *See* *Stewart v. BF Bolthouse Holdco, LLC*, 2013 WL 5210220, at *10 (Del. Ch. Aug. 30, 2013); *Synthes Inc.*, 50 A.3d at 1034.

Even applying the complete fairness standard, these transactions do not amount to breaches of any fiduciary duty because the Committee admits there is nothing wrong with an OpCo/PropCo structure. 9/26/17 Hr'g Tr. 50:6–7 (Feinstein). The contribution of the real property from Holdings to PropCo did not harm any party. It had no effect on any Holdings shareholder or creditor, because the property simply went from being held by Holdings to its wholly-owned subsidiary. Holdings received value that was exactly equivalent to the transferred property. *DVI*, 326 B.R. at 306. This transaction likewise caused no prejudice to OpCo because it never owned the real property in the first place. Likewise, none of the rent payments by OpCo amount to a breach of fiduciary duty. While the Committee initially alleged that the rent payments from OpCo to PropCo were above market, they ***276** later stipulated that the rental payments and obligations were priced at market.

The Committee is ultimately arguing that the failure to capitalize OpCo harmed the OpCo creditors, but not only did Comvest have no duty to capitalize OpCo with the real property, it had no fiduciary duties to the OpCo creditors whatsoever. *Trenwick*, 906 A.2d at 191. None of the Challenged Transactions can thus form the basis of any claim for breach of fiduciary duty. *Id.*

2. The Committee Failed to Prove that the Comvest Managers Were Not Independent and Disinterested.

Caple, Niegsch, and Rodriguez, whom the Committee refers to as the "Comvest Managers," were three of the five members of Holdings' Board of Managers. *See* D.I. 142 at ¶¶ 24–29). The Committee contends the Comvest Managers lacked independence and were not disinterested board members because they were infected with Comvest's alleged conflict. *See* D.I. 144 at 34–35. As a result of this lack of independence and disinterestedness by a majority of Holdings' Board, the Committee contends that Holdings' Board was not independent and therefore their actions are subject to the entire fairness review.

The Committee, however, has failed to prove that the Comvest Managers lacked independence or disinterestedness. For disinterestedness, the Committee presented no evidence that any of the Comvest Managers appeared on both sides of the Albertson's Acquisition. The Committee likewise presented no evidence that any Comvest Manager derived any personal benefit from any of those transactions. Simply put, the Committee failed to prove that any of the Comvest Managers lacked disinterestedness.

With regard to independence, the Committee's only evidence is that the Comvest Managers worked for Comvest. *See* D.I. 144 at 34–35. However, the fact that the Comvest Managers worked for Comvest is not relevant to the issue of whether the Comvest Managers were independent. *See* *Crimson Expl.*, 2014 WL 5449419, at *21 (recognizing that the fact that board members worked for and had been appointed by the alleged controlling shareholder was irrelevant in independence analysis of members because controller itself was not conflicted). This is especially so since Comvest itself was not conflicted. The Committee presented no other evidence of how the Comvest Managers lacked independence.

The Committee failed to show that the Comvest Managers actually lacked independence or disinterestedness. In turn, this means that the Committee failed to prove that Holdings' Board lacked independence or disinterestedness. Accordingly, entire fairness review does not apply in this case, and the Court will utilize the Business Judgment Rule when reviewing Defendants' actions.

3. Comvest and Holdings' Managers Duty of Loyalty.

The Committee alleged that Comvest and Holdings' Managers acted in bad faith in relation to their duties owed to Holdings in consummating the Albertson's Acquisition and in setting up the corporate structure. *See* D.I. 1 at ¶¶ 672–674, 694–698. With regard to participating in the Albertson's Acquisition, the evidence showed that Comvest and Holdings' Managers acted reasonably, intending to advance Holdings' best interest. *See* *Stone*, 911 A.2d at 369. As Holdings' Managers all testified, Comvest spent hundreds of hours running different financial models and scenarios to determine whether Holdings could succeed with the Albertson's Acquisition. Comvest spent millions of dollars on experts to address potential risks associated ***277** with the acquisition in an effort to make sure it succeeded. Likewise, the evidence showed that the OpCo/PropCo structure was instituted for sound business purposes that fall squarely within the scope of the Business Judgment Rule. The Committee failed to present any evidence that Comvest and Holdings' Managers intentionally acted with any purpose other than what was in Holdings' best interest.

The evidence showed that the Defendants expended their best efforts and did all they could to work for Haggen's success. When the stores experienced pricing issues or supply issues, Comvest gathered its Deal Team and Management Team together to address those issues. It was "all hands on deck." Trial Tr. (10/17) at 242:4–243:1 (Barnett). They spent extensive time with Supervalu and Willard Bishop, who had been hired to prevent these very pricing issues from happening, to come up with a plan to address the problems, all in an effort to enable Holdings' OpCo subsidiaries to succeed. *Id.* Clougher and Shaner both testified that they thought the pricing issues had been addressed, only to find new pricing issues pop up at the next store.

When faced with sufficient evidence of improper conduct by Albertson's, whether by design or in reality, Comvest and Holdings' Managers took steps to remedy the situation. They withheld more than $40 million in payments owed to Albertson's and then filed a lawsuit against Albertson's. While in hindsight they might have taken different actions that could have resulted in different outcomes, Delaware law will not "impose retroactive fiduciary obligation simply because [the fiduciary's] chosen business strategy did not pan out." *Trenwick*, 906 A.2d at 173. Under the review of the Business Judgment Rule, Comvest actions were reasonable and realistic.

The evidence also proved that the OpCo/PropCo structure was utilized for sound business purposes protected by the Business Judgment Rule. In the Albertson's Acquisition, Comvest saw two distinct businesses—a grocery store operation and a real estate business—with two distinct time horizons that had two distinct business plans. Indeed, the corporate structure was set up in a way that Comvest and Holdings' Managers believed would maximize the effectiveness of both OpCo and PropCo, all for the benefit of Holdings. Trial Tr. (10/17) at 90:8–92:7 (Niegsch). When carrying out their fiduciary duties, Comvest's actions needed only "be reasonable, not perfect," a standard that is easily met here. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009).

There is no evidence that Comvest received anything more or different than what other Haggen shareholders received by virtue of the Albertson's Acquisition or the OpCo/PropCo corporate structure. Holdings' Managers did not receive any personal benefits from the Albertson's Acquisition or the corporate structure. There was no self-dealing by Comvest or Holdings' Managers. In the absence of any disparate treatment of any other shareholder, there can be no claim for breach of the duty of loyalty or good faith to Holdings. *BF Bolthouse*, 2013 WL 5210220, at *10; *Synthes Inc.*, 50 A.3d at 1034.

E. Damages.

The Committee has failed to present any evidence of damages to Holdings. The Committee promised in its Complaint to prove damages "in an amount to be determined at trial." D.I. 1 ¶ 677 (emphasis added). According to the Pre-Trial Order, for each of the breach of fiduciary duty claims, the Committee seeks "damages in an amount equal to the OpCo Entities' unsatisfied liabilities." D.I. 142 at 52. As a ***278** starting point, the Committee is suing the Managers and shareholders of Holdings for all "unsatisfied liabilities" two corporate levels lower. The Committee did not present an expert on the "unsatisfied liabilities" or a witness from the Debtors who testified. At the close of the Committee's case, there was only one piece of evidence in the record regarding the amount of unsatisfied liabilities—the Claims Register, P-620—and the Committee stipulated to the Court that it was not using the claims register to establish a damages claim. Trial Tr. (10/20) at 37:13–18; *see also id.* at 31:3–16 ("we're not offering it for the truth of the matter asserted."), 40:1–16, 42:8–14 (Morris).

The request for all of OpCo's "unsatisfied liabilities" is speculative and unproven. The Committee had an obligation under Delaware law and the Federal Rules of Civil Procedure, as incorporated into this adversary proceeding, to present concrete evidence at trial. It did not. The Committee's damages theory constitutes speculation founded upon uncertainty. *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *5 (Del. Ch. Dec. 19, 2002), *aff'd*, 825 A.2d 239 (Del. 2003); *Cline*, 2010 WL 761142, at *2-3 (holding that the plaintiff was entitled to no damages, despite the defendant's breach of fiduciary duty, where the plaintiff failed to present any evidence of damages). The Court therefore rejects the Committee's claim.

VI. THE OFFICERS' AND DIRECTORS' FIDUCIARY DUTIES (COUNT 67).

The Committee lumps together all of the individual defendants into the category of "Officers and Directors." D.I. 1 at ¶¶ 678–87. It is necessary to address the individual Defendant's alleged breach of fiduciary duty vis-à-vis each Debtor. Unlike the earlier counts, the Committee brings these claims against the Directors and Officers at every Debtor, not just Holdings. The legal standard for breach of fiduciary duty does not change for this claim.

At the outset it is clear that the Directors tried hard to make Haggen succeed. None of them experienced any benefit from the downfall of Haggen, and all of them suffered personal loss due to the failure of the Haggen businesses. *See*, *e.g.*, Trial Tr. (10/19) at 93:18–94:14 (Shaner).

A. John Caple's Fiduciary Duties.

In addition to being a manager of Holdings, Caple was also an officer of Holdings. *See* D.I. 142 at ¶ 24. Because the claim is limited to Caple's actions at the Holdings level it fails for many of the same reasons that the nearly identical claim against Caple in his role as a Manager of Holdings failed. The Exculpatory Provision limited Caple's fiduciary duties as a manager of Holdings to the duty of loyalty and a lack of bad faith. At trial, the Committee failed to distinguish Caple's actions as a manager of Holdings from any action he took as an officer of Holdings. In such a situation, Delaware law allows the officer/manager to invoke the exculpatory clause that otherwise mentions only a manager. *See Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1288 (Del. 1994) (where plaintiff failed to distinguish the defendants' acts as officers from their actions as directors, the exculpatory clause precluded all claims for breach of duty of care for those directors/officers); *Continuing Creditors' Comm of Star Telecomms. Inc. v. Edgecomb*, 385 F.Supp.2d 449, 464 (D. Del. 2004) (an exculpatory clause that applied to directors also applied to claims asserted against an officer who was also a director). As such, in his capacity as an officer of Holdings, Caple can only be liable for a breach of the duty of loyalty and for acts in bad faith.

***279** The Committee presented no evidence that Caple was on both sides of the Albertson's Acquisition or that he personally benefitted from the transaction. Thus, there is no evidence that he breached his fiduciary duty of loyalty to Holdings. Nor is there any evidence that Caple acted in bad faith at any point as an officer of Holdings. Caple, like everyone at Comvest and Haggen, relied on the subject matter expertise of the numerous advisors they hired. The rationale for the OpCo/PropCo structure was explained at trial, there were two different businesses with two different business plans and two different time horizons. The evidence showed that Caple did not intentionally abandon any of his duties to Holdings. To the contrary. Caple spent enormous time and effort trying to make Holdings successful. While in the end it did not prove successful, to fulfill his fiduciary duties Caple needed only to act reasonably, not perfectly.

Caple was also a director of Haggen, Inc. *See* D.I. 142 at ¶ 24. Haggen, Inc.'s Restated Articles of Incorporation contain an exculpatory provision in Article 8, which states as follows: "A director of this corporation shall not be liable to this corporation or its shareholders for monetary damages for conduct as a Director." *See* DX0638. This provision limited Caple's fiduciary duties to the duty of loyalty and an absence of bad faith. The Committee failed to present any evidence that as a director of Haggen, Inc., Caple received any personal benefit from the Albertson's Acquisition or from the creation of the OpCo/PropCo structure while a director of Haggen, Inc. As such, the Committee failed to prove Caple breached his duty of loyalty to Haggen, Inc. As explained above, when Haggen, Inc. and the other OpCo Entities (OpCo North and OpCo South) experienced problems, Caple did not abandon his duties. He, Niegsch and the entire management team had "all hands on deck" meetings in an effort to help Haggen, Inc. survive. In the end, they were unsuccessful. But this does not mean that Caple acted in bad faith at any point.

B. Cecilio Rodriguez's Fiduciary Duties.

The Court found Rodriquez to be an untruthful witness. He "remembered" very few of the facts about the Project which the Court finds to be highly unlikely and disturbing.

Rodriguez occupied nearly all of the same positions as Caple. In addition to being a manager of Holdings, Rodriguez was also an officer of Holdings. *See* D.I. 142 at ¶ 25. The Committee failed to present any evidence at trial that distinguished Rodriguez's actions as a manager of Holdings from his actions as an officer of Holdings. The Exculpatory Clause therefore applies to Rodriguez's actions as an officer of Holdings. As such, in his capacity as an officer of Holdings, Rodriguez can only be liable for a breach of the duty of loyalty and for acts in bad faith. The Committee presented no evidence that Rodriguez was on both sides of the Albertson's Acquisition or that he personally benefitted from the transaction. Nor is there any evidence that he acted in bad faith. When the OpCo Entities needed money to meet payroll, Rodriguez was instrumental in allowing the PropCo Entities to loan $25 million to the OpCo Entities in an effort to make the entire Holdings' enterprise successful. Thus, Rodriguez did not breach his duty of loyalty or act in bad faith.

Rodriguez was also a director of Haggen, Inc. *See* D.I. 142 at ¶ 25. He is therefore covered by the exculpatory provision in Article 8 of Haggen, Inc.'s Restated Articles of Incorporation. *See* DX0638. This provision limited Rodriguez's fiduciary duties to a duty of loyalty and an absence ***280** of bad faith conduct toward Haggen, Inc. The Committee failed to present any evidence that as a director of Haggen, Inc., Rodriguez received any personal benefit from the Albertson's Acquisition or from the creation of the corporate structure while a director of Haggen, Inc. Rodriguez acted to advance the best interest of Haggen, Inc. Thus, Rodriguez did not breach his duty of loyalty or act in bad faith toward Haggen, Inc.

C. John Clougher's Fiduciary Duties.

Like Caple and Rodriguez, Clougher was both a manager and an officer of Holdings. *See* D.I. 142 at ¶ 27. The Exculpatory Clause therefore applies to Clougher's actions as an officer of Holdings. As such, in his capacity as an officer of Holdings, Clougher can only be liable for a breach of the duty of loyalty and for bad faith acts. Yet, the Committee presented no evidence that Clougher was on both sides of either the Albertson's Acquisition or the Challenged Transactions or that he personally benefitted from either. Thus, there is no evidence he breached his fiduciary duty of loyalty to Holdings.

Nor is there any evidence he acted in bad faith. The Committee presented no evidence that Clougher intentionally acted at any time with the purpose of anything other than advancing the best interest of the Holdings enterprise. Nor did the Committee present any evidence that Clougher acted in conscious disregard of his duties to Holdings. Clougher testified he spent hundreds of hours in the weeks leading up to the Albertson's Acquisition meeting, planning and testing various models and business plans to ensure that Holdings could be successful. After signing the APA, Clougher spent countless hours preparing for and then executing the store conversions. He also worked very hard trying to make the Holdings enterprise succeed.

Under the Business Judgment Rule, an officer's actions need only be reasonable and realistic, not perfect. *See Lyondell*, 970 A.2d at 243. Clougher is only liable for a breach of the duty of due care if the Committee proves he acted with gross negligence, and the Committee can only satisfy this burden if it proves that Clougher deliberately failed to fully inform himself of the information reasonably available. *Opus East*, 528 B.R. at 56. None of these requirements are met.

The evidence at trial showed that Clougher availed himself of expert counsel and considered all available information. For example, Clougher relied on ATK's projections for same store sales. Trial Tr. (10/19) at 154:13–18 (Clougher) Clougher testified that he believed that the projections were reasonable. Clougher's belief that the projections were reasonable was based upon the time and effort he spent on the business plan in the months leading up to the APA Signing Date and the presentations to the FTC. *Id.* PNC Bank had also provided an untapped $210 million ABL facility to the OpCo Entities to operate their business. Moreover, the OpCo Entities would have access to a $50 million equity infusion from Comvest. Further, the OpCo Entities were expected to receive, and ultimately did receive, approximately $50 million in excess proceeds from the sale-leaseback transactions.

The record shows extensive evidence that Clougher made every effort to work for Haggen's success both before and after the acquisition of the new stores. He retained an experienced management that worked tirelessly on the conversions. Clougher testified that after the FTC awarded Haggen the stores, he and the rest of the Haggen Management Team spent extensive time and energy preparing to “Haggenize” each store and to hire the necessary staff. Clougher, Shaner, Barnett ***281** and Anderson all testified that the changes in the stores had the effect that they hoped—they looked and felt like the legacy Haggen stores.

Clougher also retained both SuperValu and Willard Bishop to make sure that the new Haggen stores properly priced the products. The evidence showed that once pricing problems arose, Clougher, Shaner, and other Haggen management worked hard to solve the pricing problems that arose.

In sum, the trial proved that Clougher relied on reasonable projections from industry experts to ensure that OpCo was adequately capitalized. He worked with both experienced Haggen management and outside experts and had sound reasons for concluding that the OpCo companies would succeed. The Committee presented no evidence that Clougher was grossly negligent in reaching that conclusion. All the Committee has done is point to the ultimate failure of OpCo and argue post hoc that there must have been some improper conduct, but this is the exact sort of hindsight challenge that the Business Judgment Rule prohibits. *Cede*, 634 A.2d at 361.

D. William Shaner's Fiduciary Duties.

Like Caple, Rodriguez and Clougher, Shaner was both a manager and an officer of Holdings. *See* D.I. 142 at ¶ 29. The Exculpatory Clause therefore applies to Shaner's actions as an officer of Holdings. Shaner was also a director of Haggen, Inc., and so is entitled to the protection of the exculpatory provisions contained in Haggen, Inc.'s Articles of Incorporation. As such, in his capacity as an officer of Holdings, Shaner can only be liable for a breach of the duty of loyalty and for bad faith acts. The Committee presented no evidence that Shaner was on both sides of the Albertson's Acquisition or the Challenged Transactions, or that he personally benefitted from either. Thus, there is no evidence he breached his fiduciary duty of loyalty to Holdings.

Nor is there any evidence he acted in bad faith. The Committee presented no evidence that Shaner intentionally acted at any time with the purpose of anything other than advancing the best interest of the Holdings enterprise. Nor did the Committee present any evidence that Shaner acted in conscious disregard of his duties to Holdings. Shaner testified that he spent hundreds of hours in the weeks leading up to submitted the bid for the Albertson's Acquisition meeting, planning, and testing various models and business plans to ensure that Holdings would be successful. After the APA Signing Date, Shaner spent countless hours preparing for and then executing the store conversions. He also worked very hard trying to make the Holdings enterprise successful. Shaner further sold his house in Missouri, abandoned other lucrative business opportunities, and moved out to California to make the enterprise successful.

Like Clougher, the evidence is that Shaner sought expert advice, and personally worked hard with Haggen management to make the company a success. Shaner was aware of ATK's projections for same store sales growth and believed that they were reasonable. Shaner testified that he believed that OpCo South did not need to own the real estate to be successful. Shaner described the tremendous efforts spent converting the stores. OpCo South personnel took over the stores at 12:01 a.m. on the day each store closed and then quickly launched many workers to convert the Albertson's stores into a Haggen store. Shaner testified that he felt they had accomplished the task with all of the stores, accomplishing that “wow” factor they had hoped to get. Trial Tr. (10/19) at 65:3–66:16 ***282** (Shaner). All of these actions are squarely protected by the business judgment rule, and none of them show any bad faith or breach of fiduciary duty. *Cede*, 634 A.2d at 361.

E. Blake Barnett's Fiduciary Duties.

Barnett was an officer of Holdings, Haggen, Inc., and OpCo North. *See* D.I. 142 at 28. Like the other officers, directors and managers, Barnett participated in all of the discussions and planning leading up the APA Signing Date and the meeting with the FTC. Like the other officers, directors, managers, PNC, Spirit, GIG and the FTC, Barnett believed that ATK's same-store sales projections were reasonable. The Committee offered no evidence to show that Barnett's reliance on these projections, even if flawed, was unreasonable. The Committee presented no evidence that Barnett received any personal benefit from the Albertson's Acquisition or that he stood on both sides of the transaction. The Committee presented no evidence that Barnett believed that OpCo North or Haggen, Inc. needed access to the real estate or the liquidity therefrom in order to make the operations a success. The Committee offered no evidence that Barnett put the interests of any entity ahead of Holdings, Haggen, Inc., or OpCo North. Summarily, the Committee offered no evidence to rebut the presumption that Barnett's actions were reasonable and in the best interest of the companies of which he was an officer.

F. Derrick Anderson's Fiduciary Duties.

Anderson was an officer of Holdings, OpCo North, OpCo South and Haggen, Inc. *See* D.I. 142 at ¶ 30. The Committee presented no evidence that Anderson received any personal benefit from the Albertson's Acquisition or for the creation of the corporate structure. The Committee likewise presented no evidence that Anderson intentionally abandoned any of this duties or took any action that put another entity ahead of the interests of the companies of which he was an officer. The undisputed evidence at trial showed just the opposite. Anderson had been a long-standing Haggen employee who visited various stores as they were converted and made an effort to ensure that the conversion process, including the onboarding of new labor unions, occurred efficiently and effectively. In an effort to ensure the effective implementation of the conversion process, Anderson had agreed to make himself available to sign the necessary paperwork that the company's lawyers advised him to sign, as well as to effectuate the various licensing paperwork that sometimes required him to be fingerprinted at different points throughout the process.

There was no dispute that the various Debtor and non-debtor entities needed to execute numerous documents in order to effectively convert the Albertson's stores to Haggen stores. Anderson testified that there were literally hundreds of documents to sign, and that often he was the only person consistently available to ensure the necessary legal documents were signed. There is likewise no dispute that he only signed the papers that had first been reviewed and approved by Haggen's lawyers. The Committee did not present any evidence that Anderson signed any document that had not been fully vetted by Haggen's lawyers. And the law recognizes that the Contribution Agreements that Anderson signed were entirely appropriate transactions. As set forth above, Delaware law has recognized that a party's transfer of interest to a solvent, wholly- owned subsidiary does not constitute a fraudulent transfer. *DVI*, 326 B.R. at 301, 306 (finding that where a debtor "made a contribution to a ***283** solvent wholly-owned entity, the Committee would not be able to state a fraudulent transfer claim."). Therefore, there was nothing illegal, inappropriate or unreasonable about Anderson executing documents that (a) had been first vetted by counsel, and (b) transferred Holdings' right to acquire the Real Property to the PropCo and SLB Entities.

When the transaction is reviewed under the Business Judgment Rule, the Committee failed to present evidence to overcome the presumption that the actions taken by Comvest, Holdings' Managers, and each of the Officers and Directors was reasonable and in the best interest of the individual companies.

G. The Committee Is Estopped From Challenging The Decision To Enter The PropCo Leases or Spirit/GIG Leases Which Were Assumed In The Bankruptcy.

The Committee alleges, in part, that Comvest and Holdings' Managers breached their fiduciary duty to Holdings by choosing "to enter into the PropCo Leases and pay rent thereunder." D.I. 1 ¶¶ 676, 698. The Committee also challenges the decision to enter the GIG and Spirit Leases, which are defined as part of the vague term "Challenged Transactions." *Id.* ¶ 149. The Committee's decision to challenge these leases wholesale is particularly troubling because the Debtors assumed close to half of the PropCo Leases and Spirit/GIG leases. *See*, *e.g.*, *In re HH Liquidation, LLC, et al*, Case No. 15-11874, D.I. 843, 910, 1005, 718 , 719, 861, 862, 847, 964, 2080, 1550, 1775. When the Court approved the assumption of leases, it found at the Debtors request that the leases were "in the best interest of the Debtors." *See*, *e.g.*, Order Authorizing The Debtors To Assume Certain Unexpired Leases, Case 15-1874, D.I. 1716 at 1 ("the relief requested in the Motion and provided herein is in the best interest of the Debtors."). The Committee did not object.

Because assuming a contract under 11 U.S.C. § 365 requires a finding that the contract "was in the best interests" of the debtor, this finding judicially estops a breach of fiduciary duty claim related to the contract. *Network Access Solutions,* 330 B.R. at 77 ("[J]udicial estoppel prevents the Committee from supporting the assumption of the agreements as a sound exercise of NAS's business judgment and then attempting to recover all authorized, contractual payments as fraudulent transfers or breaches of fiduciary duties."); *see also In re Vision Metals, Inc.*, 327 B.R. 719, 723 (Bankr. D. Del. 2005) (applying judicial estoppel to challenges against an assumed contract). To the extent that the Committee aims to salvage this contention by focusing only on the rejected leases, there is no evidence to distinguish why certain leases would be a breach of fiduciary duty and other nearly identical leases would be in the best interest of the Debtors. This fundamental inconsistency defeats any claim of breach of fiduciary duty that relates to the PropCo Leases or the Spirit/GIG Leases.

H. Damages.

The Committee seeks "damages in an amount equal to the OpCo Entities' unsatisfied liabilities" for this claim. D.I. 142 at 52. These damages are as inappropriate and unproven here as they were for Counts 66 and 68 explained earlier.

VII. COMMITTEE STANDING TO PURSUE BREACH OF FIDUCIARY DUTY CLAIMS AGAINST LIMITED LIABILITY COMPANIES.

Separately and independently from the merits of the fiduciary duty ***284** claims, the Committee does not have standing to pursue the breach of fiduciary duty claims on behalf of any Debtor that is a limited liability company: Haggen Holdings, LLC, Haggen Operations Holdings, LLC, Haggen OpCo North, LLC, Haggen OpCo South, LLC, and Haggen Acquisition, LLC (hereinafter the "LLC Debtors"). The Court will therefore enter judgment in Defendants' favor on the Committee's breach of fiduciary duty claims relating to the LLC Debtors. Standing implicates subject matter jurisdiction, and such objections can be raised at any time during a proceeding by either the parties or the court. *See In re Harrold,* 296 B.R. 868, 871 (Bankr. M.D. Fla. 2003) (collecting numerous cases holding that standing is not waivable and may be raised at any time). A standing order does not act as a bar to raising the standing issue. *See Adelphia*, 390 B.R. at 92. Defendants explicitly reserved "all defenses" in the Committee's Standing Order. D.I. 1858-1 at 4; *see also* D.I. 24 at 185 (Defendants asserted "standing" as an affirmative defense).

Delaware law recognizes that "creditors of an insolvent corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties." *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007) (emphasis omitted). This is based on the language of Section 327 of the Delaware General Corporation Law, 8 Del. C. § 327, which provides a non-exclusive limitation on derivative standing. *CML V, LLC v. Bax*, 6 A.3d 238, 242 (Del. Ch. 2010), *aff'd* 28 A.3d 1037 (Del. 2011). In contrast, the Delaware Limited Liability Company Act ("LLC Act") is clear and unambiguous about who can bring a derivative action: the plaintiff "must be a member or an assignee." 6 Del. C. § 18-1002; *Bax*, 6 A.3d at 241. " '[A] statute, clear and unambiguous on its face, need not and cannot be interpreted by a court ....' " *Id.* at 241. The Committee is neither a member nor an assignee. Under the plain language of the statute, the Committee has no standing to bring a breach of fiduciary duty claim. The Court's ruling in *In re Golden Guernsey Dairy, LLC*, is not to the contrary. 548 B.R. 410, 413 (Bankr. D. Del. 2015). Unlike a Chapter 7 trustee, which is empowered by statute to act as "the sole representative of the estate with the authority to sue and be sued," a creditors committee is a collection of unsecured creditors. *Id.* Its rights to assert derivative claims are limited to the derivative standing of its members, none of whom have standing as creditors of a Delaware LLC to assert derivative claims of breach of fiduciary duty on behalf of the company. *CML V, LLC v. Bax*, 6 A.3d 238, 242 (Del. Ch. 2010), *aff'd* 28 A.3d 1037 (Del. 2011).

The Court of Chancery in *Bax* addressed the equity of its ruling and disagreed that the holding "generates an absurd distinction between insolvent corporations, where creditors can sue derivatively, and insolvent LLCs, where they cannot ... [because] there is nothing absurd about different legal principles applying to corporations and LLCs." *Id.* at 249. The underpinnings of Delaware's corporate law and the law of limited liability companies are different. *Id.* at 249–50. Barring a creditor from derivative standing does not conflict with the purpose of the LLC Act because the LLC Act itself gives "maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." *Id.* at 250 (citing 6 Del. C. § 18-1101(b)). Further, there is no inequity or prejudice to creditors because they "are presumed to be 'capable of protecting themselves through the contractual agreements that govern their ***285** relationships with firms.' " *Id.* (internal citation omitted). Limiting a creditor's right to sue derivatively, therefore, comports with the parties' bargained-for rights and the principles of freedom of contract that are legislated in the LLC Act. *Id.* In sum, the Committee has no standing to pursue the breach of fiduciary duty claims against the LLC Debtors.

VIII. UNJUST ENRICHMENT CLAIMS (COUNTS 73–75).

The Committee has made claims for unjust enrichment. While the Committee challenges several transactions—including the contribution of real estate assets from Holdings' to the PropCo and SLB Entities and the PropCo Leases—each is governed by express, written contracts precluding an unjust enrichment claim. Moreover, even if the transactions were not governed by written contracts, the Committee has failed to prove the necessary elements of unjust enrichment, and has failed to carry its burden for proving damages.

A. Choice Of Law.

A claim for unjust enrichment is governed by state-law. Choice of law principles point to six different states governing the different transactions being challenged by the Committee as unjust enrichments: Arizona, California, Delaware, Nevada, Oregon, and Washington.

"[B]oth Delaware and federal choice of law principles apply the 'most significant relationship test' found in section 188 of the Restatement Second of Conflict of Laws to determine which jurisdiction's laws will apply to a written or unwritten contract claim." *In re Fleming Cos., Inc.*, 347 B.R. 163, 168 (Bankr. D. Del. 2006) (applying California law to an unjust enrichment claim because the "place of performance" and the alleged "overpayments" occurred in California even though California was not the Debtor's principal place of business nor its place of incorporation). In this case, the state with the "most significant relationship" likely depends on the allegation *i.e.*, where the specific services were performed or where the real estate exists. Fortunately these states have similar elements and legal requirements for unjust enrichment allowing the Court to focus on the legal principles common to these states rather than engaging in state-by-state choice of law analyses.

B. Legal Standard For Unjust Enrichment.

As a threshold matter, "an action for unjust enrichment cannot lie in the face of an express contract." 66 Am. Jur. 2d Restitution and Implied Contracts § 22. This statement is true for all of the various states that could govern the Committee's unjust enrichment claims. *See*, *e.g.*, *MacDonald v. Hayner*, 43 Wash.App. 81, 715 P.2d 519, 523 (1986) ("The courts will not allow a claim for unjust enrichment in contravention of a provision in a valid express contract."); *see also In re Direct Response Media, Inc.*, 466 B.R. 626, 661 (Bankr. D. Del. 2012) ("exercise of [the defendant's] contractual rights" is "not an impoverishment to the Debtor or any creditor or an unjust enrichment" and therefore "the unjust enrichment count is dismissed."). Moreover, a written contract defeats a claim for unjust enrichment even if the defendant is not a signatory to the contract. *See AM Gen. Holdings LLC on behalf of Ilshar Capital LLC v. Renco Grp., Inc.*, 2013 WL 5863010, at *15 (Del. Ch. Oct. 31, 2013) (dismissing unjust enrichment claim against a parent of a co-defendant signatory and reasoning it is "irrelevant that [the defendant] is not a signatory" because "the alleged unjust enrichment ***286** arises from a relationship governed by contract").

Assuming there is no contract governing the action, unjust enrichment requires proof of five elements: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010); *see also Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 283 P.3d 45, 49 (App. 2012) (same). [12] Unjust enrichment seeks to "restore[ ] [the plaintiff] to a previous position" "by restoring the very property that the claimant gave up" or "a money equivalent." Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011).

A claim of unjust enrichment also requires a "direct relationship" between the alleged enrichment and impoverishment. *Vichi*, 62 A.3d at 61 (granting summary judgment to dismiss unjust enrichment because plaintiff "failed to adduce sufficient evidence" to prove a "direct relationship"); *Pa. Emp., Benefit Tr. Fund v. Zeneca, Inc.*, 710 F.Supp.2d 458, 485 (D. Del. 2010) ("[U]njust enrichment" requires plaintiff "to establish the requisite causal nexus between the alleged wrongful conduct ... and the injuries suffered."). Because unjust enrichment focuses on a direct exchange of value, it cannot create an ongoing obligation (even where the parties are corporate affiliates): "[t]here is no obligation of a parent [corporation] to stand by for the life of its 'child' to be sure it is always profitable." *Opus East*, 528 B.R. at 103–04 (entering judgment in favor of defendant on unjust enrichment claim).

Even though unjust enrichment is an equitable remedy, the plaintiff still has the "burden" to "show the value of his or her services." *Strong v. Beydoun*, 166 Cal. App. 4th 1398, 1404, 83 Cal.Rptr.3d 632 (Ct. App. 2008); 66 Am. Jur. 2d Restitution and Implied Contracts § 87 (The plaintiff "has the burden" of "proving the amount and value" of "services or materials in question.").

C. There Are Express, Written Contracts Governing The Transactions.

The Committee's unjust enrichment claims fail because each alleged enrichment is governed by an express written contract. 66 Am. Jur. 2d Restitution and Implied Contracts § 22 ("[A]n action for unjust enrichment cannot lie in the face of an express contract."). This is to be expected because the Committee is largely challenging the Albertson's Acquisition, which is the result of hundreds of individual contracts.

1. Allegations Against the PropCo Entities (Count 75).

In Count 75, the Committee alleges unjust enrichment because "[t]he Debtors conferred benefits on the PropCo Entities by entering into the Contribution Agreements and the PropCo Leases." D. I. 1 ¶ 743. Count 75 represents two separate allegations: (1) Holdings contributed real estate assets to the PropCo Entities via the Contribution Agreements, and (2) the OpCo Entities paid rent via the PropCo Leases. The first is governed by express, written Contribution Agreements. *See* DX0506, DX0586–DX0601. The second is governed by express, written PropCo Leases. DX0783–DX0809. Simply put, Count 75 fails because the claims cannot lie in the face of the express Contribution Agreements and PropCo Leases.

***287** 2. Allegations Against the SLB Entities (Count 74).

In Count 74, the Committee alleges unjust enrichment because "[t]he OpCo Entities conferred a benefit on the SLB Entities by entering into above-market leases in connection with the Sale Leaseback Transactions thereby artificially increasing the price that the SLB Entities received for the sale of the SLB Properties." D.I. 1 ¶ 743. Count 74 also has two steps: (1) the OpCo Entities entered into leases with Spirit and GIG, and (2) the SLB Entities sold real estate to Spirit/GIG. The first step is governed by the Spirit and GIG Leases, which are express, written contracts. *See* DX0507, DX0602–DX0628 (GIG Leases) & DX0511, DX0827–DX0844 (Spirit Leases). In addition, the sale of real estate from the SLB Entities to Spirit/GIG were all governed by written contracts. DX0845–DX0850 (Spirit); DX0629–DX0636 (GIG). Count 74 similarly fails due to the existence of written contracts.

3. Allegations Against Comvest (Count 73).

In Count 73, the Committee alleges unjust enrichment because "[t]he Debtors conferred benefits on Comvest by entering into the Challenged Transactions, including but not limited to the Contribution Agreements and the PropCo Leases." D.I. 1 ¶ 731. The allegations related to the "Contribution Agreement" and the "PropCo Leases" fail for the reasons stated above. *See also* DX0517 (Asset Purchase Agreement between Albertson's and Holdings). It does not matter that Comvest was not a signatory to the Contribution Agreements or the PropCo Leases because the purported enrichments were governed by those contracts. *See AM Gen. Holdings*, 2013 WL 5863010, at *15 (holding that it is "irrelevant that [the defendant] is not a signatory" because "the alleged unjust enrichment arises from a relationship governed by contract"); *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891–92 (Del. Ch. 2009) (noting that the plaintiffs "cannot use a claim for unjust enrichment to extend the obligations of a contract to [defendants] who are not parties to the contract."). The Committee is effectively arguing that there was a benefit to the PropCo Entities that would increase the equity owned by Holdings which would increase the share of the equity owned by Comvest. The Committee has also alleged that Comvest "will unjustly benefit from [the] PropCo Entities' claim relating to the PropCo Advance [i.e. PropCo Loan]." D.I. 144 at 37. This loan and the resulting claims in the bankruptcy were governed by the PropCo Loan Agreement (DX0416), an express, written contract. The existence of express contracts defeats Count 73.

D. Separately, The Committee Cannot Satisfy The Elements Of Unjust Enrichment.

The Committee in its Trial Brief promised to prove that Comvest was unjustly enriched by its "scheme to establish the PropCo/OpCo structure and impose the intercompany PropCo Leases on the OpCo Entities." D.I. at 144 at 37. Even setting aside the fatal flaw that this entire "scheme" was governed by written, express contracts, the Committee still failed to prove the necessary elements of unjust enrichment.

First, the OpCo Entities suffered no "impoverishment" by Holdings' decision to place the real estate assets in the PropCo Entities through an OpCo/PropCo structure. Unjust enrichment is meant to "restore" a party to "to a previous position" by "restoring the very property that the claimant gave up" or "a money equivalent." Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011). Because the OpCo Entities never possessed ***288** the real estate assets, the Committee cannot ask the Court to "restore" the OpCo Entities to a position where they owned the real estate. In addition, because the OpCo Entities never owned the real estate, they had no reasonable expectation of "compensation" by Holdings' decision to place certain assets in the PropCo Entities rather than in the OpCo Entities. *See Moses*, 2014 WL 12577167, at *10.

Second, the decision to use a PropCo/OpCo corporate structure is a common business practice, and therefore it is not unjust or unfair to the OpCo Entities. More generally, unjust enrichment cannot be used as the Committee seeks to do here to create an "obligation of a parent" corporation "to stand by for the life of its 'child' to be sure it is always profitable." *Opus East*, 528 B.R. at 103.

Third, the OpCo Entities' agreement to pay fair market rent under the PropCo Leases does not create an unjust enrichment. After substantial discovery, the Committee has stipulated that "Plaintiff will not offer any evidence that the rents paid by Operations or the OpCo Entities to the PropCo Entities were above-market." D.I. 142 at 21. In other words, the OpCo Entities paid fair market rent under the PropCo Leases for access to land they needed to operate the stores. That is the definition of a fair market transaction with no enrichment or impoverishment, let alone an unjust enrichment. *See Nemec*, 991 A.2d at 1130.

Fourth, the Committee's assertion that the OpCo Entities' leases with Spirit and GIG resulted in a benefit to the SLB Entities does not meet the elements of unjust enrichment. As an initial matter, the contemporaneous documents and parties to the transaction agree that the Spirit/GIG Leases were arm's length negotiations. The Court accepts the testimony of the Committee's Expert, Howard, that the rents charged by Spirit/GIG were above market. But, the Committee is not suing Spirit or GIG. At best, the Committee's legal theory is that the OpCo Entities may have provided some benefit to GIG and Spirit. However, GIG and Spirit are not defendants here and they owe no duty to the OpCo Entities.

Finally, the Committee's assertion that Comvest was unjustly enriched through the Albertson's Acquisition is unfounded because Comvest lost money on the transaction. Comvest invested $50 million in equity, it placed its valuable portfolio company (Haggen, Inc.) within reach of the OpCo Entities' creditors, and it contributed the $49 million in excess proceeds from the sale-leaseback transactions to the OpCo Entities. There cannot be a claim for unjust enrichment when the defendant lost money in the transaction. In sum, the Committee has not proven the elements of unjust enrichment.

E. Evidence To "Value" The Alleged Enrichment.

The Committee's alleged damages for unjust enrichment are unsupported and bear no connection to the unjust enrichment theories it posits. According to the Pre-Trial Order, the Committee is seeking "the net equity value of Holdings (after the payment of all claims other than to equity holders) (Count 73)" and "the value of the assets currently owned by each of the PropCo Entities and the SLB Entities (Counts 74 and 75)." D.I. 142 at 52. In other words, the Committee is claiming that the entire value of PropCo is somehow an unjust benefit that was bestowed upon it by the OpCo Entities.

To recover under unjust enrichment, the plaintiff has the "burden" to "show the value of his or her services." *Strong*, 83 Cal.Rptr.3d at 635-36; 66 Am. Jur. 2d Restitution and Implied Contracts § 87 ("In ***289** an action for quantum meruit or unjust enrichment," plaintiff "has the burden" of "proving the amount and value" of "services or materials in question."). In *McKenna v. Singer*, the plaintiff sought unjust enrichment for services rendered to GEC Holdings, and at trial "put forth damages evidence related to the value of GEC Holdings." 2017 WL 3500241, at *21 (Del. Ch. July 31, 2017). The court held that the plaintiff failed to carry its "burden of establishing an unjust enrichment" because "the proper calculation of damages" is not the value of the entity to which it provided services but "the fair market value of the [plaintiff's] services minus the [amount] they were paid." *Id.* The Committee's theory has the same flaw. Rather than seeking the precise value of the benefit (i.e. assets or services) provided by OpCo, the Committee is simply seeking the full value of the PropCo Entities (or the net value minus Holdings' creditors). Accordingly, with respect to the Committee's evidence of damages, they have not "carried their burden." *Id.*

IX. THE RECHARACTERIZATION CLAIM (COUNT 71).

The Committee seeks to recharacterize the $25 million PropCo Loan into equity. Both the Committee's expert and Defendants agree that the parties to the PropCo Loan intended it to be an instrument of debt, not equity. Under the Third Circuit case law, that alone is sufficient to reject the claim because "the intent of the parties" is the "determinative inquiry." *In re SubMicron Sys. Corp.*, 432 F.3d 448, 457 (3d Cir. 2006). The evidence is clear that the parties intended the PropCo Loan to be secured debt as shown by the written agreements and their treatment of the loan. Moreover, the PropCo Loan served a rescue financing to the OpCo Borrowers and even the Committee's expert admits that the loan was a benefit to the OpCo creditors.

A. Legal Standard For Recharacterization.

The Third Circuit has held that in evaluating a claim to recharacterize a purported debt into equity, the "determinative inquiry" "is the intent of the parties as it existed at the time of the transaction." *SubMicron*, 432 F.3d at 457. The Court's role is to determine whether "the party infusing funds [did] so as a banker (the party expects to be repaid with interest no matter the borrower's fortunes; therefore, the funds are debt) or as an investor (the funds infused are repaid based on the borrower's fortunes; hence, they are equity)." *Id.* at 456. Given this inquiry, recharacterization is an unusual remedy where an advance is secured.

While the recharacterization inquiry can be broad, the goal is to look at the evidence to determine "what the parties actually intended." *Id.* Accordingly, unlike equitable subordination, "[r]echaracterization has nothing to do with inequitable conduct." *Fedders*, 405 B.R. at 554. One way to evaluate intent is to look at whether the parties accounted for the advance as a loan or equity. *SubMicron*, 432 F.3d at 457 (holding that "numerous facts to support a debt characterization" including "1999 notes were recorded as secured debt on *SubMicron's* 10Q SEC filing."). In addition, courts have identified related agreements, such as forbearance agreements between creditors, to be strong evidence of intent. *See*, *e.g.*, *In re Optim Energy, LLC*, 2014 WL 1924908, at *9 (Bankr. D. Del. May 13, 2014), *aff'd*, 527 B.R. 169 (D. Del. 2015) ("[T]he fact that the parties entered into the Forbearance Agreement lends support to the existence of a true creditor relationship.").

***290** Where there is ambiguity with the parties' intent, courts in the Third Circuit have at times turned to various multi-factor tests to aid their analysis. One such test is the 11-factor *AutoStyle* test developed by the Sixth Circuit. *See In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 749–50 (6th Cir. 2001). The Third Circuit warned that these factors are not a "mechanistic scorecard" to be tallied. *SubMicron*, 432 F.3d at 456. Indeed, many Delaware courts have turned away from the *AutoStyle* factors into a more streamlined seven-factor test that focuses more on recharacterization in the context of insolvency—with factors that focus on whether "voting rights" exist and "certainty of payment." *Id.* at 455 n.8. *See also In re Color Tile, Inc.*, 2000 WL 152129, at *4 (D. Del. Feb. 9, 2000) (considering the Delaware seven- factor analysis); *In re Liberty Brands, LLC*, 2014 WL 4792053, at *3 (Bankr. D. Del. Sept. 25, 2014) (considering the Delaware seven factors); *In re USDigital, Inc.*, 443 B.R. 22, 52 (Bankr. D. Del. 2011) ("Courts in the Third Circuit have applied a seven-factor test" for recharacterization). While these various factors are potentially "pertinent," the "overarching inquiry" is to determine "what the parties actually intended." *Id.* at 455–56 ("[I]n the end, [the form of the advance] is no more than an indicator of what the parties actually intended and acted on.").

If recharacterization of an investment from debt to equity is warranted, the characterization occurs "*ab initio,*" from the beginning of the investment. *United States v. State Street Bank & Tr. Co.*, 520 B.R. 29, 74 (Bankr. D. Del. 2014) (citing *AutoStyle*, 269 F.3d at 747–48). Accordingly, the advance does not disappear; instead it becomes equity in the borrowing parties with all the rights and privileges associated with equity.

B. <u>The Parties Intended The Loan To Be Secured Debt</u>. The Committee's claim for recharacterization of the PropCo Loan from debt into equity fails because the "determinative inquiry" on this issue "is the intent of the parties as it existed at the time of the transaction." Here, the parties intended it to be a loan. *SubMicron*, 432 F.3d at 457.

The intent for the PropCo Loan to be debt is manifest. The PropCo Loan document is 107 pages laying out in detail the terms and conditions of the lending arrangement. *See* DX0416. It has an interest rate, borrowing conditions, and it explicitly refers to the investment as a "loan." DX0416-0004 (titled "Term Loan and Security Agreement), DX0416-0004 (defines OpCo North, OpCo South, and Haggen, Inc. as "Borrowers" and defines PropCo North and PropCo South as "lenders"), DX0416-0024 & 0028 (interest equals "Term Loan Rate" of "8%" with a "Default Rate" of 12%), DX0416-0054–59 (listing "Events of Default" and remedies after default). The loan was secured by all the assets of the OpCo Borrowers. *See* DX0416-00029 ("[E]ach Borrower hereby pledges and grants to Agent ... a continuing security interest in and to and Lien on all of its Collateral."). *See* P-245 at P-245.002 & P-245.005. The PropCo Entities entered an Intercreditor Agreement with PNC—the asset- backed lender for the OpCo Entities—to delineate and formalize the terms between the two creditor classes. *See* DX0425 (Intercreditor Agreement: referring to PropCo Entities as "Subordinated Lenders"). The OpCo Borrowers entered a Forbearance Agreement with PNC where both sides formally recognized the loan from PropCo. *See* DX0427 (Forbearance Agreement). Together there are hundreds of pages of legal documents signed by PropCo Lenders, by OpCo Borrowers, and by PNC clearly announcing ***291** the PropCo Loan as debt. The Committee concedes that both sides accounted for the investment as a loan on their books. Trial Tr. (10/18) at 197:18–23 (Flaton). To be clear, at no point in time have the PropCo Entities ever owned any equity in OpCo North, OpCo South, or Haggen, Inc. Trial Tr. (10/18) at 217:10–20 (Flaton). Indeed, the relationship between these entities was that of landlord (PropCo) and tenant (OpCo). The circumstances of the PropCo Loan demonstrate that the parties to the instrument intended it as debt.

While the facts support the Defendants' view that the PropCo Loan is debt, the Court need not evaluate the circumstances in detail because there is no real disagreement regarding intent. The testimony of witnesses at trial is consistent with the intent of the PropCo Loan to be debt. *See*, *e.g.*, Trial Tr. (10/16) at 268:7–24 (Caple); Trial Tr. (10/19) at 112:12–14 (Clougher). On the other side, the Committee put forward a recharacterization expert, Flaton, who reviewed the evidence surrounding the loan and came to the same conclusion—that the parties to the PropCo Loan intended it to be a loan:

> Q. And you agree that based on your review of the evidence, you believe that the PropCo lenders intended that the PropCo to OpCo loan was an extension of credit. Isn't that correct?
>
> A. Yes, I do believe that.

Q. And similarly from the perspective of the OpCo borrowers, you agree that a representative of each OpCo borrower signed an agreement that said they were taking an extension of credit. Isn't that correct?

A. Yes.

Q. And you agree that the PropCo/OpCo loan document taken as a whole is an instrument evidencing indebtedness. Isn't that correct?

A. I think I testified before it's not a normal agreement, but it's intended to be.

Q. An instrument evidencing indebtedness.

A. Yes.

Trial Tr. (10/18) at 194:13–195:4 (Flaton). Flaton further placed her conclusion on intent in context. She recognized that the PropCo Loan had real economic significance with $25 million moving from the PropCo Entities to the OpCo Entities. *Id.* at 197:10–20. It was a condition precedent to the OpCo Entities' forbearance agreement. *Id.* at 209:21–210:25. Despite her wealth of experience, she could not recall a single case where a court recharacterized a secured loan to equity, let alone a transaction with a 70 page loan document, or one with an Intercreditor Agreement. *Id.* at 170:3–22. On these facts alone, there is no dispute over the intent of the PropCo Lenders or the OpCo Borrowers as to the nature of the investment.

In light of this evidence, the Committee has asked the Court to set aside the intent of the parties because the "recharacterization factors," *i.e.,* the *AutoStyle* factors, which the Committee favors over the other sets of factors—"apply with full force here." D.I. 144 at 28. In other words, the Committee is asking this Court to apply a "scoreboard" approach to recharacterization even though there is no dispute of "what the parties actually intended." This is contrary to the Third Circuit precedent where "intent" is the "determinative inquiry." *SubMicron*, 432 F.3d at 457. In sum, the PropCo Loan was intended to be debt by the OpCo Borrowers and the PropCo Lenders (as admitted by the Committee's own expert), and therefore it must be characterized as debt.

In its Trial Brief, the Committee propounds the argument that "subjective intent is irrelevant" based on a single case ***292** from the Fifth Circuit from forty years ago. D.I. 144 at 28 (*citing Slappey Drive Indus. Park v. United States*, 561 F.2d 572, 583 (5th Cir. 1977)). Simply put, that case is not the law of the Third Circuit. Presenting evidence of recharacterization is merely a way to divine "what the parties actually intended" when there is ambiguity or disagreement. *SubMicron*, 432 F.3d at 455–56); *see also In re Shubh Hotels Pittsburgh, LLC*, 476 B.R. 181, 189 (Bankr. W.D. Pa. 2012) ("Allowing the Shubh Hotels' hindsight characterization of the Advances to prevail over its confessed intent at the time the Advances were made, would run contrary to this well established precedent.").

C. The Multi-Factor Tests, Establish That The PropCo Loan Is Debt.

Both the PropCo Lenders and the OpCo Borrowers intended the PropCo Loan to be debt. The Committee and its recharacterization expert, Flaton, focus exclusively on the eleven *AutoStyle* factors ignoring the other "pertinent" factors identified by courts in the Third Circuit. Even were the Court to adopt the *AutoStyle* factors, they would favor treating the PropCo Loan as debt, especially when placed in the proper legal and factual context. The same is true of the additional factors identified by Delaware courts.

1. The Eleven *AutoStyle* Factors Weigh in Favor of Treating the PropCo Loan as Debt.

Factor 1 - The names given to instruments, if any, evidencing the indebtedness: The PropCo Entities signed a 107-page written agreement titled "Term Loan and Security Agreement" (the "Loan Agreement") with the OpCo Entities. DX0416. The instrument's name clearly evidences a secured loan. Even the Committee agrees that this evidences debt. Trial Tr. (10/18) at 155:2–15, 211:1–8 (Flaton).

Factor 2 - The presence or absence of a fixed maturity date and schedule of payments: The PropCo Loan provides that the loan's maturity date is "April, 2016." DX0416-0060. The Committee is asking the Court to take the blank in the Agreement (i.e., whether it is April 1 or April 30) and conclude that there is no maturity date at all. Courts regularly interpret imperfect contracts and resolve such minor ambiguities through common sense and extrinsic evidence. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (noting that when a contract is "susceptible of different interpretations" there is "ambiguity," and the court "must look beyond the language" to "ascertain the parties' intentions."). Indeed, treating the PropCo Loan as if it had no maturity date would render several of the

Loan Agreement's provisions meaningless as they rely on the defined term “Maturity Date.” *See* DX0416 at §§ 2.6, 3.1, 13.1, and 16.2(b)(iii). Courts do not require perfect documentation to evidence intent to create a debt. *See* *SubMicron*, 432 F.3d at 458 (characterizing an advance as a debt despite “numerous mistakes and errors when generating notes”); *In re Liberty Brands, LLC*, 2014 WL 4792053, at *5 (Bankr. D. Del. Sept. 25, 2014) (holding that the parties intended the “Miller Loan” to be debt even though it “was not documented” at all for six months). A written contract with a formal “Maturity Date” and obligations related to such a date weigh in favor of the parties' intending to create a debt instrument.

Factor 3 - The presence or absence of a fixed rate of interest and interest payments: The absence of “a fixed rate of interest and interest payments” is “a strong indication that the investment was a capital contribution.” *See* *In re Broadstripe, LLC*, 444 B.R. 51, 95–96 (Bankr. D. Del. 2010). The PropCo Loan provides that ***293** the interest shall accrue at 8% per annum (Term Loan Rate) and that all accrued and unpaid interest is due in full on the Maturity Date. DX0416- 0024 & 0028. In the event of a default, the interest rate increases to 12%. DX0416-0024 & 0028, DX0416-0054–59 (listing “Events of Default” and remedies after default). According to the Intercreditor Agreement, the interest payable to the PropCo Lenders would accrue, but no interest could be paid until the PNC Revolving Agreement was paid in full. But “deferral of interest payments does not by itself mean that the parties converted a debt transaction to equity since the defendants still expected to be repaid.” *AutoStyle*, 269 F.3d at 751; *Broadstripe*, 444 B.R. at 96 (“presence of PIK interest is not decisive” of the recharacterization analysis “especially in a distressed investment context.”). *See also* *State Street Bank*, 520 B.R. at 79 (“The Junior PIK Notes reflect all indicia of indebtedness, including the issuance of notes with payment at a fixed interest rate (although payment of interest was deferred).”). Overall, this factor favors the treatment of the PropCo Loan as debt because there was a fixed rate of interest accruing over time.

Factor 4 - The source of repayments (whether repayment is dependent on success): Under this factor, “[i]f the expectation of repayment depends solely on the success of the borrower's business, the transaction has the appearance of a capital contribution.” *In re Friedman's Inc.*, 452 B.R. 512, 521 (Bankr. D. Del. 2011) (internal citation omitted); *State Street Bank*, 520 B.R. at 76 (“all extensions of credit depend on a company's success, and that risk alone—without more—does not indicate that they are capital contributions.”). The PropCo Loan and the Intercompany Note provide that the PropCo Entities have an absolute right to payment *i.e.*, repayment is not contingent on success of the business. DX0416 at §§ 2.3, 2.6; Intercompany Note at 1. Moreover, the PropCo Loan was secured by the assets of the OpCo Borrowers. The evidence is clear that the OpCo Borrowers had sufficient unencumbered collateral to pay the PropCo Loan even in the event of a liquidation. Trial Tr. (10/17) at 113:21–115:4, 128:23–129:9 (Niegsch).

Flaton asserts that because the PropCo Loan is “underneath the ABL” “it will require success of the business in order to get repaid.” Trial Tr. (10/18) at 160:23–161:2 (Flaton). While Flaton's statement could be true if the PNC Loan was undersecured, that was not the case. Flaton agreed that “where a secured lender has adequate collateral, they are not dependent on the success of the business for repayment because they have the collateral.” Trial Tr. (10/18) at 215:7–20 (Flaton). The testimony by the fact witnesses (plus the outcome of the bankruptcy sales and even the fact of this lawsuit) shows that there was adequate collateral for repayment of the secured PropCo Loan. Notably, Flaton “never attempted to value the collateral at the OpCo.” *Id.* Accordingly, the PropCo Loan did not depend on the success of the OpCo Borrowers because there was sufficient unencumbered collateral to repay the loan, even in a liquidation scenario.

Factor 5 - The adequacy or inadequacy of capitalization: Defendants acknowledge that the OpCo Borrowers were not adequately capitalized in August 2015. Narrowly evaluated, this factor would weigh in favor of characterizing the PropCo Loan as equity.

This factor, however, has limited weight where an “existing lender ... extend[s] additional credit to a distressed borrower as a means to protect its existing loans.” ***294** *In re Radnor Holdings Corp.*, 353 B.R. 820, 839 (Bankr. D. Del. 2006); *see also* *SubMicron*, 432 F.3d at 457 (“When existing lenders make loans to a distressed company...traditional factors that lenders consider (such as capitalization, solvency, collateral, ability to pay cash interest and debt capacity ratios) do not apply as they would when lending to a financially healthy company.”). Admittedly, the PropCo Lenders were not preexisting lenders to the OpCo Borrowers. But the PropCo Lenders did have a preexisting contractual relationship with OpCo North and OpCo South: they were parties to long-term lease agreements—with the PropCo Lenders as landlord and OpCo North and South as tenant. DX0783–DX0809. The PropCo Lenders did not want the value of those leases to evaporate due to quickly deteriorating problems with the tenants. Accordingly, the logic for limiting the weight of the capitalization factor for an "existing lender" applies with equal force to the PropCo Lenders because they had a preexisting interest in their long-term leases with the OpCo Entities to protect. *See* Radnor Holdings Corp., 353 B.R. at 839.

Factor 6 - The identity of interest between the creditor and the stockholder: Under this factor, "[i]f stockholders make advances in proportion to their respective stock ownership, an equity contribution is indicated." *See* Broadstripe, 444 B.R. at 97 (citations omitted); *see also* *In re Exide Techs., Inc.*, 299 B.R. 732, 741 (Bankr. D. Del. 2003) (holding that this factor favored debt because "the advances were made not by stockholders, and not in proportion to respective stock ownership."). The PropCo Entities owned no equity in OpCo North, OpCo South, or Haggen, Inc. at the time of the PropCo Loan (or any time thereafter). Therefore, the PropCo Entities could not "make advances in proportion to their respective stock ownership" because they owned no equity. But the OpCo Entities and the PropCo Entities had common indirect ownership by Holdings and Comvest. Accordingly, this factor is mixed: a narrow interpretation of the factor favors debt (since PropCo Entities owned no stock in the OpCo Entities), but a broader interpretation could potentially favor a characterization of equity (due to common, indirect ownership).

Factor 7 - The security, if any, for the advances: The OpCo Borrowers pledged all of their assets as security pursuant to the Loan Agreement. DX0416. at § 4.1. The Promissory Notes also evidence that they were "secured." P-245 at P-245.002 & P-245.005. Both the Loan Agreement and the Promissory Notes are dated August 7, 2015. Contrary to the documentation, Flaton testified that she understood that the PropCo Loan was "unsecured" until the Intercreditor Agreement was signed with PNC on August 21, 2015. Trial Tr. (10/18) at 163:3–14 (Flaton). Her belief is that a default on the PNC ABL Agreement made it such that "there was no ability for [the OpCo Borrowers] to actually sign a security agreement." *Id.* It is true that the OpCo Borrowers' pledge of their assets to the PropCo Lenders on August 7, 2015 without PNC's approval constituted an "Event of Default" under the PNC Revolving Loan Agreement. DX0699-0042–43 (Permitted Encumbrances), 699-0110-114 (Negative Covenants). But the PNC Revolving Loan Agreement did not prevent the OpCo Borrowers from pledging their collateral to the PropCo Lenders. This is clear from the Forbearance Agreement where PNC agreed to forebear the "Event of Default" but there was no change to the security status of the PropCo Loan. DX0427-0005–6 (allowing the "Liens" under the "PropCo Special Advance" and "Initial Provisional Funding" to no longer be an "Event of Default"). From the signing of the PropCo ***295** Loan Agreement on August 7, 2015, the money advanced to OpCo was secured.

The security interest was created on August 7, 2015 with the first advance, but that security interest was not perfected (through the filing of a Financing Statement) until August 21, 2015. DX0772–DX0774 (UCC Financing Statements). Regardless, the legal documents are clear: the PropCo Loan was secured and fully perfected prior to the bankruptcy filing.

Factor 8 - The corporation's ability to obtain financing from outside lending institutions: Where "no reasonable creditor would have acted in the same manner" it is "evidence that the advances were capital contributions rather than loans." *AutoStyle*, 269 F.3d at 752. Admittedly, the PropCo Lenders were not "outside lending institutions" and, given the time constraints, the OpCo Entities were not able to find an outside lender. Flaton testified that this factor favors equity because the record does not contain evidence that any outside lender was offering to lend to the OpCo Entities at the time. Trial Tr. (10/18) at 164:9–165:11 (Flaton).

The issue with Flaton's approach is that it ignores the fact that the PropCo Loan was fully secured. Niegsch testified that in August 2015 he believed that the OpCo Borrowers had "asset value" that "exceeded the ABL by more than $25 million." Trial Tr. (10/17) at 128:23–129:9 (Niegsch). Indeed, he was proven right by the eventual sale of the assets where the sale exceeded the PNC ABL plus the PropCo Loan amount. Trial Tr. (10/17) at 113:21–115:4 (Niegsch). The choice not to pursue outside lenders was due to "the speed that it needed to get a loan." Trial Tr. (10/16) at 185:4–186:25 (Caple). Flaton did not perform any analysis of whether a reasonable outside lender would have made a loan directly to OpCo, especially if OpCo had had more time. *See* Trial Tr. (10/18) at 218:3–13 (Flaton). Accordingly, Flaton's opinion is little more than a recitation of the factual record. The OpCo Entities did not have time to pursue new outside lenders and educate them regarding the value of the OpCo Entities' unencumbered collateral. Defendants will admit that it is unlikely that a lender would have loaned unsecured money to the OpCo Entities in August 2015. But it is reasonable to believe that a lender would have offered, like the PropCo Lenders, a secured loan where the unencumbered assets were more than sufficient to cover the amount of the loan.

Factor 9 - The extent to which the advances were subordinated to the claims of outside creditors: This factor only supports the Committee if there was "subordination of advances to claims of all other creditors." *AutoStyle*, 269 F.3d at 752-53. While the PropCo Loan was subordinated to the PNC ABL, it was superior to all other creditors. Trial Tr. (10/18) at 218:19–219:4 (Flaton agreed that assuming no recharacterization the PropCo Loan "will be paid ahead of the general unsecured creditors."). Flaton misinterprets this factor in her testimony at trial. She testified that "ultimately if [the PropCo Loan is] down toward the bottom of the stack, it's looking more like equity than anything else." Trial Tr. (10/18) at 165:22–24 (Flaton). But the factor does not look at whether the PropCo Loan is subordinated to the senior, secured creditor. It looks at whether the PropCo Loan is subordinated to "all other creditors." *See Broadstripe*, 444 B.R. at 101 ("Subordination of advances to claims of all other creditors indicates that the advances were capital contributions, not loans.") (citations omitted). Accordingly, this factor favors a characterization of debt.

Factor 10 - The extent to which the advances were used to acquire capital assets: "Use of advances to meet the daily ***296** operating needs of the corporation, rather than to purchase capital assets, is indicative of bona fide indebtedness." *AutoStyle*, 269 F.3d at 752. The record evidence is consistent that the PropCo Loan was used for working capital—not to acquire capital assets. Trial Tr. (10/18) at 166:5–8 (Flaton) ("This in fact was used for working capital and paying payroll."). Even the Committee agrees that this factor favors the Defendants' view that the PropCo Loan is debt. See Trial Tr. (10/18) at 219:10–19 (Flaton).

Factor 11 - The presence or absence of a sinking fund to provide repayments: Courts have recognized that, where a loan is "secured with liens," the "need for any sinking fund" is "obviated" and this factor will not weigh in favor of recharacterization. *AutoStyle*, 269 F.3d at 753. Here, the PropCo Loan is secured, obviating any need for a sinking fund and rendering this factor irrelevant. The Third Circuit cautions that the *AutoStyle* factors (or any set of factors) are not a "scorecard" to be tallied. *SubMicron*, 432 F.3d at 456. But taken together, and evaluated in context, these factors overwhelmingly favor the view that the parties to the PropCo Loan intended it to be debt.

2. Additional Factors Identified by Delaware Courts.

In addition to the *AutoStyle* factors, Delaware courts have considered several other factors in evaluating a recharacterization inquiry. Among other factors, these courts evaluate the "certainty of payment in the event of the corporation's insolvency or liquidation." *SubMicron*, 432 F.3d at 456 n.8; *Liberty Brands*, 2014 WL 4792053, at *5. The "certainty of payment" factor cuts straight to what a lender cares about when making a loan, especially in a distressed situation. In the seven-factor test, this "certainty of payment" factor effectively replaces the more amorphous *AutoStyle* factors of capitalization, whether outside lenders would have lent, and source of repayments. Given the unencumbered collateral at the OpCo Borrowers available to the PropCo Lenders, the "certainty of payment" factor would weigh heavily in favor of treating the PropCo Loan as debt.

Another factor is the "presence or absence of voting rights" because equity is frequently associated with voting rights in the company. *SubMicron*, 432 F.3d at 456 n.8 (3d Cir. 2006); *Liberty Brands*, 2014 WL 4792053, at *5. Here, the PropCo Loan does not offer the PropCo Entities any voting rights in the OpCo Borrowers. Accordingly the lack of voting rights suggests that the PropCo Loan is debt.

Another factor frequently cited by courts to evaluate intent is how the parties accounted for the advance on their financial statements and accounting records. *SubMicron*, 432 F.3d at 457 (citing numerous facts to support debt characterization including "1999 notes [that] were recorded as secured debt on SubMicron's 10Q SEC filing and UCC-1 financing statements."); *see also Liberty Brands*, 2014 WL 4792053, at *4 ("Sunflower loan was at all times denominated as 'Loan Payable to Sunflower' on the Debtor's books."). It is undisputed that PropCo and OpCo accounted for the PropCo Loan as a loan. Trial Tr. (10/18) at 197:21–23 (Flaton) ("Q. And both sides to the loan accounted for it as a loan on their books. Isn't that correct? A. I believe that's correct. Yes.").

Overall, even focusing on the various factors, the PropCo Loan has characteristics more similar to debt. In *Liberty Brands*, the court evaluated the "Sunflower Loan" where there was "no (i) written documentation of the Sunflower loan, (ii) maturity date, (iii) schedule of payments, or (iv) fixed rate of interest" and the "loan depended on the Debtor's success." ***297** *Liberty Brands*, 2014 WL 4792053, at *3–4. The Sunflower Loan was "not secured." *See* Findings of Fact and Conclusions of Law, *In re Liberty Brands, LLC*, No. 07-10645 (MFW), D.I. 226 at ¶ 111. Even with these factors favoring equity, the court found that the parties intended it to be a loan because it was "denominated as 'Loan Payable to Sunflower' on the Debtor's books," key witnesses "considered" it to be a loan, and the lender did not acquire voting rights. *See Liberty Brands*, 2014 WL 4792053 at *3–4. If the "Sunflower Loan" is treated as debt, then there can be no doubt that the PropCo Loan is a true loan. *See Id.* In sum, even using various multi-factor tests to divine the intent of the parties, the PropCo Loan will be treated as debt.

D. The PropCo Loan Was Rescue Financing That Benefited OpCo's Creditors.

Recharacterization is designed to treat an investment consistent with the "the intent of the parties." *SubMicron*, 432 F.3d at 456. At its core, the PropCo Loan is the type of rescue financing that courts aim to preserve. The PropCo Loan fits the characteristics of a rescue financing as described by Flaton: the PropCo Loan was "made by non-traditional lenders," it was "secured by collateral," and it "is subordinate to the existing debt on the structure." Trial Tr. (10/18) at 199:4–24 (Flaton) (describing characteristics of a typical rescue loan). Moreover, Flaton testified that based on her experience the PropCo Loan was "good for OpCo's creditors" and that she would have advised them to accept the money:

> Q. And you agree that the additional $25 million in capital into this failing situation was a good fact for OpCo's creditors. Isn't that correct?
>
> A. Yes. Any cash coming in would be a good fact for OpCo's creditors.
>
> Q. In fact, if you had been advising the OpCos in August of 2015, you would not have advised them to reject a term loan from the OpCos. Isn't that correct?
>
> A. I would not have advised them to reject cash coming in.

Trial Tr. (10/18) at 197:24–198:17 (Flaton). The alternative to the PropCo Loan was missing payroll, "Employees don't show up," and likely a freefall bankruptcy. Trial Tr. (10/17) at 117:1–16 (Niegsch); *see also* Trial Tr. (10/16) at 304:12–305:2 (Caple). As Flaton testified, "freefall bankruptcies can be destructive of value" and such a freefall could cause the Debtors' creditors to suffer. Trial Tr. (10/18) at 221:8–19 (Flaton). From a practical standpoint, the PropCo Loan provided much needed liquidity that was used in part to pay OpCo's creditors while ultimately allowing for an organized descent into bankruptcy.

Courts have frequently worried that an overly aggressive recharacterization regime could deter good-faith rescue financing for struggling companies. *In re Dornier Aviation (N. Am.), Inc.*, 453 F.3d 225, 234 (4th Cir. 2006) ("In many cases, an insider will be the only party willing to make a loan to a struggling business, and recharacterization should not be used to discourage good- faith loans."); *In re Alternate Fuels, Inc.*, 789 F.3d 1139, 1152 (10th Cir. 2015) ("[P]lacing too heavy an emphasis on undercapitalization in our recharacterization analysis would create an 'unhealthy deterrent effect,' causing business owners to fear that, should their 'rescue efforts' fail, a court will ... 'too quickly refuse to treat their cash infusions as loans.' ") (citations omitted). An overly aggressive recharacterization regime could eliminate efficient, good-faith rescue financing to the detriment of creditors. In addition, going forward it could nudge corporations ***298** into specific jurisdictions to avoid recharacterization risk. Regardless, it would be an "unhealthy deterrent" to punish the PropCo Lenders for stepping in and protecting value at the OpCo Borrowers—to the benefit of OpCo's creditors—through rescue financing.

IX. THE COMMITTEE's EQUITABLE SUBORDINATION CLAIMS (COUNTS 69, 70, AND 77).

The Court should also reject the Committee's claims to equitably subordinate the $25 million PropCo Loan or any proofs of claim filed (or to be filed) by the PropCo Entities (the "PropCo Proofs of Claim") to the claims of the unsecured creditors (Counts 69 and 77). These claims, which are against the PropCo Entities, fail because the Committee has not shown that there was any inequitable conduct on the part of the PropCo Entities or that the OpCo Entities' creditors were harmed.

A. Legal Standard for Equitable Subordination.

The doctrine of equitable subordination, codified in section 510(c) of the Bankruptcy Code, authorizes a bankruptcy court to "subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim." 11 U.S.C. § 510(c). The Third Circuit requires a movant to establish three elements before a court may subordinate a creditor's claim: "(1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code." *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 411 (3d Cir. 2009) (quotations and brackets omitted) (*citing Benjamin v. Diamond* (*In re Mobile Steel Co.*), 563 F.2d 692, 699–700 (5th Cir. 1977)). Equitable subordination is "an extraordinary remedy which is applied sparingly." *See, e.g.*, *In re Epic Capital Corp.*, 307 B.R. 767, 773 (D. Del. 2004); *see also Radnor Holdings*, 353 B.R. at 840 (describing equitable subordination as a "drastic" and "unusual" remedy).

"Courts recognize three general categories of behavior that may constitute inequitable conduct: 1) fraud, illegality, or breach of fiduciary duties; 2) undercapitalization; and 3) claimant's use of the debtors as a mere instrumentality or alter ego." *In re Epic Capital Corp.*, 290 B.R. 514, 524 (Bankr. D. Del. 2003). While the burden of proof on the movant "is less demanding when the respondent is an insider," *id.*, it is axiomatic that "[i]nsider status alone ... is insufficient to warrant subordination." *In re Nutri/Sys. of Fla. Assocs.*, 178 B.R. 645, 657 (E.D. Pa. 1995). In addition, obtaining a security interest—without more—is not inequitable conduct. *See Optim Energy*, 527 B.R. at 177. Neither is undercapitalization "without evidence of deception about the debtors' financial condition or other misconduct." *Matter of Lifschultz Fast Freight*, 132 F.3d 339, 349 (7th Cir. 1997); *AutoStyle*, 269 F.3d at 747 ("Undercapitalization alone is insufficient to justify the subordination of insider claims."); *Alternate Fuels*, 789 F.3d at 1155 (reasoning that "undercapitalization is not in itself inequitable conduct"). This makes sense, as "[a]ny other analysis would discourage loans from insiders to companies facing financial difficulty and that would be unfortunate because it is the shareholders who are most likely to have the motivation to salvage a floundering company." *AutoStyle*, 269 F.3d at 747 (*citing In re Octagon Roofing*, 157 B.R. 852, 858 (N.D. Ill. 1993)).

***299** Finally, equitable subordination and recharacterization are distinct claims that "address distinct concerns." *SubMicron*, 432 F.3d at 454. While the recharacterization inquiry focuses on "the proper characterization" of an advance "in the first instance," equitable subordination "is apt when equity demands that the payment priority of claims of an otherwise legitimate creditor be changed to fall behind those of other claimants." *Id.* The Third Circuit has described the equitable subordination doctrine as "remedial, not penal, and it should be applied only to the extent necessary to offset specific harm that creditors have suffered on account of the inequitable conduct." *Id.* at 462 (emphasis added). "The critical inquiry," therefore, when evaluating an equitable subordination claim "is whether there has been inequitable conduct on the part of the party whose debt is sought to be subordinated." *In re Hedged-Invs. Assocs., Inc.*, 380 F.3d 1292, 1300 (10th Cir. 2004).

B. <u>The PropCo Entities Did Not Act Inequitably In Making A Secured Loan To The OpCo Entities</u>.

The Committee's claims to equitably subordinate the PropCo Loan fail because the Committee has not shown that the PropCo Entities engaged in any inequitable conduct. In its Complaint, the Committee alleges two types of misconduct:

1. The PropCo Entities took "security interests" in the OpCo Entities in exchange for the PropCo Loan "at a time when the Debtors were insolvent, unable to pay their debts as they became due, and left with unreasonably small capital"; and

2. Comvest "engaged in a pattern of misconduct and inequitable conduct at the expense of the Debtors .... including by engineering and executing the Challenged Transactions."

D.I. 1 at ¶¶ 703, 704, 710. The first allegation does not warrant the subordination of the PropCo Loan; the second allegation asserts misconduct by the wrong party (Comvest) and is not supported by the evidence.

As for the first allegation, neither that the PropCo Entities took security interests in the OpCo Entities nor that the Debtors were in dire financial straits when the PropCo Loan was executed constitute conduct sufficient to support equitable subordination. Taking a security interest does not constitute inequitable conduct. *See Optim Energy*, 527 B.R. at 177 ("It is not inequitable for a lender, even an insider lender, to obtain a lien on the borrower's assets in order to secure its position above creditors in the event of the borrower's default."). This is especially so where, as here, the security interest was taken in conjunction with a loan that generated $45 million in additional liquidity at the OpCo Entities. *See* Trial Tr. (10/18) at 153:8–154:8 (Flaton); Trial Tr. (10/17) at 107:25–108:11 (Niegsch). The fact that the OpCo Entities were in financial distress when the PropCo Loan was made does not change the analysis. Courts consistently hold that insider loans to distressed companies will not *ipso facto* be subordinated. *AutoStyle*, 269 F.3d at 747; *Sinclair v. Barr* (*In re Mid-Town Produce Terminal, Inc.*) 599 F.2d 389, 392 (10th Cir. 1979) ("To hold the debt may be subordinated [solely on the basis of the insider nature of the transaction] would discourage owners from trying to salvage a business, and require all contributions [from insiders] to be made in the form of equity capital.”). This is sound policy, as “[t]he penalty for attempting to save the corporation should not be subordination.” *Matter of Rego Crescent Corp.*, 23 B.R. 958, 964 (Bankr. E.D.N.Y. 1982).

***300** As for the second allegation, the Committee has not demonstrated that the PropCo Entities engaged in any inequitable conduct. Indeed, the Committee does not even allege that the PropCo Entities engaged in any inequitable conduct; rather it claims that Comvest engaged in inequitable conduct, and that conduct should be imputed to the PropCo Entities. *See* D.I. 1 at ¶¶ 704, 705. Comvest's alleged conduct should not be imputed to the PropCo Entities. *See*, *e.g.*, *Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co., Inc.* (*In re Sunbeam Corp.*), 284 B.R. 355, 369 (Bankr. S.D.N.Y. 2002) (holding that the committee's allegations regarding the control exercised by a corporate parent that advised the debtor on corporate acquisitions over the decision by a corporate affiliate to finance such acquisitions were insufficient to hold the corporate affiliate liable for the parent's alleged misconduct, and thus to equitably subordinate affiliate's claim on that basis); *Official Comm. of Unsecured Creditors of Champion Enter., Inc. v. Credit Suisse* (*In re Champion Enter., Inc.*), 2010 WL 3522132, at *10 (Bankr. D. Del. Sept. 1, 2010) (dismissing complaint because “courts commonly hold that equitable subordination must be based on the claimant's own acts” and plaintiff failed to allege inequitable conduct on the part of the claimants themselves).

Even if Comvest's conduct could be imputed to the PropCo Entities, the allegation that Comvest engaged in inequitable conduct is not borne out by the evidence. The Committee alleges that the “Challenged Transactions” constituted inequitable conduct. None of the Challenged Transactions were inequitable.

The Committee defined the “Challenged Transactions” as (1) the creation of the OpCo/PropCo corporate structure, (2) the downstream contributions of the right to acquire real property from Holdings to the wholly- owned PropCo and SLB Entities, (3) the sale-leaseback transactions with Spirit and GIG, and (4) the imposition of above-market leases on the OpCo Entities.

First, the Committee admitted repeatedly in this case that there is nothing wrong with creating an OpCo/PropCo corporate structure. *See*, *e.g.*, Trial Tr. at 50:6–7 (Feinstein) (“There is nothing, per se, wrong about the PropCo and OpCo structure.”). Second, as described above, there is nothing fraudulent or inequitable about a corporation contributing value to its wholly-owned subsidiaries. Third, the evidence shows that the sale-leaseback transactions were the product of arm's length negotiations, and that except for the Sprint and GIG leases, the resulting leases were not above market. *See* D. Rosenberg (Spirit) Dep. at 131:2–4; M. West (HFF) Dep. at 173:7–11, 173:17–18; DX0222-0023; DX0131-0013; DX0439-0001. Fourth, the Committee concedes that the leases between the PropCo and OpCo Entities were not above market. *See* D.I. 142 at 21 (“Plaintiff will not offer any evidence that the rents paid by Operations and the OpCo Entities to the PropCo Entities were above-market.”).

The Committee also has not shown that either the PropCo Entities or Comvest engaged in any of the “three general categories of behavior that may constitute inequitable conduct.” *Epic Capital*, 290 B.R. at 524. The Committee has not demonstrated, for example, that Defendants engaged in any conduct that would constitute fraud, illegality, or breach of fiduciary duty. The evidence adduced at trial shows that the OpCo Entities were not undercapitalized at the outset of the Albertson's Acquisition. The case law is also clear that undercapitalization of the debtor at the time it entered into a secured loan with a lender does not constitute inequitable conduct, ***301** absent something more. *See*, *e.g.*, *In re Filtercorp, Inc.*, 163 F.3d 570, 583-84 (9th Cir. 1998) (holding that the insolvency of the debtor at the time it entered into secured loan transactions with claimants, standing alone, is insufficient to require subordination of claimants' claims). The Committee has not shown, much less alleged, that the OpCo Entities were mere instrumentalities or alter egos of either the PropCo Entities or Comvest.

Ultimately, just as with so many of its other claims, the Committee's complaint is that “[f]rom the outset this transaction was set up in such a way that it was going to benefit Comvest whether, you know, heads I win tails you lose.” Trial Tr. (10/20) at 88:7–10 (Feinstein). The evidence clearly shows that the PropCo Entities did not engage in any inequitable conduct. As a result, the Committee cannot make out a prima facie case for equitable subordination.

C. The PropCo Loan Did Not Harm the OpCo Entities' Unsecured Creditors.

The Committee also has the burden to show that the PropCo Loan harmed the unsecured creditors at the OpCo Entities or bestowed an unfair advantage on the PropCo Entities. The Committee's position as to this element is two-fold: if the

PropCo Loan "is allowed as a secured claim," then (a) the OpCo Entities' creditors will be harmed "because there will be $25 million (plus interest) less to satisfy their claims"; and (b) it "will confer an unfair advantage to the PropCo Entities by ratifying Comvest's decision to use the Debtors' assets under dire circumstances to try to protect its own equity investment." D.I. 144 at 31. The evidence does not support either position.

The unsecured creditors were not injured by the PropCo Loan. Indeed, the evidence shows that they were the primary beneficiary of it. The PropCo Loan directly resulted in the infusion of $25 million in the OpCo Entities in August 2015. *See* DX0416; Trial Tr. (10/18) Tr. at 197:18–20 (Flaton). That money was used to make payroll and to pay then-existing obligations to the very same unsecured creditors that the Committee represents. *See* Trial Tr. (10/18) at 166:5–8 (Flaton) ("This in fact was used for working capital and paying payroll."). The PropCo Loan was also a condition precedent for unlocking $20 million of additional liquidity: as part of the Forbearance and Intercreditor Agreements, PNC provided an additional $20 million of availability under the PNC Revolver. *See* Trial Tr. (10/18) at 198:15–19 (Flaton). These funds, $45 million in total, reduced the OpCo Entities' debt and were designed to give the OpCo Entities time to execute a turnaround plan. *See* Trial Tr. (10/17) at 108:5–109:2 (Niegsch). The evidence also shows that, absent the PropCo Loan, the OpCo Entities would have descended into a freefall bankruptcy, which would have destroyed value and left the unsecured creditors worse off. *See* Trial Tr. (10/17) at 117:6–16 (Niegsch); Trial Tr. (10/18) at 220:23–221:25 (Flaton). As a result, the unsecured creditors benefited from this additional working capital; they were not harmed.

The Committee's own expert agrees that the unsecured creditors were better off because of the PropCo Loan than they otherwise would have been. During cross-examination, Flaton admitted that, from the perspective of the OpCo Entities' creditors, it was a good thing for the OpCo Entities to receive the proceeds of the PropCo Loan. *See* Trial Tr. (10/18) at 197:24–198:3 (Flaton). She further admitted that had she been advising the OpCo Entities, she would not have advised them to turn down the PropCo Loan. *See* Trial ***302** Tr. (10/18) at 198:4–7 (Flaton). Flaton also testified that, in her view, the PropCo Loan was better than market, as nobody else would have made a loan to the OpCo Entities on as good of terms as the PropCo Loan. *See* Trial Tr. (10/18) at 217:21–218:2 (Flaton). In other words, not only did the OpCo Entities' creditors benefit from the additional liquidity in the short run, they did so on terms that were favorable to them over the long run.

The PropCo Loan also did not confer an "unfair advantage" on the PropCo Entities vis-à-vis the OpCo Entities. The PropCo Loan was an attempt to rescue the OpCo Entities. Had that attempt been successful, the OpCo Entities' creditors would have benefitted tremendously from a healthy grocery brand that would have been able to pay its creditors. Comvest would also have been a beneficiary of that success, but to say that Comvest's attempt to "protect its own equity investment" constitutes an "unfair advantage" is to ignore the benefits that the unsecured creditors would have reaped. The Committee's argument also ignores the short term benefits that the unsecured creditors reaped as a direct result of the PropCo Loan. As discussed above, there are important policy reasons to encourage loans from insiders to companies in dire straits, as insiders are often a company's last best chance to avoid a bankruptcy filing. *See AutoStyle*, 269 F.3d at 747; *Mid-Town Produce*, 599 F.2d at 392.

Importantly, this is not a case where the PropCo Entities improved their priority position vis-à-vis other creditors on an existing debt on the eve of bankruptcy. Courts often equitably subordinate attempts by insiders to improve their recovery on existing debts through the last minute taking of a security interest. For example, in *State Street Bank*, the court found inequitable conduct and harm to creditors when an insider-noteholder implemented a plan in conjunction with a debtor's management to convert its preexisting debt to secured status and obtain priority over other creditors. 520 B.R. at 82; *see also In re Le Café Crème, Ltd.*, 244 B.R. 221, 236 (Bankr. S.D.N.Y. 2000) (finding evidence of inequitable conduct and creditor harm when insider- shareholders used the debtor to repay themselves first on preexisting debt, and then extended additional credit on a secured basis to exchange their equity interest).

Here, the PropCo Entities took a security interest at the OpCo Entities in conjunction with a loan of $25 million. Prior to that loan, the PropCo Entities had not extended any debt to the OpCo Entities. The simple fact that the unsecured creditors were subordinate to the PropCo Loan does not, in and of itself, establish that they were harmed. *See*, *e.g.*, *Official Comm. of Unsecured Creditors of Midway Games Inc. v. Nat'l Amusements Inc.* (*In re Midway Games Inc.*), 428 B.R. 303, 319 (Bankr. D. Del. 2010) (dismissing equitable subordination claim and reasoning that although the challenged transactions may have "buried the creditor beneath more debt than would have been the case had the Debtor filed for bankruptcy beforehand, the Committee did not allege that the Debtor suffered harm”). After all, “[a]ttaining a higher priority of repayment is a major motivation behind secured lending.” *Optim Energy*, 527 B.R. at 177.

The PropCo Loan was a real economic transaction that provided real benefits to the OpCo Entities and its creditors. It is not the kind of transaction that should lead to equitable subordination.

D. The PropCo Proofs Of Claim Also Should Not Be Equitably Subordinated.

Finally, the Committee has not established that the PropCo Proofs of Claim ***303** should be equitably subordinated because there is no evidence that the PropCo Entities acted inequitably or that the OpCo Entities were harmed. As discussed above, the Committee has not established that the PropCo Entities acted inequitably in any way. In addition, the PropCo Proofs of Claim stem directly from the leases that the PropCo and OpCo Entities entered into so that the OpCo Entities could operate the stores. The Committee has already stipulated that the rent that the PropCo Entities charged to the OpCo Entities were not above-market. *See* D.I. 142 at 21. Accordingly, the Committee did not show that the PropCo Entities acted inequitably with regard to those leases or that the OpCo Entities were harmed by inflated rental rates.

CONCLUSION

For the foregoing reasons, the Court finds in favor of the Defendants on all Counts of the Complaint. An Order will issue.

ATTACHMENT

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GLOSSARY OF DEFINED TERMS

All capitalized terms not defined in the text shall be defined in accordance with these definitions.

Term	Definition
A&M	Alvarez & Marsal, an advisor retained by Haggen in 2015
ABL	The Revolving Credit and Security Agreement dated February 12, 2015 among PNC Bank, National Association, as Agent, PNC Bank and other party thereto, as Lenders and Haggen, Inc., OpCo North and OpCo South, as Borrowers
Acquisition	HH Acquisition, LLC (f/k/a Haggen Acquisition, LLC)
Akerman	Akerman, LLP, counsel to Comvest and Haggen in connection with the Albertson's Acquisition
Albertson's	Albertson's LLC and Albertson's Holdings LLC
Albertson's Acquisition	The December 2014 transaction whereby Holdings agreed to acquire 146 grocery stores and related real estate assets from Albertson's
Anderson	Derrick Anderson, Defendant and at relevant times corporate secretary of various Haggen entities
APA	The Asset Purchase Agreement dated as of December 10, 2014, between Albertson's LLC and Albertson's Holdings LLC, as sellers, and Holdings, as buyer
ATK	ATKearney
Bankruptcy Code	Title 11 of the United States Code
Barnett	Blake Barnett, Defendant and at relevant times CFO of various Haggen entities
BofA	Bank of America
Caple	John Caple, Defendant and at relevant times Partner of Comvest, member of Comvest's IC and Deal Team
Cerberus	Cerberus Capital Management, L.P., the owner of Albertson's
CGH	Comvest Group Holdings, LLC
CHH III	Comvest Haggen Holdings III, LLC
CHH IV	Comvest Haggen Holdings IV, LLC
CIP III	Comvest Investment Partners III, L.P.
CIP IV	Comvest Investment Partners IV, L.P.
Citibank	Citibank, National Association, and party to, inter alia, that certain $25,000,000 Qualified Borrower Note among Citibank, Property Lender, CIP IV, and Comvest Investment Partners IV-A, L.P. dated August 12, 2015
Clark	Thomas Clark, Partner of Comvest Partners and member of Comvest's IC
Clougher	John Clougher, Defendant and at relevant times CEO of various Haggen entities
Committee	Official Committee of Unsecured Creditors
Comvest	Comvest Advisors, CGH, CIP III, CIP IV, CHH III, and CHH IV
Comvest Advisors	Comvest Advisors, LLC

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Contribution Agreement	An agreement pursuant to which Holdings transferred, directly or indirectly, rights to Real Property to one of the PropCo Entities or one of the SLB Entities
Deal Team	Caple, Niegsch and Scholl
Debtors	HH Liquidation, LLC (f/k/a Haggen Holdings, LLC), HH Operations, LLC (f/k/a Haggen Operations Holdings, LLC), HH OpCo South, LLC (f/k/a Haggen OpCo South, LLC), HH OpCo North, LLC (f/k/a Haggen OpCo North, LLC), HH Acquisition, LLC (f/k/a Haggen Acquisition, LLC), and HH Legacy, Inc. (f/k/a Haggen, Inc.)
Defendants	The Individual Defendants, Comvest, the PropCo Entities, and the SLB Entities
Falk	Michael Falk, CEO, Managing Partner and Co-Founder of Comvest Partners, and Member of Comvest's IC
Forbearance Agreement	The Forbearance Agreement, Second Amendment to Revolving Credit and Security Agreement and First Amendment to Guarantor Security Agreement dated as of August 21, 2015, among Haggen, Inc., OpCo North, and OpCo South, as borrowers, Operations and Acquisition, as guarantors, JPMorgan Chase Bank, N.A. and Keybank, N.A. as co-syndication agents, and PNC, as agent for the lenders
FTC	Federal Trade Commission
Garrison	GIG TCG Wave Holdings, LLC and its affiliates
Garrison Lease	That certain Master Land and Building Lease dated February 17, 2015, between Garrison, as landlord, and OpCo South and OpCo North, as tenants, and any amendments thereto
Garrison SLB Agreement	The Purchase and Sale Agreement and Joint Escrow Instructions dated December 4, 2014, between Holdings and Garrison, and any amendments thereto
Garrison SLB Properties	Those nineteen (19) parcels of real estate (and improvements) located in Arizona, California, Nevada, Oregon, and Washington that the SLB Entities sold pursuant to the Garrison SLB Agreement
Genser	Ira Genser, at relevant times partner at Operating Advisory Group, LLC, consultants to Haggen
Haggen	The entire Haggen enterprise as it may have existed at the referenced time period, including all subsidiaries and affiliates, and without regard to whether any entity was a debtor at the referenced time period
Haggen SLB	Haggen SLB, LLC, an SLB Entity managed by its sole member, Acquisition
Haggen, Inc.	HH Legacy, Inc. (f/k/a Haggen, Inc.)
HHI	HHI, Corp.
Holdings	HH Liquidation, LLC (f/k/a Haggen Holdings, LLC)
IC	Comvest's Investment Committee, comprising voting members Falk, Marrero, Rodriguez, Clark and Caple, and observer Louis

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	Colosimo
Intercreditor Agreement	The Intercreditor Agreement dated as of August 21, 2015, among PNC, as agent for itself and the other lenders, PropCo North and PropCo South, as subordinated lenders, and Haggen, Inc., OpCo North, and OpCo South, as obligors
Individual Defendants	Defendants Anderson, Barnett, Caple, Clougher, Niegsch, Rodriguez, and Shaner
Marrero	Roger Marrero, Managing Partner of Comvest Partners, and member of Comvest's IC
Monitor	FTC-appointed monitor, Richard King
Niegsch	Michael Niegsch, at relevant times Vice President of Comvest and member of Comvest's Deal Team
OpCo Entities	OpCo North and OpCo South
OpCo North	HH OpCo North, LLC (f/k/a Haggen OpCo North, LLC), an OpCo Entity solely owned by Operations
OpCo South	HH OpCo South, LLC (f/k/a Haggen OpCo South, LLC), an OpCo Entity solely owned by Operations
Operations	HH Operations, LLC (f/k/a Haggen Operations Holding, LLC), the holding company for the OpCo Entities, whose membership interests are solely owned by Holdings
Owned Properties	The twenty-eight (28) parcels of real property (fee owned or ground leases), that Holdings contributed, directly or indirectly, to the PropCo Entities pursuant to the Contribution Agreements
Petition Date	September 8, 2015, the date the Debtors filed voluntary petitions for relief under the Bankruptcy Code
Plaintiff	The Official Committee of Unsecured Creditors
PNC	PNC Bank, National Association, Haggen's ABL lender
PropCo Advance	The $25 million advance provided by the PropCo Entities to the OpCo Entities pursuant to the PropCo Agreement
PropCo Agreement	That certain Term Loan and Security Agreement dated as of August 7, 2015, between the OpCo Entities and the PropCo Entities, and any amendments thereto
PropCo Entities	PropCo North, PropCo South and Property Holdings
PropCo Leases	The leases and subleases entered into between an OpCo Entity and a PropCo Entity, and any amendments thereto
PropCo North	Haggen Property North, LLC, a PropCo Entity managed by its sole member, Property Holdings
PropCo Notes	The promissory notes that the OpCo Entities issued in favor of PropCo North and PropCo South, respectively, on August 7, 2015
PropCo South	Haggen Property South, LLC, a PropCo Entity managed by its sole member, Property Holdings
Property Holdings	Haggen Property Holdings, LLC, a PropCo Entity managed by its sole member, Holdings
Property Holdings II	Haggen Property Holdings II, LLC, an SLB Entity managed by its sole member, Holdings

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Property Holdings III	Haggen Property Holdings III, LLC
Property Lender	Haggen Property Lender, LLC
PTO	Final Pretrial Order, entered on October 6, 2017, at Docket No. 142
Rodriguez	Cecilio Rodriguez, Defendant and CFO of Comvest, and member of Comvest's IC
Safeway	Safeway, Inc.
Sale Leaseback Transaction	The transactions whereby certain of the real property subject to Contribution Agreements was first transferred to an SLB Entity and then immediately resold to third parties
Scholl	Lucas Scholl, at all relevant times, an Associate with Comvest Partners and member of the Deal Team
Shaner	William Shaner, Defendant and at relevant times CEO of OpCo South
SLB Entities	Property Holdings II and Haggen SLB
SLB Properties	The Real Property that was subject to the Contribution Agreements and that was first transferred to an SLB Entity and then immediately resold to third parties
Spirit	Spirit Master Funding IV, LLC and its affiliates.
Spirit Lease	The Master Lease Agreement, together with any amendments thereto, and any related documents pursuant to which Spirit leased certain of the Spirit SLB Properties to Operations
Spirit SLB Agreement	The Purchase and Sale Agreement and Joint Escrow Instructions signed on November 24, 2014, by Holdings and Spirit, and any amendments thereto
Spirit SLB Properties	Those twenty (20) parcels of real estate (and improvements) located in Arizona, California, Nevada, Oregon, and Washington that the SLB Entities sold pursuant to the Spirit SLB Agreement
Supervalu	Supervalu, Inc.

All Citations

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Footnotes

1 The Findings of Fact and Conclusions of Law is corrected to remove the final sentence at the bottom of page 123.

2 These Findings of Fact and Conclusions of Law utilize many defined terms. The Court will use the glossary which the Committee provided. The glossary is at the rear of this document.

3 All of the entities were formed under the laws of Delaware.

4 Defendants contend that Haggen employed a “PropCo/OpCo” structure prior to the time Comvest invested in Haggen in 2011. *See*, e.g., Trial Tr. (10/17) at 269:17-270:2. While this contention is irrelevant, the evidence does not support it. Although it appears that the Haggen family owned a grocery (or “operational”) business known as Haggen, and a “PropCo type entity called Briar Development,” (a) the Haggen family “operated them very separately,” and (b) the real estate was never part of the grocery business. Indeed, there is no evidence that Haggen, Inc. ever transferred real estate to Briar Development or (as here) that it did so in anticipation of a broader corporate transaction. Trial Tr. (10/17) at 281:24-282:10.

5 As a technical matter, Garrison formed a joint venture with another firm, Cogent, and their joint venture was named “GIG TCG Wave Holdings, LLC,” Garrison (Rosenthal) Tr. 18:20-19:6. For convenience purposes only, the Court refers to this joint venture as “Garrison.”

6 Comvest actually "invested" $51.5 million, not $50 million, so that it could and did pay itself a "management fee" of 3%, or $1.5 million. Trial Tr. (10/17) at 47:24-48:6. The Committee seeks to recover this $1.5 million "management fee" under Counts 64 and 65 of the Complaint.

7 More precisely, the borrowers under the Fund IV Revolver were CIP IV and Comvest Investment Partners IV, L.P. PX 431.

8 The Court found Clark to be very careful and deliberate in his deposition testimony but does not share the Committee's view that he was "evasive."

9 In Count 78 of the Complaint, the Committee objects to the allowance of claims due to pending avoidance actions. D.I. 1 at ¶¶ 759–61. The Committee makes its objection based on Counts 1–65 of the Complaint. *Id.* at ¶ 760. For reasons set forth in these Conclusions of Law, the Court rejects Counts 1–65 of the Complaint. Under such circumstances, Count 78 also fails.

10 In Count 76 of the Complaint, the Committee asserts that "if any of the PropCo Leases are avoided, the PropCo Entities' Lease Claims must be disallowed." D.I. 1 at ¶ 750. This claim is just an extension of the Committee's fraudulent transfer claims related to the leases with the PropCo Entities (Counts 20–38). When those claims fail, this claim fails.

11 Notably, the Committee has not set forth any calculation of the "amounts paid under the PropCo leases" meaning that the Court has no ability to assign damages. The Committee's damages would be limited to the PropCo Leases that were not assumed in the bankruptcy, and the stores opened on a rolling basis over the course of months. The calculation of the amount of rent is difficult.

12 The Committee also adopted this five element test for unjust enrichment. D.I. 144 at 36 (*citing* *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010)).

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Edith Ramirez, Chairwoman** **Julie Brill** **Maureen K. Ohlhausen** **Joshua D. Wright** **Terrell McSweeny**

In the Matter of **Cerberus Institutional Partners V, L.P.** **a limited partnership;** **AB Acquisition LLC,** **a limited liability company;** **and** **Safeway Inc.,** **a corporation.**	**Docket No. C-4504**

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondents AB Acquisition LLC ("Albertson's") and Cerberus Institutional Partners V, L.P. ("Cerberus"), of Respondent Safeway Inc. ("Safeway"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Cerberus Institutional Partners V, L.P. is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 875 Third Avenue, New York, New York.

2. Respondent AB Acquisition LLC is a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho.

3. Respondent Safeway Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED THAT, as used in this Order, the following definitions shall apply:

A. "Cerberus" means Respondent Cerberus Institutional Partners V, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cerberus Institutional Partners V, L.P. (including Respondent Albertson's), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Albertson's" means Respondent AB Acquisition LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by AB Acquisition LLC (including Albertson's LLC, Albertson's Holdings LLC and, after the Acquisition is consummated, Safeway), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Safeway" means Respondent Safeway Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Safeway Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Cerberus, Albertson's, and Safeway, individually and collectively.

E. "Acquirer" means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.

F. "Acquisition" means Albertson's proposed acquisition of Safeway pursuant to the Acquisition Agreement.

G. "Acquisition Agreement" means the Agreement and Plan of Merger by and among AB Acquisition LLC, Albertson's Holdings LLC, Albertson's LLC, Saturn Acquisition Merger Sub, Inc., and Safeway Inc., dated as of March 6, 2014, as amended on April 7, 2014, and June 13, 2014.

H. "Assets To Be Divested" means the Supermarkets identified on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, or any portion thereof, and all rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Supermarket business operated at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and goodwill. Assets To Be Divested includes any of Respondents' other businesses or assets associated with, or operated in conjunction with, the Supermarket locations listed on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, including any fuel centers (including any convenience store and/or car wash associated with such fuel center), pharmacies, liquor stores, beverage centers, gaming or slot machine parlors, store cafes, or other related business(es) that customers reasonably associate with the Supermarket business operated at each such location. At each Acquirer's option, the Assets To Be Divested shall also include any or all inventory as of the Divestiture Date.

Provided, however, that the Assets To Be Divested shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names, *except* with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Remedial Agreement(s).

Provided, further, that in cases in which books or records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies or relevant excerpts of the materials containing such information. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

I. "Associated Food Stores" means Associated Food Stores, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Utah, with its offices and principal place of business located at 1850 West 2100 South, Salt Lake City, Utah.

J. "Associated Food Stores Divestiture Agreement" means the Amended and Restated Asset Purchase Agreement dated as of December 5, 2014, by and between Respondent Albertson's and Associated Food Stores, attached as non-public Appendix I, for the divestiture of the Schedule A Assets.

K. "AWG" means Associated Wholesale Grocers, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Kansas, with its offices and principal place of business located at 5000 Kansas Avenue, Kansas City, Kansas, and its direct and indirect subsidiaries, including LAS Acquisitions, LLC.

L. "AWG Divestiture Agreement" means the Amended and Restated Asset Purchase Agreement dated as of December 11, 2014, by and between Respondent Albertson's, AWG, and LAS Acquisitions, LLC (a wholly owned subsidiary of AWG) ("LAS"), attached as non-public Appendix II, for the divestiture of the Schedule B Assets.

M. "Divestiture Agreement" means any agreement between Respondents and an Acquirer (or a Divestiture Trustee appointed pursuant to Paragraph III of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to any of the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order. The term "Divestiture Agreement" includes, as appropriate, the Associated Food Stores Divestiture Agreement, the AWG Divestiture Agreement, the Haggen Divestiture Agreement, and the Supervalu Divestiture Agreement.

N. "Divestiture Date" means a closing date of any of the respective divestitures required by this Order.

O. "Divestiture Trustee" means any person or entity appointed by the Commission pursuant to Paragraph III of this Order to act as a trustee in this matter.

P. "Haggen" means Haggen Holdings, LLC, a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 2221 Rimland Drive, Bellingham, Washington.

Q. "Haggen Divestiture Agreement" means the Asset Purchase Agreement dated as of December 10, 2014, by and between Respondent Albertson's and Haggen, attached as non-public Appendix III, for the divestiture of the Schedule C Assets.

R. "Proposed Acquirer" means any proposed acquirer of any of the Assets To Be Divested submitted to the Commission for its approval under this Order; "Proposed Acquirer" includes, as appropriate, Associated Food Stores, AWG, Haggen, and Supervalu.

S. "Remedial Agreement(s)" means the following:

1. Any Divestiture Agreement; and

2. Any other agreement between Respondents and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer), including any Transition Services Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order.

T. "Relevant Areas" means: Coconino, Maricopa, Mohave, Pima, and Yavapai Counties in Arizona; Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura Counties in California; Deer Lodge, Missoula, and Silver Bow Counties in Montana; Clark County in Nevada; Baker, Clackamas, Deschutes, Jackson, Josephine, Klamath, Lane, Marion, and Washington Counties in Oregon; Collin, Denton, Dallas, and Tarrant Counties in Texas; Chelan, Clallam, Island, King, Kitsap, Pierce, Snohomish, Spokane, Thurston, and Walla Walla Counties in Washington; and Albany, Natrona, and Sheridan Counties in Wyoming.

U. "Schedule A Assets" means the Assets To Be Divested identified on Schedule A of this Order.

V. "Schedule B Assets" means the Assets To Be Divested identified on Schedule B of this Order.

W. "Schedule C Assets" means the Assets To Be Divested identified on Schedule C of this Order.

X. "Schedule D Assets" means the Assets To Be Divested identified on Schedule D of this Order.

Y. "Supervalu" means Supervalu Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 7075 Flying Cloud Drive, Eden Prairie, Minnesota.

Z. "Supervalu Divestiture Agreement" means the Asset Purchase Agreement dated as of December 5, 2014, by and between Respondent Albertson's and Supervalu, attached as non-public Appendix IV, for the divestiture of the Schedule D Assets.

AA. "Supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and/or distilled spirits.

BB. "Third Party Consents" means all consents from any person other than the Respondents, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

CC. "Transition Services Agreement" means an agreement that receives the prior approval of the Commission between one or more Respondents and an Acquirer of any of the assets divested under this Order to provide, at the option of each Acquirer, any services (or training for an Acquirer to provide services for itself) necessary to transfer the divested assets to the Acquirer in a manner consistent with the purposes of this Order.

II.

IT IS FURTHER ORDERED THAT:

A. Respondents shall divest the Assets To Be Divested, absolutely and in good faith, as ongoing Supermarket businesses, as follows:

1. Within 60 days of the date the Acquisition is consummated, the Schedule A Assets shall be divested to Associated Food Stores pursuant to and in accordance with the Associated Food Stores Divestiture Agreement;

2. Within 60 days of the date the Acquisition is consummated, the Schedule B Assets shall be divested pursuant to and in accordance with the AWG Divestiture Agreement to either (i) LAS or (ii) RLS Supermarkets, LLC (d/b/a Minyard Food Stores) (as LAS's assignee, pursuant to the acquisition agreement between LAS and RLS Supermarkets, LLC);

3. Within 150 days of the date the Acquisition is consummated, the Schedule C Assets shall be divested to Haggen pursuant to and in accordance with the Haggen Divestiture Agreement;

    Provided, however, that if any permit or license necessary for the divestiture of pharmacy assets has not been secured by Haggen as of the divestiture deadline, then the pharmacy assets may be divested following receipt of the necessary permit(s) and/or license(s), pursuant to and in accordance with the terms of the Pharmacy Transitional Services Agreement (attached as Exhibit 9(a) to the Haggen Divestiture Agreement);

4. Within 100 days of the date the Acquisition is consummated, the Schedule D Assets shall be divested to Supervalu pursuant to and in accordance with the Supervalu Divestiture Agreement.

B. *Provided, that,* if prior to the date this Order becomes final, Respondents have divested the Assets To Be Divested pursuant to Paragraph II.A and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Any Proposed Acquirer identified in Paragraph II.A is not an acceptable Acquirer, then Respondents shall, within five days of notification by the Commission, rescind such transaction with that Proposed Acquirer, and shall divest such assets as ongoing Supermarket businesses, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within 90 days of the date the Commission notifies Respondents that such Proposed Acquirer is not an acceptable Acquirer; or

2. The manner in which any divestiture identified in Paragraph II.A was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph III of this Order, to effect such modifications to the manner of divesting those assets to such Acquirer (including, but not limited to, entering into additional agreements or arrangements, or modifying the relevant Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.

C. Respondents shall obtain at their sole expense all required Third Party Consents relating to the divestiture of all Assets To Be Divested prior to the applicable Divestiture Date.

D. All Remedial Agreements approved by the Commission:

1. Shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of any such Remedial Agreement(s) shall constitute a violation of this Order; and

2. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligation of Respondents under such agreement. If any term of any Remedial Agreement(s) varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

E. At the option of each Acquirer of any Assets To Be Divested, and subject to the prior approval of the Commission, Respondents shall enter into a Transition Services Agreement for a term extending up to 180 days following the relevant Divestiture Date. The services subject to the Transition Services Agreement shall be provided at no more than Respondents' direct costs and may include, but are not limited to, payroll, employee benefits, accounting, IT systems, distribution, warehousing, use of trademarks or trade names for transitional purposes, and other logistical and administrative support.

F. Pending divestiture of any of the Assets To Be Divested, Respondents shall:

1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Divested, to minimize any risk of loss of competitive potential for the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except for ordinary wear and tear; and

2. Not sell, transfer, encumber, or otherwise impair the Assets To Be Divested (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Divested.

G. With respect to each Divestiture Agreement:

1. Respondents shall provide sufficient opportunity for the Proposed Acquirer to:

   a. Meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any or all of the employees of the Supermarket Assets To Be Divested pursuant to the Divestiture Agreement; and

   b. Make offers of employment to any or all of the employees of the Supermarket Assets To Be Divested pursuant to the Divestiture Agreement; and

2. Respondents shall: not interfere with the hiring or employing by the Acquirer of employees of the divested Supermarkets; remove any impediments within the control of Respondents that may deter those employees from accepting employment with such Acquirer (including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer); and not make any counteroffer to any employee who has an outstanding offer of employment, or who has accepted an offer of employment, from such Acquirer.

H. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED THAT:

A. If Respondents have not divested all of the Assets To Be Divested in the time and manner required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the remaining Assets To Be Divested in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, contract, deliver, or otherwise convey the relevant assets or rights that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order.

3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestitures or transfers required by the Order.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If,

however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

5. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities relating to the assets that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

6. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for any of the relevant Assets To Be Divested, and if the Commission determines to approve more than one such acquiring entity for such assets, the Divestiture Trustee shall divest such assets to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets required to be divested by this Order.

8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph III.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

12. The Divestiture Trustee shall report in writing to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture(s).

13. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

14. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties and responsibilities.

IV.

IT IS FURTHER ORDERED THAT:

A. Richard King shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix V ("Monitor Agreement") and Non-Public Appendix V-1 ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Remedial Agreement(s);

B. No later than one (1) day after the date the Acquisition is consummated, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Remedial Agreement(s), in a manner consistent with the purposes of the orders.

C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, the Order to Maintain Assets, and the Remedial Agreement(s), and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the orders and in consultation with the Commission.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve until at least the latter of (i) the completion of all divestitures required by this Order, (ii) the end of any Transition Services Agreement in effect with any Acquirer, and (iii) September 30, 2015.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order, the Order to Maintain Assets, and the Remedial Agreement(s).

E. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order, the Order to Maintain Assets, and the Remedial Agreement(s).

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph IV.G., the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph IV.F. of this Order.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order or the Order to Maintain Assets, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order and the Order to Maintain Assets. Within thirty (30) days from the date the Monitor receives the first such report, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.

I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission may require, among other things, the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

    1. The Commission shall select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after the notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

    2. Not later than ten (10) days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant terms of this Order, the Order to Maintain Assets, and the Remedial Agreement(s) in a manner consistent with the purposes of orders and in consultation with the Commission.

L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

M. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDERED THAT if Associated Food Stores purchases the Schedule A Assets pursuant to Paragraph II.A.1, Associated Food Stores shall not sell or otherwise convey, directly or indirectly, any of the Schedule A Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. *Provided*, *however*, that prior approval of the Commission is not required for the following buyers to acquire the following Supermarkets:

A. Missoula Fresh Market LLC may acquire Safeway Store Nos. 1573 and 2619, pursuant to the assignment and assumption agreement between Missoula Fresh Market LLC and Associated Food Stores;

B. Ridley's Family Markets, Inc. may acquire Albertson's Store No. 2063 and Safeway Store Nos. 433, 2468, and 2664, pursuant to the assignment and assumption agreement between Ridley's Family Markets and Associated Food Stores; and

C. Stokes Inc. may acquire Albertson's Store No. 2007 and Safeway Store No. 3256, pursuant to the assignment and assumption agreement between Stokes Inc. and Associated Food Stores.

Associated Food Stores shall comply with this Paragraph until three (3) years after the date this Order is issued.

VI.

IT IS FURTHER ORDERED THAT if LAS purchases the Schedule B Assets pursuant to Paragraph II.A.2, LAS shall not sell or otherwise convey, directly or indirectly, such Schedule B Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. *Provided*, *however*, that prior approval of the Commission is not required for RLS Supermarkets, LLC (d/b/a Minyard Food Stores) to acquire the Schedule B Assets, pursuant to the acquisition agreement between RLS Supermarkets, LLC and LAS. LAS shall comply with this Paragraph until three (3) years after the date this Order is issued.

VII.

IT IS FURTHER ORDERED THAT if Supervalu purchases the Schedule D Assets pursuant to Paragraph II.A.4, Supervalu shall not sell or otherwise convey, directly or indirectly, any of the Schedule D Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. Supervalu shall comply with this Paragraph until three (3) years after the date this Order is issued.

VIII.

IT IS FURTHER ORDERED THAT:

A. For a period of ten (10) years commencing on the date this Order is issued, Respondents shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

1. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in any of the Relevant Areas.

2. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in any of the Relevant Areas.

Provided, however, that advance written notification shall not apply to the construction of new facilities or the acquisition or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondents' offer to purchase or lease such facility.

Provided, further, that advance written notification shall not be required for acquisitions resulting in total holdings of one (1) percent or less of the stock, share capital, equity, or other interest in an entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in any of the Relevant Areas.

B. Said notification under this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IX.

IT IS FURTHER ORDERED THAT:

A. Within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II and III of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II and III of this Order. Respondents shall submit at the same time a copy of their reports concerning compliance with this Order to the Monitor. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II and III of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their reports copies of all material written communications to and from such parties, all non-privileged internal memoranda, reports, and recommendations concerning completing the obligations; and

B. One (1) year from the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

X.

IT IS FURTHER ORDERED THAT Respondents shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Respondents;

B. Any proposed acquisition, merger, or consolidation of Respondents; or

C. Any other change in the Respondents, including but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XI.

IT IS FURTHER ORDERED THAT, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and upon five (5) days' notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and

B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

XII.

IT IS FURTHER ORDERED THAT this Order shall terminate on July 2, 2025.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: July 2, 2015

Schedule A Assets

Montana Stores:

1. Safeway Store No. 1573, located at 3801 S. Reserve Street, Missoula, Montana (Missoula County).

2. Albertson's Store No. 2007, located at 1301 Harrison Avenue, Butte, Montana (Silver Bow County).

3. Safeway Store No. 2619, located at 800 W. Broadway Street, Missoula, Montana (Missoula County).

4. Safeway Store No. 3256, located at 1525 West Park, Anaconda, Montana (Deer Lodge County).

Wyoming Stores:

5. Albertson's Store No. 2063, located at 3112 East Grand Avenue, Laramie, Wyoming (Albany County).

6. Safeway Store No. 433, located at 1375 Cy Avenue, Casper, Wyoming (Natrona County).

7. Safeway Store No. 2468, located at 300 S.E. Wyoming Boulevard, Casper, Wyoming (Natrona County).

8. Safeway Store No. 2664, located at 169 Coffeen, Sheridan, Wyoming (Sheridan County).

Schedule B Assets

<u>Texas Stores</u>:

1. Albertson's Store No. 4182, located at 3630 Forest Lane, Dallas, Texas (Dallas County).

2. Albertson's Store No. 4132, located at 6464 E. Mockingbird Lane, Dallas, Texas (Dallas County).

3. Albertson's Store No. 4134, located at 4349 W. Northwest Highway, Dallas, Texas (Dallas County).

4. Albertson's Store No. 4140, located at 7007 Arapaho Road, Dallas, Texas (Dallas County).

5. Albertson's Store No. 4149, located at 1108 N. Highway 377, Roanoke, Texas (Denton County).

6. Albertson's Store No. 4168, located at 3524 McKinney Avenue, Dallas, Texas (Dallas County).

7. Albertson's Store No. 4197, located at 8505 Lakeview Parkway, Rowlett, Texas (Dallas Counties).

8. Albertson's Store No. 4297, located at 10203 E. Northwest Highway, Dallas, Texas (Dallas County).

9. Safeway (Tom Thumb) Store No. 2568, located at 4836 West Park Boulevard, Plano, Texas (Collin County

10. Safeway (Tom Thumb) Store No. 3555, located at 3300 Harwood Road, Bedford, Texas (Tarrant County).

11. Safeway (Tom Thumb) Store No. 3573, located at 3001 Hardin Boulevard, McKinney, Texas (Collin County).

12. Safeway (Tom Thumb) Store No. 3576, located at 4000 William D. Tate Avenue., Grapevine, Texas (Tarrant County).

Schedule C Assets

Arizona Stores:

1. Albertsons Store No. 967, located at 1416 E Route 66, Flagstaff, Arizona (Coconino County).

2. Albertsons Store No. 979, located at 34442 N. Scottsdale Road, Scottsdale, Arizona (Maricopa County).

3. Albertsons Store No. 983, located at 11475 E. Via Linda, Scottsdale, Arizona (Maricopa County).

4. Safeway Store No. 1726, located at 3655 W. Anthem Way, Anthem, Arizona (Maricopa County).

5. Albertsons Store No. 1027, located at 1980 McCulloch Boulevard, Lake Havasu City, Arizona (Mohave County).

6. Safeway Store No. 234, located at 8740 East Broadway, Tucson, Arizona (Pima County).

7. Safeway Store No. 2611, located at 10380 East Broadway Boulevard, Tucson, Arizona (Pima County).

8. Albertsons Store No. 972, located at 1350 N. Silverbell Road, Tucson, Arizona (Pima County).

9. Albertsons Store No. 953, located at 174 East Sheldon Street, Prescott, Arizona (Yavapai County).

10. Albertsons Store No. 965, located at 7450 E. Highway 69, Prescott Valley, Arizona (Yavapai County).

California Stores:

11. Albertsons Store No. 6323, located at 3500 Panama Lane, Bakersfield, California (Kern County).

12. Albertsons Store No. 6325, located at 7900 White Lane, Bakersfield, California (Kern County).

13. Albertsons Store No. 6379, located at 8200 East Stockdale Highway, Bakersfield, California (Kern County).

14. Albertsons Store No. 6315, located at 3830 W. Verdugo Avenue, Burbank, California (Los Angeles County).

15. Albertsons Store No. 6168, located at 3443 S. Sepulveda Boulevard, Los Angeles, California (Los Angeles County).

16. Albertsons Store No. 6169, located at 8985 Venice Boulevard Suite B, Los Angeles, California (Los Angeles County).

17. Safeway (Vons) Store No. 2062, located at 240 S. Diamond Bar Boulevard, Diamond Bar, California (Los Angeles County).

18. Albertsons Store No. 6329, located at 5038 W. Avenue North, Palmdale, California (Los Angeles County).

19. Albertsons Store No. 6107, located at 2130 Pacific Coast Highway, Lomita, California (Los Angeles County).

20. Albertsons Store No. 6127, located at 1516 S. Pacific Coast Highway, Redondo Beach, California (Los Angeles County).

21. Albertsons Store No. 6138, located at 615 N. Pacific Coast Highway, Redondo Beach, California (Los Angeles County).

22. Albertsons Store No. 6153, located at 21035 Hawthorne Boulevard, Torrance, California (Los Angeles County).

23. Albertsons Store No. 6189, located at 2115 Artesia Boulevard, Redondo Beach, California (Los Angeles County).

24. Albertsons Store No. 6160, located at 1636 W. 25th Street, San Pedro, California (Los Angeles County).

25. Albertsons Store No. 6164, located at 28090 South Western Avenue, San Pedro, California (Los Angeles County).

26. Albertsons Store No. 6388, located at 5770 Lindero Canyon Road, Westlake Village, California (Los Angeles County).

27. Albertsons Store No. 6397, located at 6240 Foothill Boulevard, Tujunga, California (Los Angeles County).

28. Albertsons Store No. 6162, located at 2627 Lincoln Boulevard, Santa Monica, California (Los Angeles County).

29. Albertsons Store No. 6154, located at 6235 East Spring Street, Long Beach, California (Los Angeles County).

30. Safeway (Vons) Store No. 2031, located at 23381 Mulholland Drive, Woodland Hills, California (Los Angeles County).

31. Safeway (Vons) Store No. 1669, located at 26518 Bouquet Canyon Road, Saugus, California (Los Angeles County).

32. Safeway (Pavilions) Store No. 1961, located at 27095 McBean Parkway, Santa Clarita, California (Los Angeles County).

33. Safeway (Pavilions) Store No. 2703, located at 25636 Crown Valley Parkway, Ladera Ranch, California (Orange County).

34. Albertsons Store No. 6575, located at 30922 Coast Highway, Laguna Beach, California (Orange County).

35. Safeway (Vons) Store No. 1676, located at 30252 Crown Valley Parkway, Laguna Niguel, California (Orange County).

36. Safeway (Vons) Store No. 1670, located at 28751 Los Alisos Boulevard, Mission Viejo, California (Orange County).

37. Albertsons Store No. 6517, located at 25872 Muirlands Boulevard, Mission Viejo, California (Orange County).

38. Albertsons Store No. 6504, located at 3049 Coast Highway, Corona Del Mar, California (Orange County).

39. Safeway (Pavilions) Store No. 2822, located at 3901 Portola Parkway, Irvine, California (Orange County).

40. Albertsons Store No. 6510, located at 21500 Yorba Linda Boulevard, Yorba Linda, California (Orange County).

41. Albertsons Store No. 6521, located at 21672 Plano Trabuco Road, Trabuco Canyon, California (Orange County).

42. Safeway (Vons) Store No. 2146, located at 550 E. First Street, Tustin, California (Orange County).

43. Safeway (Vons) Store No. 2324, located at 17662 17th Street, Tustin, California (Orange County).

44. Safeway (Vons) Store No. 2383, located at 72675 Highway 111, Palm Desert, California (Riverside County).

45. Safeway (Pavilions) Store No. 3218, located at 36-101 Bob Hope Drive, Rancho Mirage, California (Riverside County).

46. Safeway (Vons) Store No. 2597, located at 4200 Chino Hills Parkway Suite 400, Chino Hills, California (San Bernardino County).

47. Albertsons Store No. 6523, located at 8850 Foothill Boulevard, Rancho Cucamonga, California (San Bernardino County).

48. Albertsons Store No. 6589, located at 1910 N. Campus Avenue, Upland, California (San Bernardino County).

49. Albertsons Store No. 6701, located at 955 Carlsbad Village Drive, Carlsbad, California (San Diego County).

50. Albertsons Store No. 6720, located at 7660 El Camino Real, Carlsbad, California (San Diego County).

51. Safeway (Vons) Store No. 2006, located at 505 Telegraph Canyon Road, Chula Vista, California (San Diego County).

52. Safeway (Vons) Store No. 2336, located at 360 East H Street, Chula Vista, California (San Diego County).

53. Safeway (Vons) Store No. 3063, located at 870 Third Avenue, Chula Vista, California (San Diego County).

54. Albertsons Store No. 6747, located at 150 B Avenue, Coronado, California (San Diego County).

55. Albertsons Store No. 6771, located at 1608 Broadway Street, El Cajon, California (San Diego County).

56. Safeway (Vons) Store No. 2064, located at 2800 Fletcher Parkway, El Cajon, California (San Diego County).

57. Safeway (Vons) Store No. 2137, located at 5630 Lake Murray Boulevard, La Mesa, California (San Diego County).

58. Albertsons Store No. 6741, located at 14837 Pomerado Road, Poway, California (San Diego County).

59. Albertsons Store No. 6763, located at 12475 Rancho Bernardo Road, Rancho Bernardo, California (San Diego County).

60. Albertsons Store No. 6760, located at 10633 Tierrasanta Boulevard, San Diego, California (San Diego County).

61. Albertsons Store No. 6714, located at 2235 University Avenue, San Diego, California (San Diego County).

62. Albertsons Store No. 6715, located at 422 W. Washington Street, San Diego, California (San Diego County).

63. Albertsons Store No. 6742, located at 7895 Highland Village Place, San Diego, California (San Diego County).

64. Albertsons Store No. 6770, located at 10740 Westview Parkway, San Diego, California (San Diego County).

65. Albertsons Store No. 6772, located at 14340 Penasquitos Drive, San Diego, California (San Diego County).

66. Albertsons Store No. 6788, located at 730 Turquoise Street, San Diego, California (San Diego County).

67. Albertsons Store No. 6781, located at 5950 Balboa Avenue, San Diego, California (San Diego County).

68. Safeway (Vons) Store No. 2174, located at 671 Rancho Santa Fe Road, San Marcos, California (San Diego County).

69. Albertsons Store No. 6727, located at 9870 Magnolia Avenue, Santee, California (San Diego County).

70. Albertsons Store No. 6702, located at 2707 Via De La Valle, Del Mar, California (San Diego County).

71. Safeway (Vons) Store No. 2365, located at 3681 Avocado Avenue, La Mesa, California (San Diego County).

72. Albertsons (Lucky) Store No. 6228, located at 350 W. San Ysidro Boulevard, San Ysidro, California (San Diego County).

73. Safeway (Vons) Store No. 2333, located at 13439 Camino Canada, El Cajon, California (San Diego County).

74. Albertsons Store No. 6304, located at 1132 West Branch Street, Arroyo Grande, California (San Luis Obispo County).

75. Albertsons Store No. 6390, located at 8200 El Camino Real, Atascadero, California (San Luis Obispo County).

76. Safeway (Vons) Store No. 2312, located at 1130 Los Osos Valley Road, Los Osos, California (San Luis Obispo County).

77. Safeway (Vons) Store No. 2317, located at 1191 E. Creston Road, Paso Robles, California (San Luis Obispo County).

78. Albertsons Store No. 6372, located at 771 Foothill Boulevard, San Luis Obispo, California (San Luis Obispo County).

79. Albertsons Store No. 6409, located at 1321 Johnson Avenue, San Luis Obispo, California (San Luis Obispo County).

80. Safeway (Vons) Store No. 2425, located at 850 Linden Avenue, Carpinteria, California (Santa Barbara County).

81. Albertsons Store No. 6339, located at 1500 North H Street, Lompoc, California (Santa Barbara County).

82. Albertsons Store No. 6351, located at 2010 Cliff Drive, Santa Barbara, California (Santa Barbara County).

83. Albertsons Store No. 6352, located at 3943 State Street, Santa Barbara, California (Santa Barbara County).

84. Safeway (Vons) Store No. 2048, located at 163 S. Turnpike Road, Goleta, California (Santa Barbara County).

85. Safeway (Vons) Store No. 2691, located at 175 N. Fairview Avenue, Goleta, California (Santa Barbara County).

86. Albertsons Store No. 6369, located at 1736 Avenida De Los Arboles, Thousand Oaks, California (Ventura County).

87. Albertsons Store No. 6318, located at 7800 Telegraph Road, Ventura, California (Ventura County).

88. Albertsons Store No. 6317, located at 5135 Los Angeles Avenue, Simi Valley, California (Ventura County).

89. Albertsons Store No. 6363, located at 2800 Cochran Street, Simi Valley, California (Ventura County).

90. Safeway (Vons) Store No. 2163, located at 660 E. Los Angeles Avenue, Simi Valley, California (Ventura County).

91. Albertsons Store No. 6385, located at 2400 East Las Posas Road, Camarillo, California (Ventura County).

92. Albertsons Store No. 6217, located at 920 N. Ventura Road, Oxnard, California (Ventura County).

93. Safeway (Vons) Store No. 1793, located at 2100 Newbury Road, Newbury Park, California (Ventura County).

<u>Nevada Stores</u>:

94. Safeway (Vons) Store No. 2391, located at 1031 Nevada Highway, Boulder City, Nevada (Clark County).

95. Albertsons Store No. 6028, located at 2910 Bicentennial Parkway, Henderson, Nevada (Clark County).

96. Safeway (Vons) Store No. 1688, located at 820 S. Rampart Boulevard, Las Vegas, Nevada (Clark County).

97. Safeway (Vons) Store No. 2392, located at 7530 W. Lake Mead Boulevard, Las Vegas, Nevada (Clark County).

98. Safeway (Vons) Store No. 2395, located at 1940 Village Center Circle, Las Vegas, Nevada (Clark County).

99. Albertsons Store No. 6014, located at 575 College Drive, Henderson, Nevada (Clark County).

100. Albertsons Store No. 6019, located at 190 North Boulder Highway, Henderson, Nevada (Clark County).

<u>Oregon Stores</u>:

101. Albertsons Store No. 261, located at 1120 Campbell Street, Baker City, Oregon (Baker County).

102. Albertsons Store No. 503, located at 14800 S.E. Sunnyside Road, Clackamas, Oregon (Clackamas County).

103. Albertsons Store No. 521, located at 16199 Boones Ferry Road, Lake Oswego, Oregon (Clackamas County).

104. Albertsons Store No. 506, located at 1855 Blankenship Road, West Linn, Oregon (Clackamas County).

105. Albertsons Store No. 566, located at 10830 S.E. Oak Street, Milwaukie, Oregon (Clackamas County).

106. Albertsons Store No. 587, located at 1800 N.E. 3rd Street, Bend, Oregon (Deschutes County).

107. Albertsons Store No. 588, located at 61155 S. Highway 97, Bend, Oregon (Deschutes County).

108. Safeway Store No. 4292, located at 585 Siskiyou Boulevard, Ashland, Oregon (Jackson County).

109. Albertsons Store No. 501, located at 340 N.E. Beacon Drive, Grants Pass, Oregon (Josephine County).

110. Albertsons Store No. 537, located at 1690 Allen Creek Road, Grants Pass, Oregon (Josephine County).

111. Safeway Store No. 1766, located at 2740 S. 6th Street, Klamath Falls, Oregon (Klamath County).

112. Safeway Store No. 4395, located at 211 North Eighth Street, Klamath Falls, Oregon (Klamath County).

113. Albertsons Store No. 507, located at 1675 W. 18th Avenue, Eugene, Oregon (Lane County).

114. Albertsons Store No. 568, located at 3075 Hilyard Street, Eugene, Oregon (Lane County).

115. Safeway Store No. 311, located at 5415 Main Street, Springfield, Oregon (Lane County).

116. Albertsons Store No. 562, located at 5450 River Road North, Keizer, Oregon (Marion County).

117. Albertsons Store No. 559, located at 8155 S.W. Hall Boulevard, Beaverton, Oregon (Washington County).

118. Albertsons Store No. 565, located at 16200 S.W. Pacific Highway, Tigard, Oregon (Washington County).

119. Albertsons Store No. 576, located at 14300 S.W. Barrows Road, Tigard, Oregon (Washington County).

120. Albertsons Store No. 579, located at 16030 S.W. Tualatin Sherwood Road, Sherwood, Oregon (Washington County).

Washington Stores:

121. Albertsons Store No. 244, located at 1128 N. Miller, Wenatchee, Washington (Chelan County).

122. Albertsons Store No. 404, located at 114 E. Lauridsen Boulevard, Port Angeles, Washington (Clallam County).

123. Safeway Store No. 3518, located at 31565 SR 20 #1, Oak Harbor, Washington (Island County).

124. Albertsons Store No. 411, located at 15840 1st Avenue South, Burien, Washington (King County).

125. Albertsons Store No. 473, located at 12725 First Avenue South, Burien, Washington (King County).

126. Albertsons Store No. 425, located at 17171 Bothell Way NE, Seattle, Washington (King County).

127. Albertsons Store No. 470, located at 14215 SE Petrovitsky Road, Renton, Washington (King County).

128. Safeway Store No. 1468, located at 4300 N.E. 4th Street, Renton, Washington (King County).

129. Albertsons Store No. 403, located at 3925 236th Avenue NE, Redmond, Washington (King County).

130. Safeway Store No. 442, located at 15332 Aurora Avenue North, Shoreline, Washington (King County).

131. Albertsons Store No. 496, located at 31009 Pacific Highway South, Federal Way, Washington (King County).

132. Albertsons Store No. 443, located at 2900 Wheaton Way, Bremerton, Washington (Kitsap County).

133. Albertsons Store No. 492, located at 2222 NW Bucklin Hill Road, Silverdale, Washington (Kitsap County).

134. Safeway Store No. 1082, located at 3355 Bethel Road SE, Port Orchard, Washington (Kitsap County).

135. Safeway Store No. 2949, located at 4831 Point Fosdick Drive NW, Gig Harbor, Washington (Pierce County).

136. Albertsons Store No. 472, located at 2800 Milton Way, Milton, Washington (Pierce County).

137. Albertsons Store No. 468, located at 11012 Canyon Road East, Puyallup, Washington (Pierce County).

138. Safeway Store No. 551, located at 15805 Pacific Avenue South, Tacoma, Washington (Pierce County).

139. Albertsons Store No. 498, located at 111 S. 38th Street, Tacoma, Washington (Pierce County).

140. Albertsons Store No. 465, located at 8611 Steilacoom Boulevard SW, Tacoma, Washington (Pierce County).

141. Safeway Store No. 517, located at 7601 Evergreen Way, Everett, Washington (Snohomish County).

142. Albertsons Store No. 476, located at 19881 SR 2, Monroe, Washington (Snohomish County).

143. Albertsons Store No. 401, located at 17520 SR 9 Southeast, Snohomish, Washington (Snohomish County).

144. Safeway Store No. 1741, located at 1233 N. Liberty Lake Road, Liberty Lake, Washington (Spokane County).

145. Albertsons Store No. 415, located at 3520 Pacific Avenue SE, Olympia, Washington (Thurston County).

146. Albertsons Store No. 225, located at 450 N. Wilbur Avenue, Walla Walla, Washington (Walla Walla County).

Schedule D Assets

Washington Stores:

1.Albertson's Store No. 459, located at 14019 Woodinville-Duvall Road, Woodinville, Washington (King County).

2. Albertson's Store No. 477, located at 303 91st Avenue NE, Lake Stevens, Washington (Snohomish County).

APPENDIX I
Associated Food Stores Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX II

AWG Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX III

Haggen Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX IV

Supervalu Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX V

Monitor Agreement

APPENDIX V-1

Monitor Compensation

[Redacted From the Public Record Version]

West's Oregon Revised Statutes Annotated
Title 50. Trade Regulations and Practices
Chapter 646. Trade Practices and Antitrust Regulation (Refs & Annos)
Antitrust Law (Refs & Annos)

O.R.S. § 646.715

646.715. Declaration of purpose

Currentness

(1) The Legislative Assembly deems it to be necessary and the purpose of ORS 646.705 to 646.805 and 646.990 is to encourage free and open competition in the interest of the general welfare and economy of the state, by preventing monopolistic and unfair practices, combination and conspiracies in restraint of trade and commerce, and for that purpose to provide means to enjoin such practices and provide remedies for those injured by them.

(2) Without limiting the scope of ORS 646.705 to 646.805 and 646.990, it is the legislative purpose that it apply to intrastate trade or commerce, and to interstate trade or commerce involving an actual or threatened injury to a person or property located in this state. The decisions of federal courts in construction of federal law relating to the same subject shall be persuasive authority in the construction of ORS 646.705 to 646.805 and 646.990.

Credits
Laws 1975, c. 255, § 3; Laws 2001, c. 415, § 1.

Notes of Decisions (3)

O. R. S. § 646.715, OR ST § 646.715
Current through laws enacted in the 2022 Regular Session of the 81st Legislative Assembly, which convened February 1, 2022 and adjourned sine die March 4, 2022, in effect through December 31, 2022, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

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