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Robert A. Eckert

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

MGA ENTERTAINMENT, INC., Plaintiff, vs. MATTEL, INC. and ROBERT A. ECKERT, Defendants.	CASE NO. CV 11-01063 Hon. David O. Carter MATTEL, INC.'S AND ROBERT A. ECKERT'S NOTICE OF MOTION AND MOTION TO DISMISS MGA ENTERTAINMENT, INC.'S COMPLAINT; AND MEMORANDUM OF POINTS AND AUTHORITIES Hearing Date: June 6, 2011 Time: 8:30 a.m. Place: Courtroom 9D

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on such date and time as the Court may order, before the Honorable David O. Carter, United States District Judge, located at 411 West Fourth Street, Santa Ana, California 92701, Mattel, Inc. and Robert A. Eckert (collectively "Mattel") will and hereby do move this Court pursuant to Federal Rules of Civil Procedure 12(b)(6) and 13(a), for an order dismissing all affirmative claims alleged against Mattel in MGA Entertainment, Inc.'s latest Complaint, including (1) Violation of Section 2 of the Sherman Act (15 U.S.C. § 2), (2) Abuse of Process, and (3) Violation of California Business & Professions Code § 17043 (hereinafter, the "Complaint" or "Compl.").

This motion to dismiss is made on the grounds that MGA's Complaint violates the prohibition against claim-splitting; brings claims that are compulsory counterclaims to Mattel's earlier claims against MGA; the Section 2 and abuse of process claims are barred by the Noerr-Pennington doctrine and/or California's litigation privilege; and the Complaint otherwise fails to state any claims upon which relief can be granted.

This motion is based on this Notice of Motion, the Memorandum of Points and Authorities, the records and files of this Court, and all other matters of which the Court may take judicial notice.

Certificate of Compliance

This motion is made following the conference of lead counsel on March 11, 2011.

DATED: March 17, 2011

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By /s/ Michael T. Zeller
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Preliminary Statement

On February 3, 2011, two weeks after Mattel and MGA had already commenced the retrial of claims in their longstanding litigation, MGA filed a new and purportedly "stand-alone" action against Mattel asserting antitrust, abuse of process and predatory pricing claims. The Complaint warrants dismissal for several dispositive reasons.

First, MGA's latest Complaint does no more than repeat factual allegations and legal theories – such as Mattel's supposed pursuit of baseless litigation, manipulation of industry data, and tampering with MGA's retail displays – that MGA asserted in the prior-filed litigation in this Court. To the extent MGA's ostensible "new" claims are not precluded completely by prior rulings of this Court rejecting them, MGA's recent Complaint is an improper attempt to split claims. The prohibition against claim-splitting recognizes that a plaintiff cannot generally "maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." Adams v. Dep't of Health Servs., 487 F.3d 684, 688 (9th Cir. 2007) (internal quotation marks omitted). The three claims MGA brings in this latest Complaint seek redress for Mattel's allegedly anticompetitive efforts, including in particular Judge Larson's grant of equitable relief against MGA, purportedly to "eliminate the dreaded competition" MGA posed. Compl. ¶ 26. MGA has pleaded this same theory a number of times since the Bratz litigation began in 2004. To name two: In support of its 2005 complaint, MGA alleged that Mattel had used a variety of anticompetitive tactics (including baseless litigation) in an attempt to "banish MGA from the market" (see Dkt. No. 1 (05-2727) ¶ 32), one of the few remnants of its unfair competition claim to survive to trial. More recently, this Court granted summary judgment to Mattel on claims that were predicated on these same allegations. MGA's RICO claim expressly asserted that Mattel used anticompetitive market intelligence activities and withheld evidence in the initial trial against MGA to secure overbroad equitable relief to

destroy MGA. See Dkt. No. 8583 at ¶¶ 4, 315-18. MGA has previously raised virtually every factual underpinning of its latest Complaint. MGA's new claims plainly arise from the "same transactional nucleus of facts" as these prior claims, and MGA seeks substantially the same relief as it did before. This claim splitting compels dismissal. Adams, 487 F.3d at 693-94. See Point I.A, infra.

Second, MGA's new claims should also be dismissed for the independent reason that they are compulsory counterclaims arising "from the same aggregate set of operative facts as" Mattel's earlier claims in the pending Bratz litigation. In re Lazar, 237 F.3d 967, 979 (9th Cir. 2001) (internal quotation marks omitted). MGA itself previously argued that claims concerning conduct in the already-pending litigation were compulsory counterclaims. See Dkt. No. 8747 (Opp. to Motion to Dismiss) at 13 ("The parties are fighting over the same thing: are Mattel's claims justified, did Mattel bring those claims improperly, and did Mattel seek to prevent a defense of those claims through its own wrongdoing."). The Court agreed, holding that a claim addressing the parties' conduct in "*this* litigation" was a compulsory counterclaim. See Dkt. No. 8892 at 5-7 (Motion to Dismiss Order). Branding that conduct as "anticompetitive" does not change the application of that rule. MGA's abuse of process claim is also a late-pled compulsory counterclaim: Not only has the Ninth Circuit held that "an abuse of process claim is a compulsory counterclaim in the very action which allegedly is abusive," Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1252 (9th Cir. 1987), but MGA admitted this point to the Court here, see Dkt. No. 8747 at 13-14 ("abuse of process claim[s] [are] compulsory."). See Point I.B, infra.

Third, MGA's claim that Mattel pursued a purportedly "baseless, overreaching remedy" (Compl. ¶ 19) is barred directly under the Noerr-Pennington doctrine. See Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1183 (9th Cir. 2005) (The doctrine, emanating out of the Petition Clause of the First Amendment, "exempts bringing a lawsuit – that is, petitioning a court – from antitrust liability.").

MGA makes a futile effort to plead around the doctrine, spending at least half the Complaint seeking to depict Mattel's pursuit of equitable relief as a "sham" that was objectively without merit. Mattel's claims have survived summary judgment before two neutral judges, and this Court has already held that "[t]he undisputed evidence establishes that the equitable relief awarded by the district court . . . was the product of a careful and reasoned, albeit incorrect, application of the law by the district court." Dkt. No. 9600 (Amended Summary Judgment Order) at 146. In these circumstances, a "reasonable litigant" might "realistically expect success on the merits," Amarel v. Connell, 102 F.3d 1494, 1518 (9th Cir. 1996) (internal quotation marks omitted); the reasoned (if incorrect) order granted by Judge Larson confirms that. That the Ninth Circuit rejected certain aspects of Judge Larson's opinion and remanded the case for retrial certainly is no ground for asserting that Mattel lacked a realistic expectation of success. See Boulware v. Nev. Dep't of Human Res., 960 F.2d 793, 798-99 (9th Cir. 1992) (rejecting plaintiff's "contention that the subsequent reversal of the injunction . . . proves that the suit was without foundation" and holding that initial success on the merits of a litigation, while not dispositive, "strongly suggests that" the underlying litigation "was not baseless"). See Point II, infra.

Fourth, the Court has ruled already that MGA cannot recover damages on a claim that the injunction was wrongfully obtained. See Dkt. No. 8892 at 12; see generally Russell v. Farley, 105 U.S. 433, 437 (1881) (In the absence of a bond or undertaking, "the court has no power to award damages sustained by either party in consequence of the litigation."); W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 770 n.14 (1983). Certainly, MGA is not entitled to reargue that issue now under the guise of reframed claims. See Point III, infra.

Fifth, MGA's monopolization claims fail for the simple reason that the Complaint does not set forth any specific allegations that would permit a plausible inference that the alleged conduct had any adverse affect on *competition* (as opposed

to MGA itself) or caused any injury cognizable under the federal antitrust laws. Even MGA's allegations of sustaining injury are implausible, given this Court's summary judgment ruling previously dismissing MGA's RICO claim and rejecting the assertion that any harm resulting from the specter of the equitable remedies originally ordered by Judge Larson (which were immediately stayed) can be attributed to Mattel. See Dkt. No. 9600 (Amended Summary Judgment Order) at 146.

MGA's monopolization claims must also be dismissed for the additional independent reason that they are utterly implausible. See generally Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). MGA previously insisted in this Court that it would be "impossible" for any company "to be monopolistic in toys." Dkt. No. 9316 (MGA Opp. to MSJ Counterclaims-in-Reply) at 38 (internal quotation marks omitted). Any suggestion of dominance is also undermined by MGA's own allegation that at the time Mattel's anticompetitive conduct purportedly began, MGA and Bratz had already "acquired a market share equal to or in excess of Barbie." Compl. ¶ 37. The Complaint simply fails to provide *any* factual allegations of the predicates for a monopolization claim – namely, dominant market share, high barriers to entry in the relevant market, and the inability of competitors to increase output in response to predatory prices. See Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995). See Point IV, infra.

Finally, MGA's sole cause of action not predicated on litigation conduct consists of just a single sentence that does nothing more than simply assert that Mattel has violated California Business & Professions Code § 17043 by pricing a product below its fully allocated cost. Compl. ¶ 62. This allegation, devoid of any specifics (as to price, general time frame, or anything else), is wholly deficient. See Twombly, 550 U.S. at 555 ("a formulaic recitation of the elements of a cause of action" fails to state a claim). See Point V, infra.

Background

This Court is well-versed in the history of the litigation between MGA and Mattel, beginning with Mattel's complaint against Carter Bryant in April 2004. In December 2004, MGA intervened as a party-defendant in Mattel's action. In April 2005, MGA filed a separate action against Mattel alleging, *inter alia*, trade dress infringement, dilution, unjust enrichment and violation of statutory and common law unfair competition laws ("2005 Complaint"). See Dkt. No. 1 (05-2727) ¶¶ 101-25. The premise of MGA's 2005 unfair competition claims was that "[i]nstead of fairly competing, Mattel waged war against MGA using a wide-array of tortious, unfair and anti-competitive practices . . . to banish MGA from the market." Id. ¶ 32. Among MGA's allegations of anticompetitive conduct was that Mattel had used "lawsuits or threats of lawsuits as a deliberate weapon of business aggression rather than an instrument for adjudicating honest disputes." Dkt. No. 19 (05-2727) (Opp. to MTD 2005 Compl.) (internal quotation marks omitted), at 17; see also Dkt. No. 9157, Ex. 36 (MGA Resp. Second Rogs.), at 14, 16.[1]

MGA did not, however, contend that Mattel's alleged anticompetitive practices violated the Sherman Act. Instead, MGA claimed it could prevail on its unfair competition claims under California law by showing either an "incipient" (rather than actual) violation of the antitrust laws or that Mattel's conduct was contrary to the "spirit" (rather than the letter) of the antitrust laws. See Dkt. No. Dkt. No. 19 (05-2727) at 14-19.

More recently, MGA filed its "counterclaims in reply" to Mattel's Fourth Amended Answer and Counterclaims ("FAAC"). The gravamen of that filing,

[1] The Court may on a motion to dismiss take judicial notice of documents on its docket and in court files without converting the motion into one for summary judgment. See Mullis v. U.S. Bankr. Ct. for Dist. of Nev., 828 F.2d 1385, 1388 (9th Cir. 1987); Britz Fertilizers, Inc. v. Bayer Corp., 2008 WL 341628, at *6 (E.D. Cal. Feb. 5, 2008).

particularly MGA's RICO claim, was that Mattel suppressed evidence of its market intelligence activities to seize an "unlawful competitive advantage" and obtain from Judge Larson overbroad equitable relief that "nearly drove MGA out of business." Id. at ¶ 4. Though MGA had every opportunity at that time to allege that Mattel's conduct in the litigation amounted to a violation of the federal antitrust laws or an abuse of process, MGA did not do so.

Moreover, at the time MGA filed its new counterclaims-in-reply, MGA stated that Mattel "likely" had priced its Wee 3 Friends dolls below cost. See Dkt. No. 8169, Ex. 1 at 726:5-7; see also Dkt. No. 8168 (MGA Supp. Br. Pursuant to June 7, 2010 Order) at 1-2. MGA did not, however, bring a predatory pricing claim under California Business and Professions Code § 17043, instead informing Mattel and the Court that it was investigating whether to raise allegations of below-cost pricing as an element of its *existing* unfair competition claim. See Dkt. No. 8168 at 1.

In defending its right to file its counterclaims in reply, and recognizing that such claims are permitted only if they are compulsory in nature, MGA argued that its new claims were all compulsory counterclaims to Mattel's FAAC. See Dkt. No. 8747 at 11-14. This Court agreed, holding that the parties' conduct in "*this* litigation" constituted a transactional nucleus from which both the FAAC and MGA's counterclaims-in-reply arose. See Dkt. No. 8892 at 5 (Motion to Dismiss Order). The Court then dismissed MGA's so-called wrongful injunction claim on the grounds that any harm arising from the "specter" of the largely stayed injunction could not be traced to Mattel (see id. at 13-15) and that in the absence of a bond a party can maintain "'no action for damages'" for a wrongful injunction unless it can make out a claim for malicious prosecution (which MGA had not done). Id. at 12 (quoting W.R. Grace & Co, 461 U.S. at 770 n.14).

On January 5, 2011, the Court granted summary judgment as to the bulk of MGA's remaining claims, including its trade dress infringement, dilution, common law unfair competition, unjust enrichment and RICO claims. See Dkt. No. 9600 at

163.[2] As to MGA's RICO claim, the Court held "MGA cannot identify any contracts or retailer relationships affected by Mattel's alleged pattern of racketeering activity" (id. at 145) and, once again, that MGA could not draw any causal link between Mattel's conduct and any harm arising from the injunction. Id. at 146. This Court also noted that MGA's allegations "irresponsibly attempt to attribute a district court's decisions about equitable relief to Mattel's non-production of documents." Id.

Two weeks into trial, MGA filed the instant Complaint in a purported "stand-alone" action. See Compl. ¶ 7. Cobbling together rehashed factual allegations from its prior claims, MGA asserts that Mattel deployed anticompetitive practices and wrongfully pursued overbroad equitable relief – not in violation of California unfair competition law or RICO, as MGA had previously alleged, but this time in violation of the Sherman Act, California abuse of process law, and § 17043 of the California Business and Professions Code.

Argument

I. THE COMPLAINT MERELY REPACKAGES PREVIOUSLY FILED CLAIMS AND SHOULD BE DISMISSED

A. The Complaint Violates the Prohibition on Claim-Splitting

A plaintiff generally has "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." Adams, 487 F.3d at 688 (internal quotation marks omitted). This rule, known as the prohibition on claim-splitting, is designed to protect the "defendant from being harassed by repetitive actions based on the same claim." Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 328 (9th Cir. 1995) (internal quotation marks omitted). To determine whether an action is duplicative of an

[2] MGA conceded its Bratz trade dress infringement claims in a letter dated March 24, 2010. See Ex. 1 to Dkt. No. 7684.

earlier-filed action, courts in this Circuit "borrow from the test for claim preclusion" and "examine whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." Adams, 487 F.3d at 688-89. As set forth below, MGA's effort to repackage its allegations under the guise of Sherman Act and other state law claims is squarely prohibited by the doctrine. See id. at 688-92.

1. MGA's New Claims Arise from the Same Transactional Nucleus and Thus the Same "Cause of Action"

The claim-splitting analysis turns on whether the new claims arose from the "same transactional nucleus of facts" as the prior claims, such that they "'relate[] to the same set of facts'" and could have been "'conveniently [] tried together.'" Id. at 689 (internal quotation marks omitted). Claims arising from the same transactional nucleus are part of the same "cause of action" for claim-splitting purposes. See id. While MGA's latest claims invoke different legal doctrines than the prior claims, claim-splitting doctrine cannot be circumvented by "attaching a different legal label to an issue that has, or could have, been litigated" in the earlier-filed action. See Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077-78 (9th Cir. 2003); see also Adams, 487 F.3d at 694.

MGA's new antitrust, abuse of process and § 17043 claims all embody the same basic theory – that Mattel allegedly engaged in various unfair market practices, including obtaining from Judge Larson "baseless litigation remedies" that impaired MGA's ability to do business. See Compl. ¶ 53. This was precisely the theory upon which MGA premised its previously filed unfair competition and RICO claims. The gravamen of MGA's previously asserted unfair competition claims was that "[i]nstead of fairly competing, Mattel waged war against MGA using a wide-array of tortious, unfair and anti-competitive practices," including aggressive litigation tactics and below-cost pricing, "to banish MGA from the market." See

Dkt. No. 1 (05-2727) ¶ 32.[3] MGA's dismissed RICO claim likewise rested on allegations of unfair competition, in particular the assertion that Mattel's market intelligence activities allowed Mattel to "maintain its unlawful competitive advantage," and that Mattel suppressed evidence of its intelligence gathering in the Phase 1 trial to secure overbroad injunctive relief from Judge Larson. See Dkt. No. 8583 ¶¶ 4, 60.

The claims in MGA's new complaint obviously arise from the same transactional nucleus, and virtually every factual allegation MGA has advanced in support of its latest claims was previously alleged in support of MGA's unfair competition and/or RICO claims:

Allegation in Latest Complaint	Allegations in Prior-Filed Litigation
Seeking to litigate Bratz out of business by pursuing "baseless litigation remedies." Compl. ¶ 53(m).	Alleged in support of RICO claim, see, e.g., Dkt. No. 8583 ¶¶ 4, 60, 315-318, and unfair competition claims, see, e.g., Dkt. No. 19 (05-2727) at 17; Dkt. No. 9157, Ex. 36 at 14, 16.
Engaging in illicit market intelligence practices to "secure protected competitor information." Compl. ¶ 53(a).	Alleged in support of RICO claim. See, e.g., Dkt. No. 8583 ¶¶ 4, 6, 11-13.
Concealing documentary evidence that would have "changed the outcome" of the Phase 1 rulings and suborning perjury. Compl. ¶ 30(f)-(g).	Alleged in support of RICO claim. See, e.g., Dkt. No. 8583 ¶¶ 4, 60, 315.
Copying MGA's (1) "service mark for 'Passion for Fashion," (2) "4-Ever Best Friends" doll, and (3) "distinctive trapezoidal packaging." Compl. ¶ 53(a).	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 1 (05-2727) ¶ 46, 58, 68.
Improperly influencing companies not to distribute and license Bratz dolls or supply MGA with raw materials. See	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 1 (05-2727) ¶¶ 9, 76-78, 113.

[3] See also Dkt. No. Dkt. No. 19 (05-2727) at 17; Dkt. No. 9157, Ex. 36 at 14, 16; Dkt. No. 8169, Ex. 1 at 726:5-7; Dkt. No. 8168 at 1-2.

Allegation in Latest Complaint	Allegations in Prior-Filed Litigation
Compl. ¶ 53(b).	
Manipulating NPD data. See Compl. ¶ 53(c).	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 1 (05-2727) ¶ 86.
Forcing employees to sign overbroad agreements assigning intellectual property. See Compl. ¶ 53(d).	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 9157, Ex. 36 at 13-15.
Making MY SCENE television commercials that imitated MGA commercials. See Compl. ¶ 53(e).	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 1 (05-2727) ¶¶ 51, 57, 62.
Booking actresses that appeared in Bratz commercials to interfere with MGA's ability to shoot its own commercials. See Compl. ¶ 53(f).	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 9157, Ex. 36 at 18.
Selling Wee 3 Friends dolls below allocated costs. See Compl. ¶ 53(g)	In a March 25, 2010 deposition, MGA's counsel asserted that it was "likely" that Wee 3 Friends was priced below costs in violation of California unfair competition laws and asserted that it was pursuing the issue in the prior action. See Dkt. No. 8169, Ex. 1 at 726:5-7; Dkt. No. 8168 at 1-2.
Tampering with retail displays. See Compl. ¶ 53(h).	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 1 (05-2727) ¶ 79.
Sending intimidating letters to former employees. See Compl. ¶ 53(i).	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 1 (05-2727) ¶ 75.
"[I]mproperly initiated and influenced criminal investigations." Compl. ¶ 53(j).	Alleged in support of unfair competition claims. See, e.g., Dkt. No. 9157, Ex. 36 at 36.

That MGA's latest complaint includes a very small number of new factual allegations of purportedly anticompetitive conduct – for example, that Mattel falsely

publicized that "Bratz dolls say the 'F' Word" (Compl. ¶ 53(l)) – does not change the analysis. See, e.g., Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982) ("Under federal law, appellant does not avoid the bar of res judicata merely because he now alleges conduct by [the defendant] not alleged in his prior suit."). The relevant question is whether the later-filed claims arise from the same underlying transaction such that they could have been asserted in the earlier action. See Tahoe Sierra Pres. Council, 322 F.3d at 1078. Nothing prohibited MGA from bringing antitrust, abuse of process, or § 17043 claims in the prior action. MGA elected to pursue alternative grounds – RICO and unfair competition – for recovery. MGA is bound to that decision. See id. (claim preclusion bars relitigation of grounds for recovery that "could have been asserted[] in a previous action between the parties"); accord Adams, 487 F.3d at 694 (Claim-splitting doctrine prevents "litigating piecemeal the issues which could have been resolved in one action." (internal quotation and bracket marks omitted)).[4]

Nor can MGA legitimately argue that its new claims could not have been conveniently tried in a single proceeding with the prior claims. To establish that Mattel's alleged practices were "unfair" under California unfair competition law, MGA would have to demonstrate that the practices threatened an "'incipient violation of the antitrust law.'" Dkt. No. 9600 (Amended Summary Judgment Order) at 111 (quoting Gregory v. Albertson's Inc., 104 Cal. App. 4th 845, 851 (Cal. App. 1st Dist. 2002)). MGA acknowledged this requirement. See Dkt. No. 9620 (MGA Proposed Jury Instructions) at 233. It obviously would have been highly

[4] See also In re Int'l Nutronics, Inc., 28 F.3d 965, 971 (9th Cir. 1994) (antitrust claim brought by bankruptcy trustee alleging anticompetitive bidding in bankruptcy sale barred because the claim "unquestionably ar[o]se" from the same transaction underlying a prior action in bankruptcy court to confirm the sale); Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 595 (7th Cir. 1986) (holding that antitrust and RICO claims arising from same alleged anticompetitive scheme arose from the same operative facts, precluding litigation of later-filed RICO claim).

inconvenient and inefficient to have separate trials as to whether Mattel's conduct amounted to an "incipient" antitrust violation and an "actual" antitrust violation.

While the common nucleus analysis is generally "outcome determinative," Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 988 (9th Cir. 2005), courts assessing whether a later-filed action arises from the same "cause of action" may also consider: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right." Adams, 487 F.3d at 689 (internal quotation marks omitted). Here, these factors also compel dismissal. First, MGA would need to adduce the same evidence to support both its old and new claims.[5] Second, a determination in this action that Mattel did not violate the Sherman Act or engage in other illegal conduct would naturally impair MGA's ability to establish an incipient antitrust violation in the earlier-filed action. Finally, MGA's new and prior claims involve the alleged infringement of the same right – namely, to operate in a marketplace free of anticompetitive and predatory practices.

2. MGA Seeks Substantially the Same Relief

The second consideration in the claim-splitting analysis is whether the claims seek the "same relief." Adams, 487 F.3d at 691. This requirement is satisfied so long as the relief requested in the two actions is "substantially the same." Id.; see also id. at 689 (claim precluded where "'available relief do[es] not significantly differ'" (quoting Serlin v. Arthur Anderson & Co., 3 F.3d 221, 223 (7th Cir. 1993)); Mauro v. Fed. Exp. Corp., 2009 WL 1905036, at *4 (C.D. Cal. June 18, 2009).

Here, the relief MGA now seeks is virtually identical to what it sought previously. In its latest Complaint, MGA alleges that the equitable remedies Judge

Larson granted after the Phase 1 trial decimated MGA's $1 billion net worth. Compl. ¶¶ 18-26, 58. MGA seeks those damages trebled under the Sherman Act and § 17043 of the California Business & Professions Code, along with exemplary damages for abuse of process. Id. (Prayer for Relief). MGA previously sought the same remedies. In particular, MGA alleged that those same Phase 1 equitable remedies "destroyed most, if not all, of the brand equity in Bratz" (Dkt. No. 8583 ¶ 60) and that it was entitled to those damages trebled under RICO along with exemplary damages for Mattel's purported "malicious conduct." Id. (Prayer); Dkt. No. 1 (05-2727) (Prayer for Relief).

Though MGA also sought injunctive and other relief in the prior-filed action (largely for claims that have since been dismissed), that does not make the slightly narrower relief it now seeks any less duplicative. See, e.g., Britz Fertilizers, 2008 WL 341628, at *16-17 (suits "entirely duplicative" even though first sought punitive damages for fraud and false promises and the second sought no punitive damages but instead $10 million for negligence and breach of contract).[6]

3. The Actions Involve the Same Parties

The final claim-splitting requirement – congruence of parties – is obviously satisfied. Both actions involve MGA and Mattel. That other parties were joined in the earlier-filed action, or that Mattel's CEO is named in this action, is irrelevant. The presence of additional parties does not affect the preclusion analysis so long as

[5] Some difference in the evidence "does not defeat the bar of res judicata." Int'l Union of Operating Eng'r-Employers Constr. Indus. Pension v. Karr, 994 F.2d 1426, 1430 (9th Cir. 1993).

[6] While Adams described a "same relief" requirement, a more commonly invoked formulation of the claim preclusion test does not even require any comparison of the relief sought in the two actions. See, e.g., United States v. Liquidators of European Fed. Credit Bank, 630 F.3d 1139, 1150 (9th Cir. 2011) (res judicata defense requires showing of "'(1) identity of claims, (2) a final judgment on the merits, and (3) privity between the parties'" (quoting Tahoe Sierra Pres. Council, 322 F.3d at 1077)).

the party against whom claim-splitting is asserted – here, MGA – "was a party to the former litigation." U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 249 (9th Cir. 1992) (internal quotation marks omitted). And the additional parties here are indistinct in any event for claim-splitting purposes, because each is in privity, or otherwise aligned, with either MGA or Mattel. See Tahoe Sierra Pres. Council, 322 F.3d at 1081-84 (The same-party element of the res judicata analysis is satisfied if the parties share a "sufficient commonality of interest." (internal quotation marks omitted)). In sum, each and every one of the requirements for dismissal on grounds of claim-splitting is met here.

B. MGA's Claims Were All Compulsory Counterclaims

Separate and apart from claim-splitting, MGA's latest claims are also barred because each was a compulsory counterclaim in the prior-filed action and should have been filed, at the very latest, in response to Mattel's final complaint. It is well-settled that "[f]ederal courts will not permit an action to be maintained where the claims asserted should have been brought as a compulsory counterclaim in an earlier action." In re Crown Vantage, Inc., 421 F.3d 963, 973 n.7 (9th Cir. 2005) (internal quotation marks omitted). If a party fails "to plead a compulsory counterclaim, the claim is waived and the party is precluded by principles of res judicata from raising it again." Mitchell v. CB Richard Ellis Long Term Disability Plan, 611 F.3d 1192, 1201 (9th Cir. 2010); see also Pochiro, 827 F.2d at 1253 n.12 (preclusive effect can also arise from principles of waiver and estoppel).

Fed. R. Civ. P. 13(a) defines a compulsory counterclaim as any claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." The Ninth Circuit applies the so-called "logical relationship test" to determine if a claim arises from the same transaction or occurrence. See In re Lazar, 237 F.3d at 979 ("A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim.") (internal quotation marks omitted). The test is a "liberal" one that "attempts to analyze

whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." Pochiro, 827 F.2d at 1249 (internal quotation marks omitted). See also Dkt. No. 8892 at 5 (Motion to Dismiss Order), at 4 ("Two claims may be logically related even though they do not arise out of the same nucleus of facts"); id. at 4 n.2 (logical relationship test applies both to counterclaims and counterclaims-in-reply).

1. MGA's Antitrust Claim Was Compulsory

MGA's Sherman Act claim focuses on Mattel's litigation-related conduct – Mattel's alleged decision to "litigate MGA to death" through the pursuit of "baseless litigation remedies." Compl. ¶¶ 13, 53(m). MGA has previously argued, and the Court has already found, that the litigation between Mattel and MGA was the transaction underlying Mattel's FAAC, and that MGA's RICO, trade secret misappropriation, and wrongful injunction claims concerning conduct in the litigation were compulsory in response to the FAAC. Specifically, MGA stated: "The parties are fighting over the same thing: are Mattel's claims justified, did Mattel bring those claims improperly, and did Mattel seek to prevent a defense of those claims through its own wrongdoing. To try Mattel's claims, this Court is necessarily trying the same facts that give rise to MGA's Counterclaims-in-Reply. They are therefore compulsory." See Dkt. No. 8747 at 13.[7] This Court explained that Mattel's FAAC "encompasses hundreds of economic and legal interactions between MGA and Mattel over the last decade, including the 'transaction' of *this* litigation." Dkt. No. 8892 at 7. Trying MGA's counterclaims separately "would

[7] Having successfully argued that the FAAC rested on the parties' litigation conduct, MGA is precluded from urging a different or narrower construction of the FAAC here. See United Nat. Ins. Co. v. Spectrum Worldwide, Inc., 555 F.3d 772, 778 (doctrine of judicial estoppel "bar[s] litigants from making incompatible statements in two different cases" (internal quotation marks omitted)).

duplicate the already tremendous burden on judicial resources caused by this litigation, and prevent the fact-finder from evaluating evidence arising out of a common factual background." Id.

MGA's latest antitrust claim in this action thus was a compulsory counterclaim-in-reply to the FAAC. MGA's claim – that Mattel's conduct in bringing suit and in pursuing certain equitable remedies was part of a "sham" effort to secure a monopoly in a purported market for fashion dolls – arises directly from the parties' conduct in "this litigation," the very "transaction" underlying the FAAC.[8]

That MGA also alleges that Mattel engaged in various other anticompetitive practices – for example, that Mattel copied MGA designs and influenced dealers and retailers not to work with MGA (see Compl. ¶¶ 11, 53) – does not render MGA's antitrust claim any less compulsory. In its complaint, Mattel alleged that MGA had, in contravention of California unfair competition law, engaged in similar unfair practices in the marketplace, including misappropriation of trade secrets. See, e.g., Dkt. No. 6366 ¶¶ 105-06, 224. MGA's ancillary allegations were thus intimately intertwined with Mattel's claims and, as such, compulsory under this Circuit's

[8] Courts have recognized that interests of fairness and judicial economy are best served by resolving sham litigation claims in the litigation involving the alleged sham. See Critical-Vac Filtration Corp. v. Minuteman Int'l, Inc., 233 F.3d 697, 700 (2d Cir. 2000) (finding an "obvious 'logical relationship'" between sham litigation claim and litigation alleged to have been sham, adding that "considerations of judicial economy and fairness dictate that all the issues [should have been] resolved in one lawsuit" (internal quotation marks omitted)); Eon Labs., Inc. v. Smithkline Beecham Corp., 298 F. Supp. 2d 175, 179 (D. Mass. 2003) (no dispute that sham litigation bore a logical relation to the litigation alleged to have been a sham); see also Shmuel Shmueli, Bashe, Inc. v. Lowenfeld, 68 F. Supp. 2d 161, 162, 165-66 (E.D.N.Y. 1999) (dismissing, *inter alia*, antitrust and abuse of process claims arising from defendant's prosecution of an earlier-filed action because the claims "stem[med] directly from" the earlier-filed action and thus were "plainly compulsory counterclaims" in that action).

"logical relationship" test. See Pochiro, 827 F.2d at 1249; see also Magna Pictures Corp. v. Paramount Pictures Corp., 265 F. Supp. 144, 153 (C.D. Cal. 1967) (logical relationship between unfair competition claim and antitrust claim is "clearly evident").

2. MGA's Abuse of Process Claim Was Compulsory

In the Ninth Circuit, "an abuse of process claim is a compulsory counterclaim in the very action which allegedly is abusive." Pochiro, 827 F.2d at 1252. MGA itself relied on this rule by likening its RICO, trade secret misappropriation, and unlawful injunction claims to abuse of process claims and emphasizing that, under Pochiro, "abuse of process claim[s] [are] compulsory." Dkt. No. 8747 at 13-14.

Because Mattel's alleged abuse of process – the wrongful procurement of broad equitable relief (see Compl. ¶ 60) – occurred during the Phase 1 proceedings, MGA was required to bring its abuse of process claim during those proceedings. See Pochiro, 827 F.2d at 1252. At the very latest, the claim was compulsory in response to Mattel's FAAC, after the equitable remedies were vacated by the Ninth Circuit.

3. MGA's § 17043 Claim Was Compulsory

MGA's § 17043 claim alleges that Mattel predatorily priced its Wee 3 Friends doll below costs, which obviously corresponds to Mattel's FAAC claim that MGA was unfairly competing against Mattel. See, e.g., Dkt. No. 6366 ¶¶ 105-06, 224. Claims arising from competition in the same alleged market are logically related and decidedly compulsory in nature. See Oahu Gas Serv., Inc. v. Pacific Res., Inc., 473 F. Supp. 1296, 1299 (D. Haw. 1979). MGA was obligated to bring its § 17043 claim in response to the FAAC.

4. Hydranautics Does Not Shield MGA

MGA can be expected to argue that under Hydranautics v. Filmtec Corp., 70 F.3d 533 (9th Cir. 1995), its Sherman Act claim was not compulsory. See Compl. ¶ 7 (relying on Hydranautics for the proposition that its new Complaint is a "stand-

alone" action). But Hydranautics is of no assistance to MGA. Interpreting *dicta* from the Supreme Court's heavily criticized decision in Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944),[9] Hydranautics held that "[a] claim that *patent infringement* litigation violated an antitrust statute is a permissive, not a mandatory, counterclaim in a *patent infringement* case, and is not barred in a subsequent suit by failure to raise it in the *infringement* suit." 70 F.3d at 536 (emphasis added) (citing Mercoid, 320 U.S. at 669-71).

Commentators and Courts in this Circuit have recognized that Hydranautics limited Mercoid to sham litigation claims targeting patent infringement litigation. See Arthur R. Wright and Mary Kay Kane, 6 Fed. Practice and Proc. Civ. § 1412 n.16 (3d ed. 2010); Alibaba.com, Inc. v. Litecubes, Inc., 2004 WL 443712, at * 2 n.5 (N.D. Cal. Mar. 8, 2004). As Hydranautics itself explained, appeals in patent cases must be taken to the Federal Circuit. See Hydranautics, 70 F.3d at 536. If antitrust claims were compulsory in patent infringement cases, the Federal Circuit would be called upon to regularly adjudicate antitrust counterclaims, creating a risk of divergence between "the antitrust law generally applicable within each regional circuit, and the antitrust law in predatory patent infringement cases." Id. ("That Congress has provided for regional courts of appeals to decide antitrust appeals, and for the federal circuit to decide patent appeals, suggests that Congress perceived a distinction between the kinds of facts giving rise to one or the other."). No such concern is presented where, as here, the purported sham litigation does not involve the enforcement of patents and any appeal would be to the Ninth Circuit. See, e.g., Alibaba.com, 2004 WL 443712, at *2 & n.5 (observing that antitrust claims arising from the enforcement of copyrights are often deemed compulsory and distinguishing

[9] See Arthur R. Wright and Mary Kay Kane, 6 Fed. Practice and Proc. Civ. § 1412 (3d ed. 2010) (collecting criticism of Mercoid).

Hydranautics as involving a "'*patent infringement case*.'") (quoting Hydranautics, 70 F.3d at 536) (emphasis in Alibaba.com).

C. MGA's Claims Warrant Dismissal with Prejudice

When a party splits its claim or files suit on a claim that was compulsory in a pending action, the court may dismiss the later-filed action, stay the later-filed action pending resolution of the previously filed suit, or consolidate both actions. See Adams, 487 F.3d at 688 (claim-splitting); Farnam Cos., Inc. v. Stabar Enters., Inc., 2005 WL 3334348, *7 (D. Ariz. Dec. 8, 2005) (compulsory counterclaim). Dismissal with prejudice is generally appropriate where the plaintiff "had a full and fair opportunity to raise and litigate" the later-filed claims in the first-filed action. Adams, 487 F.3d at 693; see also Hans v. Homesite Indem., Co., 2009 WL 2169170, at *3-4 (D. Ariz. July 17, 2009) (dismissing late-filed compulsory counterclaim where documents supporting claim were available but overlooked). Leave to add a compulsory claim to a pending action is rarely provided when the first-filed action is in advanced pretrial stages, much less, as here, months into trial. See Breakdown Servs., Ltd. v. Now Casting, Inc., 550 F. Supp. 2d 1123, 1133 (C.D. Cal. 2007) (denying leave to add late-pled monopolization claim where trial was three months away).[10]

MGA has no justification for its delay. MGA's latest claims are based on the same factual allegations underlying its prior claims, not new evidence. MGA could have brought its antitrust claim years ago in conjunction with its unfair competition claims or, for that matter, at any point up to and through the filing of its latest

[10] See also Solomon v. N. Am. Life & Casualty Ins. Co., 151 F.3d 1132, 1139 (9th Cir. 1998) (affirming denial of motion to amend filed "on the eve of the discovery deadline"); Moody v. FMC Corp., 995 F.2d 63, 66 (5th Cir. 1993) (affirming refusal to amend complaint midtrial to add new claim); Schmidt v. Fidelity Nat'l Title Ins. Co., 2009 WL 3018709, at *3 (D. Haw. Sept. 21, 2009) (holding that defendants did not have "good cause" to add compulsory counterclaim "nearly seven months after" defendants became aware of claim).

counterclaims-in-reply. Likewise, MGA's abuse of process claim could have been brought during Phase 1, or at the latest in response to Mattel's final complaint. And MGA's § 17043 claim could have been brought in conjunction with its 2005 unfair competition claims, or, at the latest, in August 2010 as a counterclaim-in-reply to the FAAC (at which point MGA believed it "likely" that Wee 3 Friends dolls were being priced below costs). See Dkt. No. 8169, Ex. 1 at 726:5-7; Dkt. No. 8168 at 1-2; Ralston-Purina Co. v. Bertie, 541 F.2d 1363, 1367 (9th Cir. 1976) (affirming dismissal of late-filed counterclaim where record did not provide "any reasonable explanation for [the] delay").

Mattel has waited the better part of a decade for final resolution of this dispute and has invested substantial time and resources in litigating MGA's already existing legal theories before and at trial. Allowing MGA to advance new claims at this late stage would force Mattel to engage in significant new preparation (and most likely further discovery), including as to such antitrust-specific issues as the nature of the market and monopoly power. See Breakdown Serv., 550 F. Supp. 2d at 1133 (permitting addition of antitrust claim three months *before* trial "would substantially prejudice" the defendant); see also Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999) (need to open discovery supports finding of prejudice). The prospect here of another trial – this one plainly unnecessary and duplicative – satisfies any prejudice requirement.

Further proceedings would also be futile: as set forth below, MGA's claims are either barred by the Noerr-Pennington doctrine or fail to state a claim under Fed. R. Civ. P. 12 (b)(6).

Finally, a stay of this action pending resolution of the current trial would not be appropriate because, as the Ninth Circuit has observed, "[d]ismissal of a duplicative lawsuit, more so than the issuance of a stay or the enjoinment of proceedings, promotes judicial economy and the comprehensive disposition of litigation." Adams, 487 F.3d at 692 (internal quotation marks omitted). A final

judgment following trial will preclude further litigation of this suit. See Farnam Cos., Inc., 2005 WL 3334348, at *8 (where court stays a claim that should have been brought as a compulsory counterclaim, final judgment in the earlier-filed action will inevitably operate as merger and bar).

II. NOERR-PENNINGTON BARS MGA'S SHERMAN ACT § 2 CLAIM

The lynchpin of MGA's claim under Section 2 of the Sherman Act is the allegation that Mattel tried to use litigation to destroy MGA. According to the Complaint, because Mattel's other attempts to "oppress[] MGA's competitive efforts were not enough for Mattel to stem the tide" of MGA's Bratz success, Mattel was forced to "turn[] to the courts for relief" and embarked on a strategy to "litigate MGA to death" by pursuing overbroad and unsustainable equitable remedies – "a baseless, overreaching" constructive trust, as well as a copyright injunction. Compl. ¶¶ 12-13, 18, 22; see also id. ¶ 26 ("Mattel knew that merely obtaining that interim order would eliminate the dreaded competition").

MGA's antitrust claim is barred by the Noerr-Pennington doctrine as a matter of law. The doctrine, which emanates out of the Petition Clause of the First Amendment, exempts from antitrust scrutiny Mattel's conduct in bringing a lawsuit and petitioning the Court for equitable relief. Freeman, 410 F.3d 1180, 1183 (9th Cir. 2005).

A. Mattel's Litigation Was Not a "Sham"

The Ninth Circuit has recognized three circumstances in which allegedly anticompetitive litigation might be a "sham" and lose Noerr-Pennington protection. First, if the "alleged anticompetitive behavior consists of bringing" a single or small number of "sham" lawsuits, the plaintiff must demonstrate that the litigation was "(1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships." Id. at 1184. Second, if the alleged anticompetitive behavior does not involve a small number of allegedly "sham" lawsuits, but rather "the filing of a series of lawsuits, 'the question is not whether any one of them has merit . . .

but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.'" Id. (citation omitted). Finally, "if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if" the alleged misrepresentations "deprive the litigation of its legitimacy." Id. at 1184. "Because the sham exception to the Noerr-Pennington rule may have a chilling effect on those who seek redress in the courts, we have held that the exception should be applied with caution." Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 944 F.2d 1525, 1528-29 (9th Cir. 1991), aff'd, 508 U.S. 49 (1993).

The three types of "sham" litigation recognized in this Circuit each has different pleading and proof requirements. As set forth below, MGA does not – and could not – properly plead that Mattel's litigation here was a "sham."

1. Mattel's Claims Are Not Objectively Baseless

The Complaint is properly analyzed under the first "sham" litigation exception – where the alleged anticompetitive conduct involves the bringing of a "single" or "small number" of lawsuits – because it is premised on Mattel's lawsuit against MGA and the decision Mattel made in that lawsuit to pursue certain equitable remedies. Compl. ¶¶ 24-26. The Complaint's tangential reference to extraneous lawsuits against entities other than MGA (see Compl. ¶¶ 16-17, 30(c)) cannot bring this case within the second "series of lawsuits" exception to Noerr-Pennington. This second exception, designed to guard against the burden of "having to defend a whole series" of lawsuits (as opposed to a single suit), is simply not implicated where the plaintiff (MGA) did not have to do so. Kaiser Found. Health Plan, Inc. v. Abbott Labs., 552 F.3d 1033, 1046 (9th Cir. 2009).[11]

[11] At a more fundamental level, the extraneous lawsuits cited in the Complaint have no bearing at all on any allegedly anticompetitive conduct. One lawsuit did (footnote continued)

MGA's wholly conclusory allegations that Mattel pursued a "baseless" remedy that "no objective litigant could have expected . . . to survive judicial review" (see Compl. ¶ 18) are insufficient as a matter of law. See White v. Lee, 227 F.3d 1214, 1232 (9th Cir. 2000) ("We do not lightly conclude in any Noerr-Pennington case that the litigation in question is objectively baseless, as doing so would leave that action without the ordinary protections afforded by the First Amendment, a result we would reach only with great reluctance."). See also Twombly, 550 U.S. at 555 (mere "labels and conclusions" will not suffice); Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) (The Court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.").

To be "objectively baseless," the allegedly anticompetitive litigation must be one in which "no reasonable litigant could realistically expect success on the merits." Amarel, 102 F.3d at 1518 (quoting Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993)). Here, two neutral judges and a jury have already determined that Mattel's litigation claims have merit.[12] To

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not even involve a competitor of Mattel, but rather a photographer who had produced and sold nude photographs of Barbie. Compl. ¶ 17; Mattel v. Walking Mountain Prods., 353 F.3d 792, 796 (9th Cir. 1992). In another lawsuit, Mattel was victorious. Compl. ¶ 16; Mattel, Inc. v. Luce, Forward, Hamilton & Scripps, 99 Cal. App. 4th 1179, 1191 (Cal. App. 2d Dist. 2002). Tellingly, MGA has not alleged any facts that connect these lawsuits to Mattel's alleged "Kill Bratz" strategy. Accordingly, nothing in the Complaint warrants analysis under the "series of lawsuits" exception to Noerr-Pennington. MGA's reference to various motions and discovery requests, see Compl. ¶ 14, likewise fails to allege a "series of *lawsuits*." Even counterclaims filed within a single litigation do not count as separate lawsuits for this analysis (see Amarel, 102 F.3d at 1519) and discovery between parties is considered conduct incidental to the right to petition protected under Noerr-Pennington unless the underlying litigation is itself a "sham." Freeman, 410 F.3d at 1184-85; Sosa v. DirectTV, Inc., 437 F.3d 923, 935 (9th Cir. 2006).

[12] See Dkt. No. 3286 (Partial Summary Judgment Order); Dkt. No. 3758 (Partial Summary Judgment Order); Dkt. No. 4279 (Verdict Form); Dkt. No. 9600 (footnote continued)

the extent the Ninth Circuit vacated certain equitable remedies and remanded for further proceedings, this Court recently found that "the undisputed evidence establishes that the equitable relief awarded by the district court . . . *was the product of a careful and reasoned*, albeit incorrect, application of the law by the district court." Dkt. No. 9600 (Amended Summary Judgment Order) at 146 (emphasis added). Where, as here, a "careful and reasoned" legal analysis by a neutral judge came to the same conclusion, there is no basis to conclude objectively that a "reasonable litigant" could not have "realistically expect[ed] success on the merits." Amarel, 102 F.3d at 1518; see Eden Hannon & Co. v. Sumitomo Trust & Banking Co., 914 F.2d 556, 565 (4th Cir. 1990) ("If a litigant can persuade a neutral judge or jury that it is entitled to legal relief from the conduct of another based upon the law and facts, that suit cannot be a sham . . . .").

Boulware v. Nev. Dep't of Human Res., 960 F.2d 793, 795 (9th Cir. 1992), is instructive. There, the plaintiffs (NCSC and Humana) in the underlying action sought and obtained both a temporary and then permanent injunction against Boulware from a state trial court. Id. at 795. On appeal, the Nevada Supreme Court unanimously reversed that relief. Id. Allegedly "[d]riven into bankruptcy by the injunction that stalled his" business venture, Boulware filed a federal lawsuit against NCSC and Humana alleging they had violated the Sherman Act by pursuing the injunctive relief. Id. at 796. The Ninth Circuit "rejected the contention that the subsequent reversal of the injunction . . . proves that the suit was without foundation" and held that a party's initial success on the merits of a litigation, while

(Amended Summary Judgment Order); Dkt. No. 4441 (Order Granting Constructive Trust); Dkt. No. 4442 (Order Granting Declaratory Judgment); Dkt. No. 4443 (Order Granting Permanent Injunction); Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 917-918 (9th Cir. 2010) (remanding for further proceedings on merits).

not necessarily dispositive, "strongly suggests that" the litigation "was not baseless." Id. at 798-99.[13] That reasoning plainly applies here.

Here, not only did a jury and Judge Larson find in favor of Mattel, but the Ninth Circuit's opinion itself belies any assertion that Mattel's litigation was objectively baseless. The Ninth Circuit recognized that "while he was still employed by Mattel, Bryant pitched his idea for the Bratz line of dolls to two employees of MGA" (Mattel, 616 F.3d at 907); while he was still working for Mattel, Bryant was "also working with MGA to develop Bratz, even creating a preliminary Bratz sculpt" (id. at 907-8); and while key provisions in the employment agreement defining the relationship between Bryant and Mattel were "ambiguous" and would have to be construed by a jury, the agreement "could easily" support Mattel's claims that Bryant assigned his "ideas" as an "invention" to Mattel. Id. at 909, 912-913. Even with respect to the equitable remedies MGA now focuses upon, the Ninth Circuit noted that nothing in its opinion would "preclude[] entry of equitable relief based on appropriate findings" on remand. Id. at 917.[14]

MGA does not challenge as baseless any of the seven claims Mattel brought against MGA in the Phase 1 Trial, or all the forms of relief Mattel sought. See Dkt. No. 3917 (Final Pretrial Order), at 11; Dkt. No. 4439, at 2; Dkt. No. 653 (Prayer for Relief). Rather, MGA challenges only the specific equitable remedies that Mattel pursued and Judge Larson granted. But even pursuit of a baseless remedy – and the equitable relief was hardly that, since even the Ninth Circuit recognized that a narrower equitable remedy might be proper – could not render an entire litigation

[13] See also Intellective, Inc. v. Mass. Mut. Life Ins. Co., 190 F. Supp. 2d 600, 608 n.2 (S.D.N.Y. 2002) ("Although the state court eventually decided against granting an injunction on the software portion of the complaint, the fact that a state court granted a TRO and then a partial preliminary injunction precludes a finding that the litigation was 'objectively baseless.'").

[14] See also Amarel, 102 F.3d at 1520 (where "evidence in the record" existed that supported the bringing of the lawsuit, it was not objectively baseless).

objectively baseless. See Meridian Project Sys., Inc. v. Hardin Constr. Co., 404 F. Supp. 2d 1214, 1222 (E.D. Cal. 2005) ("allegation that a single claim is objectively baseless does not bring [the] filing of the entire complaint within the sham exception"); VAE Nortrak N. Am., Inc. v. Progress Rail Servs. Corp., 459 F. Supp. 2d 1142, 1166 (N.D. Ala. 2006) ("[T]he entire lawsuit – not just certain alleged claims – must be objectively baseless and brought with the requisite level of subjective mal-motive in order for the doctrine not to apply."). "A lawsuit is not rendered a sham merely because one form of relief sought may be objectively unreasonable. The rationale of the Noerr- Pennington doctrine is to protect the right of plaintiffs to petition the government unless the plaintiffs have *no* reasonable claim. If the court were to embrace [defendant's counterclaim] argument, then the First Amendment protections for objectively reasonable claims could be undermined simply because an attorney overreaches in the remedies he or she seeks. [Defendant's] interpretation would, in effect, measure the merit of a suit by its weakest aspect, not its strongest claim as the Noerr-Pennington doctrine clearly contemplates." Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc., 2006 WL 516749, at *7 (D. Conn. Mar. 1, 2006) (internal citation omitted).

2. MGA Does Not and Could Not Plead that Mattel Made Misrepresentations Depriving the Litigation of Legitimacy

In order to avail itself of the third "sham" exception, MGA must allege facts that, if true, would establish that Mattel made "intentional misrepresentations to the court" that deprived the litigation as a whole of its legitimacy. Freeman, 410 F.3d at 1184, 1885 n.2 (internal quotation marks omitted). Here, MGA does not allege that the entire litigation was irreparably undermined by any supposed misrepresentations. Nor could it. MGA impermissibly seeks to recast "disputed issues from the underlying litigation . . . as misrepresentations." MedImmune, Inc. v. Genentech, Inc., 2003 WL 25550611, at *7 (C.D. Cal., Dec. 23, 2003) (citing reference omitted). But nearly all the alleged misrepresentations have been

previously addressed by the Court or have no merit based on the record. Or. Natural Res. Council v. Mohla, 944 F.2d 531, 535-36 (9th Cir. 1991). at 535-36 & n.4 (affirming dismissal where alleged "misrepresentations" contradicted by record). For example, MGA's claim that Mattel "erroneously claimed privilege" and wrongfully concealed evidence related to the statute of limitations (see Compl. ¶ 30(a)) has been addressed and rejected several times by the Court. See Dkt. No. 9663 (Order on MGA's MIL No. 24) (rejecting arguments that Mattel waived privilege, and that Mattel should be precluded from arguing fraudulent concealment); see also Dkt. Nos. 3284, 3410, 3669.

MGA claims that Mattel contradicted its express disclaimer to the Court of any "proprietary rights" to the "Bratz" name and its representation that it "only sought to reference the name 'Bratz' . . . to establish when Mr. Bryant conceived the idea of the Bratz dolls generally." Compl. ¶ 30(b). As shown in a recently-filed brief, however, Mattel's counsel clearly enunciated Mattel's position that it owns a property interest in the name "Bratz" through Bryant's work at Mattel. Dkt. No. 10152 at 16-19.[15] In addition, the allegations that Mattel fraudulently sought and obtained duplicative damages (see Compl. ¶ 30(d), (e)) have already been considered and rejected by Judge Larson. See Dkt. No. 5273 at 8 ("The fact is the evidence not only supported a verdict of $100 million, this Court could have, under the remittitur standard, easily sustained a verdict many times this amount.").

The other alleged misrepresentations raised by MGA fare no better. While MGA alleges that Mattel made certain misrepresentations concerning the Omni transaction, the Complaint notes that Omni and Omni-related claims were dismissed

[15] As noted in Dkt. No. 10152, Mattel's counsel expressly represented that the "['Bratz'] name is part of the concept. It is part of the idea. It is part of what it is that Carter Bryant created when he was employed by Mattel that relates to Bratz. That is among the inventions that he created. And therefore, we own it." Id. at 16 (quoting Hearing on the Pre-Trial Conference Order at 79:19-80:1 (May 23, 2008)).

from the litigation. Compl. ¶ 30(c). Accordingly, any alleged misrepresentation logically could not have deprived the litigation of its legitimacy. The various allegations suggesting that Mattel executives gave false deposition testimony (see id. ¶¶ 30(c), (g)) are likewise irrelevant, because such allegations "concern out-of-court misconduct," not "misrepresentations to the court." Freeman, 410 F.3d at 1885 n.2. The Court has also previously rejected MGA's allegations that Mattel induced false testimony or suppressed evidence. See Dkt. No. 9600 (Amended Summary Judgment Order) at 156. Finally, MGA's other allegations are so completely vague as to be meaningless. Compl. ¶¶ 30 (f), (g).

3. Noerr-Pennington and California's Litigation Privilege Also Bar MGA's Abuse of Process Claim

MGA's abuse of process claim is predicated on the same core conduct that underpins the alleged Section 2 violation – that "Mattel . . . knowingly required the district judge to enter a ruling that was an abuse of discretion" (see Compl. ¶ 60) – and likewise fails under the Noerr-Pennington doctrine. See Or. Natural Res. Council, 944 F.2d at 532-33, 536 (affirming dismissal of "abuse of process" counterclaim under Noerr-Pennington). While the doctrine "originally arose in the antitrust context," it broadly applies to other claims since "it is based on and implements the First Amendment right to petition." White, 227 F.3d at 1231.

MGA's abuse of process claim is also barred by California's litigation privilege under Cal. Civ. Code § 47(b). California's litigation privilege "has been extended to *any* communication . . . and to *all* torts other than malicious prosecution." Edwards v. Centex Real Estate Corp., 53 Cal. App. 4th 15, 29 (Cal. App. 1st Dist. 1997); see also Silberg v. Anderson, 50 Cal. 3d 205, 214 (1990) (describing the litigation privilege as "immunizing participants from liability for torts arising from communications made during judicial proceedings"). Abuse of process is a tort (Drasin v. Jacoby & Meyers, 150 Cal. App. 3d 481, 485 (Cal. App. 2d Dist. 1984)), and California's litigation privilege prevents MGA from asserting

an abuse of process claim based on Mattel's litigation conduct. Action Apartment Ass'n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 1241-42 (2007) (noting litigation privilege applies to abuse of process, among other claims).

4. Casting a Lawsuit As Part of a "Scheme" Cannot Thwart the First Amendment Right to Petition the Court

MGA argues that "Mattel is not entitled to Noerr protection because the litigation against MGA was part and parcel of an overall and calculated scheme to monopolize the fashion doll market." Compl. ¶ 29 (citing Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1263 (9th Cir. 1982)). MGA simply misreads Clipper Express. The Ninth Circuit did not hold that a lawsuit is no longer protected by Noerr-Pennington any time a plaintiff casts it as part of "scheme." Rather, Clipper Express provided that if lawful petitioning activity is alleged as part of an overall anticompetitive scheme, the doctrine does not provide the defendant with "overall immunity" for "an overall and independent antitrust violation." Clipper Express, 690 F.2d at 1263, 1265. That is, while the *other* non-petitioning acts may violate the antitrust laws, the "petitioning activity" at issue still has "immunity." Id. at 1265.

As other courts have recognized, the interpretation of Clipper Express that MGA propounds cannot be reconciled with the Supreme Court's directive that genuine petitioning activities "do not violate the antitrust laws even though intended to eliminate competition. *Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act*." United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965) (emphasis added). The Fifth Circuit read Clipper Express to hold that "Noerr-Pennington 'provides immunity only for the narrow petitioning activity,' but not 'overall immunity' to other violations," reasoning that a court "could not hold consistently with Pennington, that the overall scheme makes the otherwise protected petitioning a sham," because to "hold otherwise would unduly infringe on the protection Noerr-Pennington

extends to petitioning activities genuinely intended to influence governmental action." In re Burlington Northern Inc., 822 F.2d 518, 525-6 (5th Cir. 1987) (quoting Clipper Express, 690 F.2d at 1263, 1265); see also Johnson v. Con-Vey/Keystone, Inc., 856 F. Supp. 1443, 1448 (D. Or. 1994) (rejecting argument that "Noerr-Pennington doctrine does not extend to cases where the antitrust allegations include activities which constitute a scheme of anti-competitive activity in addition to the filing of the anti-trust lawsuit").

III. THE VACATED EQUITABLE REMEDIES DO NOT PROVIDE A BASIS FOR *ANY* ACTION FOR DAMAGES

The only arguably non-conclusory allegation of injury to MGA is that the equitable remedies issued by Judge Larson after the Phase 1 trial were a "death blow" to MGA's business. Compl. ¶ 24. Indeed, MGA seeks (only) the $1 billion (before trebling) it claims MGA was worth at the point the equitable remedies were issued. Id. ¶¶ 18, 58. The challenged equitable remedies cannot, however, support a claim for damages.

It is well-settled that in the absence of a bond or undertaking, "the court has no power to award damages sustained by either party in consequence of the litigation." Russell, 105 U.S. at 437. Damages arising from remedies imposed by the court "is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit." Id. at 438; see also W.R. Grace & Co., 461 U.S. at 770 n.14 ("A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond."); Buddy Sys., Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1167-68 (9th Cir. 1976) (same). The only exception to this rule is for cases in which the allegedly injured party "can make out a case for malicious prosecution." In re Ladner, 799 F.2d 1023, 1025 (5th Cir. 1986) (internal quotation marks and citation omitted); accord Russell, 105 U.S. at 438.

The Court applied these principles in the prior-filed action to conclude that MGA could not obtain damages on its wrongful injunction claim. See Dkt. No. 8892 at 12. The same result obtains here. The only damages MGA specifically alleges flow from Judge Larson's independent imposition of equitable relief and, consequently, any damages MGA sustained "is *damnum absque injuria*." Russell, 105 U.S. at 438. Nor may MGA satisfy the malicious prosecution exception to the bar on relief since it has not even alleged such a claim.

IV. MGA FAILS TO STATE A SHERMAN ACT § 2 CLAIM

A. MGA's Monopolization Claims Are Wholly Implausible

On a Rule 12(b)(6) motion to dismiss, a court must accept as true all well-pleaded facts and their reasonable inferences, but it need not credit "allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010). "Mere legal conclusions are not to be accepted as true and do not establish a plausible claim for relief." Sherman v. Hertz Equip. Rental Corp., 2011 WL 317985, at *1 (C.D. Cal. Jan. 28, 2011) (Carter, J.). The plaintiff must do more than simply assert "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. The plaintiff instead must plead enough "[f]actual allegations . . . to raise a right to relief above the speculative level." Id. "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, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570); William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 662 (9th Cir. 2009).

MGA claims that Mattel monopolized and attempted to monopolize in violation of Section 2 of the Sherman Act. To prevail on its monopolization claim, MGA must establish (1) that the defendant possessed "monopoly power in the

relevant market," and (2) the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acquisition, or historic accident." John Doe 1 v. Abbott Labs., 571 F.3d 930, 933 n.3 (9th Cir. 2009) (internal quotation marks and citation omitted). Similarly, to prevail on its attempted monopolization claim, MGA must show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Id. (internal quotation marks and citation omitted).

MGA's monopolization and attempted monopolization claims here cannot be reconciled with MGA's prior judicial admissions that it would be "impossible" for any company to "be monopolistic in toys." Dkt. No. 9316 (MGA Opp. to MSJ Counterclaims-in-Reply) at 38 (internal quotation marks omitted). As MGA testified at its Rule 30(b)(6) deposition: "And when you – you know, in an ideal world, each one of these companies, be it Mattel, MGA, Hasbro – every one of them would like to have a period when it introduces a product in which it's kind of like the only kid on the block because that gives you a chance to get a consumer excited and come to your product and not be confused about what they want. So you want to be, in a sense, unique for a period of time because it gives you – *not a monopolistic position because toys – it's impossible to be monopolistic in toys*, but it gives you a chance to be unique for a period of time." Id. (emphasis added).

B. MGA Does Not Allege Cognizable Antitrust Injury

MGA's Section 2 claim must be dismissed because it fails to allege the element of antitrust injury. An antitrust "plaintiff must prove the existence of '*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). At the pleading stage, the plaintiff must allege antitrust injury with sufficient factual enhancement,

as "[c]onclusory allegations of anticompetitive effect are insufficient without supporting facts as to how competition in the [relevant market] has actually been reduced or harmed." In re Webkinz Antitrust Litig., 695 F. Supp. 2d 987, 997 (N.D. Cal. 2010).

Courts have long held that "the antitrust laws 'were enacted for the protection of competition, not competitors.'" Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1064 (9th Cir. 2001) (quoting Atl. Richfield, 495 U.S. at 338). Even malicious conduct resulting in the "'*elimination* of a single competitor, standing alone, does not prove anticompetitive effect.'" Austin v. McNamara, 979 F.2d 728, 739 (9th Cir. 1992) (quoting Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)) (emphasis in Austin); see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . ."). The plaintiff therefore must show more than injury to itself as a competitor, "but rather injury to competition." Austin, 979 F.2d at 739; see also Tanaka, 252 F.3d at 1064. Harm to competition "'means injury from higher prices or lower output, the principal vices proscribed by the antitrust laws.'" Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001) (quoting Nelson v. Monroe Reg'l Med. Ctr., 925 F.2d 1555, 1564 (7th Cir. 1991)).

The plaintiff, of course, must also make a showing that it was personally harmed as a result of the antitrust violation. See 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring a damages suit). This requires the plaintiff to allege a "direct relationship between the injury and the alleged wrongdoing." Assoc. of Wash. Pub. Hosp. Dists. v. Philip Morris Inc., 241 F.3d 696, 701 (9th Cir. 2001). The plaintiff does not establish antitrust injury if it is premised on "speculative, tenuous links," or if the plaintiff is "one step removed from the allegedly harmful conduct." Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris,

Inc., 17 F. Supp. 2d 1170, 1176-78 (D. Or. 1998). The Complaint here is narrowly focused on harm to MGA and not at all on competition at large. MGA's core allegation is that Mattel undertook a campaign to eradicate Bratz from the marketplace – to "Kill Bratz." Compl. ¶ 37. But a strategy (even an allegedly malicious one) to expel a competitor cannot give rise to antitrust injury. See Tanaka, 252 F.3d at 1064 (plaintiff "alleges nothing more than a personal injury to herself, not an injury to a definable market"); Austin, 979 F.2d at 739 (plaintiff "was required to show not merely injury to himself as a competitor, but rather injury to competition").

MGA does not allege that prices in the alleged fashion doll market rose or that the supply of dolls was reduced as a result of the "Kill Bratz" campaign. Nor does MGA allege that any competitor other than MGA has suffered an injury as a result of Mattel's alleged "Kill Bratz" campaign. And MGA does not allege any specific change in market conditions (aside from impairment to MGA) resulting from the alleged "Kill Bratz" campaign. See, e.g., Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989) (affirming dismissal for failure to plead antitrust injury and stressing absence of "factual allegations outlining the effect of the [defendant's] ban on the price or availability of exhibition drag racing services in the United States"); POURfect Prods. v. KitchenAid, 2010 WL 1769413, at *4 (D. Ariz. May 3, 2010) (dismissing complaint that failed to "allege facts showing that [defendant's] conduct either raised prices or diminished quality").

The few allegations in the Complaint that remotely bear on harm to competition are both generic and conclusory. For example, MGA makes the vacuous allegation that the ability of "MGA and others" to compete in the market has been impaired and that consumers are "deprived of choice and price competition." Compl. ¶ 54. Elsewhere, MGA simply lists the purported "exclusionary effects" of Mattel's alleged acts without any added facts or

explanation. Id. ¶ 56. Such "[c]onclusory allegations of anticompetitive effect" absent any "supporting facts" are insufficient to allege harm to competition. Webkinz, 695 F. Supp. 2d at 997 ("Plaintiffs do not allege that [defendant's] conduct has in any way affected the price of the tied products or even the overall price for the bundled goods.").

MGA also fails to demonstrate that it suffered an injury-in-fact that had a "direct relationship" with the alleged antitrust violation. See Assoc. of Wash., 241 F.3d at 701. MGA's allegations of its lost sales and profits either stem from conduct that this Court already held was not caused by Mattel, or are wholly conclusory. As discussed above, the only non-conclusory allegation of harm in the new Complaint is that the equitable remedies issued by Judge Larson destroyed the Bratz brand. MGA is absolutely precluded from obtaining redress for the purportedly overbroad equitable remedies. See Point III, supra. Even if it were not, the claim would fail because in rejecting MGA's RICO claim, this Court has already concluded that Mattel was not the direct legal cause of the equitable relief, finding that the injunction was the "product of a careful and reasoned, albeit incorrect, application of the law by the district court." Dkt. No. 9600 (Amended Summary Judgment Order) at 146. The RICO causation standard is identical to the antitrust causation standard (see Assoc. of Wash., 241 F.3d at 701), giving preclusive effect to the Court's earlier summary judgment ruling that Mattel did not cause the equitable orders to issue. See Luben Indus., Inc. v. United States, 707 F.2d 1037, 1040 (9th Cir. 1983) (final judgment for issue preclusion is any judgment that is "sufficiently firm" (internal quotation marks and citation omitted)); Scripps Clinic & Research Found. v. Genentech, Inc., 678 F. Supp. 1429, 1436 (N.D. Cal. 1988) (partial summary judgment order given preclusive effect).

MGA's vague references to "the specter of the constructive trust" and "clouds over MGA" (Compl. ¶ 25) are too attenuated to satisfy MGA's burden of pleading a "direct relationship between the injury and the alleged wrongdoing." Assoc. of

Wash., 241 F.3d at 701. MGA provides no additional information connecting the dots between the "specter" of that relief and any injury suffered by MGA. The "tenuous and speculative character of the relationship between the alleged antitrust violation" and the equitable relief makes MGA's injury argument too indirect to plead antitrust injury. Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983).

MGA's other, scattershot allegations of harm are just the type of "'naked assertion[s]' devoid of 'further factual enhancement'" that are insufficient to state a claim. Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557). MGA's conclusory statements of Mattel's alleged efforts to book the same actresses that MGA had used, copy MGA's commercials, manipulate industry data, and the like are completely unhinged from any allegation of a resulting increase in prices or decrease in competition. Compl. ¶ 53. MGA provides no explanation of how such acts did cause or could have caused any injury to competition at large or to MGA in particular. For example, MGA asserts that Mattel threatened MGA's licensees, distributors, and suppliers (id. ¶ 53(b)), but MGA fails to allege that any company acted in line with any alleged threat, or any resulting impact on prices or competition. The gratuitous addition of incendiary rhetorical flourishes, such as that Mattel "killed 4-Ever Best Friends and then celebrated its death" (id. ¶ 53(g)), do nothing to nudge MGA's deficient pleadings across the line. See In re Online DVD Rental Antitrust Litig., 2009 WL 4572070, at *7 (N.D. Cal. Dec. 1, 2009) (dismissing monopolization claim given that conclusory allegations failed to establish "direct causal link" between defendants' conduct and prices); Or. Laborers-Employers, 17 F. Supp. 2d at 1176-78 ("the claim of causation between the plaintiffs' injury and the defendants' alleged restraint on the market and attempt to monopolize the market contains too many speculative, tenuous links to withstand scrutiny").

C. MGA's Other Conclusory Allegations Compel Dismissal

Dismissal is also warranted here because MGA's allegations concerning the relevant market and monopoly power are purely conclusory (or contradicted by other allegations), further underscoring the implausibility of MGA's claim.

1. MGA Fails to Define the Relevant Market

A properly defined relevant market is "essential to establish a monopolization claim" (Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1104-05 (9th Cir. 1999)), and a complaint should be dismissed if it proceeds from a "facially unsustainable" market definition. Ticketmaster LLC v. RMG Techs., Inc., 536 F. Supp. 2d 1191, 1195 (C.D. Cal. 2008) (internal quotation marks and citations omitted). A viable definition must encompass both the relevant geographic market and the relevant product market. See Big Bear, 182 F.3d at 1104-05. The product market "must encompass the product at issue as well as all economic substitutes for the product." Ticketmaster, 536 F. Supp. 2d at 1195 (internal quotation marks and citation omitted). The geographic market must include the "area of effective competition." Tanaka, 252 F.3d at 1063.

Here, MGA has described the relevant product market (in all of one paragraph) as "fashion dolls, which are dolls in the 9-12 [inches] tall range and which are designed to be dressed with fashion clothes and accessories." Compl. ¶ 50. MGA's allegations, however, fail to consider supply, instead focusing solely on demand considerations by alleging that for "girls there is no reasonably interchangeable substitute" and "the lack of reasonable interchangeability among the purchasers." Id. So defining the relevant market on "demand considerations alone is erroneous," as a "reasonable market definition must also be based on 'supply elasticity.'" Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995) (quoting Virtual Maint., Inc. v. Prime Computer, Inc., 11 F.3d 660, 664 (6th Cir. 1993)). MGA makes no attempt to address supply elasticity, or whether competitors

in the alleged "fashion doll market" are unable to increase production in order to capture business from Mattel when Mattel increases prices.

MGA's new Complaint also does not plausibly allege the boundaries of the "fashion doll" product market or identify players in the market other than Barbie and Bratz. See Tanaka, 252 F.3d at 1063 (affirming dismissal of antitrust complaint because it contained only "conclusory assertion" that product market is "unique" and "not interchangeable"). MGA's alleged "fashion doll" product market cannot be reconciled with the trial testimony of MGA's Larian, who testified that Bratz faces competition not only from "fashion dolls" other than Barbie but also from toy animals and computer games. See Dkt. No. 5581 (Trial Transcript) at 6252:19-6253:19 (August 7, 2008) (discussing competition from "Hannah Montana" and "High School Musical" fashion dolls, as well as "Webkinz" and "Littlest Pet Shop").

A threadbare recitation of the applicable legal standard is inadequate, and Courts routinely dismiss complaints for failure to address market substitutes in any meaningful detail or with factual support. See, e.g., Golden Gate Pharm. Servs., Inc. v. Pfizer, Inc., 2010 WL 1541257, at *5 (N.D. Cal. Apr. 16, 2010) (dismissing antitrust complaint for failure to allege "that any of the alleged markets or submarkets identified in the SAC consists of products reasonably interchangeable by consumers"); Delano Farms Co. v. Cal. Table Grape Comm'n, 2009 WL 3586056, at *25-26 (E.D. Cal. Oct. 27, 2009) (dismissing antitrust claim for failure to allege "plausible basis" for defining market as each of the patented grape varieties); UGG Holdings, Inc. v. Severn, 2004 WL 5458426, at *4 (C.D. Cal. Oct. 1, 2004) (dismissing claim where allegation of "sheepskin, fleece-lined boots" market was too conclusory given that plaintiff failed to explain why "other types of boots would not be reasonable substitutes for sheepskin, fleece-lined boots").

MGA's definition of the relevant geographic market is equally defective. MGA concludes (in a single sentence) that "[t]he relevant geographic market is the

United States." Compl. ¶ 51. But MGA contradicts itself throughout the Complaint, alleging that any purported fashion doll market (if such a product market were sustainable) is in fact global and not limited to the United States. See id. ¶ 8 ("Barbie had been, by a wide margin, the dominant fashion doll in the world."); id. ¶ 11 (Mattel paid "retailers around the globe not to buy Bratz or MGA products."); id. (Mattel "spread derogatory and negative statements about MGA and Bratz on a global basis."); id. ¶ 34 ("Barbie" has made Mattel an "international powerhouse."); id. (in the late 1990s, "Barbie was the world's best-selling toy."); id. ¶ 39 (in 2001, "MGA invited Mattel to look at and consider distributing Bratz in Latin America.").

The Court need not credit MGA's self-contradictory assertions. See Daniels-Hall, 629 F.3d at 998 ("allegations that contradict exhibits attached to the Complaint" need not be accepted). MGA does not assert a single fact (nor can it) explaining why the alleged fashion doll market should be limited to the United States. See Tanaka, 252 F.3d at 1063-64 (affirming dismissal where geographic market was improperly limited); Big Bear, 182 F.3d at 1104-05 (same); Commercial Data Servers v. Int'l Bus. Machs. Corp., 166 F. Supp. 2d 891, 897 (S.D.N.Y. 2001) (failure to allege "any facts explaining why the relevant geographic market is domestic rather than worldwide," where plaintiffs sold products globally, constituted independent ground for dismissal of antitrust claims).

2. MGA Fails to Allege Monopoly Power

To state a monopolization claim, a plaintiff must also show that the defendant possesses "monopoly power," while an attempted monopolization claim requires a showing that the defendant has a "dangerous probability of achieving monopoly power." John Doe 1, 571 F.3d at 933 n.3 (internal quotation marks and citations omitted). Monopoly power is the unilateral power to "restrict marketwide output and, hence, increase marketwide prices," and its key elements are dominant market share, high barriers to entry and inability of competitors to increase output in response to predatory prices. Rebel Oil, 51 F.3d at 1434. A court should dismiss a

complaint premised on merely contradictory or conclusory allegations of monopoly power. See, e.g., Korea Kumho Petrochem. v. Flexsys Am. LP, 2008 WL 686834, at *9 (N.D. Cal. Mar. 11, 2008).

Here, MGA's only specific allegations of Mattel's market share are from the late 1990s – *before* Mattel allegedly initiated the "Kill Bratz" campaign. Compl. ¶¶ 34, 54. But the only relevant question is whether Mattel had, or was dangerously close to acquiring, monopoly power at the time of the alleged conduct. See United States v. Syufy Enters., 903 F.2d 659, 666 (9th Cir. 1990). And as to that question, MGA alleges that when Mattel purportedly initiated the "Kill Bratz" campaign, Bratz had already "acquired a market share *equal to or in excess of Barbie*." Compl. ¶ 37 (emphasis added).

A market share of 50 percent or less is often incapable of establishing market power. See, e.g., Rebel Oil, 51 F.3d at 1438 (declining to apply an exact numeric threshold but recognizing that "numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power"); Twin City Sportserv., Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975) ("[O]n several occasions courts have considered a 50% share of the market as inadequate to establish a proscribed monopoly."). MGA does not make a factual allegation that Mattel acquired a dominant share after or as a result of the "Kill Bratz" campaign. MGA's lone statement that "Barbie market shares are up again" (Compl. ¶ 26) is not supported by a specific allegation of Barbie's share or any factual assertion concerning the actual state of the putative fashion doll market.

It also is well settled that "[a] mere showing of substantial or even dominant market share alone cannot establish market power sufficient to" support a monopolization claim. Am. Prof'l Testing Serv., 108 F.3d at 1154 (internal quotation marks and citation omitted). An antitrust plaintiff must also plausibly allege that "rivals are barred from entering the market" and "that existing competitors lack the capacity to expand their output to challenge the predator's high

price." Id. (internal quotation marks and citation omitted). MGA's allegations here of high barriers to entry are not only entirely conclusory (see, e.g., Compl. ¶ 55), they also are squarely contradicted by MGA's own allegations about its sudden and highly successful emergence into the purported fashion doll market. See id. ¶ 37 (prior to entering the market in 2001, MGA had not produced fashion dolls and was "little-known."); id. (the release of Bratz, "propelled [MGA] into the limelight" and "[w]ithin only a few years, Bratz devastated Barbie's dominance of the fashion doll market and acquired a market share equal to or in excess of Barbie."); id. ¶ 45 ("Although merely a tiny fraction of Mattel's size, MGA, with Bratz, was able to chip away at Mattel's stranglehold on the fashion doll market, gaining shelf space and market share as Barbie sales remained flat or, at times, declined.").

Where, as here, the plaintiff's allegations of high barriers to entry are conclusory and contradicted by other well-pleaded allegations in the Complaint, they should be dismissed. See McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc., 2008 WL 2437739, at *8-9 (D. Haw. June 17, 2008) (allegation that "[r]ivals will be barred from entering the stevedoring market" and similar conclusory claims were insufficient to survive motion to dismiss); Korea Kumho Petrochem., 2008 WL 686834, at *9 (dismissing attempted monopolization claim where allegation of monopoly power contradicted by other allegations in complaint); see also Syufy Enters., 903 F.2d at 665 (movie theatre operator lacked monopoly power where competitor stepped into the market and "against all odds, began giving [the operator] serious competition").

V. MGA FAILS TO STATE A § 17043 CLAIM

To state a predatory pricing claim under California state law, MGA must allege that Mattel (1) sold its product "at less than the cost thereof" and (2) had "the purpose of injuring competitors or destroying competition." See Cal. Bus. & Prof. Code § 17043. The Complaint here merely alleges that Mattel has sold Wee 3 Friends "at prices which are below its fully allocated cost in violation of California

Business & Professions § 17043." Compl. ¶¶ 53(g), 62. MGA's utter failure to allege Mattel's sales price, cost in the product, and cost of doing business requires dismissal of MGA's predatory pricing claim. See Indep. Journal Newspapers v. United W. Newspapers, Inc., 15 Cal. App. 3d 583, 587 (Cal. App. 2d Dist. 1971) (affirming dismissal of § 17043 claim). Given MGA's allegations of the similarity between Mattel's Wee 3 Friends and MGA's 4-Ever Best Friends (see Compl. ¶¶ 53(g), 62) MGA was in a position to plead its predatory pricing claim with sufficient particularity and cannot now claim otherwise. The Complaint's sole allegation about this claim boils down to a legal conclusion, which is "not to be accepted as true" (Sherman, 2011 WL 317985, at *1) and fails to state a claim. See Twombly, 550 U.S. at 555.

Conclusion

For all of the foregoing reasons, Mattel respectfully submits that the Complaint should be dismissed with prejudice.

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