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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Aerotec International, Inc.,**  
**Plaintiff,**  
**vs.**  
**Honeywell International, Inc.,**  
**Defendant.**

**2:10-cv-00433 JWS**  
**AMENDED\* ORDER AND OPINION**  
**[Re: Motions at Dockets 107 & 115]**

**I. MOTIONS PRESENTED**

At docket 107, Plaintiff Aerotec International, Inc. ("Aerotec") filed a motion for summary judgment on all of its claims against Defendant Honeywell International, Inc. ("Honeywell"). Aerotec's supporting statement of facts is at docket 108. Honeywell filed its response at docket 122, along with its controverting statement of facts filed at docket 123. Aerotec's reply is at docket 130, and additional facts in support of the reply are at dockets 131 and 132.

At docket 115, Honeywell filed a motion for summary judgment on all claims. Its supporting statement of facts is at docket 116. Aerotec's response is at docket 137, and its controverting statement of facts is at docket 138. Honeywell's reply is at docket 142. All documents related to the summary judgment motions were filed under seal. Oral argument was heard on December 5, 2013.

1 **II. BACKGROUND**

2 The case at hand relates to competition in the repair market for auxiliary power  
3 units (“APUs”). APUs are small engines in commercial aircraft that provide power  
4 needed for non-propulsion functions such as electric power for on-board electrical  
5 equipment and for air conditioning the cabin. Honeywell and Hamilton Sundstrand are  
6 the two major manufacturers of APUs, but Honeywell is the largest manufacturer of  
7 APUs for commercial aircraft. Honeywell manufactures and sells approximately a  
8 dozen different models of APUs.

9 APUs need routine maintenance, as well as repair and overhaul (“MRO”)  
10 services. When an airline does not perform its own MRO services, it typically will solicit  
11 bids from MRO service providers for long-term contracts. An airline usually has more  
12 than one type of aircraft, and therefore has to arrange MRO services for different  
13 models of APUs. Consequently, an airline will often contract for MRO services with  
14 more than one provider.

15 The most common MRO service agreements are Maintenance Service  
16 Agreements (“MSAs”) and Not-To-Exceed Agreements (“NTEs”). Both types generally  
17 have terms of three to seven years. Under a standard MSA, an MRO service provider  
18 charges an airline a negotiated rate based on number of hours spent on repairs, and in  
19 exchange the airline agrees to send all APUs of the model covered under the MSA to  
20 the MRO service provider for repairs and overhaul for the duration of the agreement.  
21 An NTE agreement is a commitment to repair a certain APU model for a price that will  
22 not exceed a negotiated amount. That is, an airline will agree to a set rate for labor and  
23 parts, but the total charge for any given APU repair job cannot exceed the amount  
24 negotiated by the parties.

25 Honeywell provides MRO services for Honeywell APU models. Indeed, it is the  
26 largest provider of MRO services for Honeywell APUs. Honeywell uses NTE  
27 agreements most often. There are at least 49 other MRO service providers around the  
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1 world that service Honeywell APUs. These include independent MRO service providers  
2 and airlines that service their own APUs and the APUs of other airlines.

3 APU component parts are often needed to complete an APU repair, and thus  
4 MRO service providers need to obtain component parts. Parts that come from the  
5 original APU manufacturer are known as "OEM parts." Honeywell sells Honeywell-  
6 branded OEM parts for its APUs. Other MRO service providers, airlines, brokers, and  
7 distributors purchase these parts to use or sell for Honeywell APU repairs. Thus, the  
8 independent MRO service providers that compete with Honeywell for repair contracts  
9 are also Honeywell's customers in the component parts market.

10 Some MRO service providers have contractual arrangements with Honeywell for  
11 technical support and/or component parts. In addition to straightforward supply  
12 agreements for component parts, these agreements take the form of storefront  
13 agreements and authorized service center ("ASC") agreements. If an MRO service  
14 provider has a storefront agreement with Honeywell, Honeywell will consign certain  
15 OEM parts at the provider's store for the provider's use, but Honeywell owns the  
16 inventory until the MRO service provider needs the inventory for an APU repair job.  
17 Honeywell is cutting back on storefront agreements. More common is an ASC  
18 agreement. An MRO service provider with an ASC agreement with Honeywell means  
19 that the provider is an authorized service center for selected models of Honeywell  
20 APUs. The ASC agreements are negotiated between the parties and can vary, but  
21 generally, as part of these ASC agreements, the MRO service provider receives some  
22 benefits for entering into such an agreement: discounts for the purchase of certain OEM  
23 parts, priority of OEM parts allocation, and a license to use Honeywell's intellectual  
24 property regarding the repair of APUs. In return, the ASC agreements typically impose  
25 certain obligations on the MRO service provider, such as requiring the provider to pay  
26 royalty fees to Honeywell, to use only Honeywell OEM parts for repairs of the APU  
27 models covered by the agreement, to maintain minimum inventory levels of OEM parts,  
28 and to use certain quality control measures.

1 MRO service providers that do not have agreements with Honeywell can buy  
2 OEM parts directly from Honeywell or from brokers, distributors, and others who have  
3 surplus parts to sell. They can also buy aftermarket substitute parts, which are APU  
4 parts that have been reverse engineered to replicate Honeywell-branded OEM parts.  
5 The suppliers go through a process known as “parts manufacturing authority” to obtain  
6 approval of these substitute parts; these parts are commonly referred to as “PMA”  
7 parts. PMA parts are less expensive than OEM parts but are less common and more  
8 difficult to obtain for certain Honeywell APU models. Typically, however, the  
9 aftermarket will have more PMA parts as well as more surplus OEM parts available for  
10 a certain APU model as that model ages and is installed in aircraft more frequently.

11 In order to compete with Honeywell, which is both the supplier of component  
12 parts and a large competitor for MRO service contracts, MRO providers promote their  
13 quick turn around time for repairs and availability of spare APUs for the customer’s use  
14 as benefits of their services over Honeywell’s services. Additionally, the independent  
15 MRO service providers that are not contractually obligated to use Honeywell parts can  
16 use PMA parts as a way to reduce costs; although, as discussed above, PMA parts are  
17 not always readily available.

18 Aerotec is an independent MRO service provider for several APU models,  
19 including both Honeywell APUs and Hamilton Sundstrand APUs. Aerotec competes  
20 with Honeywell in the MRO service market. Aerotec controls a small share of the  
21 market, with less than 1.0% of the Honeywell APUs in existence under contract for  
22 repair services. Aerotec is also a customer of Honeywell in the component parts  
23 market, buying Honeywell-branded OEM parts that it uses to perform MRO services on  
24 Honeywell APUs. It does not have a contractual agreement with Honeywell and thus  
25 buys parts on a purchase order to purchase order basis. The record reflects that in  
26 addition to Aerotec there are at least four other completely independent MRO service  
27 providers; that is, service providers who do not have any storefront or ACS agreements  
28 with Honeywell.

1 Aerotec filed a complaint against Honeywell, arguing that Honeywell has used its  
2 position as the predominant APU manufacturer and component parts supplier to  
3 behave in an anticompetitive manner in the MRO service market in violation of antitrust  
4 laws and price discrimination laws. Aerotec’s first claim alleges that Honeywell  
5 engaged in illegal tying in violation of Section 1 of the Sherman Act by using its power  
6 in the market for Honeywell APU component parts to tie sales of such parts to the sale  
7 of Honeywell’s MRO services. Aerotec’s second claim alleges Honeywell engaged in  
8 exclusive dealing and bundled pricing in violation of Section 1 of the Sherman Act by  
9 using “exclusive dealing agreements with APU repair customers to foreclose a  
10 substantial portion of the APU repair market from rival repair providers” and imposing “a  
11 severe pricing penalty if customers do not commit to using Honeywell repair services.”  
12 Aerotec’s third claim and forth claim for relief allege that Honeywell engaged in  
13 monopolization and attempted monopolization, respectively, in violation of Section 2 of  
14 the Sherman Act by effectively refusing to deal with Aerotec, failing to provide Aerotec  
15 reasonable access to facilities that are essential for it to compete in the repair market,  
16 using bundled pricing, and requiring exclusive dealing arrangements with repair  
17 customers. The fifth claim for relief alleges that Honeywell engaged in price  
18 discrimination in violation of the Robinson-Patman Act. Aerotec’s sixth claim for relief  
19 alleges Honeywell violated Arizona’s antitrust laws, and its seventh through tenth claims  
20 for relief allege that Honeywell committed various business torts in violation of Arizona  
21 law.

### 22 **III. STANDARD OF REVIEW**

23 Summary judgment is appropriate where “there is no genuine dispute as to any  
24 material fact and the movant is entitled to judgment as a matter of law.”<sup>1</sup> The  
25 materiality requirement ensures that “only disputes over facts that might affect the  
26 outcome of the suit under the governing law will properly preclude the entry of summary  
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28 <sup>1</sup>Fed. R. Civ. P. 56(a).

1 judgment.”<sup>2</sup> Ultimately, “summary judgment will not lie if the . . . evidence is such that a  
2 reasonable jury could return a verdict for the nonmoving party.”<sup>3</sup> However, summary  
3 judgment is mandated under Rule 56(c) “against a party who fails to make a showing  
4 sufficient to establish the existence of an element essential to that party’s case, and on  
5 which that party will bear the burden of proof at trial.”<sup>4</sup>

6 The moving party has the burden of showing that there is no genuine dispute as  
7 to any material fact.<sup>5</sup> The moving party need not present evidence; it need only point  
8 out the lack of any genuine dispute as to material fact.<sup>6</sup> Once the moving party has met  
9 this burden, the non-moving party must set forth evidence of specific facts showing the  
10 existence of a genuine issue for trial.<sup>7</sup> All evidence presented by the non-movant must  
11 be believed for purposes of summary judgment and all justifiable inferences must be  
12 drawn in favor of the non-movant.<sup>8</sup> However, the non-moving party may not rest upon  
13 mere allegations or denials, but must show that there is sufficient evidence supporting  
14 the claimed factual dispute to require a fact-finder to resolve the parties’ differing  
15 versions of the truth at trial.<sup>9</sup>

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20 <sup>2</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

21 <sup>3</sup>*Id.*

22 <sup>4</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

23 <sup>5</sup>*Id.* at 323.

24 <sup>6</sup>*Id.* at 323-25.

25 <sup>7</sup>*Anderson*, 477 U.S. at 248-49.

26 <sup>8</sup>*Id.* at 255.

27 <sup>9</sup>*Id.* at 248-49.

1 **IV. DISCUSSION**

2 **A. Section 1 of the Sherman Act**

3 Under Section 1 of the Sherman Act, “[e]very contract, combination in the form of  
4 trust or otherwise, or conspiracy, in restraint of trade or commerce among the several  
5 States, or with foreign nations, is declared to be illegal.”<sup>10</sup> The Supreme Court has  
6 interpreted Section 1 narrowly, proscribing “only unreasonable restraints.”<sup>11</sup> Thus, to  
7 establish a Section 1 claim, Aerotec must show: “1) that there was a contract,  
8 combination, or conspiracy; 2) that the agreement unreasonably restrained trade under  
9 either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint  
10 affected interstate commerce.”<sup>12</sup>

11 Here, Aerotec asserts that Honeywell enters into agreements with customers in  
12 the APU repair market that unreasonably restrain trade. First, it argues that Honeywell  
13 forecloses competition in the APU repair sector by tying Honeywell-branded APU parts  
14 to Honeywell’s MRO services in a manner that is per se illegal. Second, it argues that  
15 Honeywell forecloses competition by using exclusive dealing agreements with APU  
16 repair customers. The court will address each claim in turn.

17 **1. Tying**

18 Aerotec asserts that Honeywell engages in illegal tying. “A tying arrangement  
19 exists when a seller conditions the sale of one product or service (the tying product or  
20 service) on the buyer’s purchase of another product or service (the tied product or  
21 service).”<sup>13</sup> Not all tying arrangements are illegal. As the Supreme Court has held:

22 [T]he essential characteristic of an invalid tying arrangement lies in the seller’s  
23 exploitation of its control over the tying product to force the buyer into the

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24 <sup>10</sup>15 U.S.C. §1.

25 <sup>11</sup>*State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

26 <sup>12</sup>*Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1155 (9th 2001) (quoting  
27 *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991)).

28 <sup>13</sup>*Id.* at 1157.

1 purchase of a tied product that the buyer either did not want at all, or might  
2 have preferred to purchase elsewhere on different terms.<sup>14</sup>

3 Courts “generally evaluate whether a practice unreasonably restrains trade in  
4 violation of Section 1 under the ‘rule of reason,’” which seeks to distinguish between  
5 restraints with anticompetitive effects and those with stimulating effects on competition  
6 based on the actual market conditions.<sup>15</sup> However, certain tying arrangements can be  
7 per se violations. When a seller has sufficient market power in the tying product or  
8 service so that the existence of coercion is probable and there is a substantial potential  
9 for impact on competition, a tying arrangement can be proscribed without looking at the  
10 actual market conditions. For a tying claim to be considered a per se violation, “a  
11 plaintiff must prove: (1) that the defendant tied together the sale of two distinct products  
12 or services; (2) that the defendant possesses enough economic power in the tying  
13 product market to coerce its customers into purchasing the tied product; and (3) that the  
14 tying arrangement affects a ‘not insubstantial volume of commerce’ in the tied product  
15 market.”<sup>16</sup>

16 Aerotec asserts that Honeywell’s practices amount to per se illegal tying,  
17 claiming that Honeywell uses its dominant position in the market for Honeywell APU  
18 parts to coerce APU owners, who need Honeywell APU component parts for APU  
19 repairs, to purchase MRO services from Honeywell. To show that parts and repair  
20 services are two distinct products or services that Honeywell has tied together, Aerotec  
21 relies on *Eastman Kodak Co. v. Image Technical Services*.<sup>17</sup> In *Eastman Kodak*, the  
22 plaintiffs were independent repair providers for Kodak photocopier machines. The  
23 plaintiffs alleged that Kodak, the manufacturer and parts supplier for Kodak machines

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24 <sup>14</sup>*Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated on other*  
25 *grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

26 <sup>15</sup>*Brantley*, 675 F.3d at 1197.

27 <sup>16</sup>*Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008).

28 <sup>17</sup>504 U.S. 451 (1992).



1 and also a repair provider for its own machines, only sold replacement parts to machine  
2 owners who agreed not to buy repair services from the plaintiffs— the independent  
3 repair providers. In other words, Kodak refused to sell the needed Kodak machine  
4 parts to plaintiffs and to machine owners who wanted to buy component parts and have  
5 an independent repair provider conduct the repairs. The Supreme Court held that in  
6 these circumstances, parts and repair were two distinct products and that there was  
7 sufficient evidence of a tie between them.<sup>18</sup> The basis for the Court’s conclusion that  
8 there was a tie between parts and service was not simply that Kodak refused to sell  
9 parts to independent repair providers, but rather that Kodak only sold parts to third  
10 parties on the condition that they buy repair service from Kodak or repair the machines  
11 themselves.<sup>19</sup> There was evidence that certain customers wanted to buy only parts  
12 from Kodak and not a bundled parts/service package, but that there was no option to do  
13 so.<sup>20</sup> Those were the customers foreclosed by the tie.

14 Aerotec’s reliance on *Eastman Kodak* is misplaced. Aerotec alleges that it seeks  
15 to sell the same parts/repair service to APU owners that Honeywell provides, but that it  
16 is foreclosed from doing so because Honeywell limits its access to component parts  
17 needed to complete repairs. Aerotec does not allege that customers are foreclosed  
18 from buying its MRO services because Honeywell conditions sale of its parts on an  
19 agreement not to buy MRO services from an independent provider. Aerotec does not  
20 allege that it attempts to provide unbundled MRO service to customers who obtain their  
21 own Honeywell parts but cannot do so because Honeywell will not sell parts to anyone  
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25 <sup>18</sup>*Id.* at 463.

26 <sup>19</sup>*Id.* at 463 n.8; see also 10 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*  
27 ¶1748 at 253 (3d ed. 2011).

28 <sup>20</sup>*Eastman Kodak*, 504 U.S. at 458, 463.

1 unless they also use Honeywell MRO services.<sup>21</sup> It is undisputed Honeywell sells parts  
2 to airlines and other Honeywell customers without conditioning those sales on the  
3 purchase of Honeywell’s MRO services. There is also evidence that Honeywell sells  
4 parts to other MRO service providers, including Aerotec.<sup>22</sup> Thus, *Eastman Kodak* does  
5 not govern the outcome here.

6 Aerotec also argues that Honeywell’s bundling of parts and repairs at a discount  
7 is effectively a tie between parts and repairs, because it induces customers to buy  
8 repair services from Honeywell as opposed to buying repair services from other MRO  
9 providers. Yet, there is no evidence that customers are *foreclosed* from using Aerotec  
10 by a tie. Even if the APU parts and repair services are tied, Aerotec has not presented  
11 evidence that would prove the second element needed to prove an illegal tie.  
12 “Essential to the second element of a tying claim is proof that the seller *coerced* a buyer  
13 to purchase the tied product.”<sup>23</sup> There is no evidence from which the court can  
14 presume coercion. In *Cascade Health*, the Ninth Circuit noted that a small proportion of  
15 separate sales can show that a bundled discount is as effective as a refusal to sell the  
16 tying product separately.<sup>24</sup> Based on the facts of *Cascade Health*, where only 14% of  
17 customers made separate purchases, the Ninth Circuit concluded that the low

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19 <sup>21</sup> This distinction is discussed in 10 *Areeda & Hovenkamp*, *supra* note 19, at ¶1748 at  
20 253:

21 Rather than merely seeking to sell the same bundle to machine  
22 owners, the plaintiffs sought to sell unbundled service to customers  
23 of Kodak parts. Only those customers are foreclosed by a tie.  
Customers desiring only the parts/service bundle buy a single  
finished product, for they are not foreclosed to the plaintiffs by a tie  
but only by Kodak’s refusal to sell parts to the plaintiffs.

24 <sup>22</sup>Doc. 116-3. Aerotec does not dispute this fact but argues that the delivery of such  
25 parts are untimely. This issue will be addressed in relation to Aerotec’s Section 2 claims, but it  
26 is not relevant to the tying claim. The relevant issue is whether any customers are foreclosed  
from Aerotec because of a tie.

27 <sup>23</sup>*Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003).

28 <sup>24</sup>515 F.3d at 914.

1 percentage of separate sales indicated some degree of coercion sufficient for the issue  
2 to go to the jury.<sup>25</sup> Here, using Aerotec's figures, at least 46% of APU repairs involve  
3 the purchase of parts separate from Honeywell's MRO services.<sup>26</sup> That relatively high  
4 percentage of separate sales prevents the court from presuming coercion based on the  
5 bundled discount.<sup>27</sup> Indeed, because there is a sufficiently large percentage of  
6 customers not using Honeywell for repair services, the court actually presumes that  
7 Honeywell has not engaged in tying.<sup>28</sup> Aerotec correctly notes that the 46% figure  
8 improperly includes airlines who repair their own APUs and therefore do not purchase  
9 repair services. However, Aerotec fails to provide any evidence to indicate what the  
10 correct percentage of separate purchasers should be after taking into account such  
11 airlines, and the undisputed evidence shows that Honeywell sells parts separate from  
12 repairs. It may be added that some of the airlines perform MRO services for others.

13 Aerotec has failed to present any direct evidence of coercion. There is no  
14 evidence that Honeywell only sells needed component parts to customers who also  
15 commit to using its MRO services or to those MRO service providers who are affiliated  
16 with Honeywell through an ASC or storefront agreement.<sup>29</sup> There is no testimony from  
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18 <sup>25</sup>*Id.* at 915.

19 <sup>26</sup>Aerotec does not dispute this figure. Doc. 116 at ¶ 9; Doc. 138 at ¶ 9.

20 <sup>27</sup>See 10 *Areeda & Hovenkamp*, *supra* note 19, ¶1758b at 363 (suggesting separate  
21 sales below 10% presumptively indicates a de facto tie).

22 <sup>28</sup>*Id.* ¶1758 at 358 (suggesting a “presumption of non-tying if *either* (1) the bundle  
23 passes the attribution test or (2) a sufficiently large number of customers are observed who  
24 purchase the secondary product from someone other than the defendant”). Aerotec argues  
25 that Honeywell's bundled discount does not pass the attribution test. However, as explained in  
26 10 *Areeda & Hovenkamp*, *supra* note 19, ¶1758 at 358, the court will presume non-tying even  
if the bundle does not pass the attribution test as long as there is sufficient evidence of  
separate sales. Moreover, Aerotec has not demonstrated that Honeywell's bundled pricing fails  
the attribution test, as discussed in detail below.

27 <sup>29</sup>*Paladin*, 328 F.3d at 1160 (noting evidence of coercion can consist of a written  
28 contract with a seller with market power that contained a provision requiring a buyer to  
purchase the tied product or deposition testimony by a buyer confirming that a defendant

1 customers that it was a matter of economic imperative to choose Honeywell as the  
2 repair provider.<sup>30</sup> While Aerotec presents evidence to show that Honeywell uses long-  
3 term repair contracts, it provides no evidence to show that the duration or terms of  
4 these contracts are either out of the ordinary for the MRO service market or onerous.<sup>31</sup>

## 5 **2. Exclusive Dealing**

6 Aerotec alleges that Honeywell's exclusive dealing arrangements with its MRO  
7 service customers violate Section 1 of the Sherman Act. "An exclusive dealing  
8 arrangement is an agreement in which a buyer agrees to purchase certain goods or  
9 services only from a particular seller for a certain period of time."<sup>32</sup> Exclusive dealing  
10 arrangements have recognized economic benefits and pro-competitive effects and  
11 "generally pose little threat to competition."<sup>33</sup> Consequently, exclusive dealing  
12 arrangements are not per se violations of Section 1; they only violate Section 1 when  
13 used by a dominant supplier of a product or service to unreasonably deprive other  
14 suppliers of a market.<sup>34</sup> Therefore, the "rule of reason" must be used to determine  
15 whether the challenged exclusive dealing arrangements have anticompetitive effects.  
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20 refused to sell the needed tying product unless the buyer also bought the tied product).

21 <sup>30</sup>*Cascade Health*, 515 F.3d at 914-15 (finding evidence of coercion based in part on a  
22 customer's testimony that she had been "held hostage" by defendant's pricing practices).

23 <sup>31</sup>*Paladin*, 328 F.3d at 1160 (noting that evidence of coercion has been found when a  
24 plaintiff produces a written contract that required the purchase of the tied product on "extremely  
25 onerous terms").

26 <sup>32</sup>*ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012).

27 <sup>33</sup>*Id.*; see also *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d  
28 991, 996 (9th Cir. 2010).

<sup>34</sup>*ZF Meritor*, 696 F.3d at 270; *Allied Orthopedic*, 592 F.3d at 996.

1 The Ninth Circuit has adopted a burden-shifting approach to the rule of reason  
2 analysis.<sup>35</sup> “The plaintiff bears the initial burden of showing that the restraint produces  
3 significant anticompetitive effects within the relevant product and geographic markets.”<sup>36</sup>  
4 As part of this burden, the plaintiff must show that the defendant has market power in  
5 the defined market and that the challenged conduct restrains trade in that market.<sup>37</sup> It is  
6 essential for the plaintiff to demonstrate that the challenged conduct injures  
7 competition.<sup>38</sup>

8 Aerotec has not met its initial burden to show that Honeywell’s customer  
9 agreements with exclusive dealing provisions have significant anticompetitive effects on  
10 the repair market for Honeywell APUs. Aerotec asserts that Honeywell’s power in the  
11 repair market alone is sufficient evidence for the court to find that its exclusive dealing  
12 agreements probably exclude rivals. But it is not enough that exclusive dealing  
13 agreements have the probable effect of foreclosing competition.<sup>39</sup> To show harm to  
14 competition from an exclusive dealing arrangement, the plaintiff must show that the  
15 arrangement “*actually* foreclosed competition” in a substantial share of the relevant  
16 market.<sup>40</sup>

17 Aerotec presents evidence that it lost business to Honeywell and that its market  
18 share declined from .71% to .55%. Such evidence is insufficient; plaintiffs like Aerotec  
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20 <sup>35</sup>See *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (applying a  
21 burden-shifting analysis to determine whether the restraint’s harm to competition outweighs its  
22 procompetitive effects).

23 <sup>36</sup>*Id.*

24 <sup>37</sup>See *Bhan*, 929 F.2d at 1413.

25 <sup>38</sup>*Les Shockley Racing, Inc. v. Nat’l Hot Rod Ass’n*, 884 F.2d 504, 507 (9th Cir. 1989);  
26 see also *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979) (stating that proof of  
impact on competition “is an absolutely essential element” in a rule of reason case).

27 <sup>39</sup>*Allied Orthopedic*, 592 F.3d at 996 n.1.

28 <sup>40</sup>*Id.* at 996, 996 n.1.

1 must “prove a reduction of competition in the market in general and not mere injury to  
2 their own positions as competitors in the market.”<sup>41</sup> Assuming the relevant market is the  
3 Honeywell APU repair market, as opposed to the APU repair market as a whole, and  
4 that Honeywell controls about 50% of that market as Aerotec asserts, it has not  
5 produced any data to show how much of that repair market is foreclosed by  
6 Honeywell’s customer agreements which contain exclusive dealing provisions. Aerotec  
7 merely argues that “undoubtedly, the vast majority of [Honeywell’s] 50% [market share]  
8 is locked in with long-term exclusive repair contracts.”<sup>42</sup> It does not provide any  
9 evidence to show how many customers are locked into long-term agreements. This  
10 evidence is necessary because it is undisputed that Honeywell also has non-exclusive  
11 agreements with its repair customers.<sup>43</sup> Moreover, there is nothing in the record to  
12 prove that Aerotec’s decline in business after 2008 was also experienced by other MRO  
13 service providers during this time frame or that these declines constitute “substantial  
14 foreclosure.” While injury to a single competitor can constitute injury to competition  
15 when the relevant market is both narrow and discrete and the market participants are  
16 few,<sup>44</sup> here, the evidence shows that there are at least forty-nine MRO service  
17 providers.<sup>45</sup> Any foreclosure of Aerotec, with its small market share, does not affect  
18 competition in the market in general.

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23 <sup>41</sup>*Les Schockley*, 884 F.2d at 508.

24 <sup>42</sup>Doc. 137 at p. 21.

25 <sup>43</sup>Doc. 116 at ¶¶ 34-36; Doc. 138 at ¶¶ 34-36.

26 <sup>44</sup>*Les Shockley*, 884 F.2d at 508-09.

27 <sup>45</sup>See doc. 138 at ¶ 9 (challenging the inclusion of 16 of the 65 repair firms listed by  
28 Honeywell, leaving 49 unchallenged).

1 **B. Section 2 of the Sherman Act**

2 Section 2 of the Sherman Act makes it unlawful for a person to monopolize or  
3 attempt to monopolize “any part of the trade or commerce among the several States.”<sup>46</sup>  
4 The possession of monopoly power alone is not an antitrust violation. It must be  
5 accompanied by an element of anticompetitive conduct.<sup>47</sup> Thus, the elements of a  
6 Section 2 monopolization claim include both “the possession of monopoly power in the  
7 relevant market” and “the willful acquisition or maintenance of that power as  
8 distinguished from growth or development as a consequence of a superior product,  
9 business acumen, or historic accident.”<sup>48</sup> The elements of a Section 2 attempted  
10 monopolization claim are similar but “differ[ ] primarily in the requisite intent and the  
11 necessary level of monopoly power.”<sup>49</sup> They include predatory or anticompetitive  
12 conduct on the part of the defendant with a “specific intent to monopolize” and “a  
13 dangerous probability of achieving monopoly power.”<sup>50</sup> In addition, private parties  
14 alleging such antitrust violations must demonstrate antitrust injury,<sup>51</sup> which is “injury of  
15 the type the antitrust laws were intended to prevent and that flows from that which  
16 makes defendants’ acts unlawful.”<sup>52</sup> To prevail on either a monopolization claim or an  
17 attempted monopolization claim, a plaintiff must demonstrate that defendant engaged  
18 in anticompetitive conduct and that the harm suffered flowed from that conduct. Thus,  
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20 <sup>46</sup>15 U.S.C. § 2.

21 <sup>47</sup>*Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407  
22 (2004).

23 <sup>48</sup>*Id.*

24 <sup>49</sup>*Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir.  
25 1997) (“*Eastman Kodak II*”).

26 <sup>50</sup>*Cascade Health*, 515 F.3d at 893.

27 <sup>51</sup>*Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

28 <sup>52</sup>*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

1 the court will first consider whether Aerotec has shown the requisite anticompetitive  
2 conduct and injury.

3 **1. Refusal to deal/ denial of essential facilities**

4 Aerotec alleges that Honeywell violates Section 2 by refusing to deal with  
5 Aerotec on reasonable terms and/or denying it access to essential APU component  
6 parts. It argues that Honeywell subjects it to an onerous ordering system, delays  
7 shipments of needed component parts, refuses to provide accurate information about  
8 delivery of parts, charges it higher prices for parts than it does non-rivals, refuses to  
9 provide it with technical data, and implements restrictive payment terms. In addition to  
10 raising arguments as to why it has not engaged in unlawful conduct under the “refusal  
11 to deal” theory of monopolization, Honeywell urges the court to consider the lack of  
12 antitrust injury generally.

13 The purpose of antitrust law is to preserve competition for the benefit of  
14 consumers.<sup>53</sup> “Even an act of pure malice by one business competitor against another  
15 does not, without more, state a claim under the federal antitrust laws.”<sup>54</sup> The purpose of  
16 antitrust law is not to protect market participants from the market; it is to protect the  
17 public from market failure.<sup>55</sup> Whether or not the defendant’s conduct is anticompetitive  
18 requires the court to focus on whether the alleged unlawful conduct harms prices or  
19 quality of the goods or services in the relevant market.<sup>56</sup>

20 Here, Aerotec asserts that it has suffered injuries as a result of Honeywell’s  
21 unreasonable business terms. More specifically, Aerotec argues that it has put forth

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23 <sup>53</sup>*Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999).

24 <sup>54</sup>*Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

25 <sup>55</sup>*Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

26 <sup>56</sup>*See Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (“[T]he  
27 antitrust laws are only concerned with acts that harm ‘allocative efficiency and raise[ ] the price  
28 of goods above their competitive level or diminish[ ] their quality.’” (quoting *Rebel Oil*, 51 F.3d at  
1433)).



1 enough evidence to show, or at least create a genuine issue of fact for trial, that it lost  
2 good will and suffered a reduced market share because of Honeywell's actions. But  
3 such evidence is not enough. Aerotec must show that these injuries, even assuming  
4 they are caused by Honeywell's conduct, are not just the product of vigorous  
5 competition. Aerotec must put forth evidence that Honeywell's conduct relating to the  
6 supply of parts and technical data, harms the competitive process by raising prices for  
7 MRO repair customers or diminishing the quality of MRO services market-wide.

8 Aerotec relies on the "refusal to deal" theory of monopolization set forth in *Aspen*  
9 *Skiing Co. v. Aspen Highlands Skiing Corp.*<sup>57</sup> to argue that Honeywell's conduct was  
10 anticompetitive. Generally speaking, the Sherman Act does not restrict a business's  
11 right to choose the parties with whom it will deal.<sup>58</sup> *Aspen Skiing* presents a limited  
12 exception to that general proposition.<sup>59</sup> *Aspen Skiing* concerned the four mountains  
13 comprising the ski market in Aspen, Colorado. The defendant owned three of the  
14 mountains and the plaintiff owned the fourth. For years the parties sold a multi-day,  
15 area-wide lift ticket which allowed the purchasers to ski on any of the mountains. The  
16 defendant stopped offering the joint ticket and refused to deal with the plaintiff so that  
17 the plaintiff could provide customers a comprehensive lift ticket. The Supreme Court  
18 upheld the verdict in favor of the plaintiff, noting the long history of the voluntary  
19 business relationship, the abrupt termination of the arrangement, and the lack of any  
20 pro-competitive explanation for the change.<sup>60</sup>

21 Since *Aspen Skiing*, the Supreme Court has significantly restricted its reach.  
22 The Court has warned that *Aspen Skiing* "is at or near the outer boundary of § 2

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25 <sup>57</sup>472 U.S. 585 (1985)

26 <sup>58</sup>*Trinko*, 540 U.S. at 408.

27 <sup>59</sup>*Id.*

28 <sup>60</sup>*Aspen Skiing*, 472 U.S. at 608, 610-11.

1 liability.”<sup>61</sup> *Aspen Skiing* involved an outright refusal to deal. Here, it is undisputed that  
2 Honeywell does, in fact, sell parts to Aerotec. Aerotec instead alleges that Honeywell’s  
3 business practices towards it are unfair and onerous, but “courts are loathe to interfere  
4 when the claim is that the defendant is actually dealing, but only on disadvantageous or  
5 onerous terms.”<sup>62</sup> Such interference requires the court to manage the parties’ business  
6 relations. Indeed, Aerotec asks the court to enjoin Honeywell from engaging in this type  
7 of conduct in the future. That would require the court to identify proper prices,  
8 quantities, allocations of APU parts, and determine what proprietary information  
9 Honeywell should turn over to Aerotec, something which it is ill-suited to do as noted by  
10 the Supreme Court.<sup>63</sup>

11 Although the rationale in *Aspen Skiing* reaches far enough to include situations  
12 where the terms of dealing are unreasonable,<sup>64</sup> this is not a situation where the  
13 unreasonable terms are so onerous that they act as an outright refusal. While  
14 Honeywell’s conduct in relation to Aerotec may have been frustrating, damaging, and  
15 even malicious, the evidence shows that Aerotec continued to do business and obtain  
16 parts from Honeywell in addition to other sources; thus, there is no indirect refusal  
17 situation present here.

18 Furthermore, there is no evidence that Honeywell’s conduct caused harm to the  
19 competitive process. There is no evidence in the record to show that Aerotec’s  
20 problems with Honeywell in terms of acquiring component parts and technical data  
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22 <sup>61</sup>*Trinko*, 540 U.S. at 409.

23 <sup>62</sup>3B Areeda & Hovenkamp, *supra* note 19, ¶774e at 279.

24 <sup>63</sup>*Trinko*, 540 U.S. at 408 (noting that “[e]nforced sharing [ ] requires antitrust courts to  
25 act as central planners, identifying the proper price, quantity, and other terms of dealing,” and  
26 that courts are “ill-suited” for such a role).

27 <sup>64</sup>*See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132-34 (9th Cir. 2004)  
28 (noting that dealing with a competitor only on unreasonable terms and conditions can amount to  
a practical refusal to deal).

1 impacts the price or quality of MRO services generally. Indeed, the evidence that  
2 Honeywell has delayed shipments of replacement parts or withheld some technical  
3 data, for whatever reason, does not show an anticompetitive effect. Rather, it suggests  
4 that Honeywell's conduct, even though possibly injurious to Aerotec, has a pro-  
5 competitive effect on the market as a whole, because dissatisfaction with Honeywell's  
6 ability to provide parts and data for repairs actually increases the demand for  
7 alternatives to Honeywell-branded APU parts.

8 Aerotec argues the short-term pro-competitive effects will give way to long-term  
9 anticompetitive effects. Aerotec argues that Honeywell's actions in failing to provide  
10 adequate parts service to independent MRO service providers in the parts market will  
11 push independent repair firms, like itself, out of business, which will eventually allow  
12 Honeywell to increase its market share in the MRO service market and permanently  
13 increase prices and diminish quality of service. There is no evidence to support  
14 Aerotec's argument. The evidence presented by Aerotec shows that at most Honeywell  
15 has about a 50% share in the Honeywell APU repair market, which is insufficient to  
16 establish that Honeywell threatens to obtain sufficient market power and then  
17 permanently increase repair prices.<sup>65</sup> Nothing in the record suggests that other MRO  
18 service providers are also being pushed out by Honeywell's delays or parts allocation,  
19 or that the competitive bidding process for MRO service on Honeywell APUs is failing  
20 for lack of replacement parts or technical data. Indeed, the evidence suggests  
21 otherwise. It is undisputed that there are at least forty-nine other MRO service  
22 providers operating in competition with Honeywell for Honeywell APU repairs,<sup>66</sup> and that  
23 these providers compete for service contracts through a bidding process. It is also  
24 undisputed that there is competition in the bidding process with at least four to five

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26 <sup>65</sup>See *Eastman Kodak II*, 125 F.3d at 1206 (noting that a dominant share of the market  
27 often carries with it the power to control output and prices and that courts generally require a  
28 65% market share to show dominant share).

<sup>66</sup>See doc. 138 at ¶ 9.

1 MRO service providers submitting bids for an airline’s request for a repair contract  
2 proposal.

3 The evidence presented by Aerotec is limited to the effects felt by Aerotec.  
4 Aerotec argues that the negative effects on its business ultimately harm MRO service  
5 customers. It points to evidence that its service customers find Aerotec’s quality of  
6 service superior, but that evidence is irrelevant here. Aerotec itself possesses a small  
7 share of the MRO service market (less than 1%); thus, the court cannot conclude that  
8 effects felt by Aerotec will have a meaningful impact on the market as a whole.

## 9 **2. Bundled pricing**

10 Aerotec also alleges that Honeywell violates Section 2 by offering bundled  
11 pricing of parts and repairs in its MRO service contracts. Bundled pricing is “the  
12 practice of offering, for a single price, two or more good or services that could be sold  
13 separately. A bundled discount occurs when a firm sells a bundle of goods or services  
14 for a lower price than the seller charges for the good or services purchased  
15 individually.”<sup>67</sup> Here, Aerotec argues that Honeywell bundles the cost of parts and  
16 labor, and because Honeywell is the manufacturer of parts, it can give customers a  
17 large discount on those parts when they use Honeywell’s MRO services. Honeywell  
18 argues that Aerotec’s theory is really a price squeeze claim, whereby Aerotec  
19 complains that Honeywell raises prices of parts at the wholesale level to squeeze out  
20 competitors at the repair level who need those parts to compete. Such claims are  
21 invalid if there is no duty to deal at the wholesale level and no predatory pricing at the  
22 retail level.<sup>68</sup> Aerotec stresses that the focus of its bundling claim is not the higher  
23 prices Honeywell charges it at the wholesale level, but the discount that it offers MRO  
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25 <sup>67</sup>*Cascade Health*, 515 F.3d at 894.

26 <sup>68</sup>*Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc.*, 555 U.S. 438, 452 (2009) (“If there is no  
27 duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is  
28 certainly not required to provide *both* of these services in a manner that preserves its rivals’  
profit margins.”).

1 service customers at the retail level. Both parties agree that issue turns on whether  
2 Honeywell engages in predatory pricing at the retail level.<sup>69</sup>

3 To show predatory pricing at the retail level, Aerotec must demonstrate that  
4 Honeywell engages in below-cost pricing.<sup>70</sup> Honeywell has produced evidence to show  
5 that it has measures in place to make sure its MRO service contracts are priced above  
6 cost.<sup>71</sup> Honeywell calculates gross marginal profit, the expected gross marginal profit  
7 as a percentage above marginal cost, profit before tax, return on sales, and net present  
8 value of cash flow to Honeywell.<sup>72</sup> This evidence demonstrates that Aerotec cannot  
9 “make a showing sufficient to establish the existence of an element essential to [its]  
10 case, and on which [it] will bear the burden of proof at trial.”<sup>73</sup>

11 Aerotec argues that Honeywell’s evidence is insufficient. It argues that  
12 Honeywell has not actually disclosed its actual costs; rather, it simply provided a  
13 declaration and supporting financials without explaining how profit was calculated.  
14 Honeywell’s evidence is sufficient in the court’s view. As noted by Honeywell,  
15 “Aerotec’s vague suggestion that Honeywell could have provided even more data  
16 disproving Aerotec’s allegations is just the sort of ‘metaphysical doubt’ that will not  
17 do.”<sup>74</sup> It is Aerotec’s burden to demonstrate below-cost pricing.

18 Aerotec argues that it has put forth evidence of Honeywell’s below-cost pricing.  
19 It points to a few examples of Honeywell’s repair bids that end up being below cost  
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21 <sup>69</sup>Doc. 137 at p. 38.

22 <sup>70</sup>*Brooke Grp.*, 509 U.S. at 222 (noting that it is the plaintiff’s burden to prove predatory  
23 pricing).

24 <sup>71</sup>Doc. 116 at ¶¶ 41-50 (and exhibits cited therein).

25 <sup>72</sup>Doc. 116 at ¶¶ 41, 43 (and exhibits cited therein).

26 <sup>73</sup>*Celotex*, 477 U.S. at 322.

27 <sup>74</sup>Doc. 142 at 10 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475  
28 U.S. 574, 585 (1986)).

1 when the “discount attribution test” is applied.<sup>75</sup> The discount attribution test was  
2 adopted by the Ninth Circuit in *Cascade Health* to determine when a bundled discount  
3 can be considered anticompetitive conduct in violation of Section 2. Under this test, the  
4 plaintiff must show that when the “full amount of the discounts given by the defendant  
5 on the bundle are allocated to the competitive product or products, . . . the resulting  
6 price of the competitive product or products is below the defendant’s incremental cost  
7 to produce them.”<sup>76</sup> The appropriate measure of “incremental cost” in a bundled  
8 discount claim is the firm’s marginal cost—defined as “the cost to produce one  
9 additional unit and the price that would obtain in the market under conditions of perfect  
10 competition”—or, if that amount cannot be inferred from the defendant’s accounts, then  
11 the appropriate measure can be average variable cost.<sup>77</sup>

12 Honeywell argues that the discount attribution test does not apply in this  
13 situation. It argues that *Cascade Health*’s discount attribution test only applies in  
14 situations where the rival does not sell as many products as the bundled discounter and  
15 not in situations like the one presented here where every repair bid, whether made by  
16 Honeywell or Aerotec, by nature includes “a bundle” of labor and component parts. The  
17 competitive product here is not just the labor, but the entire bundle of parts and labor.  
18 Thus, Honeywell and Aerotec each offer the same “bundle” of parts and labor, and the  
19 application of the discount attribution test makes little sense. It further argues that the  
20 application of the discount attribution test to the specific examples relied on by Aerotec  
21 makes even less sense because it would cause the customer to pay substantially more.  
22 As explained in detail in Honeywell’s briefing, applying the discount attribution test here  
23 would require Honeywell to increase the price of its repairs on the APU model at issue  
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26 <sup>75</sup>Doc. 107 at pp. 16-17.

27 <sup>76</sup>*Cascade Health*, 515 F.3d at 906.

28 <sup>77</sup>*Id.* at 909-10.

1 more than 200% and result in a minimum price that is actually well above Aerotec's  
2 average price for that very same repair.<sup>78</sup>

3 While the court finds Honeywell's arguments against the application of the  
4 discount attribution test persuasive, it need not make a determination about whether the  
5 test should actually apply. Even applying the discount attribution test, Aerotec has not  
6 shown that Honeywell's pricing fails the test. Aerotec used Honeywell's "pricing  
7 summary sheets" in its calculations.<sup>79</sup> Those sheets list the *prices* for labor and parts  
8 that would be charged on a particular APU repair in the absence of an NTE or other  
9 MRO service agreement.<sup>80</sup> These are prices, not costs. As noted by Honeywell, the list  
10 price for APU parts is not equivalent to the cost of producing those parts. If the list  
11 prices were equated to the cost, any level of discount offered by Honeywell would result  
12 in below-cost pricing. Moreover, the discounts listed on pricing sheets do not reflect a  
13 specific discount off the price of parts or labor or a particular component of an APU  
14 repair job. Rather, it is the discount applied to the job as a whole that is needed to  
15 meet the terms of the NTE agreement that the customer has with Honeywell.<sup>81</sup> Aerotec  
16 has not provided any other evidence that Honeywell prices its MRO services below  
17 cost, and thus its bundled pricing claim against Honeywell fails.

### 18 **C. Price Discrimination**

19 In addition to the Sherman Act claims, Aerotec brings a price discrimination claim  
20 under the Robinson-Patman Act.<sup>82</sup> It argues that Honeywell charges non-affiliated  
21 MRO service providers, such as itself, an automatic 15% premium for component parts  
22 and that such discrimination between Honeywell affiliates and non-affiliates has

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23 <sup>78</sup>Doc. 122 at pp. 13-14.

24 <sup>79</sup>Doc. 108 at ¶ 131; Doc. 108-13 (Ex. 117).

25 <sup>80</sup>Doc. 123 at ¶ 131; Doc. 116 at ¶¶ 38-40; Doc. 116-1 (Ex. 1).

26 <sup>81</sup>Doc. 116 at ¶ 38; Doc. 116-1 (Ex. 1).

27 <sup>82</sup>15 U.S.C. § 13(a).

1 anticompetitive effects. The Robinson-Patman Act “does not ban all price differences  
2 charged to different purchasers of commodities of like grade and quality; rather, the Act  
3 proscribes price discrimination only to the extent that it threatens to injure  
4 competition.”<sup>83</sup> In cases such as this one where the plaintiff asserts that the price  
5 difference inhibits its ability to compete with the favored purchasers, the plaintiff must  
6 demonstrate that (1) the relevant sales were made in commerce; (2) the product sold  
7 was of “like grade and quality”; (3) the seller discriminated in price as between  
8 purchasers; and (4) the discrimination had a negative effect on competition.<sup>84</sup>

9 Aerotec alleges that both airline customers and affiliated MRO service providers  
10 receive the benefit of Honeywell’s price discrimination because they are offered  
11 Honeywell’s catalog prices without a premium. It does not point to specific instances of  
12 price discrimination but generally asserts that it has to pay 15% above Honeywell’s  
13 catalog prices while affiliates and airlines receive the catalog prices or lower.

14 Aerotec cannot base its price discrimination claim on the different prices offered  
15 to airline customers who buy component parts from Honeywell and then perform their  
16 own APU repairs because there is no competitive injury involved. To the extent those  
17 airlines do not bid for other MRO service contracts, they operate on a different level  
18 than Aerotec and are not competitors.<sup>85</sup> Aerotec is not entitled to the same prices that  
19 Honeywell charges the airline customers.

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22 <sup>83</sup>*Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006)  
23 (internal quotations and citations omitted).

24 <sup>84</sup>*Id.*

25 <sup>85</sup>*See Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191,197, 203-05 (3d Cir. 2010) (no  
26 competitive injury demonstrated where the supplier charged distributors higher prices than  
27 those charged to direct customers); *O’Byrne v. Cheker Oil Co.*, 530 F.Supp. 70, 71 (N.D. Ill.  
28 1981) (holding that sales to distributors at higher prices than direct sales to consumers were not  
actionable because consumers did not re-sell the product therefore do not compete with  
distributors).



1 Aerotec’s claim that Honeywell improperly discriminates in favor of affiliated  
2 MRO service providers also fails because of the fact that affiliates deal with Honeywell  
3 on terms set forth in complex, long-term contracts. Affiliates often receive lower prices  
4 on specific parts because of the terms in their affiliate agreements. In such situations,  
5 the affiliates’ dealings with Honeywell are not reasonably comparable to those of non-  
6 affiliates who only make purchases from Honeywell on the spot.<sup>86</sup> “A seller is not  
7 obligated to charge the same prices for a commodity if its sales contracts with different  
8 buyers contain materially different terms.”<sup>87</sup> Sales made on a purchase-to-purchase  
9 basis and sales made in conjunction with a long-term contract reflect different market  
10 conditions justifying cost differences.<sup>88</sup>

11 Honeywell puts forward evidence to demonstrate that the “favored” affiliated  
12 MRO service providers are parties to agreements with Honeywell that are materially  
13 different from the purchase-to-purchase agreements Aerotec has with Honeywell.<sup>89</sup>  
14 The affiliate agreements place obligations on those MRO service providers—such as  
15 royalty payments, restrictions on PMA parts, training requirements, and audits—that are  
16 not imposed on Aerotec when it purchases parts. Honeywell benefits from the  
17 obligations in these agreements and, as a result, often compensates those affiliates in  
18 the form of negotiated or discount pricing for certain parts.

19 Aerotec argues that spot sales and long-term contracts should only be  
20 considered materially different if those long-term contracts actually set a negotiated set  
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22 <sup>86</sup>Doc. 116 at ¶¶ 19-20 (and exhibits cited therein).

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24 <sup>87</sup>*Coalition for a Level Playing Field, LLC v. Autozone, Inc.*, 813 F. Supp. 2d 557, 566  
25 (S.D.N.Y 2011); see also *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 990 F.2d  
26 25, 27 (1st Cir. 1993) (suggesting but not deciding that high-priced purchases on the spot  
market and sales under a long-term contract are not reasonably contemporaneous); 14 Areeda  
& Hovenkamp, *supra* note 19, ¶2313d at 37-38.

27 <sup>88</sup>*Coastal Fuels*, 990 F.2d at 27.

28 <sup>89</sup>Doc. 116 at ¶¶ 17, 20-23 (and exhibits cited therein).

1 selling price for the product at issue. In those situations, long-term contracts reduce  
2 both parties' exposure to changes in the market price of a commodity and thus reflect  
3 different market conditions. Aerotec points to evidence set forth in its contravening  
4 statement of facts to argue that Honeywell does not actually negotiate pricing in its  
5 affiliate contracts and that affiliates do not receive a long-term price discounts, but  
6 instead pay whatever the catalog prices may be at the time of the order and without any  
7 additional premium.<sup>90</sup> Thus, it argues the rationale for treating spot sales and long-term  
8 contract sales differently is not present here. That evidence, however, is effectively  
9 rebutted by Honeywell. Honeywell presents evidence to show that the document  
10 Aerotec relies upon is not part of an affiliate agreement but rather is a form used for  
11 routine purchase orders.<sup>91</sup> Indeed, the document referenced by Aerotec is not linked to  
12 an affiliate agreement, and regardless, the document states that its provisions are  
13 superceded by any agreement between the buyer and Honeywell that has different  
14 terms. A close review of the sample affiliate agreements provided by Honeywell  
15 demonstrates that they do vary and that they do offer selected discount pricing or  
16 negotiated pricing in exchange for undertaking certain obligations.<sup>92</sup> Thus, when an  
17 affiliate buys a part from Honeywell at a discount, it is part of a larger negotiated  
18 agreement. As stated by Honeywell in its briefing, "it would distort both the Robinson-  
19 Patman Act and the competitive process generally if Aerotec could use the [Act] to  
20 obtain the benefits of Honeywell's agreements with its [affiliates] – i.e., selected  
21 discounts on pricing of repair parts—without being subject to the obligations these  
22 agreements impose upon the [affiliates]."<sup>93</sup> Aerotec presents no evidence to show that

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24 <sup>90</sup>Doc. 138 at ¶141 (Ex. G).

25 <sup>91</sup>Doc. 142-1.

26 <sup>92</sup>Doc. 116 at ¶ 20. See, e.g., doc. 116-3 at p. 39 (Ex. 17); doc. 116-4 at pp. 43, 52  
27 (Ex. 21); doc. 116-5 at pp. 6, 53; doc. 116-6 at p. 7.

28 <sup>93</sup>Doc. 115 at p. 44.

1 an affiliate generally receives a special discount or lower prices when that discount is  
2 not provided for in its affiliate agreements with Honeywell.

### 3 **D. State Law Claims**

4 Plaintiff pled several state law claims. The Sixth Claim is for violation of the  
5 Arizona antitrust laws. That claim must be dismissed for the same reasons that  
6 summary judgment is appropriate on all of the federal antitrust claims.<sup>94</sup>

7 The Seventh and Eighth Claims allege tortious interference, which under state  
8 law requires a showing that the defendant's interfering conduct was both intentional and  
9 improper.<sup>95</sup> As Aerotec concedes, the success of these claims depends upon the  
10 outcome of its federal antitrust claims, because Aerotec relies on Honeywell's violation  
11 of antitrust law to establish the requisite improper conduct.<sup>96</sup> Thus, its tortious  
12 interference claims must be dismissed for the same reasons that summary judgement  
13 is appropriate on all of the federal antitrust claims.

14 Aerotec's Ninth Claim alleges Honeywell published injurious falsehoods  
15 regarding Aerotec in order to prevent customers from doing business with it in violation  
16 of state law. In order to establish a claim for injurious falsehood, Aerotec must show  
17 that Honeywell published false information that is "derogatory to [its] business" and  
18 "calculated to prevent others from dealing with [Aerotec]."<sup>96</sup> Honeywell argues that  
19 there is no admissible evidence in the record to establish a genuine issue of fact  
20 regarding this claim. The only evidence Aerotec relies on in support is an email from  
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22 <sup>94</sup>*Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99, 106 (Ariz. 2003) (en banc) (noting  
23 that when interpreting Arizona's antitrust statute, Arizona courts "follow[ ] federal law in  
24 determining the standard of conduct required by antitrust law").

25 <sup>95</sup>*Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1026 (Ariz. 2005) (en banc).

26 <sup>96</sup>Doc. 137 at p. 44 (conceding that its tortious inference claims "live or die based on [its]  
27 federal antitrust claims").

28 <sup>96</sup>*Aldabbagh v. Ariz. Dep't of Liquor Licenses and Control*, 783 P.2d 1207, 1213 (Ariz.  
Ct. App. 1989).

1 one Aerotec employee to another Aerotec employee, wherein that employee states that  
2 an airline customer's employee told him that Honeywell employees had made negative  
3 comments about Aerotec's financial situation.<sup>97</sup> The email is a second-hand account of  
4 Honeywell employees saying something negative about Aerotec, and the email is being  
5 offered to prove the truth of the matter asserted therein—that Honeywell said  
6 something false and negative about Aerotec. The email is inadmissible hearsay.<sup>98</sup>  
7 Aerotec argues that it is premature to consider the admissibility of the email and that  
8 there may be an applicable exception to the hearsay rule, but it fails to explain what that  
9 exception may be and why that exception would apply. Moreover, the court can only  
10 consider admissible evidence in ruling on a motion for summary judgment.<sup>99</sup> Aerotec  
11 has failed to present any admissible evidence that Honeywell made injurious  
12 statements regarding Aerotec; Aerotec did not submit a declaration or deposition  
13 testimony from a person who has first-hand knowledge of disparaging statements made  
14 by Honeywell, nor did it submit Honeywell documents containing disparaging remarks  
15 about Honeywell. Thus, summary judgment in favor of Honeywell on this claim is  
16 warranted.

17 The Tenth Claim alleges that Honeywell violated Arizona's Consumer Fraud  
18 statute. The statute makes it illegal to engage in any "deception, deceptive or unfair act  
19 or practice, fraud, false pretense, false promise, misrepresentation, or concealment,  
20 suppression or omission of any material fact with intent that others rely on such  
21 concealment, suppression or omission, in connection with the sale or advertisement of  
22 any merchandise, whether or not any person has in fact been misled, deceived or  
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25 <sup>97</sup>Doc. 116 at ¶ 136; Doc. 116-11 (Ex. 103).

26 <sup>98</sup>Fed. R. Evid. 801, 802.

27 <sup>99</sup>See Fed. R. Civ. P. 56(e); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir.  
28 2002).

1 damaged thereby.”<sup>100</sup> Aerotec asserts that Honeywell has violated this statute on many  
2 occasions when it failed to deliver parts in a timely manner as promised. Honeywell  
3 argues that the majority of this claim is based on instances that occurred in 2007 and  
4 early 2008, and therefore are time-barred under Arizona law.<sup>101</sup> In reply, Aerotec  
5 asserts that some of Honeywell’s allegedly deceptive actions fall within the limitations  
6 period. It points to evidence regarding an APU part Aerotec ordered and paid for in  
7 2012 but did not receive for more than a year.<sup>102</sup> Honeywell argues that nothing in the  
8 evidence Aerotec relies upon shows Honeywell made any false promise or  
9 misrepresentation about delivery, because estimated delivery times are explicitly  
10 subject to change. After review of the evidence, the court concludes that Aerotec has  
11 not adequately shown that Honeywell violated the consumer fraud statute. The  
12 evidence Aerotec relies upon does not create a disputed fact as to whether Honeywell  
13 was actually deceptive in relation to Aerotec’s 2012 order, rather than just negligent or  
14 incompetent. Aerotec argues that there is a question of fact generally about whether  
15 the reason given for Honeywell’s delay was legitimate, but the legitimacy of any delays  
16 are irrelevant: to succeed on this claim. Aerotec must point to some evidence of a false  
17 promise, affirmative representation, or intentional concealment or omission on  
18 Honeywell’s part to support such a claim. It fails to do so.

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26 <sup>100</sup> A.R.S. § 44-1522(A).

27 <sup>101</sup> A.R.S. § 12-541(5).

28 <sup>102</sup> Doc. 108 at ¶¶ 90-95; Doc. 108-13 (Ex. 76).

1 V. CONCLUSION\*

2 Based on the preceding discussion, Plaintiff’s motion for summary judgment at  
3 docket 107 is **DENIED**. Defendant’s motion for summary judgment at docket 115 is  
4 **GRANTED**. The clerk will please enter judgment for Defendant.

5 DATED this 14<sup>th</sup> day of March 2014.

6 /s/  
7 JOHN W. SEDWICK  
8 UNITED STATES DISTRICT JUDGE  
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26 \* This amended order and opinion corrects the docket numbers associated with the  
27 parties’ motions.  
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