QUINN EMANUEL URQUHART & SULLIVAN, LLP
John B. Quinn (Bar No. 090378)
(johnquinn@quinnemanuel.com)
Michael T. Zeller (Bar No. 196417)
(michaelzeller@quinnemanuel.com)
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

Attorneys for Mattel, Inc. and
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 REPLY IN SUPPORT OF MOTION TO DISMISS Hearing Date: June 6, 2011 Time: 8:30 a.m. Place: Courtroom 9D

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Preliminary Statement

As Mattel demonstrated in its moving papers, MGA's claims in this action are precluded by both claim-splitting principles and compulsory counterclaim rules, and are otherwise irreparably defective. After nearly a decade of litigation and two jury trials, MGA seeks to pursue an entirely duplicative set of claims that it readily could have brought, and indeed was required to bring, in the prior action. This late attempt to open a new front in the litigation should be rejected at the threshold.

MGA contends that its claims here are not "virtually identical" to its previously filed claims. But under the doctrines of claim-splitting and compulsory counterclaims, the issue is not whether the claims in the new action and the prior action are identical, but rather whether they arise from the same transactional facts. MGA fails to identify a single fact that MGA did not also allege in the prior action.

MGA also has no sufficient answer to Mattel's showing that the new antitrust and abuse of process claims are barred because Mattel's pursuit of litigation – the backbone of these claims – is protected by both Noerr-Pennington immunity and California's litigation privilege. MGA cannot avoid these important protections by cavalierly labeling Mattel's claims as "sham," and MGA's arguments depend on tortured interpretations of relevant rulings from the Ninth Circuit and this Court.

At the same time, MGA fails adequately to answer Mattel's showing that MGA's antitrust and abuse of process claims are barred because MGA only alleges harm resulting from equitable remedies imposed by Judge Larson. It is well-settled that court-imposed equitable remedies cannot give rise to any action for damages, and MGA identifies no applicable contrary authority.

Finally, to the extent MGA's antitrust claim is not completely implausible (grounds enough for dismissal), that claim is inherently self-contradictory. MGA's own allegations directly undermine the essential elements of market definition, market power and antitrust injury. And in any event, MGA could never prove causation, given the Court's prior holding that the equitable remedies issued in the

prior-filed litigation were the product of Judge Larson, not Mattel. MGA's Business & Professions Code § 17043 claim also is defectively pleaded as a matter of law.

Because no amount of amending could remedy the Complaint's defects, Mattel respectfully submits that the Complaint should be dismissed with prejudice.

Argument

I. MGA'S DUPLICATIVE COMPLAINT SHOULD BE DISMISSED UNDER CLAIM-SPLITTING DOCTRINE

A. MGA's "New" Claims Are Not Based on New Facts

While MGA repeats the mantra that its newly filed antitrust, abuse of process and predatory pricing claims are premised on "new facts" and "new conduct" arising subsequent to the filing of its prior claims, MGA fails to identify a single fact underlying these new claims that was not in MGA's possession when it filed its prior claims. MGA does not dispute the chart set out at pages 9-10 of Mattel's opening brief, which describes where MGA previously alleged each of the material facts that MGA now alleges to support its new claims. Nor does MGA precisely delineate any "facts" that purportedly arose after the filing of its prior claims.

MGA argues that the "Ninth Circuit's ruling gave birth" to its newly filed claims. See MGA Entertainment Inc.'s Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the Complaint (Case No. 11-01063, Dkt. No. 19) ("Pl. Br.") at 1, 9-10. This argument is factually baseless. MGA's new claims are premised on a purported "Kill Bratz" campaign that Mattel allegedly commenced in *2004* (see Compl. ¶¶ 10-14, 53) and the specific transactional facts underlying MGA's new claims were virtually all alleged in support of MGA's 2005 unfair competition claim, long before the Ninth Circuit's ruling. See Mattel Inc.'s and Robert Eckert's Memorandum of Points and Authorities in Support of Motion to Dismiss (Case No. 11-01063, Dkt. No. 11) ("Def. Br.") at 9-10.

But in any event, MGA filed counterclaims in the prior litigation *after* the Ninth Circuit's ruling – including a RICO counterclaim based on allegations

regarding Mattel's litigation and an anticompetitive scheme to eradicate Bratz – and those counterclaims specifically invoked and relied upon the Ninth Circuit's decision. See Case No. 04-09049, Dkt. No. 8583 ¶¶ 4-5, 60, 320. Thus, even if the Ninth Circuit decision were to have "birthed" MGA's new claims, the claims are barred because they could have been brought when MGA filed its RICO counterclaim. See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1078 (9th Cir. 2003) ("Res judicata bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties." (internal quotation marks omitted)). see also Baker by Thomas v. General Motors Corp., 522 U.S. 222, 238 (1998) (applying standard claim preclusion principles to counterclaimant, observing that "[a] defendant who interposes a counterclaim is, in substance, a plaintiff, as far as the counterclaim is concerned" (internal quotation marks omitted)). Remarkably, MGA's opposition papers fail even to mention MGA's RICO counterclaim.

MGA also contends that its sham litigation claim is supported by "new evidence" (see Pl. Br. at 1) – specifically, evidence adduced at trial purportedly demonstrating that Mattel was on notice of its claims as early as 2001, rendering the claims time-bared. See Pl. Br. at 2-3. But MGA has long alleged that Mattel was on notice of its claims by 2001 and that the claims were therefore untimely. See, e.g., Case No. 04-09049, Dkt. No. 2572 at 6-12, 15-34 (March 7, 2008 Motion for Summary Judgment). The evidence to which MGA points is also anything but new. MGA specifically relied on the same evidence or functionally equivalent deposition testimony when it moved for summary judgment in 2008.[1] Judge Larson ruled in

[1] See Case No. 04-09049, Dkt. No. 2573 (MGA Parties' [Proposed] Statement of Uncontroverted Facts, dated March 7, 2008) (¶¶ 47-56 (internal 2001 discussions at Mattel concerning suspicion that MGA was copying Mattel's product line); ¶¶ 57-58 (2002 investigation into possible infringement); ¶¶ 62-63, 73 (Mattel executive Richard DeAnda on notice of potential infringement by March 2002); ¶ 34 (Mattel (footnote continued)

favor of Mattel on the statute of limitations at summary judgment. See Case No. 04-09049, Dkt. Nos. 3826 and 3902. Then, after the Court sent the issue to the jury, the jury found in Mattel's favor. See Case No. 04-09049, Dkt. No. 4279 at 8-9. As discussed further below, a position accepted by a judge and jury cannot be a sham.

In any event, had MGA uncovered any truly new evidence, its claims would still be barred. It is settled that adding "evidentiary detail" to a claim that was made or could have been made in a prior lawsuit is "scarcely enough to establish that the instant lawsuit arises out of a different transactional nucleus of facts." Costantini v. Trans World Airlines, 681 F.2d 1199, 1202 (9th Cir. 1982) (internal quotation marks omitted) (rejecting argument that new information obtained in FOIA requests supporting prior claims gave rise to a fresh cause of action); accord Adams v. Cal. Dept. of Health Serv., 487 F.3d 684, 690 (9th Cir. 2007) (evidentiary detail deemed "cumulative" insufficient to overcome preclusion). Simply put, claim preclusion applies even where the "second action presents new evidence or new theories." In re Lindsay, 59 F.3d 942, 952 (9th Cir. 1995) (citing Restatement (Second) of Judgments § 25); accord Int'l Union of Operating Eng'r-Employers Const. Indus. Pension v. Karr, 994 F.2d 1426, 1430 (9th Cir. 1993). MGA's assertion that evidence adduced at trial supports its new claims only underscores the overlap of the new claims and those in the prior action. See infra at Point I(D).

B. MGA's Allegations of Ongoing Conduct Do Not Defeat Preclusion

MGA also suggests, again without any sustained analysis, that its claims can proceed because Mattel's alleged anticompetitive conduct is "ongoing to date." See

---

visited Bratz at toy fairs by 2002); ¶¶ 47-50, 542-56 (internal suspicions about Bryant and MGA and similarity between Bratz dolls and Toon Teens and Diva Starz); ¶¶ 59, 67 (investigation of Mr. Larian); ¶ 69 (Mr. Eckert's receipt of anonymous letter)). The remaining evidence MGA highlights as "new" was either indisputably in its possession or publicly available by 2003. See Pl. Br. at 2-3 (2002 letter to Mr. Larian from Mattel's counsel; July 2003 Wall Street Journal article; MGA's 2002 efforts to copyright Bratz in Brazil).

Pl. Br. at 12. This argument, too, fails as a matter of law. The Ninth Circuit has held that the "continuation of commercial activity pursuant to . . . old arrangements" does not support a new antitrust cause of action. In re Dual-Deck Video Cassette Recorder Antitrust Litig., 11 F.3d 1460, 1464 (9th Cir. 1993) (affirming dismissal of antitrust claim that merely alleged continuation of conduct previously sued upon);[2] see also Tahoe-Sierra Preservation Council, 322 F.3d at 1079 & n.12. Accordingly, a party seeking to avoid claim preclusion must allege more than that the anticompetitive conduct underlying a prior action has "continued unabated through the present"; the party must allege "[d]istinct conduct" occurring after the filing of the prior action. See Dual-Deck, 11 F.3d at 1464 (internal quotation marks omitted) (dismissal deemed appropriate where "no new conspiracy, no new kinds of monopolization, no new acts" were alleged). "Enough new misconduct must be alleged to support the claim without reference to the earlier misconduct." Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995) (relying on Dual-Deck). Otherwise, claim preclusion could be sidestepped by merely asserting "the continuation of the conspiracy that formed the basis for the previous action." Id.

In this regard, MGA relies on Harkins Amusement Enters., Inc. v. Harry Nace Co., 890 F.2d 181 (9th Cir. 1989). But as Dual-Deck observed, no claim preclusion was found in Harkins Amusement, because the allegation there was that "'the defendants entered into conspiracies *after* the date' of the earlier lawsuit." Dual-Deck, 11 F.3d at 1463 (quoting Harkins Amusement, 890 F.2d at 183) (emphasis in Harkins Amusement). MGA, by contrast, does not allege any fresh act of purported monopolization that occurred after the filing of its prior claims. MGA does not

[2] While Dual-Deck invoked the doctrine of collateral estoppel, its reasoning applies with equal force in the claim preclusion context, as courts have recognized. See Lanphere Enters., Inc. v. Koorknob Enters., LLC, 145 Fed. Appx. 589, 591 (9th Cir. Aug. 19, 2005); AT&T Corp. v. MRO Commc'n, Inc., 1999 WL 1178965, at *8 (9th Cir. Dec. 13, 1999); Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995).

allege that Mattel is currently engaged in any distinct anticompetitive practice. See Compl. ¶¶ 11, 53. The Complaint focuses on Mattel's role in obtaining certain equitable remedies after the first trial, which, MGA asserts, delivered a "death blow to Bratz and MGA." Id. ¶ 24. The Ninth Circuit vacated these equitable remedies before MGA filed its counterclaims-in-reply, and Mattel obviously has not taken distinct action in connection with the remedies since that time.

Citing to evidence MGA presented at trial about Kohl's, MGA now argues that Kohl's continues to exclude MGA's products under a 2004 contract with Mattel. See Pl. Br. at 12. Putting aside that MGA cannot use its opposition brief to amend the Complaint, see Rohde v. Trantina, 2011 WL 684178, at *3 n.1 (C.D. Cal. Feb. 15, 2011) (Carter, J.), this assertion is in any event legally deficient. Even if it were assumed that the agreement and actions taken pursuant to it continue, this would not support a new cause of action. See Tahoe-Sierra Preservation Council, 322 F.3d at 1079 & n.12 (affirming dismissal on res judicata grounds where claims arose from the execution of a regional management plan that was the subject of prior litigation); see Dual-Deck, 11 F.3d at 1464 ("doing the same thing today as yesterday" is not the type of distinct action that can support a new claim to relief).[3]

C. MGA Mischaracterizes Settled Claim-Splitting Doctrine

Unable to identify any new and distinct facts supporting its Complaint, MGA distorts claim-splitting principles. *First*, relying on Walton v. Eaton Corp., 563 F.2d 66, 70 (3d Cir. 1977) (en banc), MGA asserts that claim-splitting does not apply unless the second filed action is "virtually identical" to the first. See Pl. Br. at 11 (internal quotation marks omitted). Asserting that the legal elements of its antitrust

[3] Even if MGA had alleged distinct conduct occurring subsequent to the filing of its antitrust claim, that claim would be limited to that conduct. See, e.g., Harkins Amusement, 890 F.2d at 182-83 (party permitted to bring antitrust claim for alleged conspiracies entered "*after* the date" of its prior complaint, but it was precluded from raising claims concerning the time period covered by the earlier complaint).

claim are not identical to the elements of its prior claims, MGA argues that its antitrust claim cannot be precluded. See id. But MGA misreads Walton, which merely noted that the claims at issue there were "virtually identical" – not that they had to be for preclusion to apply. See 563 F.2d at 70. In any event, there is no requirement in the Ninth Circuit that claims be "virtually identical" for claim-splitting preclusion to apply. Rather, claim-splitting analysis turns on whether the claims arose from "a common transactional nucleus of facts." Adams, 487 F.3d at 689. The specific elements of putatively split claims are irrelevant to this inquiry. See, e.g., id. at 690 (second action precluded even though it involved "two new legal theories of recovery" under new state and federal statutes); see also Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001) (previous action alleging "wrongful termination and various state law claims based on breach of contract" precluded subsequent litigation of "Title VII claims of discriminatory termination, hostile work environment, and wrongful retaliation"); Def. Br. at 8-12.

Second, MGA argues that its new claims cannot be precluded because they involve matters "which were not litigated or decided by the ongoing case." Pl. Br. at 11. Claim preclusion, however, "bar[s] all grounds for recovery which *could* have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action." Costantini, 681 F.2d at 1201 (emphasis added) (internal quotation marks omitted). Thus, the "contention that the question involved in [the] present action was never actually litigated in the prior action is simply irrelevant" to claim-splitting analysis. Id. MGA confuses issue preclusion (which applies to issues "actually and necessarily determined" in the prior action) with claim preclusion and claim-splitting (which apply to issues that "could have" been litigated in the prior action). Id. at 1201 & n.2 (internal quotation marks omitted).

D. MGA's Claims Could Have Been Litigated with Its Prior Claims

MGA's contention that its antitrust claim could not have been litigated with its prior claims (see Pl. Br. at 9-10, 14-15) rings hollow, given that MGA brought an elaborate RICO claim five months before the recent trial was scheduled to commence. See Case No. 04-09049, Dkt. No. 8583 ¶¶ 313-18 (alleging 18-year RICO conspiracy composed of numerous and diverse predicate acts); Rotella v. Wood, 528 U.S. 549, 559 (2000) (noting "necessary complexity of RICO" claims). Far from arguing that its RICO claim was too complicated to be combined for trial, MGA argued that the claim was a compulsory counterclaim and that, as such, it had to be joined in the prior litigation. See Case No. 04-09049, Dkt. No. 8747 at 11-14.

Moreover, MGA's highly generalized assertions of inconvenience are unavailing. The factual predicates for MGA's antitrust claim – from the allegation that Mattel pursued baseless litigation to the claims that Mattel manipulated industry data and tampered with retail displays – were all alleged in support of MGA's prior claims. As MGA has acknowledged, the showing required on MGA's prior unfair competition claim draws expressly on federal antitrust statutes, calling for proof of an "incipient violation of the antitrust law." Gregory v. Albertson's Inc., 104 Cal. App. 4th 845, 851 (Cal. App. 1st Dist. 2002); see also Case No. 04-09049, Dkt. No. 9620 at 233 (MGA Proposed Jury Instructions).

While it is true that, in order to prosecute a Sherman Act claim, MGA will be required to make further showings with an analysis of the relevant market and Mattel's position within that market, there is no basis to seriously suggest that an antitrust claim could not have been conveniently tried with MGA's prior claims. And based on the trial record, MGA has asked the Court (albeit without foundation) to make findings on the relevant market and Mattel's position in it – only confirming the overlap of the old claims and the new ones. See Case No. 04-09049, Dkt. No. 10525 (Proposed Findings of Fact ¶ 3; Proposed Findings of Law ¶¶ 8, 15).

In the federal courts, antitrust claims are routinely tried in conjunction with other different claims. See, e.g., Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 216 (3d Cir. 2008) (discussing jury trial of antitrust and trade secret misappropriation claims); E.W. French & Sons, Inc. v. Gen. Portland Inc., 885 F.2d 1392, 1394-95 (9th Cir. 1989) (discussing jury trial of antitrust claims and, *inter alia*, unfair competition claim). The courts long ago rejected the notion that antitrust suits are so complex that they must be approached in isolation. See Magna Pictures Corp. v. Paramount Pictures Corp., 265 F. Supp. 144, 153 (C.D. Cal. 1967) (complexity of antitrust matters does not "relegate antitrust litigation to the sacred and awesome position of requiring the singular attention of judge or jury").

MGA raises no argument why its claims should not be dismissed if the Court finds them to be split. See Def. Br. at 19-21 (discussing why dismissal is appropriate). Given their duplicative nature, MGA's claims should be dismissed with prejudice. See Adams, 487 F.3d at 692.

II. MGA'S CLAIMS WERE ALSO COMPULSORY COUNTERCLAIMS

A. Hydranautics Does Not Save MGA's Antitrust Claim

MGA does not appear to dispute that its antitrust claim bears a logical relationship to Mattel's claims in the prior action. See Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1252 (9th Cir. 1987) (counterclaim is compulsory if it stands in "logical relationship" with the other parties' claims). Nor could it. MGA admits that the "gravamen" of its antitrust claim is Mattel's litigation conduct (see Pl. Br. at 1), and MGA has already argued, successfully, that claims arising from the parties' litigation conduct satisfied the logical relationship test and were thus compulsory in the prior action. See Case No. 04-09049, Dkt. No. 8747 at 11-14; Case No. 04-09049, Dkt. No. 8892 at 5-7.[4]

[4] Any flip-flop by MGA on this issue should not be countenanced. See generally United Nat. Ins. Co. v. Spectrum Worldwide, Inc., 555 F.3d 772, 778 (9th (footnote continued)

Unable to contest the logical relationship standard, MGA invokes Hydranautics v. Filmtec Corp., 70 F.3d 533 (9th Cir. 1995). But the Hydranautics exception to the compulsory counterclaim rule applies *only* to patent litigation. Interpreting the Supreme Court's decision in Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944), 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*." 70 F.3d at 536 (emphasis added). As set out in Mattel's opening brief, leading commentators and trial courts in this Circuit have understood Hydranautics to be limited to patent infringement cases, a limitation that makes sense given that appeals in patent and antitrust cases are tracked differently in the federal system. See Def. Br. at 18. Neither party here brought patent claims in the prior action, and Hydranautics therefore does not apply.

MGA quibbles, suggesting that Mattel has cited no "*controlling* authority which *expressly* limited Hydranautics to patent infringement suits." Pl. Br. at 14 (emphasis added). But Hydranautics states a rule that applies only to "patent infringement litigation," 70 F.3d at 536, and courts interpreting Hydranautics have understood the rule to be so limited. MGA certainly has not identified a single case applying Hydranautics to anything but a patent suit, and there is none. MGA relies on Tank Insulation Int'l, Inc. v. Insultherm, Inc., 104 F.3d 83 (5th Cir. 1997), but that case expressly acknowledged that "Mercoid creates a *limited exception* to rule 13(a) for antitrust claims *in which the gravamen is the patent infringement lawsuit* initiated by the counterclaim defendant." Id. at 88 (emphasis added). MGA also cites Mead Data Cent., Inc. v. West Publ'g Co., 679 F. Supp. 1455 (S.D. Ohio 1987), but that case predates Hydranautics, does not even reference Mercoid, and,

---

Cir. 2009) (judicial estoppel designed to prevent litigants from "taking one position, gaining advantage from that position, then seeking a second advantage by later taking an incompatible position").

by running through the standard compulsory counterclaim analysis, presumed that no exception to the rule applied outside the patent context. See id. at 1457-62.

B. MGA's Abuse of Process and § 17043 Claims Were Compulsory

While Pochiro held that "an abuse of process claim is a compulsory counterclaim in the very action which allegedly is abusive" (827 F.2d at 1252), it left open the possibility that such a claim might be permissive if it arose from conduct postdating the pleadings. See id. at 1253 n.11. MGA contends that it satisfies this exception for permissive counterclaims because its abuse of process claim is premised on Mattel's conduct during the Phase 1 trial. See Pl. Br. at 36. But MGA filed counterclaims-in-reply in August 2010, *after* the Phase 1 trial had concluded. By that time, any abuse of process claim arising from the events of the Phase 1 trial was clearly ripe and, under Pochiro, compulsory as a matter of law.

MGA similarly asserts that its § 17043 claim – premised on the allegation that Mattel sold its Wee 3 Friends dolls below allocated cost – is based on "new facts" and thus was not compulsory in the prior action. See Pl. Br. at 38. MGA, however, does not identify what these supposedly new facts might be. Even before filing its counterclaims-in-reply, MGA had professed its belief that it was "likely" that Mattel was selling Wee 3 Friends Below costs. See Def. Br. at 10. MGA now does not identify any new developments. MGA contends discovery will flesh out the claim (see Pl. Br. at 38), but that is irrelevant to the compulsory counterclaim analysis.

III. THE NOERR-PENNINGTON DOCTRINE BARS MGA'S CLAIMS

Mattel demonstrated that the Noerr-Pennington doctrine bars MGA's antitrust and abuse of process claims. See Def. Br. at 21-30. MGA argues that Noerr-Pennington protections should be cast aside on two principal grounds: (1) that merely labeling a litigation "sham" by itself satisfies the pleading requirements and justifies imposing discovery costs on those seeking redress against a competitor in court, and (2) that a remand by the Ninth Circuit for further proceedings on the merits constitutes "evidence" that Mattel's litigation was a sham. This is not the

law. MGA's theories would permit an explosion of sham litigation antitrust claims after remands from appeal and would have a "chilling effect on the exercise of this fundamental First Amendment right" to petition. Or. Natural Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991) (internal quotation marks and citation omitted).[5]

A. Courts Regularly Dismiss Attempts to Plead "Shams"

As an initial matter, there is no foundation for MGA's argument that it is enough merely to plead that a litigation is "sham." See Pl. Br. at 19-20. The Court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Courts thus regularly dismiss antitrust complaints for failure to state a claim, even where the complaints included an allegation that the defendant had pursued "sham" litigation. See, e.g., Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1186 (9th Cir. 2005) (affirming dismissal); Or. Natural Res. Council, 944 F.2d at 536 (same); Luxpro Corp. v. Apple Inc., 2011 WL 1086027, at *4-6 (N.D. Cal. Mar. 24, 2011) (dismissal under Noerr-Pennington); see also Razorback Ready Mix Concrete Co., Inc. v. Weaver, 761 F.2d 484, 486-88 (8th Cir. 1985) (reversing dismissal and holding "that as a matter of law the 'sham exception' to the Noerr-Pennington doctrine is inapplicable").

B. Mattel's Litigation Was Not Objectively Baseless

1. "Objectively Baseless" Is the Relevant Standard

The actual governing standard, ignored by MGA, is that to be considered "sham" litigation unworthy of Noerr-Pennington immunity, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude the suit is reasonably

[5] MGA does not dispute that no "scheme" exception to Noerr-Pennington exists, or its failure to plead a "series of lawsuits" by Mattel. See Def. Br. at 22, 29-30.

calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail." Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993) ("PREI").

MGA argues that the focus should be on Mattel's subjective intent. See, e.g., Pl. Br. at 19. But Mattel's subjective intent is irrelevant unless MGA properly pleads the lawsuit was objectively baseless. PREI, 508 U.S. at 57 ("an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent"); see also id. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."). MGA's assertions about what Mattel allegedly "knew" and what motivated it to file suit have no bearing unless it has adequately pleaded that Mattel's lawsuit was objectively baseless.

2. The Rulings of the Ninth Circuit and This Court Make Clear That Mattel's Litigation Was Not Objectively Baseless

MGA asserts that the Ninth Circuit's appeal ruling in the prior litigation (and related rulings by this Court) are "evidence of sham litigation." Pl. Br. at 21; see also id. at 5. This is wrong. The Ninth Circuit ruling reflects an objective determination that Mattel brought viable claims and sought viable remedies. As this Court observed in the prior litigation: "MGA argues Bryant lacked an assignable right, title, or interest in his ideas because ideas are not property under California law. The Ninth Circuit rejected this argument, which MGA made in its opening brief on appeal, by holding that a narrower constructive trust may be imposed after re-trial." See Case No. 04-09049, Dkt. No. 9600 (Amended Summary Judgment Order) at 9. This Court also previously 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." Id. at 146 (emphasis added); see also Def. Br. at 23-25.

The Ninth Circuit's opinion itself controverts MGA's position that Mattel's litigation was objectively baseless. The Court noted that Bryant's inventions

agreement was "dated September 18[, 2000]," while Bryant was still employed by Mattel. Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 907 (9th Cir. 2010). Because the inventions agreement "could be interpreted to cover ideas" (id. at 909), the Court found that the jury's interpretation of this contract "could easily" support Mattel's claims that Bryant assigned his "ideas" as an "invention" to Mattel. Id. at 909, 912-913. The Court held that "[t]he drawings and sculpt clearly *were* 'inventions' as that term is defined in Bryant's employment agreement with Mattel." Id. at 911 (emphasis in original). According to the Court, "[o]n remand, Mattel might well convince a properly instructed jury" to find in its favor. Id. at 913. Even with respect to the equitable remedies, the Ninth Circuit noted that nothing in its opinion would "preclude[] entry of equitable relief based on appropriate findings." Id. at 917. The Ninth Circuit would not have remanded for a new trial if it thought Mattel's suit was a sham.

These rulings are fatal to the tortured and unreasonable inference MGA is attempting to draw from the history of the prior action. These rulings demonstrate that a "reasonable" company in Mattel's "position could have believed it had some chance of winning [the] suit." PREI, 508 U.S. at 65. Indeed, its core claims were accepted by a jury and survived summary judgment in front of two district judges. It matters not that Mattel's initial trial award was overturned on appeal, and that it did not prevail at trial. Id. (even though the underlying and allegedly baseless litigation did not survive summary judgment, it was not objectively baseless).

MGA's argument that Mattel knowingly pursued time-barred claims (Pl. Br. at 3) is equally meritless. MGA has not identified a single decision where any court has deemed a litigation a "sham" based on the applicable statute of limitations. And, here, where a neutral judge actually granted Mattel summary judgment on the defense and second judge found in Mattel's favor on the issue (see Def. Br. at 23-24; supra, at p. 3-4), it cannot be said that MGA's statute of limitations defenses are objectively ironclad. 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 under the Noerr-Pennington doctrine.").

Against this backdrop, it is difficult to comprehend MGA's assertion that the Ninth Circuit's decision and this Court's rulings establish "law of the case" determinations concerning "sham" litigation. Id. at 1, 20, 21 n.7. Neither the Ninth Circuit nor this Court has ever made a determination that Mattel was pursuing "sham" litigation. See United States v. Cote, 51 F.3d 178, 181 (9th Cir. 1995) ("Although the doctrine applies to a court's explicit decisions as well as those issues decided by necessary implication, it clearly does not extend to issues an appellate court did not address." (internal quotation marks and citations omitted)). And MGA's attempt to apply the "law of the case" doctrine is simply misplaced, since the doctrine does not apply across two separate lawsuits. See Baymiller v. Guarantee Mut. Life Co., 2000 WL 33774562, at *2 (C.D. Cal. Aug. 3, 2000) (Carter, J.) ("The 'law of the case' doctrine generally bars courts from reconsidering an issue that has already been decided by the same court or a higher court in the same case." (internal quotation marks and citation omitted)). To the contrary, Mattel won before a prior jury and survived summary judgment in front of two judges. And, as shown, far from suggesting Mattel's claims were objectively baseless, the Ninth Circuit recognized the legitimacy of Mattel's positions.

3. The Complaint Pleads Mattel Used the *Outcome* of Litigation, Which Compels Application of Noerr-Pennington

MGA asserts in its opposition brief that Mattel "intended to interfere 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." Pl. Br. at 18-19 (emphasis in original). But this is not what the Complaint pleads. Rather, the Complaint focuses on the remedy Mattel sought as an *outcome* of litigation. See, e.g., Compl. ¶ 26 ("Mattel knew that merely obtaining that interim order would

eliminate the dreaded competition."). Courts reject "sham" claims where, as here, an outcome or remedy of the prior litigation, and not the litigation's initiation, is alleged to have caused the plaintiff's harm. See, e.g., Omni Res. Dev. Corp. v. Conoco, Inc., 739 F.2d 1412, 1414 (9th Cir. 1984) (affirming judgment on pleadings where plaintiff "was injured by the finding against it in state court and by the injunction, not by the mere filing of the suit"); Thomas v. Housing Auth. of County of Los Angeles, 2006 WL 5670938, at *9 n.48 (C.D. Cal. Feb. 28, 2006) (dismissing complaint where it was "clear that the successful outcome defendants obtained in the unlawful detainer action caused plaintiffs' injury, not the mere filing of the action"); see also Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc., 2006 WL 516749, at *7 (D. Conn. Mar. 1, 2006) ("A lawsuit is not rendered a sham merely because one form of relief sought may be objectively unreasonable.").

C. MGA Does Not Allege or Argue That Any Misrepresentations Deprived the Litigation of Legitimacy

MGA repeatedly asserts that Mattel "made misrepresentations to the court." See Pl. Br. at 5; see also id. at 2, 4, 15, 37. At no point, however, does MGA make any effort to explain, as is required, how these alleged misrepresentations have "deprive[d] the litigation of its legitimacy." Freeman, 410 F.3d at 1184 (internal quotation marks and citation omitted); see also Def. Br. at 26-28. MGA cannot avoid application of Noerr-Pennington merely by alleging that "misrepresentations" took place during litigation. See Omni Res. Dev. Corp., 739 F.2d at 1414 (alleging misrepresentations such as the use of false affidavits "is a charge that can easily be leveled, and it is thus insufficient by itself to overcome Noerr-Pennington immunity."). MGA also simply ignores Mattel's showing that the

"misrepresentations" MGA alleges have been addressed by the Court or otherwise have no merit. See Def. Br. at 26-28.[6]

D. The Litigation Privilege Bars MGA's Abuse of Process Claim

Mattel showed in its moving papers that California's litigation privilege bars MGA's abuse of process claim. See Def. Br. at 28-29. MGA contends in opposition that the privilege "does not immunize tortious courses of conduct." Pl. Br. at 37. But MGA's suggestion that the *litigation* privilege does not apply to *litigation* conduct is frivolous. As one case cited by MGA recognizes, "[t]he principal purpose of [the privilege] is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." Fujisawa v. Compass Vision, Inc., 735 F. Supp. 2d 1171, 1175 (N.D. Cal. 2010) (internal quotation marks and citation omitted). Tellingly, none of the cases cited by MGA on this point even concerns litigation conduct. See LiMandri v. Judkins, 52 Cal. App. 4th 326, 345 (1997) ("neither … was a litigant or other participant in the … litigation."); Stacy & Witbeck, Inc. v. City & County of San Francisco, 36 Cal. App. 4th 1074, 1091 (1995) ("publication was submitted … for a nonlitigation purpose."); Gonzalez v. Compass Vision, Inc., 2010 WL 3783164, at *5 (S.D. Cal. Sept. 27, 2010) (privilege did not apply to conduct that "occurred before any proceedings had even been commenced"). Despite MGA's suggestion to the contrary (Pl. Br. at 37), courts regularly invoke the litigation privilege to dismiss abuse of process claims at the pleading stage. See, e.g., Winters

[6] Although the Complaint only includes a monopolization claim under Sherman Act Section 2, in an effort to avoid application of Noerr-Pennington, MGA suggests in its opposition brief that it has also pleaded a Section 1 "Group Boycott" claim. See Pl. Br. at 16-17. Putting aside this improper effort to amend the Complaint through a brief (see Rohde, 2011 WL 684178, at *3 n.1), even adding a group boycott claim would not change that, as MGA admits, "the gravamen of MGA's Complaint is the baseless litigation." Pl. Br. at 1. Thus, even a properly alleged (footnote continued)

v. Jordan, 2010 WL 3000192, at *8-9 (E.D. Cal. July 27, 2010) (dismissing abuse of process claim where the alleged "conduct was made in judicial or quasi-judicial proceedings by a party or her attorney to achieve the objects of the litigation, and it has some connection or logical relation to the action"). Thus, given that MGA's abuse of process claim is predicated on alleged litigation misconduct, MGA has no answer to application of the litigation privilege.

IV. THE VACATED EQUITABLE REMEDIES DO NOT GIVE RISE TO AN ACTION FOR DAMAGES

Mattel showed that Russell v. Farley, 105 U.S. 433 (1881), and its progeny establish that a litigant may *not* maintain an action for damages resulting from equitable remedies imposed by a court. See Def. Br. at 30-31. The Court applied these principles in the prior-filed action to conclude that MGA could not obtain damages on its wrongful injunction claim. See Case No. 04-09049, Dkt. No. 8892 at 12. Thus, to maintain an action for damages, MGA's alleged injury would need to flow from something other than equitable remedies imposed by Judge Larson. But MGA argues, as alleged in the Complaint, that its damages "flow from Mattel's abusive and sham litigation," which purportedly "induce[d] Judge Larson to commit legal error" and impose equitable remedies that "spelled the death knell for Bratz as a brand." Pl. Br. at 23.

MGA cannot legitimately claim an entitlement to damages merely by arguing that Mattel's purported "sham" litigation was "part and parcel of its wide array of tortious and monopolistic conduct." Id. The Complaint never once alleges any damages flowing from any conduct besides the alleged "sham" litigation. Indeed, the Complaint states that Mattel commenced "sham" litigation because other practices "were not enough for Mattel to stem the tide" of Bratz sales. See Compl. ¶

---

group boycott claim would not avoid Noerr-Pennington immunity for claims premised on Mattel's litigation conduct.

12. MGA seeks as damages the $1 billion (pre-trebling) it claims MGA was worth at the point the equitable remedies were issued after the first trial. See id. ¶¶ 18, 58.

V. MGA FAILS TO STATE A SHERMAN ACT CLAIM

A. MGA Does Not Dispute Its Failure to Plead Antitrust Injury

As Mattel demonstrated in its moving papers, MGA has failed adequately to plead either injury to competition (as opposed to harm merely to MGA itself) or that Mattel was the direct cause of any such injury – both critical elements of any Sherman Act claim. See Def. Br. at 32-36.

MGA responds that harm to a single competitor is sufficient to establish antitrust injury. Pl. Br. at 35. But this is not the law: harm to a single competitor only violates the antitrust law if the effect is harm to competition. This principle is only confirmed by the case MGA cites on this point. See Pl. Br. at 35 n.10 (citing E.W. French, 885 F.2d at 1401 ("[E]limination of a single competitor may violate [the Sherman Act] *if it harms competition*.") (emphasis added)). Modern antitrust jurisprudence is settled that "[i]t is the impact upon competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort. [The] failure to allege injury to competition is a proper ground for dismissal by judgment on the pleadings." Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1064 (9th Cir. 2001) (brackets in original; internal quotation marks and citations omitted).

MGA's reliance on Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), is misplaced. Klor's is considered a relic from a different "era in the Supreme Court's antitrust jurisprudence" and has been limited to cases in which a "wide combination" is alleged to have driven out a competitor. See Prods. Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 665 (7th Cir. 1982) (Posner, J.) ("No 'wide combination' is alleged here."); see also Klor's, 359 U.S. at 212-13 ("This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in

this complaint is a wide combination consisting of manufacturers, distributors and a retailer."). No such "wide combination" has been alleged by MGA.

As to causation, MGA has no meaningful response. MGA maintains that it was injured by the equitable remedies imposed by Judge Larson. But, as this Court held in rejecting MGA's RICO counterclaim in the prior litigation, Mattel was not the direct legal cause of those remedies, rather the equitable relief imposed by Judge Larson was the "product of a careful and reasoned, albeit incorrect, application of the law by the district court." Dkt. No. 9600 at 46. That holding is dispositive of MGA's antitrust claims, as it precludes MGA from establishing the requisite direct causal relationship between the alleged antitrust violation and MGA's claimed harm. See Assoc. of Wash. Pub. Hosp. Dists. v. Philip Morris Inc., 241 F.3d 696, 701 (9th Cir. 2001) (holding that plaintiff must allege a "direct relationship between the injury and the alleged wrongdoing").

B. MGA's Market Definition Is Facially Implausible and Contradicted by the Complaint

As Mattel showed in its moving papers, MGA's tortured product market definition of "fashion dolls" that are "9-12" tall" and "dressed with fashion clothes and accessories" (Compl. ¶ 50) is implausibly narrow and fails to account for other substitutes. See Def. Br. at 37-38. The Complaint certainly does not allege the absence of substitutes. MGA asserts that it can identify a submarket, but that requires an adequate threshold definition of the broader market. And a plaintiff is not at liberty to fabricate an overly narrow definition of either a market or submarket without any explanation for the lack of reasonable substitute products. See UGG Holdings, Inc. v. Severn, 2004 WL 5458426, at *4 (C.D. Cal. Oct. 1, 2004) (claimant "makes no allegations in the Antitrust Claim, nor arguments in its Opposition, as to why other types of boots would not be reasonable substitutes for sheepskin, fleece-lined boots"); see also Def. Br. at 37-38 (highlighting decisions dismissing complaints for failure to properly define product market). MGA's

purported market definition is not rendered adequate for the stringent purposes of the antitrust laws simply because certain trial witnesses in the prior action loosely referred to "fashion dolls" as a toy category. Such toy categories are set more or less arbitrarily by data companies for the sake of convenience, not as a suggestion of what a relevant market would be for an antitrust claim.

MGA also has no response to Mattel's showing that the Complaint itself contradicts MGA's conclusory allegation that the relevant geographic market is the United States. See Def. Br. at 38-39. The Complaint repeatedly alleges that Mattel's purportedly anticompetitive conduct affected MGA sales around the globe. See, e.g., Compl. ¶ 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"); Def. Br. at 38-39 (listing other allegations).

MGA's reliance on E.I. DuPont De Nemours & Co. v. Kolon Indus., Inc., 2011 WL 834658 (4th Cir. Mar. 11, 2011), is unavailing. There, the claimant alleged anticompetitive activity and sales in the U.S. geographic market, while supplies of the product at issue originated from foreign countries as well as the United States. Id. at *1, 5. The Fourth Circuit reversed the district court's holding that headquarter sites must be considered, id. at *6, focusing instead (as Mattel did in its opening brief) on the "geographic area within which the defendant's customers who are affected by the challenged practice can practicably turn to alternative supplies." Id. at *3. MGA specifically alleges that customers in foreign countries have been affected by Mattel's purported anticompetitive conduct, and the Complaint explicitly encompasses alleged anticompetitive activity abroad. DuPont supports dismissal here, given MGA's "failure even to attempt a plausible explanation" for its geographic market. Id. at *5 (internal quotation marks and citation omitted). As in DuPont, MGA "alleges a contradictory and vague delineation of the relevant geographic market." Id. (internal quotation marks and citation omitted).

MGA argues that the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, somehow limits the relevant geographic market to the United States. But the FTAIA is a jurisdictional statute and is irrelevant to defining the geographic market for purposes of a monopolization claim. Notably, it is the defendant, not the plaintiff, that would seek to take advantage of the FTAIA, by moving to dismiss for lack of jurisdiction. Mattel has not done so here, because MGA has alleged conduct that has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. See F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161 (2004) (foreign conduct is beyond the reach of the Sherman Act if it "adversely affect[s] *only* foreign markets" (emphasis added)).

MGA's invocation of Galavan Supplements, Ltd. v. Archer Daniels Midland Co., 1997 WL 732498 (N.D. Cal. Nov. 19, 1997), is also off point. In Galavan, the court dismissed the complaint on standing grounds (not at issue here), because the plaintiff was foreign but alleged a relevant market of the United States. Id. at *4. Galavan actually held that subject matter jurisdiction (also not at issue here) was proper under the FTAIA. Id. at *1-3.

C. Bratz's Own Sudden Success in the Market Renders Implausible MGA's Market Power Allegations

A plaintiff may allege either direct or circumstantial evidence of market power. See Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995). MGA has alleged neither. MGA's assertion that it alleges direct evidence of reduced output (see Pl. Br. at 29) is a mischaracterization of the Complaint. The harm MGA claims here is the alleged exclusion of a single competitor, which is not "direct proof" of "injury to competition" in the form of market-wide "restricted output and supracompetitive prices" sufficient to qualify as direct evidence of market power. Rebel Oil, 51 F.3d at 1434. Even assuming MGA reduced output as a result of Mattel's purported conduct, MGA has not alleged that other toy suppliers, including Mattel, failed to increase production to fill any supply gap.

Circumstantial allegations of market power would relate to dominant market share, high barriers to entry, and inability of competitors to increase output. See id. Contrary to MGA's assertion (see Pl. Br. 29), there is no "surrogate method" for establishing market power solely on the basis of market share. The Complaint includes no allegation concerning any purported inability of existing competitors to increase output in response to a decrease in production by Mattel. Bratz's sudden and successful rise in the toy market – which MGA trumpets throughout the Complaint (Compl. ¶ 37; Def. Br. at 40-41) – certainly renders implausible any allegation of high barriers to entry. See generally Korea Kumho Petrochem. v. Flexsys Am. LP, 2008 WL 686834, at *9 (N.D. Cal. Mar. 11, 2008) (allegations inconsistent with high barriers to entry cannot survive a motion to dismiss).[7]

MGA's conclusory list of boilerplate allegations of barriers to entry (see Pl. Br. at 32), without any added explanation, makes the insufficiency of the Complaint painfully clear. See McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc., 2008 WL 2437739, at *8-9 (D. Haw. June 17, 2008). MGA's only non-conclusory support for barriers to entry is MGA's newly minted argument that Mattel controlled a resource necessary for effective competition by seeking to destroy Bratz. See Pl. Br. at 32-33. But the Bratz brand is not a product input, and in any event Mattel never controlled the Bratz brand, including because the equitable remedies

[7] This is confirmed by Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360 (9th Cir. 1988), cited by MGA. The court there recognized that the entry of two competitors into the market tended to refute a finding of high barriers to entry. Id. at 367. But the court ultimately did not grant the motion to dismiss because, unlike here, the primary competitor's "success may have owed not so much to its competition on the merits in an open market as to the 'insider' status of its founder," who was one of the defendant's former executives and "took some large accounts with him" to the competitor. Id. Where a market participant seizes accounts to gain market share, its entry into the marketplace says nothing about prevailing competitive conditions or barriers to entry. Oahu is thus consistent with settled case (footnote continued)

transferring the property were never implemented but instead were stayed. See Def. Br. at 4, 6.

Finally, MGA's allegations of dominant market share are demonstrably self-defeating. MGA argues that "market share of 65% is generally sufficient" (Pl. Br. at 29), but the Complaint itself alleges Mattel's market share hovered below 50% during the time period that Mattel allegedly engaged in the "Kill Bratz" campaign. See, e.g., Compl. ¶ 37. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997), cited by MGA, held that "Courts generally require a 65% market share to establish a prima facie case of market power." Id. at 1206 (recognizing that the parties' agreed jury instruction "required the jury to find a 65% market share in order to find monopoly power"). MGA's allegation that "Barbie market shares are up again" as a result of the "Kill Bratz" campaign (Compl. ¶ 26) is purely conclusory and does not meet MGA's burden at the pleading stage. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). MGA cannot fix this pleading deficiency through reference in its brief to stray (and off point) testimony, news articles, or snippets from the Ninth Circuit's opinion. See Pl. Br. at 30-31; Rohde, 2011 WL 684178, at *3 n.1.

VI. MGA FAILS TO PLEAD A § 17043 CLAIM

Mattel showed that MGA's § 17043 claim fails adequately to allege Mattel's sales price and cost structure. See Def. Br. at 41-42. MGA responds by citing G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 275-76 (Cal. App. 1st Dist. 1983). But that case expressly held that "to satisfy the pleading requirements of section 17043, the plaintiff must allege defendant's sales price, its cost in the product and its cost of doing business." Id. at 275. The only issue in G.H.I.I. was whether the plaintiff – which had "specifically allege[d]" both "the price at which [the defendants] sold

---

law that contradictory allegations of high entry barriers cannot survive a motion to dismiss.

their products, as well as invoice costs" – was also required to plead the defendants' cost of doing business. See id. at 275. The G.H.I.I. court concluded that such an allegation was unnecessary on the facts, because the plaintiff there would only be able to speculate as to such a figure. See id. at 276. Accordingly, even if MGA could establish that it is unable to plead Mattel's general business costs with specificity, G.H.I.I. in no way relieves MGA of the obligation to plead sales prices and product costs. See id. at 275-76; see also Indep. Journal Newspapers v. United W. Newspapers, Inc., 15 Cal. App. 3d 583, 587 (Cal. App. 2d Dist. 1971). MGA's one-sentence and wholly conclusory allegation that Mattel sold its product "below its fully allocated costs" (Compl. ¶ 62) is deficient as a matter of law.

VII. LEAVE TO AMEND SHOULD NOT BE GRANTED

Hoping to stave off dismissal with prejudice, MGA requests leave to cure any deficiencies in its present Complaint. No amendment, however, could avoid the prohibition on claim-splitting, change the fact that MGA's claims were all compulsory counterclaims in the prior action, overcome Noerr-Pennington immunity, or rectify fundamental defects in MGA's allegations. Leave to amend should be denied where, as here, amendment would be futile. See Gordon v. City of Oakland, 627 F.3d 1092, 1094 (9th Cir. 2010).

Conclusion

For all of the foregoing reasons and those set forth in Mattel's moving papers, Mattel respectfully submits that the Complaint be dismissed with prejudice.

DATED: May 6, 2011

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By /s/ Michael T. Zeller
Michael T. Zeller
Attorneys for Mattel, Inc. and Robert A. Eckert