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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MGA ENTERTAINMENT, INC.,

Plaintiff,

vs.

MATTEL, INC. and ROBERT A. ECKERT,

Defendants.

CASE NO. CV 11-01063 DOC (RNBx)

PLAINTIFF MGA ENTERTAINMENT, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Hon. David O. Carter
Courtroom 9D

Hearing: June 6, 2011
Time: 8:30 a.m.

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PRELIMINARY STATEMENT

Having admitted Mattel's dominant monopoly power and having successfully used that power to destroy a competitive product, deplete the commercial value of MGA, and tie MGA up in seven years of baseless litigation, Defendants Mattel, Inc. and Robert Eckert (collectively "Mattel") now seek to stop MGA from obtaining access to the Court for redress. Such an attempt should be rejected – just as the jury rejected Mattel's claims. MGA has set forth sufficient facts to state each of the claims in the Complaint, and MGA should now be entitled to discovery to elicit additional facts to support these claims.

BACKGROUND

The gravamen of MGA's Complaint is the baseless litigation that the fashion doll powerhouse Mattel has ruthlessly pursued against its smaller competitor MGA to which Mattel was starting to lose market share. The extent of the baselessness was judicially sanctioned as recently as July 22, 2010 in the Ninth Circuit's stinging rebuke, which stayed all equitable orders within four hours of oral argument and then in its decision, vacated all the equitable relief under an abuse of discretion standard, and empowered this Court to vacate the entire damage award, which it promptly did. The Ninth Circuit's ruling gave birth to a viable antitrust claim grounded on baseless litigation. At that time, after seven years of litigation, the prior case was at an advanced stage and ready to proceed to trial.

Law of the Case and Mattel's Continued Abusive Litigation Tactics

Indeed, mere days after the Ninth Circuit's opinion, on August 2, 2010, Your Honor issued its "Order Setting Trial Date" (Dkt. 8434), which set the trial for **January 11, 2011**, and in bold all-caps font, the order states: "**THIS DATE WILL NOT BE CONTINUED**." *Id*. The new antitrust claim in this Complaint, flowing from the Ninth Circuit decision, presents entirely new factual and legal issues, new evidence, new expert discovery, and would have needlessly introduced added complexity and delay to an already complicated trial, if indeed it could conceivably

have been ready for a January 2011 trial.

Moreover, even after the trial commenced, additional facts continued to be uncovered, which further demonstrate that Mattel's intentional misrepresentations undermined their entire baseless, bad faith litigation, and that Mattel knew its original case was statute-barred and without any merit. For example, Michael Moore, Mattel's in-house counsel, testified about (1) an August 2001 Mattel internal memo which discussed "how closely [MGA and Mr. Larian were] following [Mattel's] product line" (4/4/11 (Vol. 3) TT 6:13-8:8; TX26701A); and (2) an "investigation filed in 2002 that related to whether Bratz was an infringement" (4/4/11 (Vol. 2) TT 26:1-13; 4/4/11 (Vol. 3) TT 8:9-20). Similarly, Mattel executive Richard DeAnda, Vice President of Global Security (3/9/11 (Vol. 1) TT 95:18-96:6), testified that he knew Carter Bryant had devised the Bratz doll for MGA and was on notice of potential infringement as early as March 2002 (3/9/11 (Vol. 2) TT 6:4-7:22; 16:9-17:10) – which clearly bars Mattel's lawsuit against MGA, which was not filed until (at the earliest) November 2006 – as the jury found with respect to Mattel's intentional interference claim. Moreover, Mr. Moore admitted that while conducting his own investigation in 2003, he never asked to see any of the written documentation Mr. DeAnda had in his file. *See* 4/4/11 (Vol. 2) TT 25:4-10.

The launch of Bratz occurred in 2001; and by 2002, Mattel had visited Bratz at several toy fairs (TX 911; 1/20/11 (Vol. 2) TT 101:7-102:11; TX 25860; 3/22/11 (Vol. 2) TT 13:11-14:2); Mattel received internal reports regarding Bratz (TX 9502; TX 9504); Mattel designers had raised suspicions about Carter Bryant and MGA, and voiced concerns about the similarities between Bratz dolls and Toon Teens and Diva Starz (1/19/11 (Vol. 1) TT 115:13-116:2; 3/10/11 (Vol. 1) TT 13:2-14:10; 3/17/11 (Vol. 2) TT 18:14-19:13, 21:14-22:2); Mattel had initiated an investigation into Mr. Larian and MGA (TX 1195RS); Mattel's outside counsel Quinn Emanuel was monitoring the web, where Carter Bryant was expressly named as the creator of Bratz, and, in February 2002, wrote to Mr. Larian to "immediately and permanently cease

infringing Mattel's BARBIE and DIVA STARZ trademarks" (TX 17252; TX 4507-2); Mr. Eckert personally received an anonymous letter stating that Carter Bryant created Bratz while working at Mattel (TX 1193); and in July 2003, the Wall Street Journal ran an article about Bratz, which identified Mr. Larian as the President of MGA and Carter Bryant as the creator of Bratz (TX 1C). In 2002, MGA publicly filed for copyright to Bratz in Brazil, naming Carter Bryant as the creator; Mattel not only had access to this public information, Mattel, in fact, obtained these Brazilian copyright applications and produced them to MGA. *See* TX 1703. Given the overwhelming evidence that Mattel was on notice of its claims and failed to sue MGA within the statute of limitations period, Mattel knew its claims were statute-barred but nevertheless pursued baseless litigation in bad faith solely for an anticompetitive purpose.

Not only did Mattel knowingly pursue baseless copyright and trade secret claims and a time-barred intentional interference claim, and seek imposition of a constructive trust (Dkt. 4305; Dkt. 4441) which no reasonable litigant could expect to be upheld on the record presented under established law, Mattel also secured the appointment of an auditor and temporary receiver (Dkt. 4657) based on false allegations that OMNI and Mr. Larian has engaged in fraudulent transfers – a claim which cost MGA millions, reduced its ability to conduct business, and has now been rejected by both this Court and the state court judge.[1] Mattel even had the "chutzpah" to file copyright applications on the Carter Bryant drawings which the jury found Mattel did not even own. *See* Dkt. 10518.

Additionally, this Court recently ordered production of inventory logs and documents Mattel intentionally and wrongfully sought to withhold. On March 28, 2011, Your Honor ordered production of 35 boxes of Mattel documents, after the

[1] On April 13, 2011, Mattel's state court claims against MGA for fraudulent transfer of funds were found to lack merit and were dismissed without leave to amend. "[A]fter an independent analysis, this court concurs with Judge David O. Carter and adopts his findings." April 14, 2011 Order, *Mattel, Inc. v. MGA Entertainment, Inc.*, No. BC444819 (Cal. Super. Ct.).

Discovery Master had reviewed a sample set and concluded that the documents did not appear to contain attorney-client privilege communications or material protected by the work product doctrine. *See* Dkt. 10302. The Court also ruled that Mattel improperly withheld its communications with Kohl's Department Stores, communications which had a direct bearing on MGA's allegations of Mattel's interference with its business dealings. *See* 4/1/11 (Vol. 3) TT 6:19-23, 7:10-12 ("This batch of communications concerning Kohl's should have been produced earlier."). Indeed, this Court was seriously concerned with abuse of the discovery process, and had to demand good faith compliance on the record during trial.

> So if Quinn Emanuel's position is there has to be a specific order . . . for every single discovery request made, and you're not going to turn over information until there is a specific order by the Court, then I want to know that on the record, and then we'll see how this Court feels about whether there is an abuse concerning discovery.

4/1/11 (Vol. 2) TT 55:14-21.

Given Mattel's continuous and ongoing egregious conduct, the antitrust claim becomes stronger by the day, and cannot possibly be barred. Misrepresentations to the Court are not entitled to *Noerr-Pennington* protection.

Ninth Circuit's Opinion

MGA has sufficiently demonstrated that Mattel's litigation was a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 144 (1961).

Even after the original trial and verdict in Mattel's favor and appellate briefing, at the Ninth Circuit hearing, Judge Wardlaw expressed skepticism as to the fairness of the proceeding and inquired of Mattel's counsel to explain "what did MGA do wrong?":

> Judge Wardlaw: I understand the verdict, I understand what

> ensued. There were certain jury instructions that were given that almost ensured that would be what ensued, so what I'm trying to figure it out from you is: You say they were wrongfully acquired by MGA?
>
> Mr. Collins: That is correct.
>
> Judge Wardlaw: How did, what did MGA do wrong?
>
> Mr. Collins: MGA interfered . . .
>
> Judge Wardlaw: Did it know that Bryant – did it have any idea that Bryant had this idea and that it was covered by this invention agreement when it made its deal with Bryant.

Dec. 9, 2009 Ninth Circuit Hearing Tr. at 19:14-15, 20:16-19, 31:5, 30:24-31:9.

The Ninth Circuit ruling in Mattel's case against MGA makes clear that there is a justiciable issue that Mattel's litigation was objectively baseless and was specifically intended to interfere directly with MGA's business relationships through the abuse of the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon.

The Ninth Circuit found the district court "erred in holding that the [inventions] agreement, by its terms, clearly covered ideas." *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 909-10 (9th Cir. 2010). Even if extrinsic evidence were to show ideas were covered, the constructive trust still went "too far."

> It is not equitable to transfer this billion dollar brand – the value of which is overwhelmingly the result of MGA's legitimate efforts – because it may have started with two misappropriated names. The district court's imposition of a constructive trust forcing MGA to hand over its sweat equity was an abuse of discretion and must be vacated.

Id. at 911.

Indeed, the Ninth Circuit concluded that the remedies Mattel sought could not be supported under settled law. After citing the relevant authorities, the Ninth Circuit explained:

> When the value of the property held in trust increases significantly because of a defendant's efforts, a constructive trust that passes on the profit of the defendant's labor to the plaintiff usually goes too far. . . Even assuming that MGA took some ideas wrongfully, it added tremendous value by turning the ideas into products and eventually, a popular and highly profitable brand. The value added by MGA's hard work and creativity dwarfs the value of the original ideas Bryant brought with him, even recognizing the significance of those ideas. We infer that the jury made much the same judgment when it awarded Mattel only a small fraction of the more than $1 billion in interest-adjusted profit MGA made from the brand.

Id.

Similarly, the copyright injunction was the result of inappropriate findings and significant legal error. *Id*. at 916-17. "Mattel can't claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing – these are all unprotectable ideas." *Id*. at 916.

Your Honor's August 2, 2010 Order After Remand

After remand, Your Honor concurred with Judge Wardlaw and the Ninth Circuit's rationale:

> Even if a claim for breach of constructive trust is cognizable, and even if Larian/MGA breached the constructive trust imposed after Phase 1, Mattel suffered no injury. The order imposing the constructive trust was invalid, because it was overbroad and predicated upon verdicts that were reached after improper instruction. *See Mattel, Inc. v. MGA Entertainment, Inc*., No. 09-55673, 2010 WL 2853761 (9th Cir. July 22, 2010). Mattel never had a valid property right to the Bratz intellectual property and suffered no damage as a result of Larian/MGA's alleged breach of the constructive trust imposed after Phase 1.

Aug. 2, 2010 Order on Motion to Dismiss, Dkt. 8423. Indeed, it was Mattel's lawyers who deliberately and wrongfully solicited the improper jury instructions upon which the initial verdict was reached. The inappropriate findings and "significant" legal errors and erroneous jury instructions which were all induced by Mattel's lawyers required the entire case to be tried again. *See, e.g.*, *Mattel*, 616 F.3d at 917-98; Dkt. 10518.

Jury Verdict after Retrial

On April 21, 2011, after a rigorous 3-month retrial, the jury returned a verdict for MGA and awarded $88.5 million in damages to MGA, and found zero liability for MGA on Mattel's copyright infringement and trade misappropriation claims. Dkt. 10518 (Apr. 21, 2011 Jury Verdict Form – Redacted). The jury outright rejected Mattel's copyright infringement and trade secret misappropriation claims, finding that Mattel does not own the idea for Bratz or any of the sketches that led to the doll. *Id*. at 1-14. The jury further found that MGA proved by clear and convincing evidence that Mattel acted willfully and maliciously in misappropriating MGA's trade secrets, and MGA is thus entitled to punitive damages. *See id*. at 26.

Significantly, the jury found that on or before April 2002, Mattel discovered, or should have discovered through the exercise of reasonable diligence, facts that would have caused a reasonable person to suspect that MGA or Mr. Larian intentionally interfered with its contractual relations with Carter Bryant, and therefore Mattel's interference claim was, in fact, statute-barred. *See id*. at 28. Even if those claims were not time-barred by the statute of limitations, the jury awarded Mattel the insignificant sum of $5,000 damages from each MGA and Mr. Larian, a mere .01% of the damages levied against Mattel. It is enlightening that Mattel has spent seven years and a reported $400 million pursuing a claim on which a jury found $10,000 in damages, which is nonetheless statute-barred!

Because the jury found that Mattel did not prove any copyright infringement by MGA or Mr. Larian, the jury did not need to reach MGA's affirmative defense on

statute of limitations, and therefore the jury did not answer Question 6 relating to the statute of limitations period as it pertains to the copyright claim. *See id*. at 4. Because the jury found that neither MGA nor Mr. Larian misappropriated any of the 80 categories of Mattel's alleged trade secrets, MGA's affirmative defense on statute of limitations was moot, and the jury need not have answered Question 11 pertaining to the statute of limitations for the trade secrets claim. *See id*. at 5-14. In any event, since the jury concluded there was *no* misappropriation, it logically follows that the jury would have concluded that *at no time* did Mattel discover, or should it have discovered through the exercise of reasonable diligence, facts that would have caused a reasonable person to suspect that MGA or Mr. Larian had misappropriated any Bratz-related concepts and works. How could Mattel be charged with knowing or suspecting something which did not exist?

The effect of Mattel's anticompetitive conduct was to devastate the commercial value of MGA and eliminate competition from the market, causing MGA significant pecuniary loss. Indeed, Mattel has been successful in its anticompetitive objective; Bratz sales are a mere fraction of what they were while Barbie sales are increasing greatly. *See* Cmplt. ¶¶ 24-26. Mattel has abused MGA and the judicial system; this antitrust case is procedurally proper and necessary and should now proceed to discovery to be decided on the merits. The Ninth Circuit said it best in its concluding sentence: "America thrives on competition; Barbie, the all-American girl, will too." *Mattel*, 616 F.3d at 918.

ARGUMENT

For purposes of ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact "'are taken as true and construed in the light most favorable to the plaintiff.'" *Williams ex rel. Tabiu v. Gerber Products Co*., 523 F.3d 934, 937 (9th Cir. 2008) (citation omitted); *accord Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002); *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Further, *Twombly* does "not require heightened fact

pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007); *see also Clemens v. DaimlerChrysler Corp*., No. 06-56410, 2008 WL 2446317, at *2 (9th Cir. June 19, 2008); *Williams*, 523 F.3d at 938.

"Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 127 S. Ct. at 1965; *Williams*, 523 F.3d at 938 ("'[T]he motion [to dismiss] is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case.'" (quoting 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356, at 354 (3d ed. 2004)) (brackets in original)).

"[T]he Federal Rules of Civil Procedure do not authorize a district court to adjudicate claims on the merits at this early stage in the proceedings; the court may only review claims for legal sufficiency." *PAE Gov't Servs., Inc. v. MPRI, Inc*., 514 F.3d 856, 858 (9th Cir. 2007). "Adjudication on the merits must await summary judgment or trial." *Id*. As Mattel correctly noted (Mattel Mtn. at 5 n.1), the Court may consider facts subject to judicial notice on a motion to dismiss. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1990, 1198 (9th Cir. 1988); *Mullis v. U.S. Bankr. Ct. for Dist. of Nev.*, 828 F.2d 1385, 1388 (9th Cir. 1987) (citing *Mack v. South Bay Beer Distribs., Inc*., 798 F.2d 1279, 1282 (9th Cir. 1986)); *Britz Fertilizers, Inc. v. Bayer Corp*., No. 07-846, 2008 WL 341628, at *6 (E.D. Cal. Feb. 5, 2008).

As shown herein, MGA's allegations are not conclusory but are more than detailed enough to meet the requirements of plausibility.

I. MGA's Complaint Demonstrates Mattel's Continuing Anticompetitive Conduct and is Based on Newly Discovered Facts, New Evidence, New Law, and the Ninth Circuit's July 22, 2010 Ruling

Applying either the "same transactional nucleus" or "logical relationship" test will not change the fact that this Complaint arises from new conduct subsequent to the existing case, presents entirely different factual and legal questions, and would have needlessly complicated, confused, delayed, and burdened the existing trial, if

indeed it could have been readied for trial between July 22, 2010 (when it came into being) and January 2011. Accordingly, the Complaint is properly brought as a separate, stand-alone case.

A. Claim-Splitting Does Not Apply Because this Case is Based on New Developments and Presents Entirely Different Evidence and Legal Issues

"To determine if the doctrine of claim splitting applies to bar a subsequent case, the Ninth Circuit 'borrow[s] from the test for claim preclusion." *Am. Int'l Specialty Lines Ins. Co. v. United States*, 2009 U.S. Dist. LEXIS 59585, *6 (C.D. Cal. 2009) (denying motion to dismiss based on claim splitting) (quoting *Adams v. Cal. Dept. of Health Services*, 487 F.3d 684, 688 (9th Cir. 2007)).

> Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by *res judicata* regardless of whether they are premised on facts representing a continuance of the same 'course of conduct' . . . Where the facts that have accumulated after the first action are enough on their own to sustain the second action, the new facts clearly constitute a new 'claim' and the second action is not barred by *res judicata*.

Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 383-84 (2d Cir. 2003) (Sotomayor, J.); *see also Maharaj v. BankAmerica Corp*., 128 F.3d 94, 97 (2d Cir. 1997) ("as a matter of logic, when the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion does not generally come into play"); *SEC v. First Jersey Securities, Inc*., 101 F.3d 1450, 1464 (2d Cir. 1996) ("If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion.").

In *Harkins Amusement Enterprises, Inc. v. Harry Nace Co*., 890 F.2d 181, 183 (9th Cir. 1989), the Ninth Circuit rejected the defendants' argument that a new antitrust violation could not be alleged after an earlier decision, finding that "it would

be over-technical and contrary to the direction of the Federal Rules of Civil Procedure to construe the complaint in *Harkins II* as narrowly as the defendants wish." The *Harkins II* court found that the complaint "alleges new antitrust conduct subsequent" to the period covered by the earlier decision and that the defendants continued to violate the antitrust laws "continuously since that date." *Id.* "It is elementary that new antitrust violations may be alleged after the date covered by decision or settlement of antitrust claims covering an earlier period." *Id.*

Mattel relies heavily on *Adams v. Cal. Dept. of Health Services,* 487 F.3d 684 (9th Cir. 2007), which cites and relies on *Walton v. Eaton Corp.*, 563 F.2d 66, 70-71 (3d Cir. 1977) (en banc), cited with approval in *Russ v. Standard Ins. Co*., 120 F.3d 988, 990 (9th Cir. 1997). *Walton* makes clear that the second lawsuit must be "virtually identical" to and duplicative of the first case. *See Walton*, 563 F.2d at 70-71. Often, only modest differences suffice.

Here, the antitrust claim presents many significant elements which were not embraced within and which were not litigated or decided by the ongoing case. Specifically, MGA's antitrust claim requires evidence of: (1) relevant product and geographic market; (2) reasonable substitutes; (3) existence of Mattel's monopoly power; (4) barriers to entry; (5) Mattel's monopolizing conduct; (6) Mattel's alleged procompetitive business justifications; (7) injury to competition; and (8) damages resulting to MGA from the antitrust violation. No one of these was or could legitimately have been litigated in the recently concluded trial. The elements of the antitrust claims and requirements of proof are distinct – not virtually identical to or duplicative of the ongoing case. *See, e.g., Abramson v. University of Hawaii,* 594 F.2d 202, 207 (9th Cir. 1979) (the present case "did not have the requisite coincidence of issues to have required that appellant litigate the entire claim in the prior suit.").

Additionally, Mattel deliberately concealed critical evidence, testimony, and documents until compelled by the Court all the way to the final hour. The antitrust case will also encompass evidence from other toy companies and retailers to show

anticompetitive effects and monopolistic conduct – evidence which was excluded in the recent trial. Mattel's anticompetitive conduct is continuing and ongoing to date. For example, Kohl's has a total of eight feet of space for all dolls and, since 2004 when Mattel induced Kohl's to eliminate four feet of Bratz space, the entire section belongs completely and solely to Mattel. During trial, Julie Scholvin, Mattel's account representative for Kohl's Department Stores, testified about a 2004 deal between Kohl's and Mattel which excluded Bratz from Kohl's toy departments – an exclusion which continues to the present. *See* 4/6/11 (Vol. 3) TT 71:7-80:16; TX 26612; TX 37112; TX 37113); *see also* 4/4/11 (Vol. 1) TT 52:5-15, 53:6-9.

B. MGA's Claims Are Not Compulsory Counterclaims

In the Ninth Circuit, to determine if claims arise out of the same transaction or occurrence, courts ask whether "the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all of the issues be resolved in one lawsuit." *Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246, 1249 (9th Cir. 1987). "The test is a 'flexible' one taking into account all of the circumstances in light of the purposes of Rule 13(a)." *Grumman Sys. Support Corp. v. Data Gen. Corp*., 125 F.R.D. 160, 162 (N.D. Cal. 1988). "Among the factors courts consider in determining whether the test is met is whether 'the facts substantially overlap, [and whether] the collateral estoppel effect of . . . the first action would preclude [the claims from being brought in a later action.]'" *Competitive Technologies v. Fujitsu Ltd*., 286 F. Supp. 2d 1118, 1135-36 (N.D. Cal. 2003), quoting *Pochiro*, 827 F.2d at 1251.

In *Mercoid Corp. v. Mid-Continent Co*., 320 U.S. 661, 671, 64 S. Ct. 268, 274 (1944), the Supreme Court plainly stated:

> The fact that [the antitrust claim] might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment *res judicata* as respects it. The case is then governed by the

> principle that where the second cause of action between the parties is upon a different claim the prior judgment is *res judicata* not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' (internal citations omitted)

Mercoid has never been overruled, and the Ninth and Fifth Circuits have given it continuing vitality. *See Hydranautics v. FilmTec Corp*., 70 F.3d 533, 536-37 (9th Cir. 1995) ("*Mercoid* leaves open the possibility of raising antitrust claims as permissive counterclaims in an infringement action, or in a separate and subsequent action. In many cases even if the antitrust counterclaim were asserted by counterclaim, the court would sever the issues and resolve the infringement case first."); *Tank Insulation Int'l, Inc. Insultherm, Inc*., 104 F.3d 83, 87-88 (5th Cir. 1997) ("the [*Mercoid*] Court plainly held that the antitrust counterclaim was permissive—controlled by *rule 13(b)*—and therefore, not barred in the second action"). "[I]t is clear that the [*Mercoid*] Court specifically considered *rule 13*'s application to the question before it and expressly and unambiguously held that the counterclaim was permissive." *Tank Insulation*, 104 F.3d at 88.

In *Hydranautics*, 70 F.3d at 536-37, the Ninth Circuit observes:

> The antitrust claim attacks the patent infringement lawsuit itself as the wrong which furnishes the basis for antitrust damages. This is somewhat analogous to a civil claim for malicious prosecution. It is usually held that a malicious prosecution claim cannot be asserted as a counterclaim to the original suit which furnishes its predicate.

This is precisely what *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62-66, 113 S. Ct. 1920, 1929-31 (1993), did: *PRE* set up a malicious prosecution standard as a condition precedent to the antitrust elements.

> The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceeding, requires the plaintiff to

> prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and the defendant pressed the action for an improper, malicious purpose.

Id. at 62.

Accordingly, drawing the analogy raised by the Ninth Circuit in *Hydranautics*, the nature of the underlying lawsuit is not dispositive. The fact is that an antitrust claim challenging conduct facially protected by *Noerr* is not a compulsory counterclaim. *Hydranautics* itself is not expressly limited to patent infringement suits; and Mattel has cited no controlling authority which expressly limits *Hydranautics* to patent infringement suits or states that the present antitrust claim is a compulsory claim. Indeed, *Hydranautics* draws its vitality from an analogy to malicious prosecution as did the Supreme Court in *PRE*.

Moreover, as explained above, new facts and evidence have arisen subsequent to the prior pleadings which could not have been part of the existing case. *See*, *e.g.*, *Jarrow Formulas, Inc. v. Int'l Nutrition Co.*, 175 F. Supp. 2d 296, 308-09 (D. Conn. 2001) (antitrust action not compulsory as it involves distinct factual issues and facts that arose after summary judgment in prior action). That is equally true in this case.

As a court of equity, the *Mercoid* Court voiced concern about "placing its imprimatur on a scheme that involves a misuse of the patent privilege and a violation of the antitrust laws. It would aid in the consummation of a conspiracy to expand a patent beyond its legitimate scope." *Mercoid*, 320 U.S. at 670. Indeed, *Mercoid*'s rationale applies with equal force to Mattel's misuse of the copyright privilege.

In *Mead Data Central, Inc. v. West Publishing Co.*, 679 F. Supp. 1455 (S.D. Ohio 1987), the court determined that the antitrust claim was not a compulsory counterclaim to the prior copyright infringement action. *Id*. at 1461-62 ("Antitrust law plays no part in the Minnesota copyright action.").

Furthermore, this case is being heard by the same judge as a related action. The Court is intimately familiar with the facts, evidentiary findings, and rulings of

the prior case.[2] The present case is suitably positioned for the Court to manage to best serve judicial economy and efficiency considerations. Courts have broad discretion to "dissect complicated trial into manageable sections." *Alarm Device Manufacturing Co. v. Alarm Products Int'l, Inc.*, 60 F.R.D. 199, 201 (E.D.N.Y. 1973). A number of reasons warrant a separate trial for the antitrust case: (1) it involves different issues, documentary proof, and witnesses; (2) consideration of all the claims at a single trial is unduly burdensome on the Court and jury; (3) antitrust involves a specialized and complex body of law, intensive fact and expert discovery requirements, and frequently protracted trials; (4) separate counsel have been retained by MGA to try the antitrust claims, and a separate trial serves to economize counsel's time. *See id*. at 202; *Henan Oil Tools, Inc. v. Engineering Enterprises, Inc*., 262 F. Supp. 629, 630-32 (S.D. Tex. 1966).

II. *Noerr-Pennington* Does Not Immunize Mattel's Anticompetitive Conduct

Noerr-Pennington is inapplicable here because MGA's injury resulted from conduct which the doctrine does not protect. The Supreme Court has held that "'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 514, 92 S. Ct. 609, 613 (1972) (citation omitted). MGA's case does not arise from Mattel's *genuine* petitioning activity because Mattel knew its case was statute-barred, made misrepresentations to the court, and sought baseless remedies. *See United States ex rel. Wilson v. Maxxam, Inc.*, 2009 U.S. Dist. LEXIS 14375, *17-*25 (N.D. Cal. 2009) (Wilkin, J.) (no *Noerr* immunity for misrepresentations); *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp*., 711 F. Supp. 2d 1074, 1081 (C.D. Cal. 2010) (Pfaelzer, J.); *Cal. Pharmacy Mgmt., LLC v. Zenith Ins. Co*., 669 F. Supp. 2d 1152, 1167-68 (C.D. Cal. 2009) (Carter, J.).

[2] *See* Mattel Mtn. at 5:2-3 ("The Court is well-versed in the history of the litigation between MGA and Mattel. . .").

Instead, MGA's case arises from an anticompetitive course of conduct engaged in by Mattel to maintain Mattel's monopoly and unlawfully exclude a competitor from the market. The allegations in the Complaint demonstrate that Mattel used its monopoly power to foreclose competition, to unlawfully gain a competitive advantage, and to destroy a competitor, all in violation of the antitrust laws. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S. Ct. 1022, 1029 (1973); *Eastman Kodak Co. v. Image Technical Servs.*, Inc., 504 U.S. 451, 482-83, 112 S. Ct. 2072, 2090 (1992).

A. Mattel's Conduct is Tantamount to the Organization of a Group Boycott in Violation of the Antitrust Laws

Mattel's anticompetitive scheme and strategy is multifaceted. In addition to Mattel's abuse of the litigation process with its "litigate MGA to death" strategy, Mattel is simultaneously and continuously pursuing its "Kill Bratz" and "Operation Cast Doubt on Bratz" strategies with a wide variety of anticompetitive practices in the marketplace, including:

> (a) infiltrating confidential competitor showrooms, accessing industry events with false identification and representing sham toy retailers made up by Mattel in order to get an illicit preview of new Bratz products before they hit the market so that Mattel could imitate or copy them; (b) rearranging Barbie/Bratz displays at key retailers such as Wal-Mart to disadvantage Bratz; (c) pricing products below cost to block Bratz's access to the market; (d) intimidating and threatening licensees, retailers and suppliers with loss of Mattel business if they dealt with MGA; and (e) paying retailers around the globe not to buy Bratz or MGA products. To implement "Operation Cast Doubt on Bratz," Mattel, among other things, spread derogatory and negative statements about MGA and Bratz on a global basis, all in an effort to cause retailers to lose confidence in MGA's product.

Cmplt. ¶ 11; *see also id*. ¶ 53.[3] Here, Mattel's conduct amounts to organizing a group boycott intended to and resulting in these third parties' refusal to deal with MGA. For example, Mr. Volero, Senior VP of Finance and Strategic Planning, admitted that Mattel paid Kohl's $1.25 million to give Barbie a minimum of eight feet on the planogram. *See* 3/29/11 (Vol. 1) TT 143:8-11. Mattel's conduct is "actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[4]

B. Mattel's Conduct is Sham and Mattel Knew it Had No Basis to Use Abusive Litigation to Exclude MGA from the Market

MGA has alleged sufficient facts to demonstrate that Mattel's alleged petitioning activity is not objectively reasonable or genuine but sham. *See Noerr*, 365 U.S. at 144, 81 S. Ct. at 533. The Complaint outlines in great detail that Mattel has developed and ruthlessly deployed a costly, lengthy "litigate MGA to death" strategy, pursued a case that it knew was statute-barred, pursued remedies that it knew lacked merit, and made material misrepresentations to the Court to accomplish its anticompetitive objective. Cmplt. ¶¶ 10-31. The Complaint alleges that Mattel's abusive litigation was objectively baseless and was specifically intended to interfere

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[3] Indeed, evidence readily supports MGA's claim. In MGA's lawsuit against Zak, a licensee from which MGA seeks unpaid royalties, Zak produced an October 2006 email in which one of Zak's suppliers states: "We used to have LIL BRATZ. It worked 'really fine' (we sold around $54,000 in a 2 years period), but we needed to give it up because Mattel/Mexico asked us to leave all the MGA properties, as a condition for getting Barbie." ZD 01554.

[4] *Noerr*, 365 U.S. at 144, as interpreted by *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 404 F. Supp. 2d 1214, 1222 (E.D. Cal. 2005) (contacts with prospective customers not *Noerr* protected; allegations that communications with prospective customers were made with "wrongful intent of disrupting [plaintiff's] relationship with prospective customers" deemed true for purposes of motion to dismiss); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1194 (C.D. Cal. 2000) citing 1 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law 202(c) at 163 (rev.ed. 1997) (courts distinguish harm caused directly by private parties from that caused by government); *Rickards v. Canine Eye Registration Found., Inc.*, 783 F.2d 1329, 1334 (9th Cir. 1986) (lawsuit not in good faith but as part of scheme to force plaintiff out of business); *Sandy River Nursing Care v. Aetna Cas.*, 985 F.2d 1138, 1143 (1st Cir. 1993) (*Noerr* inapplicable to private actors' boycott); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1264 (9th Cir. 1982) (allegations within sham as matter of law because intended to interfere directly with competitor's business relationships); *Fujitsu*, 286 F. Supp. 2d at 1152-53 (sham because scheme to interfere directly).

directly with MGA's business relationships through the use of the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon. *See PRE*, 508 U.S. at 60-61, 113 S. Ct. at 1928-29 (setting forth sham test); *Kottle v. Northwest Kidney Ctrs*., 146 F.3d 1056, 1059-63 (9th Cir. 1998) (broader sham exception in judicial arena).

Indeed, the Ninth Circuit agreed and vacated the copyright injunction and the "very broad constructive trust" that it found was "overwhelmingly" comprised of MGA's own "sweat equity." *Id*. ¶¶ 18-23 (quoting *Mattel*, 616 F.3d at 910-18). Finding that the jury instructions contained "several" errors, the Ninth Circuit recommended that the trial court further consider the damage award upon remand. The Ninth Circuit recognized:

> Because several of the errors we have identified appeared in the jury instructions, it's likely that a significant portion – if not all – of the jury verdict and damage award should be vacated, and the entire case will probably need to be retried.

Mattel, 616 F.3d at 917-18. In light of Mattel's blatant disregard of the applicable law and facts, and the Ninth Circuit's wholesale reversal under an abuse of discretion standard (and the subsequent jury verdict in MGA's favor), MGA has readily satisfied the pleading requirements sufficient to state sham.

> It is not equitable to transfer this billion dollar brand – the value of which is overwhelmingly the result of MGA's legitimate efforts – because it may have started with two misappropriated names. The district court's imposition of a constructive trust forcing MGA to hand over its sweat equity was an abuse of discretion and must be vacated.

Mattel, 616 F.3d at 911; *see also* Dkt. 8423 at 40:4-11.

The jury after retrial agreed as well. *See* Dkt. 10518. After the April 21, 2011 verdict, Mattel's investment analysis report states:

- Mattel loses Bratz trial – earlier this morning a California federal

jury reportedly sided w/ MGA Entertainment (the defendant), awarding no damages or ownership of the Bratz doll to Mattel (MAT, $26.70, Buy).

- Outcome is less relevant in our opinion – 1) a Bratz "win" was never part of our model or thesis . . .

Drew E. Crum, *Mattel Loses Bratz Trial,* Stifel, Nicolaus & Co., Apr. 21, 2011. Incredibly, this piece speaks to Mattel not even being concerned with the outcome; all that it cared about was use and abuse of the litigation process to destroy its only significant fashion doll competitor.

In sum, Mattel's claims against MGA are objectively unreasonable, inconsistent with facts and legal authority known to Mattel, and were made baselessly and in bad faith to crush its smaller rival. Mattel knew the claims and remedies they sought had no legal merit and could not be supported under established law. *See Mattel*, 616 F.3d at 909-18; Dkt. 8423 at 40:4-11; Dkt. 10518. What is in fact at play here is Mattel's attempt to use its overwhelming market dominance to apply pressure to MGA, to squash Bratz, and to eliminate competition in the relevant market.

C. The Parties' Factual Dispute is for the Trier of Fact to Resolve

At the very least, the "sham" issue presents a question of fact unsuitable for a motion to dismiss. In *Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc*., 552 F.3d 1033, 1044 (9th Cir. 2009), the Ninth Circuit explained that to prove sham, the plaintiff "need only show there is a genuine issue of material fact to avoid summary judgment." *See also Catch Curve, Inc. v. Venali, Inc*., 519 F. Supp. 2d 1028, 1036-38 (C.D. Cal. 2007) (finding plaintiff sufficiently stated claim of sham litigation to overcome motion to dismiss) ("The Ninth Circuit has stated that '[w]hether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact.'") (quoting *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc*., 690 F.2d 1240, 1253 (9th Cir. 1982); *In re Wellbutrin SR Antitrust Litig*., 2006-1 Trade Cas. (CCH) ¶ 75,158, at 104,250-53 (E.D. Pa. March 14, 2006)

(denying motion to dismiss on sham issue); *In re Relafen Antitrust Litig*., 346 F. Supp. 2d 349, 361-62 (D. Mass. 2004) (denying summary judgment because claim of objective baselessness presented fact issues); *Hoffman-La Roche Inc. v. Genpharm Inc*., 50 F. Supp. 2d 367, 380 (D.N.J. 1999) (declining to find *Noerr-Pennington* immunity because "[r]easonableness is a question of fact, and the Court cannot make such factual determinations on a factual controversy roiled by a motion to dismiss").

Here, the allegations and the law of the case (upon which the Court may properly take judicial notice) overwhelmingly show Mattel's objective baselessness and improper motive because Mattel had no reasonable basis to believe it could lawfully exclude MGA from the market. Alternatively, at the very least, serious disputed issues of fact exist.[5] MGA's allegations are to be presumed true and viewed in the light most favorable to MGA. Moreover, where the facts are disputed, as here, the fact finder makes the determination on objective reasonableness.[6]

Mattel contends that its false, untimely, overbroad assertion of ownership of MGA's "sweat equity" requires this Court to dismiss MGA's Complaint outright. If this is the law, then MGA will be deprived of any opportunity to seek a fair resolution of its dispute on the merits, and the monopolist Mattel will have succeeded in its unlawful interference and abuse of the litigation process. As demonstrated by the

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[5] *See Flowers v. Carville*, 310 F.3d 1118, 1130-31 (9th Cir. 2002). MGA's Complaint plainly alleges sham to overcome Mattel's motion to dismiss. Mattel cites *White v. Lee*, 227 F.3d 1232 (9th Cir. 2000) for the proposition that courts do not "lightly conclude" objective baselessness but "only with great reluctance. *White* was not decided on the pleadings at the motion to dismiss stage but at summary judgment on an evidentiary record. Even at summary judgment, sham must be proved only by a preponderance of the evidence, not clear and convincing evidence. *Litton Sys., Inc. v. AT&T*, 700 F.2d 785, 813-14 (2d Cir. 1984) (finding "no reason to impose any higher burden of proof").

[6] *See, e.g.*, *PRE*, 508 U.S. at 63 ("there is no dispute over the predicate facts of the underlying legal proceeding"); *Nelson v. Miller*, 227 Kan. 271, 277-78 (1980), *cited in PRE*, 508 U.S. at 63 ("it becomes the duty of the trial court to submit the question to the jury" when the facts are in dispute); *Stewart v. Sonneborn*, 98 U.S. 187, 194 (1878), *cited in PRE*, 508 U.S. at 62 (duty of court to submit issue of credibility of evidence to jury); Restatement (Second) of Torts § 673 cmt. e (deciding disputed issues of fact clearly remains function of jury); *cf. Wyatt v. Cole*, 504 U.S. 158, 173-74 (1992) (Kennedy, J., concurring) ("It seems problematic to say that a defendant should be relieved of liability under some automatic rule of immunity if objective reliance upon a statute is reasonable but the defendant in fact had knowledge of its invalidity.").

allegations, Mattel's lawsuit was sham and objectively baseless, has been decisively rejected by the jury, and neither Mattel nor any reasonable litigant could realistically have expected to secure favorable relief, much less the Draconian relief initially granted at Mattel's insistence by Judge Larson.[7]

III. The Ninth Circuit's Opinion Which Vacated the Injunction and Constructive Trust and Empowered this Court to Vacate the Damages Award is Evidence of Sham Litigation and Mattel's Anticompetitive Motive

Courts approach sham claims by independently "attempting to assess the objective legal merit of the predicate suit." *Boulware v. Nevada Dept. of Human Resources*, 960 F.2d 793, 797 (9th Cir. 1992). Success or failure on the merits is not dispositive but an "important factor to be considered under the sham inquiry." *Id.* at 798; *Aydin Corp. v. Loral Corp*., 718 F.2d 897, 903 (9th Cir. 1983) ("might be helpful as one indication" of intent); *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 841 (9th Cir. 1980) (not the "sole criterion"). As the Ninth Circuit expressly states in *Boulware*, relied on by Mattel:

> Both the initial success on the merits and the subsequent reversal are relevant to the inquiry but neither factor is determinative. The court hearing the antitrust claim must make it own assessment of the objective merits of the predicate suit and decide whether it was intended to inflict anticompetitive injury through the legal process or by virtue of

[7] In *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 535-36 (9th Cir. 1991), the Ninth Circuit held that sham allegations must satisfy a heightened pleading standard. Subsequently, in *Empress LLC v. Patel*, 419 F.3d 1052, 1055-56 (9th Cir. 2005), the Ninth Circuit, relying on applicable Supreme Court decisions, held that the district court erred in applying a heightened pleading standard over claims involving the *Noerr-Pennington* doctrine ("heightened pleading standards should only be applied when required by the Federal Rules"). Some district courts have continued to apply a heightened pleading standard. *See, e.g., Cal. Pharm. Mgmt., LLC v. Redwood & Casualty Insurance Co*., No. 09-141, 2009 U.S. Dist. LEXIS 126982, *18 (C.D. Cal. July 29, 2009). Regardless of whether a notice pleading or heightened pleading standard applies, the Complaint readily satisfies either standard because the allegations of sham are thoroughly pled with specificity and great detail. As Mattel noted, "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 Mtn. at 5:1-3. MGA also has the added benefit of the favorable and judicially noticeable law of the case as support for sham.

the legal outcome.

Boulware, 960 F.2d at 799.

This case is also distinguishable from *Boulware*, which was a summary judgment ruling rather than a motion to dismiss, because the court found there was "no evidence" that the defendant sought to keep the plaintiff from competing in the market by the maintenance of the suit and there was "no reason to believe [the defendant] participated in the case regardless of the outcome or without a legitimate expectation of success on the merits." *Id*. at 800. "This is not a case where the antitrust defendant could have used the lawsuit as a tool to impose costs and delay, to tarnish the reputation of a competitor, or to cripple its adversary's ability to obtain needed financing." *Id*. Here, by contrast, that is precisely what MGA has alleged Mattel did (Cmplt. ¶¶ 9-31), this is precisely what has in fact happened seven years, hundreds of millions of dollars, and two trials later, as the Ninth Circuit properly recognized:

> Barbie was the unrivaled queen of the fashion-doll market throughout the latter half of the 20th Century. But 2001 saw the introduction of Bratz . . . and Bratz became an overnight success. Mattel, which produces Barbie, didn't relish the competition.

Mattel, 616 F.3d at 907.

Moreover, a single baseless claim within a complaint can serve as grounds for a sham litigation claim. *MCI Communications Corp. v. American Telephone & Telegraph Co*., 708 F.2d 1081, 1154-55 (7th Cir. 1983); *Clipper Exxpress*, 690 F.2d at 1254-56; *Novelty, Inc. v. Mountain View Mktg., Inc.*, No. 07-1229, 2010 U.S. Dist. LEXIS 30783, *2 n.2 (S.D. Ind. Mar. 30, 2010) (observing that "a single claim, lawsuit or petition can be 'sham litigation' actionable under the antitrust laws" and the issue of sham litigation "requires a claim-by-claim analysis"); *In re Wellbutrin*, 2010 U.S. Dist. LEXIS 90156, at *8-*18. In *Intel Corp. v. Via Technologies, Inc*., No. 99-03062, 2001 WL 777085 (N.D. Cal. Mar. 20, 2001), the court did not resolve

the issue at the pleading stage, noting that "[d]iscovery may reveal that the incremental effects of the supposed sham components were negligible or may show that they dominated the original complaint." *Id*. at *6.

Mattel's related contention that the wrongful injunction cannot support a claim for damages (Mattel Mtn. at 30-31) is misplaced. As well-pled in the Complaint, the damages that MGA properly seeks flow from Mattel's abusive and sham litigation, as part and parcel of its wide array of tortious and monopolistic conduct, to eliminate MGA and to suppress competition in the market. *See, e.g., Intel*, 2001 WL 777085 at *4 (sham litigation qualifies as predatory act; may have discouraged customers and potential customers from doing business with plaintiff by casting a cloud over legality of its product line). The pleadings allege, and the evidence will cogently demonstrate, that Mattel's knowing inducement of Judge Larson to commit legal error – resulting in reversal under an abuse of discretion standard – by effectively awarding Bratz in perpetuity to Mattel spelled the death knell for Bratz as a brand and possibly for MGA as an entity. *See* Cmplt. ¶¶ 24-26, 31, 46-47. The Sherman Act clearly provides a claim for damages based upon such anticompetitive conduct.

IV. MGA Has Properly Alleged an Antitrust Violation

The antitrust laws seek "to promote and protect a competitive marketplace for the benefit of the public." *Image Tech. Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1214 (9th Cir. 1997). Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits the "acquisition or maintenance of a monopoly by exclusionary conduct." *Id*. A monopolization claim requires that: "(1) the defendant possesses monopoly power in the relevant market; (2) the defendant has willfully acquired or maintained that power; and (3) the defendant's conduct has caused antitrust injury." *Cost Mgmt. Servs., Inc. v. Washington Natural Gas Co*., 99 F.3d 937, 949 (9th Cir. 1996); *see also Kodak*, 504 U.S. at 481.

Attempt to monopolize requires proof that defendant (1) engaged in predatory or anticompetitive conduct (2) with a specific intent to monopolize and (3) had a

dangerous probability of achieving monopoly power. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995).

In this case, the "gravamen of the Section 2 claim is the deliberate use of market power by a competitor to control price ***or exclude competition***." *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 758 (9th Cir. 1986) (emphasis added). Finally, it is important to note that the antitrust laws have long condemned the kind of "self-help" in which Mattel has engaged. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *Assoc. Press v. United States*, 326 U.S. 1 (1945); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961); *Silver v. New York Stock Exchange*, 373 U.S. 341, 364-66 (1961).

A. MGA Has Properly Alleged Relevant Market

The "definition of the relevant market is a factual inquiry for the jury" and is not a proper grounds for dismissing the Complaint. *Rebel Oil*, 51 F.3d at 1435; *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997), *aff'd on other grounds*, 525 U.S. 299, 119 S. Ct. 710 (1999). Defining the relevant market "is a factual inquiry for the jury; the court may not weigh evidence or judge witness credibility." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989). The proper relevant market definition "can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Kodak*, 504 U.S. at 482, 112 S. Ct. at 2090 (citation omitted); *see Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 993 (9th Cir. 1986); *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001) (Sotomayor, J.) ("market definition is a deeply fact-intensive inquiry").

Expert testimony is appropriate to help define the relevant markets. *California Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001, 1003-04 (9th Cir. 1981). The boundaries of a relevant product market are determined principally by the reasonable interchangeability of use; products that are reasonably interchangeable generally compete with each other and are, therefore, part of the same market. *United States v.*

E. I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956). Finally, fashion dolls may be viewed by the jury as a submarket even if there might be some broader relevant market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Thurman*, 875 F.2d at 1375; *M.A.P. Oil Co., Inc. v. Texaco, Inc.*, 691 F.2d 1303, 1307 (9th Cir. 1982); *Kaplan v. Burroughs Corp*., 611 F.2d 286, 291 (9th Cir. 1979); *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp.*, 518 F.2d 913, 932 (9th Cir. 1975).

Despite Mattel's suggestion otherwise, the market definition alleged here – the sale of fashion dolls in the United States (Cmplt. ¶¶ 50-51) – is readily distinguishable from the market defined in *Tanaka v. University of Southern California*, 252 F.3d 1059 (9th Cir. 2001). In *Tanaka*, the plaintiff alleged a geographic market of Los Angeles based on her personal preference "to be close to her family." *Id*. at 1063. She similarly limited the product market to a single athletic program, namely "UCLA women's soccer program." *Id*. Such a market definition is facially deficient and inconsistent with her own allegations, *i.e*., that she was "heavily recruited by universities across the country." *Id*. Here, MGA's market definition here bears no resemblance to that in *Tanaka*.

MGA has alleged a recognized and unique category of product in which both Mattel and MGA compete in the market: fashion dolls. MGA has stated facts sufficient to show why fashion dolls are distinct from other types of toys. *See* Cmplt. ¶ 50. Indeed, Mattel's damage expert, Michael Wagner, admitted in his trial testimony that fashion dolls comprise a separate market:

> I believe they [Mattel] had a legal monopoly at that point in time [beginning of damages period], yes.

3/8/11 (Vol. 2) TT at 69:14-15.

* * * * *

> Q. . . . the one thing that Barbie and Bratz both have in common . . . we can all agree on is that they are both fashion dolls.
>
> A. I think everyone would agree to that, yes.

Q. And they were both sold in the fashion doll market?

A. Yes.

Id. at 71:20-25. Mattel CEO and Chairman Robert Eckert similarly admitted that fashion dolls compete in a separate and distinct product market.

A. They [other fashion dolls] might do reasonably well for a fairly short period of time, but Barbie still, in the year 2000, had a 90 percent share of the fashion doll subcategory, if you will, something like that.

3/1/11 (Vol. 2) TT at 15:11-14.

A. Well, in the early years of the 2000s, 2000 or 2001, Barbie had approximately a 90% share of the fashion doll category.

Id. at 22:13-16.

Normally, a complaint is not the vehicle to create a fight about relevant market. The Complaint does what it has to do; it tells Mattel what MGA contends is the relevant product and geographic market. The Complaint states: "The relevant product market is fashion dolls, which are dolls in the 9-12" tall range and which are designed to be dressed with fashion clothes and accessories." *Id*. MGA then explains the basis for alleging fashion dolls as a distinct and unique market:

> Fashion dolls are purchased almost exclusively by girls, and for these girls there is no reasonably interchangeable substitute for such dolls. Fashion dolls have peculiar characteristics consisting of the doll itself and the fashion clothing and accessories. Moreover, the toy industry recognizes fashion dolls as a distinct product or subproduct market and maintains statistics and reports separately on market share and other aspects of the fashion doll market or submarket. Finally, the pricing of fashion dolls is not seriously constrained by the price of any other toy because of the lack of reasonable interchangeability among the purchasers.

Id.

The test of that market definition must await the development of evidence and then summary judgment or trial. As the Supreme Court has articulated, the boundaries of this market may be determined by "examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325, 82 S. Ct. at 1524. The Court should not decide this fact-intensive issue on the face of the pleadings. The Supreme Court and the Ninth Circuit have repeatedly approved sub-set market definitions which consist of less than the total general product market. *Syufy*, 793 F.2d at 994 (approving market definition comprised of only first-run, high-grossing films); *Int'l Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 252, 79 S. Ct. 245, 251 (1959) (approving market definition limited to championship boxing); *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381, 1393 (9th Cir. 1984) (approving market defined as professional football as distinguished from other football or other sport, recreation, and entertainment options).

Similarly, the United States is an appropriate geographic market. First, relevant geographic market definition is a paradigm factual issue for the jury to decide after a full trial. *Newcal Industries, Inc. v. Ikon Office Solutions*, 513 F.3d 1038, 1045 (9th Cir. 2008); *Forsyth*, 114 F.3d at 1476; *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 790 (9th Cir. 1996) ("factual inquiry"). Indeed, in *E.I. DuPont de Memours and Co. v. Kolon Industries, Inc.*, 2011 U.S. App. LEXIS 4752, at *8-*28 (4th Cir. Mar. 11, 2011), the Fourth Circuit recently reversed dismissal on the district court's erroneous conclusion that the geographic market must be expanded to include the areas where the sellers operate and produce, *i.e.*, the world. *Id*. at *8-*28 (collecting and analyzing cases) ("*RCM Supply*, *Brown Shoe*, *Pabst Brewing*, *Dentsply*, and other cases demonstrate that, in defining the relevant geographic market in an antitrust case, plaintiffs are not required to include supplier headquarter or other sites without regard

to whether consumers can predictably turn to those places for supply."). After a detailed analysis, the Fourth Circuit held that "Kolon pled a relevant geographic market—the United States" which was subject to "a fact-intensive inquiry" and, therefore, dismissing the pleading on its face was error. *Id*. at *25.

Second, the Foreign Trade Antitrust Improvement Act of 1982 (15 U.S.C. § 6a) is an amendment to the Sherman Act which precludes application of the Sherman Act to foreign commerce unless two conditions are met: (1) the foreign conduct must have a "direct, substantial, and reasonably foreseeable" effect on domestic U.S. commerce or export commerce; and (2) the "direct, substantial, and reasonably foreseeable" effect on U.S. commerce must "give rise to" the Sherman Act claim. Here, because fashion dolls are mostly manufactured outside the United States, it would likely be difficult to meet these standards. The statute and decisions under it have been used to obfuscate the concept of exactly what foreign commerce, if any, would be subject to a Sherman Act claim.

> [T]he antitrust laws do not extend to protect foreign markets from anticompetitive effects. Although plaintiff alleges that defendants' conduct had an impact on both the 'world-wide' market and the United States domestic market, for the purposes of standing, i.e., applying the *Associated General Contractors* factors), the 'relevant market' must be the domestic market.

Galavan Supplements, Ltd. v. Archer Daniels Midland Co., 1997 U.S. Dist. LEXIS 18585, at *11 (N.D. Cal. Nov. 19, 1997). MGA has properly alleged a geographic market limited to fashion dolls sold in the United States.

B. Mattel's Dominant Market Power is Undisputed

Market power is defined as the defendant's "power to control prices or exclude competition" in the relevant market. *E. I. du Pont*, 351 U.S. at 391; *Kodak*, 504 U.S. at 481. Market power can be shown through either direct or circumstantial evidence. It may be proven directly with evidence of "injury to competition which a competitor

with market power may inflict, and thus, of the actual exercise of market power." *Rebel Oil*, 51 F.3d at 1434. Moreover, the "[c]onvergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508-09 (9th Cir. 1989). Market power may also be proven by the surrogate method of market share. *Kodak*, 125 F.3d at 1206 ("A dominant share of the market often carries with it the power to control output across the market, and thereby control prices."). A market share of 65% is generally sufficient to establish monopoly power. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc*., 627 F.2d 919, 925 (9th Cir. 1980). Finally, in order to establish market power, a plaintiff need not prove that all of the other market participants have been run out of the market. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 489 n.14 (1977) (plaintiff can prove antitrust injury and violation before it is actually "driven from the market"). What MGA must and does allege is that Mattel had the "power to exclude *competition* from the relevant market generally." *Los Angeles Land Co. v. Brunswick Corp*., 6 F.3d 1422, 1426 (9th Cir. 1993).

Mattel had the power to exclude and exercised that power to exclude MGA's competing products from the market, indisputably reducing output. This uncontroverted exclusion of MGA's Bratz from the market by Mattel provides justiciable evidence of market power.[8]

Using the surrogate test of market share, Mattel is well beyond minimum monopoly numbers. "Since 1959, Barbie had been, by a wide margin, the dominant

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[8] *See NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 (1984) ("As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output."); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978); *Indiana Fed'n of Dentists v. FTC*, 476 U.S. 477 (1986); *Rebel Oil*, 51 F.3d at 1434; *Mercy*, 791 F.2d at 758; *K.M.B. Warehouse Distribs. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) ("If a plaintiff can show an actual adverse effect on competition, such as reduced output . . . we do not require a further showing of market power.") (citing *Capital Imaging Assoc., P.C. v. Mohawk Valley Med. Assoc., Inc*., 996 F.2d 537, 546 (2d Cir. 1993) (plaintiff may avoid "'detailed market analysis' by '"offering proof of actual detrimental effects, such as a reduction of output'"").

fashion doll in the world, enjoying overwhelming market share and shattering all potential competition." Cmplt. ¶ 8. Mr. Eckert and Mr. Wagner's trial testimony include such judicial admissions attesting to Mattel's monopoly power. *See* 3/1/11 (Vol. 2) TT at 15:11-14, 22:13-16; 3/8/11 (Vol. 2) TT at 69:14-15, 71:20-25.

In Your Honor's August 2, 2010 Order, the Court observes that Judge Larson's "order imposing the constructive trust was invalid, because it was overbroad and predicated upon verdicts that were reached after improper instruction." Dkt. 8423 at 40:4-11. Judge Larson's order and erroneous instructions were wrongfully solicited by Mattel, knowing they would not withstand appellate scrutiny for the singular purpose of killing Bratz as a brand. *See* Cmplt. ¶¶ 24-26. And Mattel has accomplished that objective.

Just this month, during Mattel's first quarter 2011 earnings call, Mr. Eckert stated:

> The Barbie brand really led the way for Mattel in the first quarter, particularly in international markets. Barbie achieved the highest first quarter sales, gross sales, since 2004, and it's the first time the brand has had double-digit sales growth in the first quarter since 1997. The brand is strong, global retailers' support is good and the momentum continues. Brands like Monster High and Disney Princess also were standouts in the quarter.

Mattel's CEO Discusses Q1 2011 Results – Earnings Call Transcript, Apr. 15, 2011, *available at* http://seekingalpha.com/article/263798-mattel-s-ceo-discusses-q1-2011-results-earnings-call-transcript?source=feed; *see also Mattel Loses Bratz Trial*, Stifel, Nicolaus & Co., Apr. 21, 2001 ("we est. Mattel already controls at least 80% of the fashion doll category (domestic w/ Barbie), Disney Princess, and Monster High, while the Bratz domestic share is in the (est.) low/mid single-digits range"); Mae Anderson, *Toy Sales Rise 2 Percent in 2010, NPD Group Says*, Bloomberg, Jan. 27, 2011, *available at* http://www.bloomberg.com/news/2011-01-27/toy-sales-rise-2-percent-in-

2010-npd-group-says.html (Barbie among best-selling toys in 2010; dolls and infant and preschool toys rose 6 percent).[9]

As the Ninth Circuit aptly noted, Mattel's "Barbie was the unrivaled queen of the fashion-doll market throughout the latter half of the 20th Century." *Mattel*, 616 F.3d at 907, *quoted at* Cmplt. ¶ 9. The Ninth Circuit further found that the copyright injunction that Mattel sought and obtained was erroneous and not based on "appropriate findings" and so it "therefore vacate[d] the copyright injunction." *Mattel*, 616 F.3d at 916-18. Describing the error as "significant," the Ninth Circuit stated: "Mattel can't claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing – these are all unprotectable ideas." *Id*. at 916. The Ninth Circuit aptly concluded: "America thrives on competition; Barbie, the all-American girl, will too." *Id.* at 918. The Ninth Circuit's language in the opinion giving rise to this very Complaint is clear: Mattel has the requisite monopoly power in the fashion doll market.

Based either on the actual exclusion of MGA's fashion dolls from the market (reduced output) or Mattel's overwhelming share of the fashion doll market, MGA has properly alleged monopoly power such that a reasonable jury could find that Mattel possessed monopoly power.

C. Substantial Barriers to Entry into the Market Exist

The Ninth Circuit has adopted the Areeda-Hovenkamp standard of entry barriers: entry barriers may consist of "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." Areeda & Hovenkamp, *Antitrust Law*, 409 at 509-10 (1992 Supp.). Intellectual property rights, maintenance of a high market share, and control of superior resources, all described below, are considered barriers to entry sufficient to support a claim of monopolization. *Kodak*, 125 F.3d at 1208. Moreover, small entries into the market without growing or

[9] Under Federal Rule of Evidence 201, the Court may take judicial notice of these facts because they are not subject to reasonable dispute and their accuracy cannot reasonably be questioned. Mr. Eckert's statement is an admission by a party-opponent. Fed. R. Evid. 801(d)(2).

sustaining a significant market share do not signify "a breakdown of barriers to entry." *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 367 (9th Cir. 1988).

Numerous undisputed factors that deter entry into the fashion doll market include:

- Barbie accounts for the predominant share of fashion dolls sold over a significant period of time. *See* Cmplt. ¶ 9.
- Mattel has falsely asserted ownership of Bratz. *See* Mattel Mtn. at 27 & n.15.
- Mattel has maintained a high market share in the fashion doll market and has used its market power to keep out competition.

As MGA has sufficiently alleged:

> Mattel undertook the actions as alleged herein knowing that significant and high barriers to market entry would prohibit would-be competitors from entering the fashion doll market. These barriers to entry include, among other things:
>
> a. a substantial up-front capital investment required to penetrate the fashion doll market;
>
> b. a significant time-lag in developing a reputation such that an entrant's fashion dolls can be successfully marketed to buyers;
>
> c. patents, trademark, trade dress, copyright and other intellectual property rights relating to fashion dolls;
>
> d. requirement of access to a nationwide sales and distribution network; and
>
> e. exclusive dealing contracts already in place.

Cmplt. ¶ 55.

Given Barbie's significance to the fashion doll market, and Mattel's control of a high market share, and given Mattel's assertion of control over Bratz as evidenced by its years-long, multimillion dollar litigation against MGA, Mattel clearly has control over a resource necessary for effective competition, has deterred entry, and has enjoyed monopoly returns. This control, partly achieved by copyright, operates as an

impediment to competition. Moreover, Mattel has maintained – because of its control of these superior resources – a high market share. Indeed, in the opening statement at trial in the Mattel litigation, Mattel's attorney, John B. Quinn, Esq., told the jury: "Until Bratz, there was only one fashion doll in the market and that was Barbie." *See* Cmplt. ¶ 54; *see also* 1/18/11 (Vol. 1) TT 16:18-25 (admitting that Barbie has been the world's favorite doll for generations). Mattel's decision to destroy a competitive product and company also operates as a barrier to new entrants who will observe how MGA was treated (punished) by Mattel for its competitive fashion doll. Accordingly, entry barriers exist to deter effective competition.

D. MGA Has Shown Anticompetitive Effect and a Dangerous Probability of Monopolization

The Complaint asserts an antitrust cause of action against MGA for attempted monopolization in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). *See Spectrum Sports*, 506 U.S. at 456, 113 S. Ct. at 890; *Kodak*, 125 F.3d at 1202. Section 2 of the Sherman Act prohibits a monopolist from employing even lawful practices if they unreasonably exclude or foreclose competition to existing or potential competitors in the relevant market. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 608-11, 105 S. Ct. 2847, 2860-61 (1985). A defendant's behavior may fairly be characterized as "predatory" when the defendant is "'attempting to exclude rivals on some basis other than efficiency.'" *Id*. at 605, 105 S. Ct. at 2859 (citation omitted). Actions restricting consumer choice are inherently anticompetitive (*see, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528, 103 S. Ct. 897, 903 (1983); *Theme Promotions, Inc. v. News America Marketing FSI*, 546 F.3d 991, 1004 (9th Cir. 2008); *Ross v. Bank of America*, 524 F.3d 217, 224 (2d Cir. 2008); *Sullivan v. NFL*, 34 F.3d 1091, 1101 (1st Cir. 1994)), as is conduct which constitutes a "deliberate effort to discourage [a defendant's] customers from doing business with its smaller rival." *Aspen*, 472 U.S. at 610, 105 S. Ct. at 2861; *accord Kodak*, 504 U.S. at 482-83, 112 S. Ct. at 2090.

Here, in addition to describing the crippling injury to MGA's business as a result of Mattel's monopolistic conduct, MGA has alleged injury to competition generally. MGA has alleged that Mattel is attempting to protect the Barbie brand and ultimately to maintain Barbie monopoly in the fashion doll market. Cmplt. ¶¶ 32, 53-56. MGA has further alleged that Mattel "specifically intended to eliminate MGA as a competitor in the fashion doll market, long dominated and controlled by Mattel's Barbie, so that Mattel could reacquire and maintain a monopoly in the fashion doll market in the United States." *Id*. ¶ 32.

MGA also alleges that "Mattel's scheme and strategy to monopolize the above-described trade and commerce have been done with the specific intent of eliminating competition in general, and the specific competition of MGA, in the fashion doll market." *Id*. ¶ 53.

Finally, MGA has alleged that Mattel's conduct has harmed and will continue to harm competition by limiting consumer choice, lowering quality, increasing prices, limiting competition, and limiting innovation by depriving competitors of their ability to compete. *See id*. ¶¶ 53-56.

> Mattel waged war against MGA using a wide array of tortious, unfair and anticompetitive practices including systematic, serial copying and intellectual property infringement, aided by intimidation, threats and other acts of unfair competition and anticompetitive conduct, and finally with the prosecution of overreaching litigation seeking baseless remedies in bad faith – all with one goal in mind – to banish MGA from the market.

Id. ¶ 47.

The antitrust injury is plainly alleged:

> Mattel's anticompetitive conduct described herein, as ordered and authorized by Mr. Eckert, has produced antitrust injury, and unless restrained, will continue to produce at least the following

anticompetitive and exclusionary effects upon competition in interstate commerce:

a. competition in the development of fashion dolls has been substantially and unreasonably restricted, lessened, foreclosed and eliminated;

b. barriers to entry into the market for fashion dolls have been raised;

c. consumers' choice has been, and will continue to be, significantly limited as to selection, price and quality of fashion dolls;

d. consumers' access to MGA's competitive products has been and will be artificially restricted and reduced, and its products will continue to be excluded from the market; and

e. the market for development and sale of MGA's fashion dolls will continue to be artificially restrained or monopolized.

Id. ¶ 56. In sum, the Complaint makes clear that Mattel's anticompetitive conduct is intended to protect and maintain Mattel's monopoly power in the relevant market to the detriment of competition, consumers, and MGA.

Contending that the elimination of MGA's Bratz (and other dolls such as 4-Ever Best Friends) is too insignificant to satisfy the anticompetitive element of monopolization, Mattel ignores Supreme Court and Ninth Circuit decisions to the contrary. The Supreme Court condemned a scheme which limited the ability of a single retailer in San Francisco to compete in the sale of household appliances. *Klor's Inc. v. Broadway-Hale Stores, Inc*., 359 U.S. 207, 213 (1959) (scheme "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy"). Similarly, the Ninth Circuit declared that the "elimination of a single competitor may violate [the Sherman Act] if it harms competition."[10] The Third Circuit agrees.[11]

[10] *Rebel Oil*, 51 F.3d at 1433; *see also E.W. French & Sons, Inc. v. Gen. Portland, Inc.*, 885 F.2d 1392, 1401 (9th Cir. 1989) (rejecting defendants' contention that

Here, the undisputed facts are that Mattel prevented the sale of a competitive product and destroyed the value of a competitive company by pursuing scorched earth, baseless litigation as an anticompetitive business objective. The exclusionary conduct must be viewed in the light of Mattel's crusade to eliminate competition. Accordingly, the allegations set forth sufficient facts from which a jury could reasonably and competently find that Mattel's conduct in suppressing the competitive threat constituted anticompetitive conduct and that Mattel intended it to accomplish an anticompetitive objective.

V. MGA Has Properly Alleged an Abuse of Process Claim

For the same reasons as discussed above, MGA's abuse of process claim is proper. Mattel's abusive conduct is continuous and ongoing; the present claim is based on new facts subsequent to the prior case, and has not been actually litigated or decided by the prior case, and is therefore not virtually identical or duplicative. For example, the Complaint alleges that Mattel executives gave false testimony under oath and that "Mattel and its counsel intentionally withheld and suppressed evidence from MGA and the Court that would have otherwise significantly changed the outcome of the rulings in the case and the outcome of Phase I, and by such conduct, Mattel wasted considerable judicial time and expense." Cmplt. ¶ 30.

Mattel's lead case, *Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246, 1252 (9th Cir. 1987), is readily distinguishable. In *Pochiro*, the Ninth Circuit found that, unlike this case, there was not even "a single act" alleged which occurred after the pleadings in the prior case. *Id*. at 1253 n.11.

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elimination of single competitor could not produce anticompetitive effect sufficient to violate antitrust laws); *Oltz v. St. Peter's Comty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988) (exclusion of single nurse anesthetist constituted sufficient reduction in competitive process to satisfy anticompetitive element); *Les Shockley*, 884 F.2d at 508-09 ("[c]onvergence of injury to a market competitor and injury to competition is possible when [as here] the relevant market is both narrow and discrete and the market participants are few").

[11] *United States v. Dentsply Int'l, Inc*. 399 F.3d 181, 191 (3d Cir. 2005) ("When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, i.e., predatory conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general.").

The California litigation privilege, Civil Code § 47(b), does not bar MGA's abuse of process claim because the privilege only protects serious communications made in good faith, to achieve the objects of, and with some connection or logical relation to the litigation. The existence of good faith is a quintessential fact question that cannot be resolved on the pleadings. *Newman v. CheckRite California, Inc.*, 912 F. Supp. 1354, 1374-75 (E.D. Cal. 1995); *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 39 (1997) (whether litigation was seriously proposed and actually contemplated in good faith as a means of resolving dispute is "an issue of fact"); *Caffer v. Levinson, Miller, Jacobs & Phillips*, 34 Cal. App. 4th 117, 124 (1995) (triable issue of fact as to whether litigation in good faith). One might seriously question Mattel's good faith and active contemplation of litigation as a means of resolving the dispute here because, among other reasons, there is overwhelming evidence that its litigation was statute-barred, that Mattel pursued claims and remedies unsupportable under the law, made material misrepresentations to the Court, and withheld evidence. And both the Ninth Circuit and jury upon retrial rejected Mattel's claims.

Similarly, the litigation privilege does not bar MGA's abuse of process claim because the privilege encompasses only the communicative act and does not immunize tortious courses of conduct. *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 345 (1997); *Stacy & Witbeck, Inc. v. City & County of San Francisco*, 36 Cal. App. 4th 1074, 1091, 44 Cal. Rptr. 2d 472 (1995); *Gonzalez v. Compass Vision, Inc.*, 2010 U.S. Dist. LEXIS 101574, at *11-*15 (S.D. Cal. Sept. 27, 2010); *Fujisawa v. Compass Vision, Inc.*, 735 F. Supp. 2d 1171, 1174-76 (N.D. Cal. 2010).

As with *Noerr*, these limitations on California's litigation privilege involve certain factual predicates. Those factual predicates can be established or disproved only at summary judgment or trial after discovery has taken place. They cannot be resolved on the basis of the Complaint, and the Court should deny Mattel's motion to dismiss MGA's abuse of process claim.

VI. MGA Has Properly Alleged a § 17043 Claim

Again, for the reasons previously discussed, MGA's predatory pricing claim is proper. Mattel's conduct is continuous and ongoing; the present claim is based on new facts subsequent to the prior case, and has not been actually litigated or decided by the prior case, and is therefore not virtually identical or duplicative.

Mattel relies on *Independent Journal Newspapers v. United Western Newspapers, Inc.*, 15 Cal. App. 3d 583, 587 (1971) for the proposition that MGA's predatory pricing claim's lack of sufficient particularity about Mattel's sales prices, cost in the product, and cost of doing business requires dismissal. However, MGA finds the more recent *G.H.I.I. v. MTS, Inc*., 147 Cal. App. 3d 256, 276 (1983), which expressly distinguishes *Independent Journal Newspapers*, more persuasive:

> But we think that under the present circumstances appellants are in a demonstrably poorer position than were the plaintiffs in *Independent Journal Newspapers*, *supra*, to speculate on a 'supposed' cost figure, and that it would serve no useful purpose to require a speculative allegation of cost which adds nothing to the notice given the pleadings in their present state. Accordingly, we view the present pleadings as sufficient under *section 17043* and find error in sustaining the demurrer thereto.

MGA's allegations, taken as a whole, sufficiently give Mattel notice of MGA's claim of below-cost pricing (*see* Cmplt. ¶¶ 53, 62), and Mattel's precise pricing data will be learned during discovery. To the extent the Court requires additional factual allegations, amendment should be liberally granted to cure any deficiencies in the pleadings.

VII. If Any Portion of the Complaint Is Deemed Deficient, Leave to Amend the Pleadings Should Be Freely Granted

As shown above, MGA's Complaint should not be dismissed. If the Court finds otherwise, however, MGA requests leave to amend the pleadings. Fed. R. Civ.

P. 15(a) provides that "leave shall be freely given when justice so requires." If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless no possible amendment would cure the complaint's deficiencies. *See Reddy v. Litton Industries, Inc*., 912 F.2d 291, 296 (9th Cir. 1990). A denial of leave to amend is reviewed for abuse of discretion, "'but such denial is "strictly" reviewed in light of the strong policy permitting amendment.'" *Moore v. Kayport Package Express, Inc*., 885 F.2d 531, 537 (9th Cir. 1989) (citation omitted); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 190 (9th Cir. 1987) (reversing district court's denial of plaintiff's motion for leave to file a fourth amended complaint).

In exercising that discretion, a district court must be guided by the underlying purpose of Fed. R. Civ. P. 15, which is "to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Indeed, "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.'" *Id*.; *see also DCD*, 833 F.2d at 186; *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam). Accordingly, if the Court should find any legal infirmity in the present Complaint, MGA should be given leave to cure the deficiency.

CONCLUSION

For the reasons set forth above, MGA respectfully submits that Mattel's motion to dismiss lacks merit and should be denied in its entirety.

Dated: April 25, 2011

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