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

Stephen R. Neuwirth (admitted *pro hac vice*)
(stephenneuwirth@quinnemanuel.com)
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100

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 FIRST AMENDED COMPLAINT Hearing Date: February 13, 2012 Time: 8:30 a.m. Place: Courtroom 9D

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Preliminary Statement

In granting MGA leave to replead its antitrust complaint, the Court held that any amended complaint must be predicated on conduct post-dating August 16, 2010. See, e.g., Oct. 20, 2011 Order (Dkt. No. 29) ("MTD Order") at 8-10, 12, 20. In order to avoid dismissal, that alleged conduct must – independent of any earlier conduct – meet the requirements for liability under the antitrust laws. MGA fails that test with the stray allegations of its amended complaint. Tellingly, its opposition brief does not even attempt to justify an antitrust claim consistent with the Court's Order. To the contrary, MGA continues to rely on the litigation conduct that this Court's prior ruling held was barred by res judicata. The only injury alleged in the amended complaint, or raised in MGA's opposition, to fulfill the antitrust injury requirement stems from the grant of the injunction that pre-dated August 2010, not the smattering of new alleged conduct. In the same vein, MGA's repeated argument that it could not have raised by August 2010 the antitrust claim that this Court held is barred by res judicata ignores (a) that the Court previously rejected that precise contention and (b) indeed that the very same allegations were the subject of MGA's RICO and wrongful injunction claims in the underlying litigation.

Much of MGA's brief is no more than a plea for reconsideration of the Court's prior ruling, without any new facts or new law as its basis. The only additional legal theory now offered by MGA in its brief is an unsupported argument that "sham litigation" claims are not ripe until final judgment has been entered in the litigation alleged to be sham. This argument is contrary to authority, long-standing federal court practice, MGA's own prior conduct and positions and common sense. MGA cannot cite a single decision in support of its novel theory. To the contrary, courts regularly *require* sham litigation claims to be asserted prior to final judgment in the action alleged to be sham. The notion that a lawsuit cannot be considered a "sham" until final judgment is entered also turns on its head the requirement that

sham litigation must be patently unjustifiable from the beginning, and not simply unsuccessful. And flying in the face of the "rule" it now urges, MGA itself commenced this antitrust suit when trial in the prior action was underway and before final judgment in that case.

MGA's amended complaint is independently barred by Noerr-Pennington. MGA's effort to avoid application of Noerr-Pennington immunity by labeling Mattel's claims "sham" clearly fails. It ignores the determinations by this Court and the Ninth Circuit that Mattel's claims could be pursued. Neither the fact that those claims were ultimately rejected nor the scope of relief awarded is sufficient as a matter of law to classify the lawsuit at issue as "sham" and thus fit within the narrow exception to the First Amendment right to petition the courts for redress.

Finally, and as further independent grounds for dismissal, MGA has failed, as in its first complaint, to adequately plead essential elements of a monopolization claim, including market definition, monopoly power and antitrust injury.

MGA's inability, despite all efforts and the skill of experienced counsel, to meet the Court's mandate to amend its complaint to state a cause of action based on post-August 2010 conduct makes clear that it cannot do so. Mattel therefore respectfully submits that the amended complaint should be dismissed, this time with prejudice.

Argument

I. MGA's Amended Complaint Fails to Comply with the Requirements Set by the Court in Granting Leave to Amend

In dismissing MGA's first complaint, this Court squarely held that Mattel's "conduct in the prior litigation – conduct which must have occurred before August 16, 2010" – is barred by res judicata. MTD Order at 9. The Court's dismissal Order directed that repleading be limited to post-August 2010 conduct; it was allowed only because it did "not appear *impossible* for MGA to allege anticompetitive conduct *after* August 16, 2010." Id. at 20 (emphasis in original). MGA's amended

complaint does not comply with the dismissal Order. Mattel's current motion to dismiss MGA's amended complaint provided a detailed analysis of why the few allegations of post-August 2010 conduct included by MGA fail – by any measure – to overcome the bar of res judicata or to state a cognizable antitrust claim. In its opposition, MGA ignores that analysis.

MGA does not dispute that its amended complaint offers only three allegations that could be viewed as post-August 16, 2010 conduct, namely that (1) Mattel filed post-trial motions and a notice of appeal following the second trial in the prior action; (2) Mattel purportedly 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 in the underlying litigation; and (3) Mattel brought a fraudulent-transfer claim against Omni and MGA parties in state court. See Mattel Motion to Dismiss First Amended Complaint ("Mot.") at 9. The closest MGA comes to identifying purportedly new facts is "Mattel's investment analysis" that supposedly establishes that Mattel's purpose in bringing suit against MGA was not to win. See MGA Opposition to Mattel's Motion to Dismiss First Amended Complaint ("Opp.") at 2 ("As Mattel's investment analysis report makes clear: 'Outcome is less relevant . . . a Bratz 'win' was never part of our model or thesis.'") (emphasis omitted); see also id. at 21. But, as the amended complaint concedes, the quoted report comes not from Mattel, but from a third-party research analyst, Drew E. Crum of the firm Stifel Nicolaus. See Am. Compl. ¶ 73. Thus, this is not an allegation of post-August 16, 2010 conduct by Mattel, let alone one which would support an independent claim.

Nor does MGA make any attempt to show how the post-August 2010 allegations are distinct from the litigation conduct that has already been adjudged to be barred by res judicata. It offers no answer to established Ninth Circuit law holding that filing a motion and appeal in connection with a claim is *not* distinct from bringing the claim in the first instance. See Pace Indus., Inc. v. Three Phoenix

Co., 813 F.2d 234, 238 (9th Cir. 1987). It does not explain or even address the fact that it has long alleged discovery abuses by Mattel, and actually raised and litigated the 35 boxes and Kohl's issue in the prior action and that, having done so, any claims based on those facts are encompassed by the prior action. See Feminist Women's Health Center v. Codispoti, 63 F.3d 863, 866-68 (9th Cir. 1995); Los Angeles Branch NAACP v. Los Angeles Unified School District, 750 F.2d 731, 740 (9th Cir. 1984). And it ignores the fact that Mattel's state court claims as to fraudulent transfer were originally brought in the federal action in 2009, and were brought in state court – in what was clearly a continuation of the litigation – as a result of the Court's determination that it lacked supplemental jurisdiction. See Pace Indus., 813 F.2d at 238.

Most tellingly, because antitrust injury is a required element of liability, MGA admits that its antitrust claim still rests on pre-August 2010 conduct by emphasizing that the entire alleged injury here is predicated on the equitable remedies sought and granted in *2008*. See, e.g., Opp. at 17 (expert discovery needed to determine whether "Mattel's seeking and achieving the constructive trust remedy was the proximate cause of injury to MGA"); id. at 30 ("Judge Larson's order and erroneous instructions were wrongfully solicited by Mattel, knowing they would not withstand appellate scrutiny for the singular purpose of killing Bratz as a brand . . . And Mattel has accomplished that objective.").

Having conceded that its allegations are limited to those identified by Mattel, having no answer as to why they give rise to a claim distinct from the litigation conduct that is barred by res judicata, and having relied solely on injury that allegedly resulted from remedies sought and granted in 2008, MGA is left with the conclusory assertion that its amended complaint "relies on continuing conduct and developments throughout the pendency of the trial, jury verdict, judgment, and post-trial motions in the underlying case." Id. at 18. But in dismissing MGA's original antitrust complaint, this Court already explained that such unsupported generalities

about ostensibly continuing conduct cannot save MGA's complaint from dismissal. See MTD Order at 11-14.

II. MGA's Arguments Effectively Call For The Court To Reconsider And Reverse Its Rulings On The Prior Motion To Dismiss, And These Arguments Should Be Rejected

Rather than defend an antitrust claim based on post-August 2010 allegations, MGA presents arguments that are tantamount to a request for reconsideration of the Court's prior dismissal Order. MGA does not claim to have altered its pleading to render the Court's prior ruling inapposite; it simply argues the prior ruling was wrong. Thus, according to MGA, Mercoid and Hydranautics compel a ruling that antitrust claims are not compulsory for the same reasons the Court rejected before, and res judicata does not apply, because there is no identity of claims between the two suits if one ignores, as MGA's opposition does, MGA's RICO and wrongful injunction claims in the prior action. These arguments fare no better than when the Court rejected them three months ago. MGA's failure to address the Court's prior ruling, or even mention it, speaks volumes.

MGA's only new argument is that it *could not* have brought an antitrust claim prior to judgment in the prior action because it was unripe. That position is unsupported – and unsupportable. Numerous authorities, including those relied upon by MGA, show otherwise. Indeed, refuting its contention, MGA *did* bring its antitrust claim in this case before final judgment in the prior action. MGA, lacking any response, fails even to acknowledge this point.

A. MGA's Claim Could Have Been, And Was, Brought Prior To Final Judgment

MGA urges that it could not have brought its antitrust claim before final judgment in the prior case because, as with a malicious prosecution claim, it needed to defeat Mattel's claims before it could challenge the pursuit of those claims as a sham. According to MGA, the "Supreme Court has properly determined that an

antitrust claim based on sham litigation requires adjudication of the underlying claim in favor of the antitrust plaintiff before any antitrust claim comes into being," and therefore MGA's antitrust claim "was not ripe and was premature until MGA secured a favorable verdict and judgment in the underlying suit." Opp. at 7-8. Because its antitrust claim was unripe prior to judgment, MGA argues, the claim could not be barred by res judicata or the compulsory counterclaim rule.

This ripeness argument enjoys no support in authority. No court has held that a sham litigation antitrust claim is unripe prior to final judgment in the alleged "sham" litigation, and legions of cases show the opposite is true.

MGA's primary authority, Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) ("PREI"), nowhere states that a sham litigation antitrust claim cannot be brought prior to judgment. To the contrary, the antitrust claim in that case ***was*** brought as a counterclaim, prior to resolution of the underlying claims (id. at 52), and it was dismissed on Noerr-Pennington grounds, *not* on ripeness grounds. Id. at 65.[1] MGA notes that the trial court in PREI chose to resolve the underlying infringement claims before addressing the pending sham litigation counterclaim (Opp. at 7), but that is immaterial. The discretion vested in trial courts to bifurcate proceedings as they see fit hardly reflects a jurisprudential rule of ripeness, much less a categorical exception to the principles of claim preclusion. Nothing at all prevented MGA from alleging in the underlying case, as the antitrust counterclaimant did in PREI, that Mattel's claims not only lacked merit,

[1] The earlier proceedings in PREI confirm that the "sham" litigation counterclaim had been filed before any summary judgment decision was rendered on the underlying claims. See Columbia Pictures Indus., v. Prof'l Real Estate Investors, Inc., 866 F.2d 278, 279 (9th Cir. 1989) ("After learning of these activities at La Mancha, Columbia Pictures, Inc. and six other motion picture studios ('Columbia') filed suit to prevent La Mancha from renting videodiscs to its guests, alleging copyright infringement. La Mancha counterclaimed, alleging unfair (footnote continued)

but were objectively baseless and therefore "sham" under Noerr. See PREI, 508 U.S. at 52, 60-61.

MGA cites no authority that actually adopts its position that a sham litigation antitrust claim cannot be brought in the litigation alleged to be a sham. On the other hand, numerous authorities hold, as this Court did previously (see MTD Order at 17-19), that such claims not only *may* be brought in the underlying case but, as compulsory counterclaims, *must* be. See Mot. at 24-25 (collecting cases); Destiny Tool v. SGS Tools Co., 344 Fed. App'x 320, 323 (9th Cir. 2009) (holding antitrust claim compulsory in prior infringement action, reasoning that "although the antitrust and patent infringement claims are grounded in different statutes, they raise many of the same legal, factual, and evidentiary issues" such that "[j]udicial economy and efficiency counsel analysis of these issues in a single proceeding"); Mosdos Chofetz Chaim, Inc. v. Village Of Wesley Hills, 701 F. Supp. 2d 568, 590 (S.D.N.Y. 2010) (allegation that prior lawsuit was a "pretext for illegal actions" is "logically intertwined" with the validity of the claims in the prior lawsuit and, consequently, principles of "judicial economy and fairness dictate that all the issues should be resolved in one lawsuit" (internal quotation marks omitted)). These authorities plainly defeat MGA's ripeness argument, and yet MGA fails even to acknowledge them.

Moreover, even as it insists its claim was unripe, MGA concedes that its antitrust claim was at least "a permissive counterclaim" (Opp. at 18-19), meaning it *could have been brought* before the underlying case terminated and would not have been dismissed as unripe.[2] This concession is consistent with both the fact that the

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competition and violation of antitrust laws. Cross-motions for summary judgment concerning the copyright infringement claim were thereafter filed.").

[2] MGA heavily relies on Hydranautics v. FilmTec Corp., 70 F.3d 533 (9th Cir. 1995), as it did previously. Opp. at 13. As this Court has recognized (see MTD Order at 17-19), that authority does not apply to non-patent cases. Yet even if it did, (footnote continued)

claim *was* brought pre-termination and MGA's express admission in its amended pleading that its claim was "born" not by virtue of the underlying judgment, but "by reason of the Ninth Circuit's July 22, 2010 decision." Am. Compl. ¶19(c). As this Court recognized at oral argument on the last motion to dismiss, and as MGA admitted, the assertion of an antitrust counterclaim in response to an infringement claim is so common that it is "a knee-jerk reaction." October 11, 2011 Hearing Tr. at 38-39 ("THE COURT: How many times have you seen a patent case with the counterclaim being that counterclaim of antitrust? Numerous? MR. BLECHER: It's a knee-jerk reaction. THE COURT: It's a knee-jerk reaction. It happens.").[3] It would be unprecedented to reject both the existing authority and widespread federal court practice by ruling, as MGA requests, that sham litigation antitrust claims are unripe and premature prior to judgment in the underlying case. This Court should not be the first to do so.

In the face of all this, MGA attempts to justify its novel ripeness theory by analogizing between sham litigation claims and malicious prosecution claims. This too is unsupported and misses the critical distinction between such claims. While a party must plead that the prior action terminated in its favor to state a claim for

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it too treated the antitrust claim there as at least a permissive counterclaim, *i.e.*, one that could have been brought in the underlying case rather than one that would have been disallowed as unripe. See Hydranautics,70 F.3d at 536 ("While there may be cases where resolving both issues at once is preferable, Mercoid leaves open the possibility of raising antitrust claims as permissive counterclaims in an infringement action, or in a separate and subsequent action.").

[3] In addition to his acknowledgment at the prior oral argument that parties frequently bring sham litigation claims before the allegedly "sham" actions are terminated, MGA's counsel has actually done so on numerous occasions. See, e.g., Los Angeles Memorial Coliseum Comm'n v. City of Oakland, 717 F.2d 470, 471-73 & n.3 (9th Cir. 1983) (Clayton Act claim to enjoin pending state-court eminent domain proceeding alleged to be a "sham"); In re Hawaiian Airlines, Inc., 2008 WL 185649, at *1 (Bankr. D. Haw. Jan. 22, 2008) (antitrust counterclaim alleging that pending breach of contract claim constituted "sham").

malicious prosecution (Jenkins v. Pope, 217 Cal. App. 3d 1292, 1298 (Cal. Ct. App. 1990)), there is no analogous requirement for a "sham litigation" claim. See, e.g., Aydin Corp. v. Loral Corp., 718 F.2d 897, 903 (9th Cir. 1983) (district court properly granted summary judgment on sham litigation antitrust claim on merits, not on ripeness grounds, *before* the alleged sham litigation proceedings were terminated); Metris U.S.A., Inc. v. Faro Techs., Inc., 2011 WL 4346852 at *11 (D. Mass. Sept. 19, 2011) (granting summary judgment on sham litigation antitrust counterclaim while allowing underlying patent claim to proceed); Shire LLC v. Sandoz, Inc., 2008 WL 4402251 at *13 (D. Colo. Sept. 24, 2008) (similar); I Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 207(b) (3d ed. 2006) (party asserting "sham litigation" exception to Noerr-Pennington must only plead the elements of the substantive claim and allege with sufficient specificity that the relevant petitioning activity is "sham"). MGA itself has proclaimed, in arguing against the application of Noerr-Pennington, that "[s]uccess or failure on the merits is *not* dispositive" of the sham inquiry. Opp. at 22 (emphasis added). Its argument in the remainder of its brief that sham litigation is just like malicious prosecution because both do not "ripen unless and until there is a favorable outcome" (Opp. at 12) is inconsistent both with its own stance pages later, and with authority.

MGA's unsubstantiated ripeness argument is erroneous and should be rejected.

B. MGA Offers No Basis To Reverse The Court's Prior Res Judicata Ruling

The traditional rules of res judicata fully apply, and as to these, there hardly is a genuine dispute. Recognizing that res judicata bars all "claims that were raised or could have been raised in a prior suit" where the two suits share an identity of claims (MTD Order at 6), this Court specifically ruled in dismissing MGA's first complaint that, "to the extent MGA's antitrust claim relies on Defendants' litigation conduct, this claim also arises from the same transactional nucleus of facts as

MGA's prior claims," rendering it barred. See id. at 9-10. Nowhere does MGA contest that, as repleaded, its antitrust claim *continues* to rely on the same alleged litigation misconduct at issue in the prior version of its antitrust claim, meaning the claim *continues* to share the same transactional nucleus of facts as MGA's prior claims.

As before, the "gravamen" of MGA's amended complaint is its allegation that Mattel has "for 7 years" been trying "to litigate MGA to death." Am. Compl. ¶ 1 (internal quotation marks omitted). Ignoring the Court's mandate to limit its allegations, MGA's opposition extols the very allegations that the Court held barred by res judicata, urging that its "Complaint outlines in great detail that Mattel has developed and ruthlessly deployed a costly, lengthy 'litigate MGA to death' strategy, pursued a case that it knew was statute-barred, pursued remedies that it knew lacked merit, and made material misrepresentations to the Court to accomplish its anticompetitive objective." Opp. at 20.[4] In fact, portions of MGA's opposition here cuts and pastes passages directly from its prior opposition to Mattel's motion to dismiss that the Court granted. Thus, for example, both briefs claim, in identical language, that "[n]ot only did Mattel knowingly pursue baseless copyright and trade secret claims and a time-barred intentional interference claim, and seek imposition of a constructive trust . . . which no reasonable litigant could expect to be upheld on the record presented under established law, Mattel also [advocated for and] secured

[4] See also Am. Compl. ¶ 1 ("Mattel has spent 7 years . . . to 'litigate MGA to death' – pursuing 'overbroad remedies stunning in scope' and pursuing claims it knew were statute-barred"); id. ¶ 17 (amended complaint "based on Mattel's sham abusive tactics in the underlying litigation"); id. ¶ 19(c) (amended complaint "'born' by reason of the Ninth Circuit's July 22, 2010 decision"); id. ¶ 49 (beginning in 2003 or 2004, Mattel began a "Kill Bratz" campaign and sought to "Litigate MGA to Death"); id. ¶ 65 ("Judge Larson's order and erroneous instruction were wrongfully solicited by Mattel, knowing they would not withstand appellate scrutiny, for the singular purpose of killing Bratz as a brand").

the appointment of an auditor and temporary receiver (Dkt. 4657) based on false allegations . . . ." Opp. at 5-6; Dkt. No. 19 (MGA Opp. to First MTD) at 3.

This is the same conduct that the Court ruled was barred on res judicata grounds in its prior dismissal Order, as arising out of the same transaction asserted by MGA in the prior suit. See, e.g., MTD Order at 9; see also id. at 8-14. The Court explained that rights established in the first suit would be jeopardized if MGA's litigation misconduct antitrust claim proceeded, including because MGA sought a "recovery for a claim against which Mattel previously successfully defended. For example, judgment was previously entered against MGA regarding its counterclaims-in-reply that Mattel was liable for RICO violations and wrongful injunction – two claims that share the same transactional nucleus of facts as the current antitrust claim." MTD Order at 15. MGA's opposition fails even to mention the RICO and wrongful injunction claims it pursued in the prior action or, for that matter, the Court's prior dismissal Order.

Rather than address the plain factual overlap between MGA's current claim and its prior ones, MGA attempts (as it did on the last round of dismissal briefing) to supplant the governing transactional test, which turns on the identity of *facts* underlying the past and current claims, with a comparison of *legal* elements. See Opp. at 11-12; see also Dkt. No. 19 (MGA Opp. to First MTD) at 10-11. For example, MGA argues that its antitrust claim arises from a distinct nucleus of facts because "the antitrust claim involves analysis of" barriers to entry, the relevant product market, and competitive injury. See Opp. at 12. But as this Court observed when rejecting MGA's previous iteration of this argument, the specific elements of prior and new claims are "irrelevant" to the res judicata inquiry under controlling law. See MTD Order at 7 n.2 ("indeed, res judicata prevents 'an imaginative lawyer' from relitigating old facts by 'attaching a different legal label.'") (quoting Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1079 (9th Cir. 2003)); see also Dkt. No. 20 (Mattel First MTD) at 8. The

common *factual* nucleus test is "the most important" factor in determining if res judicata applies (MTD Order at 8), and is generally "outcome determinative." Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 988 (9th Cir. 2005). That test clearly is satisfied here.

MGA fares no better on the remaining, subsidiary res judicata factors: namely, whether (1) "substantially the same evidence is presented in the two actions;" (2) "the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;" and (3) "the two suits involve infringement of the same right." See MTD Order at 8.

With respect to the first, MGA rehashes the argument that res judicata is inappropriate because different evidence will be required to prove its antitrust claim than was required to prove the claims it filed in the prior litigation. See Opp. at 9-11; see also Dkt. No. 19 (MGA Opp. to First MTD) at 11. As this Court has already determined, "MGA's reliance on the same factual allegations in both its present and prior claim demonstrates that the same evidence would be presented to prove both claims." See MTD Order at 15; see also Int'l Union of Operating Eng'r-Employers Constr. Indus. Pension v. Karr, 994 F.2d 1426, 1430 (9th Cir. 1993) (some difference in the evidence "does not defeat the bar of res judicata.").

As to the second and third factors, MGA again incorrectly asserts that it has never sought relief for Mattel's allegedly anticompetitive and "abusive sham litigation" efforts (see Opp. at 11) and that its antitrust claim therefore involves the infringement of a different right which cannot impair any rights established in the prior action. See id. at 8-9; see also Oct. 11, 2011 Hearing Transcript (Dkt. No. 30) at 7-8. But, as is clear from the pleadings, MGA's prior and new claims are based on the same allegedly anticompetitive litigation conduct, and necessarily implicate the possible "infringement of the same right, namely, MGA's right to be compete in the market free from Mattel's allegedly illegal litigation strategy and out-of-court tactics." See MTD Order at 15. As the Court recognized in dismissing MGA's first

antitrust complaint, recovery by MGA on an antitrust claim in the pending action could improperly "lead to either a double recovery for the same injury or recovery for a claim against which Mattel previously successfully defended." Id. at 15.

Last, MGA once again urges an unprecedented expedience exception to res judicata, claiming it should be allowed to proceed on its antitrust claim because it purportedly could not feasibly have prepared that claim between the Ninth Circuit's decision on July 22, 2010, and the scheduled trial date of January 11, 2011. See Opp. at 16-17; Dkt. No. 19 (MGA Opp. to First MTD) at 9-10. The Court previously rejected this argument too when it dismissed MGA's first antitrust complaint, and here as well MGA fails to acknowledge that it had brought RICO and wrongful injunction claims that, just like its antitrust claim, were based on Mattel's conduct in the underlying litigation during that very same window of time that it claims it could not have brought an antitrust claim. See MTD Order at 10. MGA offers no explanation for its failure to raise all claims arising out of the same transactional nucleus of facts at that time. As this Court determined before, "the failure" to bring the antitrust claim in the underlying action "rests with MGA." Id.; see also Mot. at 6-7, 23-24; Dkt. No. 20 (Mattel First Reply) at 8-9.

C. MGA Offers No Basis To Reverse The Court's Prior Compulsory Counterclaim Ruling

While MGA renews its prior challenge to the application of the compulsory counterclaim rule, MGA does not suggest its current antitrust claim differs from its original one in this regard either. Thus, the amended complaint is equally subject to this Court's determination that MGA's original antitrust claim was a compulsory counterclaim in the prior action. See MTD Order at 20 (Because "both MGA's [antitrust] claim and Mattel's prior claim arise from the parties' conduct in the prior litigation, MGA's [antitrust] claim was compulsory and should have been brought in the prior litigation."); see also id. at 16-17, 19; Dkt. No. 11 (Mattel First MTD) at 14-17. MGA wholly ignores its own arguments in the prior litigation that its

counterclaims-in-reply were compulsory because "[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. To try Mattel's claims, this Court is necessarily trying the same facts that give rise to MGA's Counterclaims-in-Reply. They are therefore compulsory." See Dkt. No. 8747 at 13. MGA's concession that its amended complaint "is based on Mattel's anticompetitive litigation tactics in the underlying litigation" (Opp. at 16) demonstrates that its antitrust claim was compulsory in that prior litigation.

MGA repeats its arguments that Supreme Court's decision in Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944), and the Ninth Circuit's decision in Hydranautics preclude the application of the compulsory counterclaim rule to sham litigation antitrust claims. See Opp. at 12-15; see also Dkt. No. 19 (MGA Opp. to First MTD) at 12-14. The Court has already rejected this contention, explaining that Mercoid and Hydranautics are limited to where the prior litigation is based on patent infringement. See MTD Order at 19. The limited applicability of Mercoid and Hydranautics is well established in the case law and academic literature. See MTD Order at 18 ("'[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, 164 (N.D. Cal. 1988))). Because Mattel did not bring patent claims in the prior action, Mercoid and Hydranautics simply do not apply. MGA cites Mead Data Central v. West Pub. Co., 679 F. Supp. 1455 (S.D. Ohio 1987), as showing that Mercoid extends "outside the realm of patent infringement to antitrust claims based on copyright infringement" (Opp. at 15), but again simply ignores the Court's prior rejection of that authority. See MTD Order at 18.

In sum, there is no basis for not dismissing this pleading, like the prior one, as barred by both res judicata (in light of the claims MGA brought in the prior case)

and the compulsory counterclaim rule (in light of the claims Mattel brought). Given the manner in which MGA chose to replead its claim, the Court's prior ruling is on all fours and controlling. MGA's claim again should be dismissed as barred by res judicata.

III. MGA's Claim is Barred by Noerr-Pennington

The Noerr-Pennington doctrine independently warrants dismissal. MGA offers no answer to Mattel's argument that the fact that the prior decisions in its favor – twice surviving summary judgment, and even in the Ninth Circuit's reversal, convincing the Court that it might well succeed on remand and even that equitable relief of some sort might be justified – establish that the underlying claims are of sufficient merit to defeat a sham litigation allegation. See, e.g., 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. v. Conoco, Inc., 739 F.2d 1412, 1414 (9th Cir. 1984) (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.'"); see also Mot. at 26-28.

MGA seeks to avoid that bar by claiming that Mattel "knew that merely obtaining that interim order would eliminate the dreaded competition. And it has." Am. Compl. ¶ 83; see also Opp. at 24 ("Mattel's knowing inducement of Judge Larson to commit legal error . . . by effectively awarding Bratz in perpetuity to

Mattel spelled the death knell for Bratz."). The test for Noerr-Pennington purposes, however, is not whether one form of relief sought was reasonable, but whether the lawsuit was frivolous. See, e.g., 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."). And in all events, MGA's claim would not even fit within the exception it tries to define, because the injury pled here was not based not on the filing of the lawsuit seeking such relief – the First Amendment activity protected subject to the limited sham exception – but on actually "obtaining" that order from the Court years later. See Omni Res. Dev. Corp., 739 F.2d at 1414 (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").

MGA's only remaining argument to avoid the bar of Noerr-Pennington is to focus on what Mattel allegedly "knew" in pursuing its litigation against MGA. See, e.g., Opp. at 20 (Mattel "pursued remedies that it knew lacked merit"); Am. Compl. ¶ 83. Not only are these assertions impermissibly conclusory, they are also irrelevant, because the pertinent inquiry is whether Mattel's litigation was *objectively* baseless. PREI, 508 U.S. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."); USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 811 (9th Cir. 1994) (if the suit has "objective merit, the plaintiff can't proceed to inquire into subjective purposes, and the action is perforce not a sham"); White v. Lee, 227 F.3d 1214, 1232 (9th Cir. 2000) ("a lawsuit's objective baselessness is the 'threshold prerequisite': a court may not even consider the

defendant's allegedly illegal objective unless it first determines that his lawsuit was objectively baseless") (quoting PREI, 508 U.S. at 60).

IV. MGA Has Failed to Plead a Section 2 Claim

MGA's opposition brief confirms that MGA is unable to plead critical elements of its monopolization claim. These grounds independently warrant dismissal.

Product Market Definition. MGA's description of the relevant product market is improperly premised on "demand considerations alone" without regard to "supply elasticity." Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995) (citation omitted). MGA seeks to defend its overtly narrow "fashion doll" product market by claiming that narrow submarkets are permissible and that judicial scrutiny of the alleged product market is inappropriate at the pleading stage. See Opp. at 26-28. These arguments have no merit. A plaintiff is not at liberty to fabricate an overly narrow market or submarket definition without any explanation for the lack of reasonable substitute products. See, e.g., UGG Holdings, Inc. v. Severn, 2004 WL 5458426, at *4 (C.D. Cal. Oct. 1, 2004) (dismissing claim where there were "no allegations . . . nor arguments in its Opposition, as to why other types of boots would not be reasonable substitutes for sheepskin, fleece-lined boots"); see also Mot. at 32 n. 30; Dkt. No. 11 (Mattel First MTD) at 38 (highlighting cases dismissing for failure to properly define product market).

Monopoly Power. Monopoly power must be properly pleaded to state an antitrust claim. See Mot. at 33-34. While MGA argues that a "small" increase in market share by a competitor does not signify "a breakdown of barriers to entry" (Opp. at 31), the Complaint actually pleads just the opposite – namely, that MGA was able to transform into a major market participant in just a short period of time. See, e.g., Am. Compl. ¶ 36 ("Within only a few years, Bratz devastated Barbie's dominance of the fashion doll market and acquired a market share equal to or in excess of Barbie . . . ."); see also Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904,

907 (9th Cir. 2010) ("But 2001 saw the introduction of Bratz . . . Bratz became an overnight success."). MGA also argues that a "market share of 65% is generally sufficient to establish monopoly power" (Opp. at 29), but it alleges that Mattel's market share hovered below 50% during the time period that Mattel allegedly engaged in the "Kill Bratz" campaign. See, e.g., Am. Compl. ¶ 36. MGA's additional argument that a reduction in output by MGA demonstrates Mattel's monopoly power likewise fails. Even assuming MGA reduced output as a result of Mattel's purported conduct, there is no allegation that other toy suppliers failed, or were unable, to increase production to fill any supply gap.

Antitrust Injury. MGA's vague and conclusory assertions about harm to "competition" and "consumers" (Opp. at 33-34), are insufficient. Mere harm to MGA fails to satisfy the pleading requirements because "*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). Seeking to avoid application of this settled principle, MGA's improperly relies on Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). But 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.).[5] No such "wide combination" has been alleged by MGA.

Conclusion

MGA's amended complaint restates the claim this Court held to be barred by res judicata because this is, quite simply, the only claim MGA has. A court's

[5] 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.").

discretion to deny leave to amend is "particularly broad" where, as here, the plaintiff has already failed to rectify identified defects in the complaint. See, e.g., Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989). MGA is represented by able and experienced counsel; were there a way to amend this complaint consistent with the rules of res judicata, they would have done so. Mattel respectfully submits the amended complaint should be dismissed with prejudice.

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QUINN EMANUEL URQUHART & SULLIVAN, LLP

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