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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

MGA ENTERTAINMENT, INC., Plaintiff, vs. MATTEL, INC. and ROBERT A. ECKERT, Defendants.	CASE NO. CV 11-01063 Hon. David O. Carter MATTEL, INC.'S AND ROBERT A. ECKERT'S NOTICE OF MOTION AND MOTION TO DISMISS MGA ENTERTAINMENT, INC.'S FIRST AMENDED COMPLAINT; AND MEMORANDUM OF POINTS AND AUTHORITIES Hearing Date: February 13, 2012 Time: 8:30 a.m. Place: Courtroom 9D

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on such date and time as the Court may order, before the Honorable David O. Carter, United States District Judge, located at 411 West Fourth Street, Santa Ana, California 92701, Mattel, Inc. and Robert A. Eckert (collectively "Mattel") will and hereby do move this Court pursuant to Federal Rules of Civil Procedure 12(b)(6) and 13(a), for an order dismissing MGA Entertainment, Inc.'s First Amended Complaint.

This motion to dismiss is made on the grounds that MGA's Section 2 Sherman Act (15 U.S.C. § 2) claim, the only claim in the amended complaint, is barred by res judicata, was a compulsory counterclaim to Mattel's claims in the prior action and is barred by the Noerr-Pennington doctrine. Furthermore, MGA's amended complaint does not otherwise state a claim upon which relief can be granted, including because it fails to allege that Mattel was the proximate cause of any injury, and fails to properly define the market or adequately allege market definition or antitrust injury. As MGA has already been given the opportunity to replead its complaint, the dismissal should be with prejudice.

This motion is based on this Notice of Motion, the Memorandum of Points and Authorities, the records and files of this Court, including the proceedings and filings in the cases titled CV 04-9049 and CV 05-2727 of which judicial notice is requested, as well as all other matters of which the Court may take judicial notice.

Certificate of Compliance

This motion is made following a conference of counsel on November 29, 2011.

DATED: December 9, 2011

QUINN EMANUEL URQUHART & SULLIVAN, LLP

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

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Preliminary Statement

In October 2011, this Court dismissed MGA's complaint in this action on res judicata and compulsory counterclaim grounds.[1] While this Court granted MGA leave to replead, it instructed that any amended claim should be based on distinct conduct postdating August 16, 2010 – the date on which MGA had filed its counterclaims-in-reply in the prior litigation between MGA and Mattel. See Order (Oct. 20, 2011) (Dkt. No. 29) ("MTD Order").

Disregarding this Court's ruling, MGA now has filed an amended complaint that again focuses almost exclusively on conduct before August 16, 2010 and pleads alleged "injury" flowing exclusively from the relief granted after the "Phase 1" trial before Judge Larson. The purported antitrust violation asserted in the amended complaint is the same as in the original, dismissed complaint: namely, that during the prior litigation in the "Phase 1" pre-appeal proceedings before Judge Larson, Mattel engaged in various forms of litigation misconduct that purportedly hoodwinked Judge Larson into ordering an injunction and constructive trust that MGA alleges destroyed its going-concern value. As the Court recognized in dismissing MGA's original antitrust complaint here, this was precisely the theory of the wrongful injunction and RICO claims that MGA filed in 2010 in the prior litigation – claims that MGA contended at the time were compulsory counterclaims to Mattel's claims in the prior action. As this Court also held in dismissing the original antitrust complaint here, MGA should have brought any antitrust claim premised on the Phase 1 proceedings no later than when MGA brought the prior wrongful injunction and RICO claims premised on the same transactional nucleus of facts. MTD Order at 9-10.

Remarkably, the amended complaint includes only three allegations of post-August 16, 2010 conduct. None of them, either alone or in combination, is sufficient

[1] The Court also found certain aspects of the complaint inadequate under the principles articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

to state a claim. Specifically, sprinkled into the amended complaint are the stray allegations that (1) Mattel filed post-trial motions and a notice of appeal following the 2011 trial in the prior litigation; (2) Mattel in the prior litigation purportedly withheld communications related to Kohl's and 35 boxes of other documents until production was ordered during the second trial; and (3) Mattel filed a fraudulent transfer claim in state court against Omni and MGA parties. These allegations are a plainly inadequate response to the Court's directive that any new complaint focus on conduct after August 16, 2010, and fail under the law.

First, as noted, the only "injury" alleged in the amended complaint is said to derive from the injunction and constructive trust entered after the Phase 1 trial before Judge Larson. Nothing Mattel did after August 16, 2010 could have caused the equitable remedies that were entered in late 2008 (and then stayed). MGA does not event attempt to, and certainly could not, attribute any anticompetitive injury to the post-August 16, 2010 conduct alleged in the amended complaint, much less with the requisite "directness" to state a claim under the Sherman Act.

Second, MGA's sparse allegations of post-August 16, 2010 conduct are barred by res judicata. The post-August 16, 2010 conduct is not legally distinct from the conduct giving rise to MGA's claims in the prior litigation. The indistinct continuation of previously sued-upon conduct is not a separable wrong that can support a fresh cause of action. This is all the more so given that MGA does not even attempt to connect the post-August 16, 2010 conduct to any alleged injury.

Third, the amended complaint's smattering of post-August 16, 2010 allegations all concern Mattel's conduct in litigation. This conduct, like Mattel's pre-August 16, 2010 litigation conduct, is squarely protected by the Noerr-Pennington doctrine. The entire reason MGA focuses on purported "sham litigation" is that litigation conduct is petitioning activity protected by the First Amendment, and the primary exception to this protection occurs only when the litigation pursued was objectively baseless and therefore a "sham." Here, however, the Ninth Circuit's remand of Mattel's prior

claims for possible trial, the original jury verdict in Mattel's favor, the Ninth Circuit's initial ruling on the merits in refusing to stay the injunction, and the rulings by two neutral judges permitting claims by Mattel to go to a jury all preclude as a matter of law a finding of objective baselessness. MGA's amended complaint, like the original, asserts that Mattel sought overbroad forms of equitable relief after the Phase 1 trial. But MGA must establish that Mattel's *claims* as a whole were objectively baseless, and MGA cannot satisfy that burden by simply attacking a form of *relief* Mattel sought.

While lacking material allegations of post-August 16, 2010 conduct as this Court and the law require, the amended complaint instead includes lengthy new sections filled with legal argument that appears principally designed to challenge and reargue this Court's dismissal of the original antitrust complaint. Putting aside the inappropriateness of including such legal argument in an initial pleading, these arguments, to the extent not already expressly rejected by this Court, are meritless.

For example, MGA's amended complaint mistakenly asserts that res judicata bars only claims with legal elements that were actually litigated in a prior action. It is elementary, however, as this Court has already found, that res judicata applies to all claims that could have been raised in a prior action arising from the same transactional nucleus of facts, even if the elements of the claims differ. MGA's amended complaint also erroneously suggests that "sham litigation" claims are categorically exempted from the compulsory counterclaim rule by Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) and Hydranautics v. FilmTec Corp.,70 F.3d 533 (9th Cir. 1995). The exception articulated in these cases, however, applies only to "sham litigation" claims targeting prior *patent* litigation, as this Court has already found. See MTD Order at 17-19. MGA thus merely repeats already rejected arguments.

This Court has also already rejected MGA's assertion, reiterated in the amended complaint, that MGA and its counsel could not possibly have prepared a

"sham litigation" claim between July 22, 2010, when the Ninth Circuit entered its decision in the prior action, and the scheduled trial date of January 11, 2011. MGA had no problem during that period asserting wrongful injunction and RICO claims based on the same underlying facts. MGA contended at the time that those claims were compulsory in the prior action. MGA cannot now argue legitimately that an antitrust claim based on the same allegations should be treated differently. Nor is there any authority that permits a party to withhold a claim and then evade the bar of res judicata by protesting that it did not have enough time to assert the claim.

MGA's amended complaint also includes a new legal argument that "sham litigation" claims purportedly are not ripe until final judgment has been entered in the litigation alleged to be sham. But courts not only permit sham litigation claims to be pleaded prior to such final judgment – they regularly require it. In any event, it is difficult to take seriously MGA's argument on this point, given that MGA commenced the antitrust suit here when the trial in the prior action was still underway. And the sole case on this point cited in MGA's amended complaint involved an alleged sham litigation claim that had been filed, as here, prior to final judgment in the underlying action at issue.

For all these reasons, the amended complaint should be dismissed. Given that MGA has already used an opportunity to replead and demonstrated the absence of any legitimate basis for proceeding with an antitrust claim, Mattel respectfully submits that dismissal now should be with prejudice. This amended complaint exposes MGA's "antitrust" claim for exactly what it is: part of MGA's repeated efforts, started with the filing of RICO and wrongful injunction claims in the prior litigation, to obtain damages based on the entry of injunctive relief by Judge Larson.

Background

A. Dismissal of MGA's First Antitrust Complaint

On February 3, 2011, after nearly seven years of litigation between Mattel and MGA, and in the midst of a second trial on the parties' prior claims, MGA

commenced an entirely new action based on a complaint alleging antitrust, abuse of process and predatory pricing claims. See Dkt. No. 1 ("February 2011 complaint" or "Compl."). The February 2011 complaint arose from a set of alleged facts that MGA had also asserted in the prior pending litigation – including the core allegation that Mattel improperly pursued and achieved imposition of an injunction and constructive trust after prevailing in the Phase 1 trial before Judge Larson.

On March 17, 2011, Mattel moved to dismiss the February 2011 complaint on the grounds that this new complaint violated the prohibition on claim-splitting; included claims that had been compulsory counterclaims in the prior pending action; included claims barred by the Noerr-Pennington doctrine; and otherwise failed to state a claim. After the motion to dismiss had been briefed, the Court entered final judgment following trial in the prior pending action. Based on that final judgment, Mattel submitted a Notice of Finality, noting that the then-pending motion to dismiss should be analyzed under the doctrine of res judicata rather than claim-splitting as a result of the final judgment. See Dkt. No. 26.

At the October 11, 2011 hearing on Mattel's motion to dismiss, MGA's counsel conceded that the various "trade practices" alleged in the February 2011 complaint were "likely barred by res judicata," Dkt. No. 30 ("Tr.") at 7, and acknowledged that the complaint did not allege any non-conclusory conduct postdating August 16, 2010, id. at 20-21.[2] MGA's counsel informed the Court that

[2] "THE COURT: . . . Do you agree that your complaint does not associate defendants' alleged conduct with any dates after August 16th, 2010? 'Yes' or 'no.' I know you're not used to answering questions that way, but 'yes' or 'no.'

MR. BLECHER: Well, I don't think there's any conduct other than the securing of the relief. There are things in the jury's verdict that would certainly impact the case, but they're not their conduct.

THE COURT: Are you agreeing with my statement?

MR. BLECHER: Do you agree?

THE COURT: No. Do you agree?

MR. BLECHER: Oh, yes."

while it would not further pursue predatory pricing and abuse of process claims, id. at 24, it nevertheless intended to amend the complaint to reassert a "sham litigation" claim focused "only at the securing of the constructive trust" in the Phase 1 proceedings, id. at 12, a claim that MGA's counsel characterized as being "born" by the Ninth Circuit's July 22, 2010 decision, see id. at 39. Although the Ninth Circuit's decision was issued more than three weeks *before* August 16, 2010, MGA's counsel argued that MGA could not have readied an antitrust claim for trial by the scheduled January 11, 2011 trial date. See id. at 17-18. MGA's counsel also argued that MGA's antitrust claim could not be deemed compulsory under the Ninth Circuit's decision in Hydranautics, 70 F.3d 533, see Tr. at 10-11, and that res judicata did not apply because the elements of a Sherman Act Section 2 claim are not "virtually identical" to the claims that MGA brought and actually litigated in the prior action, see id. at 12.

This Court rejected MGA's arguments in its October 20, 2011 Order. The Court ruled that MGA's antitrust claim was barred by res judicata to the extent it relied on Mattel's litigation conduct in the prior action, including Mattel's pursuit of equitable remedies and purported "disregard for the statute of limitations." MTD Order at 9. Although the February 2011 complaint generally asserted that Mattel's monopolization was "continuing through the present time," Compl. ¶ 52, the Court held that such generic assertions did not describe a "distinct act" postdating August 16, 2010, see MTD Order at 12, and were otherwise too conclusory to state a claim, see id. at 12-14.

The Court also held MGA's antitrust claim to be a compulsory counterclaim to Mattel's litigation-related RICO claims in the prior action, rejecting MGA's contention that the Ninth Circuit's *Hydranautics* decision creates an exception to the compulsory counterclaim rule for antitrust claims. See id. at 17-20. Addressing MGA's contention that MGA could not feasibly have prepared an antitrust claim between the Ninth Circuit's decision on July 22, 2010, and the scheduled trial date of

January 11, 2011, the Court observed that MGA had brought RICO and wrongful injunction claims during that window – "claims which share the same transactional nucleus of facts as MGA's current antitrust claim" and which MGA had asserted were compulsory in the underlying action. Id. at 10. The failure to raise an antitrust claim along with the RICO and wrongful injunction claims, the Court held, "rests with MGA." Id.

Although the February 2011 complaint did not contain a single non-conclusory allegation of conduct postdating August 16, 2010, the Court reasoned that it did not "appear *impossible* for MGA to allege anticompetitive conduct *after* August 16, 2010." MTD Order at 20 (emphasis in original). On this basis, the Court dismissed the February 2011 complaint without prejudice and with leave to amend to allege anticompetitive conduct postdating August 16, 2010.

B. MGA's Amended Complaint

MGA filed an amended complaint on November 10, 2011. Even though the Court granted MGA leave to amend only to allege conduct postdating August 16, 2010, the factual allegations in MGA's amended complaint focus almost exclusively on pre-August 16, 2010 conduct. Indeed, the factual allegations in the amended complaint are virtually identical to those that the Court already dismissed and that MGA conceded, at oral argument on the motion to dismiss the February 2011 complaint, did not rest on any conduct postdating August 16, 2010. See Tr. at 20-21. The sole injury alleged in the amended complaint flows from the relief entered by Judge Larson following the Phase 1 jury trial. MGA openly concedes that the amended complaint is "based on Mattel's sham abusive tactics in the underlying litigation," Am. Compl. ¶ 17, and was "'born' by reason of the Ninth Circuit's July 22, 2010 decision," id. ¶ 19(c).

Once again, MGA also alleges that, sometime in 2003 or 2004, Mattel initiated a "Kill Bratz" campaign and committed itself to litigating Bratz to death. See id. ¶¶ 49, 51-52. Like the February 2011 complaint, the amended complaint focuses on

Mattel's efforts to obtain equitable remedies following the 2008 Phase 1 trial before Judge Larson – remedies that MGA contends "nearly destroyed MGA." Id. at ¶ 1; see also id. ¶¶ 57-64, 81-83. The theory of MGA's amended complaint, copied and pasted from the February 2011 complaint and patterned after allegations underlying MGA's prior RICO and wrongful injunction claims, is that Mattel purportedly did not care whether the injunction and constructive trust remedies would be upheld on appeal, "because the imposition of the very broad constructive trust . . . itself was a death blow to Bratz and MGA." Id. ¶ 81 (internal quotation marks omitted); Compl. ¶ 24.

MGA also repeats its allegation that Mattel was aware that its claims in the prior action were time-barred. See Am. Compl. ¶¶ 1, 93(a); Compl. ¶ 30(a). And in passages literally copied from its February 2011 complaint, MGA reasserts a number of its allegations from the pre-August 16, 2010 period, including that Mattel allegedly:

- snuck into "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," Am. Compl. ¶ 50; Compl. ¶ 11;
- over-litigated its prior claims by "launching thousands of discovery requests, taking needless depositions, and filing hundreds and hundreds of motions," Am Compl. ¶ 53; Compl. ¶ 14;
- improperly "secured the appointment of an auditor and temporary receiver" to administer MGA, Am. Compl. ¶ 93; see Compl. ¶¶ 18, 30(c);
- misrepresented in the Phase 1 pretrial conference that "it was not seeking to acquire the proprietary rights to the name 'Bratz,'" Am. Compl. ¶ 97(b); Compl. ¶ 30(b);
- misrepresented "(i) that MGA had concealed from Mattel material aspects of the Omni transaction and the source of the funds being used by Omni; and (ii) that MGA had impermissibly encumbered the rights to Bratz after the verdict," Am. Compl. ¶ 97(c); Compl. ¶ 30(c);

- "made misrepresentations to the Court to obtain duplicative damages on its state tort claims," Am. Compl. ¶ 97(d); Compl. ¶ 30(d), as well as its claims against Isaac Larian, Am. Compl. ¶ 97(e); Compl. ¶ 30(e);
- "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 the Phase 1 litigation," Am. Compl. ¶ 97(f); Compl. ¶ 30(f); and
- suborned "false testimony in depositions, including, without limitation, Matthew Bousquette and Defendant Robert A. Eckert," Am. Compl. ¶ 97(g); Compl. ¶ 30(g).

Obviously, none of these allegations references or concerns Mattel's conduct after August 16, 2010, notwithstanding MGA's conclusory assertion – repeated from the February 2011 complaint – that Mattel's anticompetitive conduct is "ongoing" and "continuing." See Am. Compl. ¶¶ 95, 104.

MGA's amended complaint includes only three stray allegations of conduct after August 16, 2010, which at most pay "lip service" to the Court's requirement for an amended complaint focusing on post-August 16, 2010 conduct. First, MGA's new complaint notes that after the second trial in the prior action, Mattel filed post-trial motions and a notice of appeal. See id. ¶¶ 78-79. Second, MGA suggests that Mattel improperly withheld communications with Kohl's, and "35 boxes" of other documents, until Mattel was required to produce those materials in the middle of the second trial. See id. ¶ 94. Third, MGA asserts that Mattel brought a fraudulent-transfer claim against Omni and MGA parties in state court. See id. ¶ 93 & n.2.[3] MGA has not even attempted to attribute any alleged injury to conduct postdating August 16, 2010. That is not surprising, given that the only alleged injury is said to have been caused by the equitable relief ordered by Judge Larson following the Phase

[3] Although MGA does not allege the date on which Mattel brought the Omni state-court action, the state-court complaint was filed on September 1, 2010.

1 trial in the prior action – long before August 16, 2010.[4] MGA has also failed to
2 attribute any conduct postdating August 16, 2010 to Robert Eckert.

Argument

I. MGA's Sparse Allegations of Post-August 16, 2010 Conduct Are Insufficient

A. The Amended Complaint is Devoted Almost Exclusively To Allegations Concerning Pre-August 16, 2010 Conduct That This Court Already Deemed Inadequate

This Court has already held that MGA's antitrust claim is precluded to the extent it rests on Mattel's conduct predating August 16, 2010, and that any amended complaint was required to focus on conduct postdating August 16, 2010.[5]

MGA's amended complaint is contrary to the Court's directive, however. It instead again focuses almost exclusively on Mattel's conduct during Phase 1 of the prior action, and in particular on Mattel's pursuit of equitable remedies and alleged awareness that its claims were purportedly time-barred. Indeed, virtually the only injury alleged by MGA flows from the injunction and constructive trust entered by Judge Larson purportedly after he was duped by Mattel into doing so. Certainly, no

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[4] MGA's references in the amended complaint to the jury's verdict in the second trial, and the inclusion of quotes from the Court's subsequent judgment in MGA's favor, obviously do not constitute allegations of post-August 16, 2010 conduct by Mattel. See Am. Compl. ¶¶ 1 ("The Ninth Circuit's ruling and the subsequent jury verdict and judgment in MGA's favor form the basis of a viable antitrust claim grounded on baseless anticompetitive litigation."), 76-77 (reciting passages from the Court's judgment). Similarly, MGA's allegations about Mattel's purported discussion of its 2011 first quarter earnings, see id. ¶ 74, is plainly not conduct that could support a "sham litigation" claim, nor is it pleaded as a basis for MGA's claim here.

[5] This is the law of the case. United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000) ("Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case.").

form of injury alleged in the amended complaint is linked to any conduct that occurred after August 16, 2010.

This Court has already found that Mattel's efforts to obtain the relevant equitable remedies obviously "occurred prior to August 16, 2010." MTD Order at 9. This Court has also already determined that Mattel's ostensible "disregard for the statute of limitations" occurred "prior to August 16, 2010." Id.; see also id. at 11 n.6 (facts MGA has alleged in support of its statute of limitations defense "either were in MGA's possession or were public knowledge by 2003, and thus are not 'new facts' for purposes of *res judicata*").

The allegations that Mattel pursued improper equitable remedies and improperly pursued time-barred claims were also, in fact, affirmatively advanced by MGA in the prior litigation. See Dkt. No. 8583 (counterclaims-in-reply) ¶¶ 4, 30-36, 58-60, 315-18 (alleging Mattel suppressed evidence and engaged in other litigation-related misconduct to secure overbroad equitable relief from Judge Larson); Dkt. No. 2572 at 6-12, 15-34 (MGA March 7, 2008 Motion for Summary Judgment) (asserting that Mattel was on notice of its claims by 2001 and the claims were therefore time-barred).[6]

MGA could have brought this antitrust claim when MGA filed its counterclaims-in-reply on August 16, 2010 (or in the months thereafter prior to the scheduled trial date). Pursuant to the compulsory counterclaim rule, MGA was required to bring any such claim in the prior action, given the claim's logical relationship to Mattel's litigation-related RICO claim. See MTD Order at 19-20. As this Court held, MGA's failure to raise an antitrust claim when it had the opportunity

[6] The Court may, on a motion to dismiss, take judicial notice of documents on its docket and in court files without converting the motion into one for summary judgment. See MTD Order at 9 n.4; id. at 12; Mullis v. U.S. Bankr. Ct. for Dist. of Nev., 828 F.2d 1385, 1388 & n.9 (9th Cir. 1987); Britz Fertilizers, Inc. v. Bayer Corp., 2008 WL 341628, at *6 (E.D. Cal. Feb. 5, 2008).

to do so, and when it did bring other claims on the same nucleus of facts, precludes MGA from raising the claim now. Id. at 9-10; see also Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982) (Claim preclusion "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."); Mitchell v. CB Richard Ellis Long Term Disability Plan, 611 F.3d 1192, 1201 (9th Cir. 2010) (if party fails "to plead a compulsory counterclaim, the claim is waived and the party is precluded by principles of res judicata from raising it again.").[7]

B. The Few Allegations Concerning Post-August 16, 2010 Conduct in The Amended Complaint Do Not Support A Viable Cause of Action

1. MGA's Post-August 2010 Allegations are Barred by Res Judicata

MGA's threadbare allegations of post-August 16, 2010 conduct are barred by res judicata, because none of that alleged conduct is *distinct* from conduct that was or could have been alleged in the prior action.

First, as to the allegations concerning Mattel's post-trial motions and appeal following the 2011 jury verdict in the prior action, filing a motion or appeal in connection with a claim is not an act separate and distinct from bringing the claim in the first instance. That is, such post-trial motions are the paradigm of a continuation, rather than distinct conduct. As the Ninth Circuit has explained:

> In every lawsuit, a party has a right, and an attorney has a duty, to prosecute or defend vigorously. Furthermore, no new injury results from the act of appealing that the defendant does not already endure as a result of the act of filing the action initially. This is true because the

[7] MGA devotes a large portion of its amended complaint to rehashing legal arguments that the Court has already rejected. An amended complaint is no vehicle for rearguing legal propositions. See, e.g., Farhang v. Indian Inst. of Tech., Kharagpur, 2010 WL 3504897, at *1 (N.D. Cal. Sept. 7, 2010) (granting motion to strike passages from complaint that "consist of legal argument"); Jones v. Kern High School Dist., 2009 WL 35708, at *1 (E.D. Cal. Jan. 6, 2009) (same).

> reasonable expectation from the commencement of a lawsuit is that the plaintiff will pursue the litigation until it prevails or the last appeal is exhausted.

Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987).

Second, MGA's allegations regarding purported discovery abuses, relating to the 35 boxes of documents and the Kohl's communications, are similarly indistinct from the conduct at issue in the prior litigation. See Am. Compl. ¶ 94. MGA has long alleged that Mattel has improperly withheld documentary evidence and otherwise abused the discovery process. See MTD Order at 9. Indeed, MGA affirmatively raised and litigated the Kohl's documents and the 35 boxes in the prior action. MGA did so both in its presentation to the jury and during post-trial hearings seeking exemplary damages and attorney's fees.[8] Because these issues were actually litigated, they are encompassed by the prior action, even if they arose after MGA filed its counterclaims-in-reply. See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731, 740 (9th Cir. 1984) (holding that to the extent the parties had "actually litigated" purportedly wrongful acts occurring after the time period covered by the prior complaint, "then the res judicata bar would have to expand to encompass those events and others that might have been litigated with them"); accord Feminist Women's Health Center v. Codispoti, 63 F.3d 863, 866, 868 (9th Cir. 1995) (res judicata extended to preclude allegations of post-complaint conduct regarding which "the state court heard evidence"); Dillon v. Select Portfolio

[8] Dkt. No. 10450 (MGA Closing Argument, Trial Day 49 Vol. 2 of 3) at 92 ("That's dishonest, knowing as they did that all those 35 boxes that we only recently found out about had been taken off site and then deliberately having their CEO, the public face of company, tell all of you that there is nothing to it."); Dkt. No. 10611 (Post Trial Hearing, May 26, 2011, Vol. 2 of 2) at 6-7 (arguing that Mr. Eckert was somehow aware "that 35 boxes of documents from the market intelligence library on a different floor had been carted away and stored at the offices of outside counsel"); Dkt. No. 10395 (Trial Day 45 Vol. 1 of 4, Eckert cross) at 52 (Q: "Well, you know (footnote continued)

Servicing, 630 F.3d 75, 81 (1st Cir. 2011) (post-judgment conduct barred by res judicata because raised in a prior post-judgment motion for contempt).

Third, MGA's cursory allegations about the fraudulent transfer action Mattel brought in state court likewise do not implicate distinct conduct. See Am. Compl. ¶¶ 93; 97(c). Mattel initially brought the state-law fraudulent transfer claim in April 2009 as part of its Third Amended Answer and Counterclaims. Dkt. No. 5157. While this Court did not believe Mattel had pleaded a viable state-law fraudulent transfer claim, this Court dismissed the claim for want of supplemental jurisdiction. See Dkt. No. 8423 at 35 (holding that the "exercise of supplemental jurisdiction over these claims would be imprudent"). Mattel's subsequent pursuit of the claim in state court was therefore merely the procedural continuation, in the proper venue, of the claim, and not a distinct act that might support a fresh claim to relief. See Pace Indus., Inc., 813 F.2d at 238 (party should expect adversary to pursue claims all the way to final judgment and through available appeals). And, in any event, as discussed below, even if considered to be post-August 16, 2010 conduct, this perfunctory allegation cannot save MGA's amended complaint from dismissal.

Consistent with this Court's MTD Order, courts that have permitted claims premised on conduct after a certain date require that the allegations concerning the conduct after the given date be "enough *on their own* to sustain the second action." Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 384 (2d Cir. 2003) (emphasis added). As Judge Posner put it, "[e]nough new misconduct must be alleged to support the claim without reference to the earlier misconduct." Nesses v. Sheppard, 68 F.3d 1003, 1004 (7th Cir. 1995); see also Harkins Amusement Enterprises, Inc. v. Harry Nace Co., 890 F.2d 181, 183 (9th Cir. 1989) ("no doubt" that res judicata barred claimant from advancing antitrust claims premised on conduct covered by the time

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that Mattel never produced any documents about its deal with Kohl's besides Exhibit 26612 that's on the screen.").

period of the prior action); MTD Order at 14 (observing that MGA had failed to "identify a single distinct act" occurring after August 16, 2010).[9] The purported allegations of "new" conduct here cannot satisfy this standard.

Relatedly, a party cannot salvage a claim that is premised primarily on precluded allegations by sprinkling in a few allegations of "new" or "continuing" conduct. As articulated by one leading commentator, "[a] plaintiff who seeks to enlarge a minor new claim by including precluded events runs a risk that the whole will be precluded." 18 Charles Alan Wright et al., Fed. Practice & Proc. Civ. § 4409 (2d ed. Supp. 2011). The dispositive question is whether the second action rests primarily on precluded events. If that question is answered affirmatively, the claim is barred by res judicata notwithstanding any ancillary allegations of "new conduct."

Illustrations of this principle abound. In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064 (9th Cir. 2003), for example, the plaintiffs challenged the defendant planning agency's 1999 decision to maintain, pursuant to a 1987 land management plan, building moratoria around Lake Tahoe. See id. at 1075-76. In prior actions, the plaintiffs had mounted an unsuccessful challenge to the 1987 plan itself. See id. at 1074-75. Dismissing on res judicata grounds, the Ninth Circuit held that the true "transactional nucleus of facts" underlying the plaintiffs' claims was the previously challenged "1987 Plan and its application to the plaintiffs' properties." Id. at 1078. Although the plaintiffs had pleaded and even emphasized new conduct postdating the prior adjudication – specifically, the planning agency's decision to maintain building moratoria at 1999

[9] See also Hatch v. Boulder Town Council, 471 F.3d 1142, 1150 (10th Cir. 2006) ("Under the transactional test, a new action will be permitted only where it raises *new and independent* claims, not part of the previous transaction, based on the new facts." (emphasis in original)); 18 Lawrence B. Solum, Moore's Federal Practice § 131.22[1] (3d ed. 2011) (New facts can support a fresh cause of action only if they "*in themselves* establish independent grounds for a claim against the defendants."(emphasis in original)).

meetings – that conduct was pursuant to the 1987 plan and, the court held, insufficient to overcome preclusion. Id. at 1079. The Court forcefully rejected the plaintiffs' attempt to revive a challenge to the 1987 plan by pleading ancillary post-judgment conduct. "[A]rtful drafting," the court reasoned, "cannot disguise the crux of the controversy." Id. Rather, to escape the preclusive effect of a prior adjudication, a party must allege "a specific and *distinct* nucleus of facts." Id. at 1078 n.11 (emphasis added).[10]

The Second Circuit's decision in Waldman v. Village of Kiryas Joel, 207 F.3d 105 (2d Cir. 2000), is similarly illustrative. The plaintiff there sought to dissolve the Village of Kiryas Joel on the ground that its institutions had become "instruments of the dominant religious group" in violation of the Establishment Clause. See id. at 107. The plaintiff had, however, previously brought Establishment and Free Exercise claims against the Village ("*Waldman I*"), claims which rested on many of the facts alleged in the dissolution action. See id. at 109-110. Although the plaintiff's dissolution complaint alleged conduct postdating the filing of his prior suits, the Second Circuit nevertheless dismissed the action on res judicata grounds. The Court reasoned that it was "simply not plausible to characterize [the plaintiff's] claim as one based in any significant way upon the post-*Waldman I* facts." Id. at 113. Asserting

[10] See also In re Dual-Deck Video Cassette Recorder Antitrust Litig., 11 F.3d 1460, 1464 (9th Cir. 1993) (mere allegation that conduct continued beyond prior lawsuit does not state a new claim where "[n]othing new is alleged – no new conspiracy, no new kinds of monopolization, no new acts"); Gospel Missions of Am. v. City of Los Angeles, 328 F.3d 548, 558 (9th Cir. 2003) (fact that city only began to enforce challenged provisions of charitable solicitations law after prior litigation did not constitute sufficient new conduct giving rise to a new claim; "[t]here is no new claim; instead there is a new fact supporting an old claim"); Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 638 (2d Cir. 1989) ("Although some of the acts of which Norman complains may have occurred in the one year interval between Judge Munson's dismissal of the 1985 action and the bringing of the instant suit in 1986, it is readily apparent that they were all part of the same cause of action and arose from a 'single core of operative facts.'").

"additional instances of what was previously asserted" does not suffice. Id.; accord Misischia v. St. John's Mercy Health Sys., 457 F.3d 800, 805 (8th Cir. 2006) ("The doctrine of res judicata would become meaningless if a party could relitigate the same issue . . . merely by positing a few additional facts that occurred after the initial suit." (internal quotation marks omitted)); Havercombe v. Dep't of Educ. of Com. of P.R., 250 F.3d 1, 4-8 (1st Cir. 2001) (claim alleging continuing pattern of discrimination was res judicata because it did not "identify discrete, separable wrongs").

Here, MGA's amended antitrust claim is based almost exclusively on conduct that occurred prior to August 16, 2010 – namely, Mattel's "tactics in the underlying litigation." Am. Compl. ¶ 17. The injury alleged stems exclusively from the relief entered by Judge Larson following the Phase 1 trial. The res judicata doctrine, and the principles that it is designed to protect, would be severely undermined if a party such as MGA could avoid the doctrine simply by making stray allegations like those here, to which MGA has not even attached any legal or factual significance.

2. The Amended Complaint Fails to Link Any Alleged Post-August 16, 2010 Conduct to an Antitrust Injury

MGA's few conclusory allegations of post-August 16, 2010 conduct do not state a claim for the simple reason that MGA has failed even to attempt to allege that such conduct caused any injury to MGA.

To state a claim under Section 2 of the Sherman Act, MGA must allege both injury-in-fact and that the claimed wrongful conduct had a "direct relationship" with (*i.e.*, was the proximate cause of) the alleged antitrust violation. Assoc. of Wash. Pub. Hosp. Dists. v. Philip Morris Inc., 241 F.3d 696, 701 (9th Cir. 2001).[11]

[11] A plaintiff must also show (1) that the defendant possessed "monopoly power in the relevant market," and (2) the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acquisition, or historic accident." John Doe 1 v. Abbott Labs., 571 F.3d 930, 933 n.3 (9th Cir. 2009) (internal quotation marks and citation omitted). To (footnote continued)

MGA's entire injury theory here is that the constructive trust and other equitable relief ordered immediately following the first trial (which relief was stayed) placed a cloud over Bratz that purportedly harmed MGA.[12] But Mattel's post-August 16, 2010 conduct obviously could not have caused equitable remedies ordered in late 2008, nor could it have caused any alleged injuries arising from those remedies. To state claims based on post-August 16, 2010 conduct, MGA must allege damages caused by the post-August 16, 2010 conduct; it cannot state a claim for "damages from subsequent consequences of the earlier conduct." Int'l Tech. Consultants, Inc. v. Pilkington PLC, 137 F.3d 1382, 1388 (9th Cir. 1998); see also Tahoe-Sierra Preservation Council, 322 F.3d at 1079 & n.12 (continuing injury caused by previously challenged land management plan did not constitute a new "fact" that could give rise to a "new cause of action"); Exhibitors Poster Exchange, Inc. v. Nat'l Screen Service Corp., 421 F.2d 1313, 1318-19 (5th Cir. 1970) (antitrust claim premised on conduct continuing after the prior action must be based on "new illegal

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prevail on an attempted monopolization claim, the plaintiff must demonstrate "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Id. (internal quotation marks and citation omitted).

[12] See Am. Compl. ¶¶ 19(vii)-(x) (discovery needed to determine whether "constructive trust remedy" "was the proximate cause of injury to MGA," "was a monopolizing act," satisfies "antitrust injury" requirement, and caused "quantifiable damage" to MGA), 57 ("Mattel sought and initially secured relief that included the imposition of a constructive trust (and the appointment of a receiver to administer MGA) over virtually all of MGA's trademarks using the words 'Bratz' or 'Jade.' At the time, these assets were worth nearly $1 billion . . . ."), 81 ("[T]he imposition of the 'very broad constructive trust' . . . itself was a death blow to Bratz and MGA." (citation omitted)), 82 ("Even the specter of the constructive trust was a blow to MGA, as it put MGA's ownership of the trademarks in question and threatened a far broader range of Bratz products than the copyright claim alone, including products produced by licensees."), 83 ("Mattel and its counsel knew that merely obtaining that interim order would eliminate the dreaded competition. And it has.").

conduct, not merely continuing damages from old, and now insulated, illegal conduct").[13]

At the hearing on the motion to dismiss MGA's original antitrust complaint, MGA's counsel conceded MGA's inability to point to any harm caused by post-August 16, 2010 conduct, stating that "the conduct is continuing, which *does not mean that we're going to assert a claim for damages based on that conduct*." Tr. at 23 (emphasis added). And no such damages have been alleged. While MGA sprinkles the complaint with conclusory references to litigation generally resulting in MGA's "expending countless resources,"[14] "preventing MGA from competing in the fashion doll market,"[15] and having "destroyed the value of a competitive company by pursuing scorched earth, baseless litigation,"[16] MGA does not connect these assertions to any improper or sham conduct alleged to have occurred after August 16, 2010. MGA simply states that more recent conduct has happened, without any additional allegation that the conduct caused or was at all connected to any harm to MGA. The amended complaint cannot possibly be read to allege that the post-August 16, 2010 conduct had a "direct relationship" (Assoc. of Wash., 241 F.3d at 701) with injury to MGA. See, e.g., In re Online DVD Rental Antitrust Litig., 2009 WL 4572070, at *7 (N.D. Cal. Dec. 1, 2009) (dismissing monopolization claim given that

[13] In rejecting MGA's prior RICO claim, the Court concluded that even Mattel's pre-August 16, 2010 conduct did not cause the relevant equitable remedies. See Dkt. No. 9600 at 146 (holding that Mattel was not the direct legal cause of the equitable relief, since the relief was the "product of a careful and reasoned, albeit incorrect, application of the law by the district court"). The RICO injury causation standard is identical to the antitrust causation standard. See, e.g., Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 267-68 (1992) (noting that causation language in RICO mirrors antitrust standard and that, by using the same words, Congress "intended them to have the same meaning that courts had already given them" in the antitrust context); accord Assoc. of Wash., 241 F.3d at 701.

[14] Am. Compl. ¶ 22; see also id. ¶ 99.

[15] Id. ¶ 54; see also id. ¶¶ 99, 106, 109.

[16] Id. ¶ 104; see also id. ¶¶ 109-10.

conclusory allegations failed to establish "direct causal link" between defendants' conduct and prices); Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 17 F. Supp. 2d 1170, 1176-78 (D. Or. 1998) (granting motion for judgment on the pleadings where "the chain of causation between the plaintiffs' injury and the defendants' alleged restraint on the market and attempt to monopolize the market contains too many speculative, tenuous links to withstand scrutiny").

Nor *could* MGA make out any claim of causal injury on the basis of the conclusory post-August 16, 2010 conduct it has alleged:

Post-trial motions and appeal. MGA's unexplained, one-liner allegations relating to these filings are wholly conclusory. In any event, as noted above, a litigant's post-trial conduct as a matter of law does not cause any additional injury to the adverse party. See Pace Indus., Inc., 813 F.2d at 238 ("no new injury results from the act of appealing that the defendant does not already endure as a result of the act of filing the action initially," since "the reasonable expectation from the commencement of a lawsuit is that the plaintiff will pursue the litigation until it prevails or the last appeal is exhausted").

35 boxes and Kohl's communications. In addition to failing for the reasons discussed above, MGA's allegations about the purportedly late production of 35 boxes of documents fail to include any claim of injury or prejudice. To the contrary, MGA itself alleges that its request for the 35 boxes was addressed when "this Court ordered production of 35 boxes of Mattel documents." Am. Compl. ¶ 94. MGA likewise does not allege that the "communications with Kohl's" were not produced, or that MGA's not receiving the communications earlier in any way harmed MGA. See id. MGA's allegations as to these discovery disputes are purely conclusory and unhinged from any allegations of competitive harm.

Omni litigation: This Court has already held that MGA's allegation about the "'baseless and frivolous new lawsuit' in state court" is "too conclusory" to state a claim. MTD Order at 9-10 n.5 (quoting Compl. ¶ 30(c)). The same allegation that

the Court previously decided was "too conclusory" has been repeated, word for word, in the amended complaint.[17] Moreover, as this Court recognized, MGA's counsel conceded at oral argument on the first motion to dismiss that it was not relying on the Omni action as a basis for its antitrust claim (even though MGA has now copied that allegation verbatim). See id. at 9-10 n.5, 12 n.7.[18]

II. MGA's Asserted Legal Arguments Do Not Rescue The Repeated Allegations of Pre-August 16, 2010 Conduct

MGA advances a variety of legal arguments in the amended complaint to defend the repeated allegations of conduct predating August 16, 2010. These arguments, which the Court already rejected in large part, are meritless.

A. Mercoid and Hydranautics Do Not Apply Outside the Patent Litigation Context

The primary argument advanced in the amended complaint is that, under the reasoning of Mercoid, 320 U.S. 661, and Hydranautics, 70 F.3d 533, MGA's antitrust claim could not have been a compulsory counterclaim in the prior action. See Am. Compl. ¶¶ 9-17. But as this Court has already held, Mercoid and Hydranautics create an exception to the compulsory counterclaim rule *only* where the prior litigation involved *patent* claims. See MTD Order at 17-19. This limited applicability of Mercoid and Hydranautics is well established in the case law and academic literature. See, e.g., 6 Arthur R. Wright and Mary Kay Kane, 6 Fed. Practice and Proc. Civ. § 1412 n.16 (3d ed. 2010); Alibaba.com, Inc. v. Litecubes, Inc., 2004 WL 443712, at *2 n.5 (N.D. Cal. Mar. 8, 2004). Because Mattel did not bring patent claims in the prior action, Mercoid and Hydranautics are inapplicable. See MTD Order at 18

[17] Compare Am. Compl. ¶ 97(c) with Compl. ¶ 30(c); see also Am. Compl. ¶ 93 n.2.

[18] See also Tr. at 22-23 ("THE COURT: Are you planning, then, on bringing back these allegations concerning Omni? MR. BLECHER: No. . . .").

("'[I]t is clear at this point that there is no general exception [grounded in Mercoid] to the operation of Rule 13(a) and no case decided in the last twenty years holds to the contrary.'" (quoting Grumman Sys. Support Corp. v. Data General Corp., 125 F.R.D. 160, 163 (N.D. Cal. 1988))).

Moreover, Mercoid and Hydranautics dealt only with the compulsory counterclaim rule. Even if the Court adopted MGA's overbroad reading of Mercoid and Hydranautics, dismissal would still be required on the independent grounds of res judicata, Noerr-Pennington, and inadequate pleading under Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

B. MGA Continues to Misconstrue Res Judicata Doctrine

Undeterred by the Court's MTD Order, MGA's amended complaint persists with the unsupported contention that res judicata purportedly only applies to claims with the same legal elements as the claims previously litigated. See Am. Compl. ¶¶ 24, 25. This is not the law. As this Court has already observed, "[c]ontrary to MGA's contention, actual litigation of claims is not a requirement for *res judicata*." MTD Order at 7 n.2; id. ("The difference in elements between the claims in the two suits is similarly irrelevant."). Res judicata applies to all grounds for recovery that "*could* have been asserted" in the prior action, irrespective of their elements. Costantini, 681 F.2d at 1201 (emphasis added) (internal quotation marks omitted). The touchstone is whether the later-filed claims arise from the same transactional nucleus of fact as the prior claims. See id.; see also MTD Order at 7 n.2, 8.

This Court has held that MGA's antitrust claim here arose from the same transactional nucleus of fact as MGA's prior claims. See MTD Order at 9-10. This Court also rejected MGA's arguments concerning the other res judicata factors. See MTD Order at 15-16; Costantini, 681 F.2d at 1201-02 (in addition to analyzing whether new claims arose from the same "transactional nucleus," courts may consider "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same

evidence is presented in the two actions; [and] (3) whether the two suits involve infringement of the same right" (internal quotation marks omitted)).[19] For example, MGA asserts that its antitrust claim is not res judicata because "new and distinct evidence is required to prove an antitrust claim." Am. Compl. ¶ 23. But as this Court has already found, because MGA's prior claims involved the allegation that Mattel pursued litigation and sought equitable remedies in bad faith,[20] MGA's prior and current claims would involve substantially the same evidence. See MTD Order at 15.

To prevail under the Sherman Act, MGA would be required to supplement its showing with an analysis of the relevant market and MGA's position within that market. But such evidentiary differences do not defeat preclusion, as this Court noted. See id.; see also Int'l Union of Operating Eng'g-Employers Constr. Indus. Pension v. Karr, 994 F.2d 1426, 1430 (9th Cir. 1993) ("The fact that some different evidence may be presented in this action . . . does not defeat the bar of res judicata").

The Court has also already rejected MGA's effort to evade application of res judicata by naming Robert A. Eckert as a defendant in this litigation. See MTD Order at 7-8; see also Pedrina v. Chun, 97 F.3d 1296, 1302 (9th Cir. 1996).

C. MGA Could Have Brought an Antitrust Claim in the Prior Action

MGA acknowledges that its antitrust claim was "'born' by reason of the Ninth Circuit's July 22, 2010 decision," Am. Compl. ¶ 19(c), but nevertheless claims, as it previously asserted at oral argument, that there was "no possibility" the antitrust claim could have been prepared in time for the January 11, 2011 trial date, see id. MGA's asserted inability to ready an antitrust case cannot be credited. Following the

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[19] See also Dkt. No. 11 (Mattel First MTD) at 12. Given that "all substantive allegations in the amended complaint are identical to those in the original complaint," the Court may consider Mattel's initial motion dismiss. See Nicosia v. Diocese of Reno, 2011 WL 1447686, at *1 (D. Nev. Apr. 14, 2011); see also Edwards v. Zigler, 2009 WL 3429661, at *1 (N.D. Cal. Oct. 22, 2009).

[20] See Dkt. No. 8583 ¶¶ 4, 58-60, 315-18; Dkt. No. 19 at 17; Dkt. No. 9157, Ex. 36 at 14, 16; see also MTD Order at 9.

Ninth Circuit's ruling, MGA brought complex RICO and wrongful injunction claims premised on the same factual nucleus as its instant antitrust claim. This Court has already observed that far from contending that its RICO and wrongful injunction claims could not be readied by the scheduled trial date, MGA argued at the time that joinder of those claims was *required* under the compulsory counterclaim rule. See MTD Order at 10; Dkt. No. 8747 at 13 (contending that "[t]he parties are fighting over the same thing: are Mattel's claims justified, did Mattel bring those claims improperly, and did Mattel seek to prevent a defense of those claims through its own wrongdoing"). Having advanced this argument successfully, MGA is judicially estopped from taking the opposite position in respect to its antitrust claim. See United Nat. Ins. Co. v. Spectrum Worldwide, Inc., 555 F.3d 772, 778 (9th Cir. 2009).

If MGA truly believed it had a viable antitrust claim at the time it filed counterclaims-in-reply, but that the claim could not be readied for trial, MGA should have asserted the claim and, if need be, asked the Court for an extension of the trial date. But "*because* never advanced its antitrust claim, the Court was not given the opportunity to decide whether to extend the trial deadline." MTD Order at 10 (emphasis in original). It was improper for MGA to silently withhold its antitrust claim, spring it as a purported "stand alone" action only *after* the second trial had begun, and then speculate *ex post facto* as to how the Court would have reacted if the claim had been timely raised.

D. "Sham Litigation" Claims Ripen Prior to Final Judgment

The final legal contention asserted in the amended complaint – a contention that MGA did not assert in opposition to Mattel's prior motion to dismiss – is that a "sham litigation" claim purportedly "cannot be res judicata or a compulsory counterclaim at least until the outcome of the underlying suit is determined." Am. Compl. ¶ 8. MGA manufactures this novel rule from a serious misreading of Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) ("PREI"). While PREI likened the objective prong of a sham litigation claim to the

"probable cause" component of a malicious prosecution claim, see id. at 62-63, it took the analogy no further. It certainly did not suggest that a sham litigation antitrust claim, like a malicious prosecution claim, cannot proceed absent a final judgment in the underlying action. See id. Quite the opposite. The party raising the "sham" claim in PREI brought it as a counterclaim *prior to final judgment.* Id. at 52; see also id. at 67 (Souter, J., concurring) (noting that majority opinion did not purport to "transplant[] every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal antitrust law").

In fact, courts have repeatedly *required* sham litigation claims to be pleaded as compulsory counterclaims in the action alleged to be "sham," reasoning that joint adjudication of the claims will conserve judicial and party resources. See, e.g., Critical-Vac Filtration Corp. v. Minuteman Int'l., Inc., 233 F.3d 697, 700 (2d Cir. 2000) (holding sham litigation claim compulsory in the action alleged to be "sham," since "[a]n obvious 'logical relationship exists" between the actions); Eon Labs., Inc. v. Smithkline Beecham Corp., 298 F. Supp. 2d 175, 179-81 (D. Mass. 2003) (holding "sham litigation" compulsory in litigation alleged to be sham); Shmuel Shmueli, Bashe, Inc. v. Lowenfeld, 68 F. Supp. 2d 161, 162, 165-66 (E.D.N.Y. 1999) (antitrust claim based on defendant's pursuit of litigation was "plainly compulsory" in the underlying litigation).

MGA's purported "ripeness" rule lacks credibility in any event, given that MGA itself filed its February 2011 "sham litigation" claim here even before final judgment in the prior litigation.

III. Noerr-Pennington Independently Bars MGA's Amended Complaint

MGA's amended complaint is also squarely barred on the independent basis of the Noerr-Pennington doctrine. The doctrine, emanating from the Petition Clause of the First Amendment, "provides broad antitrust protection for those who 'petition the government for a redress of grievances.'" USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 810 (9th Cir. 1994) (Kozinski,

J.) (quoting City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 378 (1991)). Under settled law, Noerr-Pennington immunity extends to the post-August 16, 2010 conduct alleged by MGA. Mattel's filing of the Omni action in state court, notice of appeal and other post-trial motions are core petitioning activities protected by Noerr-Pennington. See Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1184 (9th Cir. 2005) (Kozinski, J.). MGA's allegations concerning discrete document production disputes also are immunized as "conduct incidental to the prosecution" of Mattel's litigation. See id.

Seeking to avoid dismissal under Noerr-Pennington, MGA labels Mattel's prior litigation as "sham." Allowing MGA to proceed under the narrow "sham" exception to Noerr-Pennington on such an implausible theory would itself have a "chilling effect on the exercise of this fundamental First Amendment right" to petition. See Or. Natural Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991) (internal quotation marks and citation omitted). Under MGA's theory, almost any litigant would be able thwart First Amendment protections by bringing a "sham litigation" antitrust claim following a successful appeal against a competitor. This concern is heightened with respect to the post-August 16, 2010 litigation conduct on which MGA must rest its claim. The right to petition would be gutted if a litigant could avoid Noerr-Pennington simply by alleging that discrete and routine litigation activities, such as the filing of a notice of appeal or document production disputes, are anticompetitive conduct on which a monopolization claim can be premised. See Omni Res. Dev. Corp. v. Conoco, Inc., 739 F.2d 1412, 1413 (9th Cir. 1984) ("The petition right and the adjudication process can be impaired if they are subject to collateral attacks through the antitrust laws, and antitrust liability must be circumscribed to accommodate those interests.").

To avoid Noerr-Pennington, MGA would have to demonstrate that the lawsuit was "'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.'" USS-POSCO Indus., 31 F.3d at 810 (quoting PREI,

508 U.S. at 60).[21] But such a showing is foreclosed here as a matter of law. Mattel's claims have twice proceeded to trial following rulings by two different neutral judges, with one jury finding in Mattel's favor "on each of its claims." MTD Order at 2.[22] The equitable relief on which MGA focuses was awarded by Judge Larson "[o]n the basis of the jury's special and general verdicts and after *independently* examining the similarity between the concept sketches/sculpts and MGA's Bratz dolls." Id. (emphasis added). See also Dkt. No. 9600 (Amended Summary Judgment Order) at 146 ("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."). And, initially, the Ninth Circuit refused to stay Judge Larson's order because it was not convinced that MGA would likely succeed on the merits of the appeal from that order. See Dkt. No. 51 (9th Cir., 09-55673) at 3.

In subsequently remanding Mattel's claims for further proceedings following MGA's appeal, the Ninth Circuit also specifically "rejected" MGA's argument that "Bryant lacked an assignable right, title, or interest in his ideas because ideas are not property under California law . . . by holding that a narrower constructive trust may

[21] The conclusory allegation that Mattel filed the Omni state court action cannot bring this case within the separate "series of lawsuits" exception to Noerr-Pennington. In Amarel v. Connell, the Ninth Circuit held that the "series" exception does not apply when only two lawsuits are alleged. See 102 F.3d 1494, 1518-19 (9th Cir. 1996) (noting contrast to USS-POSCO which involved a "series" of twenty-nine legal proceedings). Nor can the Omni action be deemed a "sham" as Mattel only filed in state court after the Court determined that it did not have supplemental jurisdiction over the state-law claim. See Dkt. No. 8423 at 35. The objective basis for the filing is thus readily apparent.

[22] See also Dkt. No. 3286 (Partial Summary Judgment Order); Dkt. No. 3758 (Partial Summary Judgment Order); Dkt. No. 4279 (Verdict Form); Dkt. No. 9600 (Amended Summary Judgment Order); Dkt. No. 4441 (Order Granting Constructive Trust); Dkt. No. 4442 (Order Granting Declaratory Judgment); Dkt. No. 4443 (Order Granting Permanent Injunction).

be imposed after re-trial." Dkt. No. 9600 (Amended Summary Judgment Order) at 9. The Ninth Circuit noted that Bryant's inventions agreement was "dated September 18[, 2000]," while Bryant was still employed by Mattel. See 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 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 Ninth Circuit also 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). "On remand," the Ninth Circuit reasoned, "Mattel might well convince a properly instructed jury" to find in its favor. Id. at 913.

The Ninth Circuit's remand and its initial denial of a stay, along with the prior jury and judicial determinations, clearly demonstrate that "an objective litigant could conclude the suit is reasonably calculated to elicit a favorable outcome." PREI, 508 U.S. at 60. See also Boulware v. Nev. Dep't of Human Res., 960 F.2d 793, 790 (9th Cir. 1992) (rejecting "contention that the subsequent reversal of the injunction . . . proves that the suit was without foundation"); Omni Res. Dev. Corp., 739 F.2d at 1414 (dismissing alleged "sham" where defendant was successful "at least to the point of a preliminary injunction" in the underlying litigation); 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."); Intellective, Inc. v. Mass. Mut. Life Ins. Co., 190 F. Supp. 2d 600, 608 n.2 (S.D.N.Y. 2002) ("Although the state court eventually decided against granting an injunction on the software portion of the complaint, the fact that a state court granted a TRO and then a partial preliminary injunction precludes a finding that the litigation was 'objectively baseless.'").

That the amended complaint principally focuses on certain *relief* that Mattel sought, see, e.g., Am. Compl. ¶¶ 19 (vii)-(x), 81-83,[23] only underscores the implausibility of MGA's "sham" assertion. "A lawsuit is not rendered a sham merely because one form of relief sought may be objectively unreasonable. The rationale of the Noerr-Pennington doctrine is to protect the right of plaintiffs to petition the government unless the plaintiffs have *no* reasonable claim." Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc., 2006 WL 516749, at *7 (D. Conn. Mar. 1, 2006) (emphasis in original).[24]

For similar reasons, the amended complaint's focus on the Court's fee order from the prior litigation is also misplaced. While the Court's fee order does contain language that *relief* sought by Mattel was "overbroad," Dkt. No. 10703 at 6, the Court did not purport to countermand the prior court rulings and jury determinations that demonstrate the objective merit of Mattel's claims. As the Supreme Court has noted, "when the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." PREI, 508 U.S. at 61 n.5 (internal quotation marks omitted).

As MGA cannot plead that Mattel's lawsuit was objectively baseless, MGA's assertions about what Mattel allegedly "knew" or "desired" are irrelevant. PREI, 508 U.S. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."). In any event, the subjective prong of the "sham" inquiry focuses on whether a litigant "use[d] the governmental *process* – as

[23] See Dkt. No. 3917 (Final Pretrial Order), at 11; Dkt. No. 4439, at 2; Dkt. No. 653 (Prayer for Relief).

[24] See also Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC, 404 F. Supp. 2d 1214, 1222 (E.D. Cal. 2005) ("allegation that a single claim is objectively baseless does not bring [the] filing of the entire complaint within the sham exception"); VAE Nortrak N. Am., Inc. v. Progress Rail Servs. Corp., 459 F. Supp. 2d 1142, 1166 (N.D. Ala. 2006) (same).

opposed to the *outcome* of that process – as an anticompetitive weapon." Freeman, 410 F.3d at 1185 (internal quotation marks omitted) (emphasis in original). Courts reject "sham" claims where, as here, the *outcome* or remedy sought in prior litigation is alleged to have caused the plaintiff's harm.[25] See Omni Res. Dev. Corp, 739 F.2d at 1414 (affirming application of Noerr-Pennington doctrine where plaintiff "was injured by the finding against it in state court and by the injunction, not by the mere filing of the suit").[26]

MGA has also failed to plead that any alleged misrepresentations render Mattel's litigation conduct a "sham." At no point does MGA make any effort to explain, as is required, how any alleged misrepresentations "deprive[d] the litigation of its legitimacy." Freeman, 410 F.3d at 1184 (internal quotation marks and citation omitted). Nor could MGA make such a showing, given that the litigation as a whole was not a sham as a matter of law. Id. at 1185 n.2 (where litigation "as a whole was not a sham," discrete misrepresentations do not deprive litigation "as a whole of its legitimacy"). MGA's effort to impermissibly recast "disputed issues from the underlying litigation . . . as misrepresentations" should be rejected. MedImmune, Inc. v. Genentech, Inc., 2003 WL 25550611, at *7 (C.D. Cal., Dec. 23, 2003).

Finally, the amended complaint's assertion that Noerr immunity should be cast aside, because Mattel's litigation conduct purportedly is part of larger anticompetitive scheme, is meritless. See Am. Compl. ¶ 96 (citing Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1263 (9th Cir. 1982)). MGA has failed to plead a single allegation, let alone any larger "scheme," involving non-litigation conduct occurring after August 16, 2010. See supra at 9. Moreover, MGA

[25] See, e.g., Am Compl. ¶ 83 (Mattel "knew that merely obtaining that interim order would eliminate the dreaded competition. And it has.").

[26] See also 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 (footnote continued)

misreads Clipper Exxpress. The Ninth Circuit did not hold that litigation loses Noerr-Pennington immunity any time a creative plaintiff casts the pursuit of litigation as part of a broader "scheme." Rather, genuine petitioning activity is "not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965). Thus even when, unlike here, a broader scheme is alleged, Noerr-Pennington immunity still applies to litigation conduct that is alleged to be part of the broader scheme.[27] Clipper Exxpress simply clarified that Noerr-Pennington immunity for litigation conduct would not preclude an antitrust claim with respect to the rest of the alleged scheme. Clipper Exxpress, 690 F.2d at 1263.

As MGA cannot satisfy the established criteria for avoiding Noerr, the amended complaint should be dismissed with prejudice, as courts regularly do at the pleading stage when confronted with defective "sham" allegations.[28]

IV. MGA Fails To State Any Elements Of A Sherman Act Section 2 Claim

As this Court noted in dismissing the original complaint here, "[m]ere legal conclusions are not to be accepted as true and do not establish a plausible claim for relief." MTD Order at 5. A court need not credit "allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations

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"clear that the successful outcome defendants obtained in the unlawful detainer action caused plaintiffs' injury, not the mere filing of the action")

[27] See also In re Burlington Northern Inc., 822 F.2d 518, 526 (5th Cir. 1987) (a court "could not hold consistently with Pennington, that the overall scheme makes the otherwise protected petitioning a sham"); Johnson v. Con-Vey/Keystone, Inc., 856 F. Supp. 1443, 1448 (D. Or. 1994) (recognizing that Noerr-Pennington immunity "extends to conduct which is incidental to the prior" litigation, and that the non-litigation "ancillary claims of the plaintiff" must "provide a separate and distinct basis for antitrust liability").

[28] See, e.g., Freeman, 410 F.3d at 1186; Or. Natural Res. Council, 944 F.2d at 536; Omni Res. Dev. Corp., 739 F.2d at 1415; Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1086 (9th Cir. 1976); Thomas, 2006 WL 5670938, at *7-*10.

that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570).

For the same reasons that Mattel explained in its briefs supporting its prior motion to dismiss, MGA has again defectively pleaded the mandatory elements of a Section 2 claim – market definition, monopoly power, and antitrust injury.[29]

Market Definition. MGA's description of the relevant product market is "erroneous," because it relies solely on demand considerations and fails to take into account "supply elasticity." See Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995) (citation omitted). MGA's product market definition of "fashion dolls, which are dolls in the 9-12 [inch] range and which are designed to be dressed with fashion clothes and accessories," Am. Compl. ¶ 102, is further defective because it is overly narrow on its face. See UGG Holdings, Inc. v. Severn, 2004 WL 5458426, at *4 (C.D. Cal. Oct. 1, 2004) (dismissing claim where allegation of "sheepskin, fleece-lined boots" product market was too conclusory given that plaintiff failed to explain why "other types of boots would not be reasonable substitutes for sheepskin, fleece-lined boots").[30] MGA has also defectively pleaded the geographic market, stating in one conclusory sentence: "The relevant geographic market is the United States."[31] See, e.g., Commercial Data Servers v. Int'l Bus. Machs. Corp., 166 F. Supp. 2d 891, 897 (S.D.N.Y. 2001) ("CDS has failed to allege

[29] See Dkt. No. 11 (Mattel First MTD) at 31-41; Dkt. No. 20 (Mattel First MTD Reply) at 19-24.

[30] See also Golden Gate Pharm. Servs., Inc. v. Pfizer, Inc., 2010 WL 1541257, at *5 (N.D. Cal. Apr. 16, 2010); Delano Farms Co. v. Cal. Table Grape Comm'n, 2009 WL 3586056, at *25-26 (E.D. Cal. Oct. 27, 2009).

any facts explaining why the relevant geographic market is domestic rather than worldwide. CDS sells its products both in the United States, and abroad.").

Monopoly Power. Monopoly power requires a showing of dominant market share, high barriers to entry, and inability of competitors to increase output in response to predatory pricing. See Rebel Oil, 51 F.3d at 1434. MGA's only specific allegation of Mattel's market share is that it "was over 90%" in the "late 1990s," well before Mattel even began the Bratz litigation, see Am. Compl. ¶ 32, and irrelevant to whether Mattel currently possesses monopoly power. See United States v. Syufy Enters., 903 F.2d 659, 666 (9th Cir. 1990). The amended complaint vaguely alleges that Bratz had "acquired a market share equal to or in excess of Barbie" by the time the Bratz litigation began. Am. Compl. ¶ 36. But, "numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power." Rebel Oil, 51 F.3d at 1438. MGA's allegations of barriers to entry amount to an inadequate, conclusory list of mere assertions, see Am. Compl. ¶ 107, and MGA fails to allege, at all, that existing competitors lack the capacity to expand output in response to predatory conduct. See McCabe Hamilton & Renny, Co., Ltd. v. Matson Terminals, Inc., 2008 WL 2437739, at *9 (D. Haw. June 17, 2008) (allegation that "[r]ivals will be barred from entering" the market and similar conclusory claims warranted dismissal). MGA's allegations of barriers to entry are also contradicted throughout the complaint by allegations of Bratz's sudden success and "skyrocketing" market share.[32] See Syufy Enters., 903 F.2d at 665 (movie theatre

[31] Am Compl. ¶ 103.

[32] Am. Compl. ¶ 49; see also id. ¶¶ 36 ("In June 2001, this little-known but successful company was propelled into the limelight . . . ."), 36 ("Within only a few years, Bratz devastated Barbie's dominance . . . ."), 44 ("MGA – with Bratz – was able to chip away at Mattel's stranglehold . . . ."); Mattel, Inc., 616 F.3d at 907 ("But 2001 saw the introduction of Bratz . . . Bratz became an overnight success.").

operator lacked monopoly power where competitor stepped into the market and "against all odds, began giving [the operator] serious competition").

Antitrust Injury. The "*elimination* of a single competitor, standing alone, does not prove anticompetitive effect." See Austin v. McNamara, 979 F.2d 728, 739 (9th Cir. 1992) (emphasis in original) (internal citation and quotation marks omitted). Rather, antitrust injury "'means injury from higher prices or lower output, the principal vices proscribed by the antitrust laws.'" Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001) (quoting Nelson v. Monroe Reg'l Med. Ctr., 925 F.2d 1555, 1564 (7th Cir. 1991)). MGA's utter failure to allege any increase in prices to customers, or any other purported effects of reduced competition, see Am. Compl. ¶ 108, is likewise grounds for dismissal. See, e.g., Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989) (affirming dismissal for failure to plead antitrust injury and highlighting absence of "factual allegations outlining the effect of the [defendant's] ban on the price or availability of exhibition drag racing services in the United States"). Certainly, MGA has not linked and cannot link its sparse post-August 2010 allegations of misconduct to an actionable antitrust injury.

V. The Amended Complaint Should Be Dismissed With Prejudice

The manifest deficiencies of MGA's amended complaint confirm that leave to amend should not be granted a second time. No amendment could revive MGA's core allegations relating to Mattel's litigation conduct in the Phase 1 proceedings. Nor could MGA amend around Mattel's Noerr-Pennington protections or rectify intractable defects in its Section 2 allegations. See Gordon v. City of Oakland, 627 F.3d 1092, 1094 (9th Cir. 2010) (leave to amend should be denied if amendment would be futile). And MGA has failed to identify any post-August 16, 2010 conduct sufficient to support a claim.

Where a party has already once failed to cure specifically identified deficiencies in its complaint, the Court's discretion to deny further leave to amend is "particularly broad." See Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149,

1160 (9th Cir. 1989) (affirming denial of leave to file second amended complaint where the plaintiff had already filed an amended complaint that ignored the district court's directions for repleading the claim); Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009) (holding that "the district court did not err when it dismissed the SAC with prejudice, since it was clear that the plaintiffs had made their best case and had been found wanting").

Conclusion

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

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