Kleen Products LLC v. Georgia Pacific LLC

910 F.3d 927 (7th Cir. 2018)

WOOD, CHIEF JUDGE: Oligopolies have always posed problems for conventional antitrust law: without something that can be called an agreement, they elude scrutiny under section 1 of the Sherman Act, 15 USC 1, and yet no individual firm has enough market power to be subject to Sherman Act section 2, 15 USC 2. Tacit collusion is easy in those markets, see *In re Text Messaging Antitrust Litigation*, 782 F.3d 867 (7th Cir. 2015), and firms have little incentive to compete on the basis of price, "preferring to share the profits [rather] than to fight with each other." *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*, 839 F.3d 613, 615 (7th Cir. 2016).

This appeal concerns the fine line between agreement and tacit collusion, or, put another way, conscious parallelism. Direct purchasers of containerboard ("the Purchasers") charged multiple manufacturers with conspiring to increase prices and reduce output between 2004 and 2010. We affirmed the district court's decision to certify a nationwide class of buyers. *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919 (7th Cir. 2016). Before and after that ruling, most of the defendants settled with the Purchasers. But two companies—Georgia-Pacific LLC and WestRock CP, LLC—decided to fight. They persuaded the district court that there was not enough evidence of a conspiracy to proceed to trial. We agree with that assessment and affirm the judgment dismissing the case.

I

A

Containerboard is the name of the material used in countless boxes: it consists of a corrugated layer of heavy paper sandwiched between two smooth pieces of linerboard. Demand is relatively inelastic, meaning that customers will not defect to other products even if the price goes up, because the available substitutes are inferior. Containerboard is manufactured at large, costly mills, which are hard to duplicate, given both the high cost of construction and the myriad of environmental laws that must be satisfied. A handful of major players dominate the industry. Those players include the original defendants in this suit: International Paper ("IP"), Georgia-Pacific, Temple-Inland, Inc., WestRock, Weyerhaeuser Co., Norampac Holdings U.S. Inc., and Packaging Corporation of America ("PCA").

During the early 2000s, prices for containerboard were low. But from February 2004 to November 2010, they rose dramatically. The original defendants attempted to institute price increases on 15 different occasions. The pattern was a common one. After one company announced that it would raise its prices for containerboard, the rest followed suit with identical or comparable increases in the ensuing hours, days, or weeks. (The one exception was a failed attempt in which there were three hold-outs.) Such efforts took place from time to time. For example, in March 2003, the defendants attempted an ultimately unsuccessful increase. Of the proposed hikes from 2004 to 2010, Georgia-Pacific, WestRock, and a non-defendant each led the effort twice. The price increases were sustained nine times, a 60% success rate.

While containerboard prices rose, containerboard production capacity fell in North America (despite the inelasticity of demand and growth throughout the rest of the globe). The initial defendants were not immune from this decline. The Purchasers' expert concluded that the defendant companies reduced their production capacity by an amount almost double that of non-defendants, though they used different strategies to accomplish this goal. They closed a significant number of mills during the class period—WestRock alone was responsible for more than a third of those closures. WestRock also took care, through measures such as buyer selection and machinery sales, to avoid adding containerboard supply into the market. Georgia-Pacific kept all its mills running, but it slowed the rate of production. It would periodically "slow back" production by idling or shutting down machines and taking extra downtime. While these practices diminished supply to the point that it sometimes pinched, in the end Georgia-Pacific never missed an order. And the company actually increased its overall capacity by acquiring a new mill in 2007.

During this period, the defendants were in regular communication. Company executives and other employees spoke by phone and at trade association meetings every few days. The record does not reveal the contents of all these conversations, but at least some dealt with the timing and pricing of interfirm trading of containerboard—a common practice.

Internal and public-facing statements made by the defendants' employees shed light on these economic developments. Some email exchanges may be read to imply that the defendants had foreknowledge of other companies' proposed increases before they were announced. For example, just before three price hikes, a PCA employee offered an opinion about how high prices would need to go over the next year and a half in order to recover the cost of capital. A Georgia-Pacific staffer wrote "the party begins" when discussing an increase attempt. A WestRock vice president emailed that the company "always follow[s] IP," even though in fact "always" was an overstatement. And a Weyerhaeuser employee discussed a specific increase two days before WestRock first made its new price public. Other statements support the inference that a coordinated plan was in place. For instance, a Weyerhaeuser employee wrote that he "made up a bunch" of information in a report about what was learned from customers about competition, asking others to "be more specific" to stay "out of anti-trust legal issues." A Norampac executive, discussing problems with the industry, said "you have to be ready to let go business if you want to keep the price up," and "everybody needs to do the same thing."

Georgia-Pacific and WestRock made their own incriminating remarks. Because some details remain under seal in this court, some of our examples are a bit vague, but we have reviewed the sealed materials and they are consistent with the remainder of the evidence. A WestRock vice-president made remarks in an email that could easily be construed as an undertaking to follow-the-leader. A different vice-president complained that the company "ha[d] no choice but to support [a price increase] initiative" and that WestRock "ha[d] done [its] part." At one point, a company employee wrote that the "only way to get paid is to have a 1994-95 situation where the tide rises for all boats," perhaps referring to the containerboard industry's earlier run-ins with antitrust law. See, e.g., *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002). Publicly, WestRock's CEO was reported to have said that the company had a restructuring plan to "cut supply enough at [WestRock] to force price increases throughout the industry." Georgia-Pacific's president gave a speech during the period in question urging the industry to resist customer requests for price breaks.

B

In September 2010, the Purchasers filed a putative class action alleging violations of section 1 of the Sherman Act. 15 USC 1. *** Both sides moved for summary judgment. Before the court acted on those motions, some of the defendants settled with the Purchasers. The district court granted the remaining defendants, Georgia-Pacific and WestRock, summary judgment. In a lengthy opinion that delved deeply into the Purchasers' evidence, the court concluded that the record, viewed holistically in the light most favorable to the Purchasers, did not tend to rule out that the defendants had acted independently. With only the final approval of settlement agreements pending, the district court entered partial final judgment for the remaining defendants under Rule 54(b). The Purchasers ask us to revisit that ruling.

II

Section 1 of the Sherman Act prohibits every "contract, combination, ... or conspiracy in restraint of trade...." Courts have understood for more than a century that this language does not ban all contracts, but instead reaches only agreements that restrict competition. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); see also *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979). In the absence of an agreement, the antitrust laws forbid only monopolization or attempts to monopolize, see 15 USC 2, as well as a few other arrangements including anticompetitive mergers and acquisitions, see 15 USC 18. But this case concerns only section 1; the plaintiffs make no claim that any of the defendants has even attempted to monopolize, much less succeeded in such an effort. We can therefore disregard all other antitrust theories and focus on the question whether the district court correctly decided that the Purchasers did not present enough evidence to permit a trier of fact to find the agreement necessary for section 1 liability. As the Supreme Court put it in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), "at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently." Id. at 554, citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

It is worth recalling that an antitrust plaintiff, like all others, is entitled to try to meet that burden with either direct or circumstantial evidence. Antitrust plaintiffs do not face a heightened burden to defeat summary judgment. As Rule 56 generally commands, we draw all reasonable inferences in favor of the non-moving party, here the Purchasers. It is the substantive law, however, that establishes what the plaintiff must address. The Purchasers needed evidence that would allow a trier of fact to nudge the ball over the 50-yard line and rationally to say that the existence of an agreement is more likely than not. Put more directly, they must put on the table "some evidence which, if believed, would support a finding of concerted behavior." *Toys "R" Us Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000).

Armed with bountiful circumstantial evidence, the Purchasers accuse the defendant manufacturers of agreeing to restrict the supply of containerboard and thereby to create market conditions that would support significantly higher prices. The district court properly considered "economic evidence suggesting that the defendants were not in fact competing, and non-economic evidence suggesting that they were not competing because they had agreed not to compete." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002). It then drew and compared the corresponding inferences from each data point. After determining that each piece of evidence individually did not rule out the possibility of independent action, it reviewed the evidence in the aggregate, as required. The court concluded that because no individual piece of evidence tended to show collusion, the combined probative value was zero. We are not so sure of that. While no single piece of information may win the day, the whole may be greater than the sum of its parts in tending to exclude the possibility of conscious parallelism.

Nonetheless, our assessment of the district court's decision is de novo, and so we need only satisfy ourselves that we have the proper standard in mind. Viewing the evidence and reasonable inferences in the Purchasers' favor, we ask whether they have produced any evidence that would rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior during the relevant period. Despite the volume of evidence the Purchasers submitted in opposition to summary judgment, we find ourselves in agreement with the district court's ultimate conclusion. *** We conclude that nothing in this record would permit a trier of fact to conclude that the defendants were colluding, rather than behaving in their independent self-interest.

III

A

We start with some structural evidence about the containerboard industry. As we noted in our earlier encounter with this litigation, the market has certain structural features that make it "conducive to successful collusion," such as a small number of manufacturers, vertical integration, inelastic demand, a standardized commodity product, and high barriers to entry. *Kleen Prods.*, 831 F.3d at 927-28. These characteristics make it easier for companies either to form a cartel or to follow the leader independently. *Text Messaging*, 782 F.3d at 871-72. We explained why this is so in our 2015 *Text Messaging* opinion:

> [I]f a small number of competitors dominates a market, they will find it safer and easier to fix prices than if there are many competitors of more or less equal size. For the fewer the conspirators, the lower the cost of negotiation and the likelihood of defection.... But the other side of this coin is that the fewer the firms, the easier it is for them to engage in "follow the leader" pricing ("conscious parallelism," as lawyers call it, "tacit collusion" as economists prefer to call it)—which means coordinating their pricing without an actual agreement to do so. As for the apparent anomaly of competitors' raising prices in the face of falling costs, ... this may be not because they've agreed not to compete but because all of them have determined independently that they may be better off with a higher price. That higher price, moreover—the consequence of parallel but independent decisions to raise prices—may generate even greater profits (compared to competitive pricing) if costs are falling, provided that consumers do not have attractive alternatives.

Text Messaging, 782 F.3d at 871-72. Because of the competing inferences that can be drawn from this market structure, the district court properly found that the economic evidence did not tend to exclude the possibility of independent action.

B

Next, we turn to more specific evidence that the Purchasers offered. In establishing both defendants' failure to compete, the Purchasers rely heavily on the 15 price hikes that occurred over the class period. But one must take care with the inferences that can be drawn from such evidence. Following a competitor's price increases can be consistent with rational self-interest in oligopolies. A firm in a tight oligopoly might think that it will reap greater profits if it imitates, rather than undermines, its peers' price hikes. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). And it might reach that conclusion without any conscious coordination with its competitors. For that reason, "it is not a violation of antitrust law for a firm to raise its price, counting on its competitors to do likewise (but without any communication with them on the subject). ..." *Text Messaging*, 782 F.3d at 876.

1

The task before any plaintiff is thus to find and produce evidence that reveals coordination or agreement (even a wink and a nod—formal agreements have never been required for purposes of Sherman Act section 1). For instance, foreknowledge of price increases may be persuasive evidence that an agreement was afoot. See *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 408 (3d Cir. 2015). The Purchasers here attempt to carry their burden by emphasizing the timing of the price increase attempts, which they describe as "lockstep." They urge us to draw the inference that such tight congruence of price movements could not have occurred unless the competitors had an inside scoop. But a close look at the record reveals that the Purchasers overstate how coordinated these hikes actually were. Different manufacturers, including non-defendants, led the attempts. Sometimes companies followed suit over a month later. Even the attempts that saw quick turnaround times do little to raise suspicions. If it is in a company's self-interest to imitate a price leader's increase, why wait to enjoy the benefit? The Purchasers accuse the defendants of lying when they claim to have explored independently a possible increase. But there is no evidence supporting this allegation.

The Purchasers' "proof" of prior knowledge amounts to nothing more than speculation. They emphasize a March 2004 PCA memorandum that said "at least three $40-50 increases over the next 18 months" were needed to recoup the cost of capital. By September 2005, three attempts to raise prices had indeed occurred. But this supposed smoking gun could be nothing more than a somewhat accurate industry prediction. That two of the increases were for $50 is unsurprising, given that most of the 15 attempts were for $40 or $50. More tellingly, the PCA employee did not accurately predict three successful increases, since the second one failed and the third was only for $30.

The evidence that Georgia-Pacific provided or received advance notice is even weaker. The best that the Purchasers offer is a comment made by a Georgia-Pacific employee that "the party begins," following a discussion that a few manufacturers had announced an increase. This remark could merely express enthusiasm about the upward trend in pricing.

Another aspect of the Purchasers' argument is that the rising prices throughout the class period reflect an abrupt change in business practices. If that is an accurate description of what happened, it might support an inference of conspiracy. But before the inference can be drawn, we have looked for a shift in firm behavior, as opposed to external market conditions. In the present case, the Purchasers' evidence reveals only changed market conditions. For instance, they point to complaints that manufacturers made about aggressively competitive pricing that took place before, but not during, the class period. Yet the shift may be explained by external factors, such as the emergence from the economic downturn of 2008, which occurred in the middle of the class period. And in terms of the companies' behavior—the relevant inquiry—the manufacturers had attempted to raise prices before the class period as well. A continuation of a historic pattern—including of parallel price increase announcements—does not plausibly allow one to infer the existence of a cartel.

A further strike against the Purchasers' case is the failure rate of the manufacturers' efforts: 40% of the attempted increases did not hold. The district court pondered why a company would risk treble damages by colluding on an often-ineffective plan when tacitly following price hikes had no downside risk. Perhaps the Purchasers have a good answer to that question: when potential profits are in the billions, even 60% odds provide a substantial incentive. But that at best leaves matters in equipoise.

If this was a cartel, it would have tried to impose disciplinary measures on the "cheaters" who did not go along with the price increases. But that type of evidence is conspicuously absent, even though nearly half the price hikes failed. The Purchasers propose two possible mechanisms for enforcement, but they have not pointed to any evidence indicating that either one was used. It is true that a cartel may exist with only soft measures of control or ineffective enforcement. Even if that is so, however, the absence of evidence about enforcement does nothing to dissipate the inference of independent behavior. We are still left with price increases that appear to be just as consistent with independent action as with collusion.

2

The second half of the Purchasers' theory focuses on supposedly coordinated reductions of output through mill closures and machine slowdowns. Supply behavior is highly relevant because price-fixing arrangements often function through restrictions of output. But not every supply-side change is equally suggestive of a conspiracy. Conduct that is easily reversed may be consistent with self-interested decision-making.

An example illustrates the point. Suppose Company X takes its machines offline more frequently in order to reduce its supply. If competitors follow suit, and industry-wide production falls, all companies can charge more for the commodity and potentially reap greater profits. But what if instead the competitors maintain their supply and woo Company X's customers. Because Company X's reduction strategy was flexible, it can quickly get its machines running and filling orders again, minimizing any losses. In contrast, if Company X had lowered its production by selling its mills or equipment, it could not rapidly undo its efforts while competitors came knocking on customers' doors. *** Firms take significant risks by reducing their output in an inflexible manner, unless there is an enforceable agreement in place to ensure that competitors will follow suit. Because [this behavior] makes "little economic sense" absent coordination, evidence of less-reversible supply restrictions supports an inference of conspiracy.

During the class period, the North American market saw a drop in overall capacity for containerboard. The original defendants collectively were responsible for 19 mill closures. Yet Georgia-Pacific not only kept its mills open; it also purchased a new mill. The Purchasers respond that Georgia-Pacific underutilized its machines, but Georgia-Pacific has an answer for that: its run-to-demand strategy. Under this strategy, which dated back to 1999, Georgia-Pacific aimed to produce just enough containerboard to fill orders without creating excess inventory. Internal communications suggest that this strategy led to some close calls when filling orders, but Georgia-Pacific always found a way to meet its customer demand. Moreover, its acquisition of a mill allowed it to increase its production capacity over the class period.

The Purchasers' strongest evidence undercutting Georgia-Pacific's account are comments in performance reviews that credit employees for getting price increases by keeping inventory low. Because Georgia-Pacific did not have sufficient market power to alter containerboard pricing on its own, the Purchasers insist that these statements can be understood only as proof of an anticompetitive agreement. But underusing machinery is the kind of flexible behavior that is consistent with rational attempts to raise prices through watchful attention to one's competitors' actions. Far from perilous, had Georgia-Pacific's efforts not paid off, it could have increased its output quickly. Georgia-Pacific's supply behavior does not point towards its having a role in any conspiracy.

3

As ammunition against both defendants, the Purchasers cite the frequent contacts that company executives had by phone and at trade association meetings. They allege that the defendants' regular communications and trades served as opportunities for collusion. Some courts have held that this type of information flow, especially between executives, may be probative of conspiracy. But having the opportunity to conspire does not necessarily imply that wrongdoing occurred. Especially when companies have legitimate business reasons for their contacts, plaintiffs must offer some evidence that moves beyond speculation about the content of what was conveyed.

The Purchasers have no evidence indicating that the executives discussed illicit price-fixing or output restriction deals during their calls or meetings. They rely instead on the frequency and timing of the contacts. For example, 20 calls were made in the days around a Georgia-Pacific-led price increase, despite the fact that the company had predicted flat pricing just two weeks earlier. That is not enough. We cannot put much stock in the frequency of contacts, given the amount of trading that was taking place among the firms.

Furthermore, we hesitate to impugn the companies' intentions solely from the timing of the contacts. To be clear, we do not see the frequency of the calls and meetings as evidence tending to exclude collusion. Such a rule would create an incentive for businesses to make constant phone calls in order to immunize themselves from antitrust liability. Here, however, though some trade association meetings occurred before price-increase proposals, most of Georgia-Pacific's announcements were not preceded by meetings. The Purchasers' speculation about the content of the frequent interfirm contacts is not enough to create a jury issue.

4

Incriminating remarks by defendants' employees can support the inference that a conspiracy existed. The Purchasers flag a few comments that they see as particularly inculpatory. For starters, a Weyerhaeuser employee wrote that he "made up a bunch" of information in a report and instructed others to "be more specific" to keep the company "out of anti-trust legal issues." In addition, while discussing problems with the industry, a Norampac executive said "you have to be ready to let go business if you want to keep the price up," and "everybody needs to do the same thing."

Yet even if these statements are enough to create a triable question about the presence of an agreement generally, they are not enough to show that Georgia-Pacific was a part of that cartel. On this front, the Purchasers present little proof. They point to a speech in which Georgia-Pacific's CEO supposedly suggested that the industry should "say 'no' on deals" that, though competitive, are not profitable. But that is hardly an earthshattering insight, even if proof of the statement were possible without the use of hearsay contained in newspaper articles reporting on the speech. And the account of an attendee rejects the rumors, stating that this message "was not said nor implied." And the CEO claimed in his deposition that he was speaking only about Georgia-Pacific, not the industry, needing to decline deals. Like their economic proof, the Purchasers' noneconomic evidence— even when viewed with the parallel conduct—does not exclude the possibility that Georgia-Pacific acted in a self-interested but permissible way.

C

Some of the Purchasers' evidence was particular to WestRock, to which we now turn. There is a wrinkle in its potential liability: in June 2010, just shy of the close of the class period, WestRock received a discharge in bankruptcy, for which it had filed in 2009. At that moment, it was free of any antitrust liability incurred up to the date of discharge. Nonetheless, WestRock is potentially liable for the alleged conspiracy if there is evidence it rejoined the cartel post-discharge. We must therefore look to see if there is evidence that would permit a trier of fact both to find the initial agreement, and to find that WestRock rejoined that agreement after its discharge.

1

As we have explained, the parallel price hikes alone do not suffice to permit a jury to find a cartel. But the Purchasers cite evidence hinting at WestRock's conspiratorial involvement. For example, they point to an email from Weyerhaeuser that discussed a $50 increase just days before WestRock announced it. Though a publication's email blast had made public the existence of a future attempt, it had gotten the amount wrong. Weyerhaeuser had the right number.

Yet even if this is enough to create a fact question about WestRock's original participation in the alleged agreement, it does nothing to establish that it rejoined the agreement post-discharge. During the relevant period, in July 2010, WestRock did participate in an unsuccessful attempt to hike prices. The Purchasers insist that this reveals more than parallel conduct, given an email between WestRock staff that the company "always follow[s] IP [International Paper]." But, as we have noted several times, merely following a leader is not the same as agreeing to do something. Also of little probative value is the fact that a WestRock vice president met with other manufacturers on the day between the first defendant's joining the increase and WestRock's decision to follow suit. Before this meeting, the increase had been floated by a non-defendant. And WestRock offered evidence that since April it had been contemplating that prices would go up. Purchasers' parallel pricing evidence does not provide a hook for WestRock's liability.

2

Perhaps the most compelling evidence of collusion is WestRock's supply restrictions. During the class period, WestRock closed seven of its mills and took other steps to reduce capacity. WestRock attempts to rationalize this behavior in various ways. It claims that the closures were part of a 2003 restructuring plan to get rid of inefficient plants in light of its purchase of a highly efficient mill. It also asserts that it made certain sales decisions in light of a green marketing plan where buyers would assume a mill's associated environmental liabilities. And WestRock reminds us that it sold the mills while it was under the oversight of the bankruptcy court, a committee of creditors, and financial advisors.

These explanations are all plausible. Yet they do not overcome the inference of conspiracy given that, unlike Georgia-Pacific's reversible cuts, WestRock's supply behavior could not be undone easily. Such perilous leading risked significant losses. Furthermore, a vice president wrote that WestRock "ha[d] done [its] part," implying it played a role in a larger agreement. And other company emails state that restricting supply would help raise prices, something no manufacturer could do alone.

While this discussion may suggest that the Purchasers win the day, the insurmountable problem is one of timing: these events occurred pre-discharge. Even assuming (favorably to the Purchasers) that WestRock was part of a cartel, they fall short on presenting evidence that WestRock was involved post-discharge. In those months, WestRock did some machine maintenance, but it did not close any mills and generally operated at a high level of production and capacity.

3

Last, we consider the other evidence that the Purchasers lodged against WestRock. This includes incriminating statements made by WestRock employees and an article discussing the CEO's statements that the company needed a restructuring plan to "cut supply enough at [WestRock] to force price increases throughout the industry." The latter is inadmissible hearsay. The Purchasers maintain nonetheless that the CEO's deposition testimony confirms that he was signaling indirectly the company's commitment to a price-fixing plan. It does not.

Worse for WestRock are two vice-presidents' remarks that the company had "little choice" or "no choice" but to join the price increases, even though one was not supported by supply and demand. The most plausible explanation for its decision to go along with a price hike out of obligation, when that hike is not economically justified, is that WestRock had committed to an agreement. Also inculpatory was a staff member's email to a vice-president, among others, that "the only way to get paid is to have a 1994-95 situation where the tide rises for all boats." The Purchasers encourage us to read this statement as a reference to the containerboard industry's earlier antitrust violations. These statements are some of the Purchasers' strongest evidence that WestRock's price hikes and mill closures were more than just conscious parallelism. But again, they all occurred pre-discharge, and so they say nothing about WestRock's post-discharge conduct.

The Purchasers finally offer some economic and noneconomic evidence that could suggest suspicious activity. But even if it is credited, it is not enough to permit a trier of fact to find impermissible coordination. Statements by Georgia-Pacific staff are not enough to cast a cloud over its follow-the-leader price increases and flexible production adjustments. And while some of WestRock's behavior, particularly its mill closures, gives us pause, the Purchasers fail to establish that anything the company did post-discharge amounts to rejoining any existing conspiracy. This case shares many similarities with our decision in *Text Messaging*. In both situations, the plaintiffs did not discover a "smoking gun or ... additional circumstantial evidence that further tilts the balance in favor of liability." Id. at 871 (citation omitted). The Purchasers may be right that the containerboard industry got savvier at hiding its antitrust violations. But unfortunately for them, they "failed to carry the burden" of "establishing a prima facie case of explicit collusion," offering "no more than a plausible interpretation" of the defendants' anticompetitive conduct. Id. at 876.

IV

The outcome of this case flows directly from both the limitation in section 1 of the Sherman Act to anticompetitive agreements and the Supreme Court's cautions against interfering with individual firm behavior in ways that could inadvertently distort incentives to compete. In *Matsushita*, the Court warned against "mistaken inferences ... [that] chill the very conduct the antitrust laws are designed to protect.'" *Matsushita*, 475 U.S. at 594.

Scholars, lawmakers, and courts have yet to agree on a regulatory regime that can address oligopolistic behavior that leads to higher prices and reduced consumer choice, without stifling normal business activity. For now, we follow established law to the effect that "'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Twombly*, 550 U.S. at 552 (citation omitted). Because the evidence proffered by the Purchasers does not tend to exclude the possibility that Georgia-Pacific and WestRock engaged only in tacit collusion, we AFFIRM the judgment of the district court.

National Collegiate Athletic Ass'n v. Alston

594 U.S. ___ (2021)

JUSTICE GORSUCH, delivered the opinion of the Court. In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104, n. 27 (1984). The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion that cut both ways. The court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

I

A

*** [In 1929], the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000, while Harvard's football revenue alone came in at $429,000. Id., at 87. College football was "not a student's game"; it was an "organized commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable." Id., at viii.

The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college." Id., at xiv-xv. One coach estimated that a rival team "spent over $200,000 a year on players." A. Zimbalist, Unpaid Professionals 9 (1999). In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. Crabb, The Amateurism Myth: A Case for a New Tradition, 28 Stan. L. & Pol'y Rev. 181, 190 (2017). In the 1940s, Hugh McElhenny, a halfback at the University of Washington, "became known as the first college player 'ever to take a cut in salary to play pro football.'" Zimbalist 22-23. He reportedly said: "'[A] wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate.'" Id., at 211, n. 17. In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general undercover work behind the scenes, big-time college football is in a class by itself." Woodward, Is College Football on the Level?, Sport, Nov. 1946, Vol. 1, No. 3, p. 35.

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." Colleges Adopt the 'Sanity Code' To Govern Sports, N. Y. Times, Jan. 11, 1948, p. 1, col. 1. The code reiterated the NCAA's opposition to "promised pay in any form." Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Congress, 2d Sess., pt. 2, p. 1094 (1978). But for the first time the code also authorized colleges and universities to pay athletes' tuition. Ibid. And it created a new enforcement mechanism—providing for the "suspension or expulsion" of "proven offenders." Colleges Adopt 'Sanity Code,' N. Y. Times, p. 1, col. 1. To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. To others, the code marked "the beginning of the NCAA behaving as an effective cartel," by enabling its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')." Zimbalist 10.

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry." In re *National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1063 (ND Cal. 2019) (hereinafter D.Ct.Op.). In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. In 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." *O'Bannon v. National Collegiate Athletic Assn.*, 802 F.3d 1049, 1054-1055 (CA9 2015). The 80 member schools of the "Power Five" athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship limits to an amount that is generally several thousand dollars higher than previous limits. *D.Ct.Op.*, at 1064.

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." Id., at 1072. These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." Id., at 1072, n. 15. In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. Id., at 1072. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. Id., at 1073. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance. Ibid.

The NCAA has also allowed payments "'incidental to athletics participation,'" including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). Id., at 1064, 1071, 1074. The NCAA permits its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of $10,000 for students to attend graduate school after their athletic eligibility expires. Id., at 1074. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events." Id., at 1069. ***

The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. See id., at 1077, n. 20. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. See id., at 1063; Bachman, ESPN Strikes Deal for College Football Playoff, Wall Street Journal, Nov. 21, 2012. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year." *D.Ct.Op.*, at 1063. All these amounts have "increased consistently over the years." Ibid.

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly $4 million per year. Commissioners of the top conferences take home between $2 to $5 million. College athletic directors average more than $1 million annually. And annual salaries for top Division I college football coaches approach $11 million, with some of their assistants making more than $2.5 million.

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." *D.Ct.Op.*, at 1062, 1065, n. 5. Specifically, they alleged that the NCAA's rules violate §1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U.S.C. §1.

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. *** In applying the rule of reason, the district court began by observing that the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market." *D.Ct.Op.*, at 1097. The "most talented athletes are concentrated" in the "markets for Division I basketball and FBS football." Id., at 1067. There are no "viable substitutes," as the "NCAA's Division I essentially is the relevant market for elite college football and basketball." Id., at 1067, 1070. In short, the NCAA and its member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." Id., at 1070.

The district court then proceeded to find that the NCAA's compensation limits "produce significant anticompetitive effects in the relevant market." Id., at 1067. Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to "cap artificially the compensation offered to recruits." Id., at 1097. In a market without the challenged restraints, the district court found, "competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result." Id., at 1068. "Student-athletes would receive offers that would more closely match the value of their athletic services." Ibid. And notably, the court observed, the NCAA "did not meaningfully dispute" any of this evidence. Id., at 1067; see also Tr. of Oral Arg. 31 ("[T]here's no dispute that the—the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market").

The district court next considered the NCAA's procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, *D.Ct.Op.*, at 1070, n. 12, and the NCAA does not pursue them here. The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA's seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so. Id., at 1098.

Turning to that task, the court observed that the NCAA's conception of amateurism has changed steadily over the years. The court noted that the NCAA "nowhere define[s] the nature of the amateurism they claim consumers insist upon." *D.Ct.Op.*, at 1070. And, given all this, the court struggled to ascertain for itself "any coherent definition" of the term, id., at 1074, noting the testimony of a former SEC commissioner that he's "'never been clear on . . . what is really meant by amateurism.'" Id., at 1070-1071.

Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed "to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand." Id., at 1070. *** At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits "may have some effect in preserving consumer demand." Id., at 1082. Specifically, the court found that rules aimed at ensuring "student-athletes do not receive unlimited payments unrelated to education" could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics. Id., at 1083.

The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the same procompetitive effect as the challenged set of rules." Id., at 1104. The district court emphasized that the NCAA must have "ample latitude" to run its enterprise and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints." Ibid. (internal quotation marks omitted). In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments. . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand." Ibid.

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. Id., at 1088. On no account, the court found, could such education-related benefits be "confused with a professional athlete's salary." Id., at 1083. If anything, they "emphasize that the recipients are students." Ibid. Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. Id., at 1088.

The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. App. to Pet.

for Cert. in No. 20-512, p. 167a, ¶1. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually). The court added that the NCAA and its members were free to propose a definition of compensation or benefits "'related to education.'" App. to Pet. for Cert. in No. 20-512, at 168a, ¶4. And the court explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual conferences (and the schools that constitute them) to impose tighter restrictions if they wish. Id., at 169a, ¶6. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1263 (CA9 2020). The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its view that "the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." Ibid.

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions in fact decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market.

Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. Some amici argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off" sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. Brief for American Antitrust Institute as Amicus Curiae 3, 11-12. But the parties before us do not pursue this line.

II

A

With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA does raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," Brief for Petitioner in No. 20-512, p. 14, or a "'quick look,"' Brief for Petitioners in No. 20-520, p. 18, before approving them. ***

The NCAA accepts that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. See *D.Ct.Op.*, at 1067. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. See *Board of Regents*, 468 U.S., at 101 (quoting R. Bork, The Antitrust Paradox 278 (1978)). Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the "'twinkling of an eye."' *American Needle*, 560 U.S., at 203.

But this insight does not always apply. That some restraints are necessary to create or maintain a league sport does not mean all "aspects of elaborate interleague cooperation are." Id., at 199, n. 7. While a quick look will often be enough to approve the restraints "necessary to produce a game," ibid., a fuller review may be appropriate for others.

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. 468 U.S., at 94. *** Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. ***

C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and its member schools are not "commercial enterprises" and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience." The NCAA represents that it seeks to "maintain amateurism in college sports as part of serving [the] societally important non-commercial objective" of "higher education." Id., at 3.

Here again, however, there may be less of a dispute than meets the eye. The NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to the Sherman Act. *** Nor, on the other side of the equation, does anyone contest that the status of the NCAA's members as schools and the status of student-athletes as students may be relevant in assessing consumer demand as part of a rule of reason review.

With this much agreed it is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. ***

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well. When describing the rule of reason, this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for "'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *American Express Co.,* 585 U. S., at ___ (slip op., at 9). As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." Ibid. Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." Ibid. If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." Id., at ___-___ (slip op., at 9-10). ***

In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express's*. As its first step, the district court required the student-athletes to show that "the challenged restraints produce significant anticompetitive effects in the relevant market." *D.Ct.Op.*, at 1067. This was no slight burden. According to one amicus, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae 21, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground"). This suit proved different. As we have seen, based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects.

See *D.Ct.Op.*, at 1067. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion. Ibid.

Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. Id., at 1070. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA's entire package of compensation restrictions has substantial anticompetitive effects collectively. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits individually. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.

We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. *** Even worse, "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (CA1 1983) (BREYER, J.). After all, even "[u]nder the best of circumstances," applying the antitrust laws "'can be difficult'"—and mistaken condemnations of legitimate business arrangements "'are especially costly, because they chill the very'" procompetitive conduct "'the antitrust laws are designed to protect.'" Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004). ***

While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. See *D.Ct.Op.*, at 1070-1076, 1080-1083. Recall that the court found the NCAA failed "to establish that the challenged compensation rules . . . have any direct connection to consumer demand." Id., at 1070.

***[W]e see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. Ibid. Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the least restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints "'patently and inexplicably stricter than is necessary'" to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. *D.Ct.Op.*, at 1104. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions.

B

In a related critique, the NCAA contends the district court "impermissibly redefined" its "product" by rejecting its views about what amateurism requires and replacing them with its preferred conception. Brief for Petitioner in No. 20-512, at 35-36.

This argument, however, misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. But none of that means a party can relabel a restraint as a product feature and declare it "immune from §1 scrutiny." *American Needle*, 560 U.S., at 199, n. 7. ***

The NCAA's argument not only misapprehends the inquiry, it would require us to overturn the district court's factual findings. While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. The court found, too, that the NCAA adopted these restrictions without any reference to "considerations of consumer demand," id., at 1100, and that some were "not necessary to preserve consumer demand," id., at 1075, 1080, 1104. None of this is product redesign; it is a straightforward application of the rule of reason.

C

Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. Brief for Petitioner in No. 20-512, at 46. The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business. Id., at 50.

Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Trinko*, 540 U.S., at 415. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. Judges must be wary, too, of the temptation to specify "the proper price, quantity, and other terms of dealing"—cognizant that they are neither economic nor industry experts. *Trinko*, 540 U.S., at 408. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for "what we see may vary over time." *California Dental*, 526 U.S., at 781. And throughout courts must have a healthy respect for the practical limits of judicial administration: "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. *Trinko*, 540 U.S., at 415. Nor should any court "'impose a duty . . . that it cannot explain or adequately and reasonably supervise.'" Ibid. In short, judges make for poor "central planners" and should never aspire to the role. Id., at 408.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. *D.Ct.Op.*, at 1104. And the court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still.

In the end, it turns out that the NCAA's complaints really boil down to three principal objections.

First, the NCAA worries about the district court's inclusion of paid posteligibility internships among the education-related benefits it approved. The NCAA fears that schools will use internships as a way of circumventing limits on payments that student-athletes may receive for athletic performance. *** The court refused to enjoin NCAA rules prohibiting its members from providing compensation or benefits unrelated to legitimate educational activities—thus leaving the league room to police phony internships. As we've observed, the district court also allowed the NCAA to propose (and enforce) rules defining what benefits do and do not relate to education. Accordingly, the NCAA may seek whatever limits on paid internships it thinks appropriate. And, again, the court stressed that individual conferences may restrict internships however they wish. All these features underscore the modesty of the current decree.

Second, the NCAA attacks the district court's ruling that it may fix the aggregate limit on awards schools may give for "academic or graduation" achievement no lower than its aggregate limit on parallel athletic awards (currently $5,980 per year). *D.Ct.Op.*, at 1104. This, the NCAA asserts, "is the very definition of a professional salary." Brief for Petitioner in No. 20-512, at 48. The NCAA also represents that "[m]ost" of its currently permissible athletic awards are "for genuine individual or team achievement" and that "[m]ost . . . are received by only a few student-athletes each year." Ibid. Meanwhile, the NCAA says, the district court's decree would allow a school to pay players thousands of dollars each year for minimal achievements like maintaining a passing GPA.

The basis for this critique is unclear. The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary. And this portion of the injunction sprang directly from the district court's finding that the cap on athletic participation awards "is an amount that has been shown not to decrease consumer demand." *D.Ct.Op.*, at 1088. Indeed, there was no evidence before the district court suggesting that corresponding academic awards would impair consumer interest in any way. Again, too, the district court's injunction affords the NCAA leeway. It leaves the NCAA free to reduce its athletic awards. And it does not ordain what criteria schools must use for their academic and graduation awards. So, once more, if the

NCAA believes certain criteria are needed to ensure that academic awards are legitimately related to education, it is presently free to propose such rules—and individual conferences may adopt even stricter ones.

Third, the NCAA contends that allowing schools to provide in-kind educational benefits will pose a problem. This relief focuses on allowing schools to offer scholarships for "graduate degrees" or "vocational school" and to pay for things like "computers" and "tutoring." App. to Pet. for Cert. in No. 20-512, at 167a-168a, ¶2. But the NCAA fears schools might exploit this authority to give student-athletes "'luxury cars'" "to get to class" and "other unnecessary or inordinately valuable items" only "nominally" related to education. Brief for Petitioner in No. 20-512, at 48-49.

Again, however, this over-reads the injunction in ways we have seen and need not belabor. Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a "no Lamborghini" rule. And, again, the district court invited the NCAA to specify and later enforce rules delineating which benefits it considers legitimately related to education. To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.

When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." *United States v. Addyston Pipe & Steel Co.*, 85 F.271, 284 (CA6 1898) (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

*

***

The judgment is Affirmed.

JUSTICE KAVANAUGH, concurring: *** I join the Court's excellent opinion in full. But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the education-related benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws. Three points warrant emphasis.

First, the Court does not address the legality of the NCAA's remaining compensation rules. *** Second, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the NCAA's remaining compensation rules should receive ordinary "rule of reason" scrutiny under the antitrust laws. *** Third, there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.

The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.

Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. See, e.g., *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. See Brief for African American Antitrust Lawyers as Amici Curiae 13-17.

Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Cf. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235-237 (1996); *Wood v. National Basketball Assn.*, 809 F. 2d 954, 958-963 (CA2 1987) (R. Winter, J.). Regardless of how those issues ultimately would be resolved, however, the NCAA's current compensation regime raises serious questions under the antitrust laws.

To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series in Oklahoma City and Omaha; the list goes on. But those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

Standard Fashion Co. v. Magrane-Houston Co.

258 U.S. 346 (1922)

MR. JUSTICE DAY delivered the opinion of the Court: Petitioner brought suit in the United States District Court for the District of Massachusetts to restrain the respondent from violating a certain contract concerning the sale of patterns for garments worn by women and children, called standard patterns. The bill was dismissed by the District Court and its decree was affirmed by the Circuit Court of Appeals.

Petitioner is a New York corporation engaged in the manufacture and distribution of patterns. Respondent conducted a retail dry goods business at the corner of Washington street and Temple place in the city of Boston. On November 14, 1914, the parties entered into a contract by which the petitioner granted to the respondent an agency for the sale of standard patterns at respondent's store, for a term of two years from the date of the contract, and from term to term thereafter until the agreement should be terminated as thereinafter provided. *** Respondent agreed to purchase a substantial number of standard fashion sheets, to purchase and keep on hand at all times, except during the period of exchange, $1,000 value in standard patterns at net invoice price, and to pay petitioner for the pattern stock to be selected by it on terms of payment which are stated. Respondent agreed not to assign or transfer the agency, or to remove it from its original location, without the written consent of the petitioner, and not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell standard patterns except at labeled prices. Respondent agreed to permit petitioner to take account of pattern stock whenever it desired, to pay proper attention to the sale of standard patterns, to conserve the best interests of the agency at all times, and to reorder promptly as patterns were sold. Either party desiring to terminate the agreement was required to give the other party 3 months' notice in writing within 30 days after the expiration of any contract period, the agency to continue during such 3 months. Upon expiration of such notice respondent agreed to promptly return to petitioner all standard patterns, and petitioner agreed to credit respondent for the same on receipt in good order at three-fourths cost. ***

The principal question in the case, and the one upon which the writ of certiorari was granted, involves the construction of section 3 of the Clayton Act. That section, so far as pertinent here, provides:

> "It shall be unlawful * * * to * * * make a sale or contract for sale of goods * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The contract contains an agreement that the respondent shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns. It is shown that on or about July 1, 1917, the respondent discontinued the sale of the petitioner's patterns and placed on sale in its store patterns of a rival company known as the McCall Company.

It is insisted by the petitioner that the contract is not one of sale, but is one of agency or joint venture; but an analysis of the contract shows that a sale was in fact intended and made. It is provided that patterns returned for exchange must have been purchased from the petitioner. Respondent agreed to purchase a certain number of patterns. Upon expiration of the notice of termination the respondent agreed to promptly return all standard patterns bought under the contract. In the event of the disposition of the business property of the respondent at Washington street and Temple place, the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

Full title and dominion passed to the buyer. While this contract is denominated one of agency, it is perfectly apparent that it is one of sale. The contract required the purchaser not to deal in goods of competitors of the seller. It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force. The real question is: Does the contract of sale come within the third section of the Clayton Act, because the covenant not to sell the patterns of others "may be to substantially lessen competition or tend to create a monopoly"?

The Clayton Act, as its title and the history of its enactment discloses, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890. The latter act had been interpreted by this court to apply to contracts, combinations and conspiracies which unduly obstruct the free and natural flow of commerce. ***

As the Sherman Act was usually administered, when a case was made out, it resulted in a decree dissolving the combination, sometimes with unsatisfactory results so far as the purpose to maintain free competition was concerned.

The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which "may substantially lessen competition or tend to create a monopoly."

*** Section 3 condemns sales or agreement where the effect of such sale or contract of sale "may" be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.

Both courts below found that the contract interpreted in the light of the circumstances surrounding the making of it was within the provisions of the Clayton Act as one which substantially lessened competition and tended to create monopoly. These courts put special stress upon the fact found that of 52,000 so-called pattern agencies in the entire country, the petitioner, or its holding company controlling it and two other pattern companies, approximately controlled two-fifths of such agencies. As the Circuit Court of Appeals, summarizing the matter, pertinently observed:

> "The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers

> whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

We agree with these conclusions, and have no doubt that the contract, properly interpreted, with its restrictive covenant, brings it fairly within the section of the Clayton Act under consideration.

Affirmed.

Ohio v. American Express Co.

585 U.S. ___ (2018)

THOMAS, J., delivered the opinion of the Court. American Express Company and American Express Travel Related Services Company (collectively, Amex) provide credit-card services to both merchants and cardholders. When a cardholder buys something from a merchant who accepts Amex credit cards, Amex processes the transaction through its network, promptly pays the merchant, and subtracts a fee. If a merchant wants to accept Amex credit cards—and attract Amex cardholders to its business—Amex requires the merchant to agree to an anti-steering contractual provision. The anti-steering provision prohibits merchants from discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee. In this case, we must decide whether Amex's anti-steering provisions violate federal antitrust law. We conclude they do not.

I

A

Credit cards have become a primary way that consumers in the United States purchase goods and services. When a cardholder uses a credit card to buy something from a merchant, the transaction is facilitated by a credit card network. The network provides separate but interrelated services to both cardholders and merchants. For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. Cardholders also can receive rewards based on the amount of money they spend, such as airline miles, points for travel, or cash back. For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment. This saves merchants the trouble and risk of extending credit to customers, and it increases the number and value of sales that they can make.

By providing these services to cardholders and merchants, credit-card companies bring these parties together, and therefore operate what economists call a "two-sided platform." As the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them. For credit cards, that interaction is a transaction. Thus, credit-card networks are a special type of two-sided platform known as a "transaction" platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. For example, no credit card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network.

Two-sided platforms differ from traditional markets in important ways. Most relevant here, two-sided platforms often exhibit what economists call "indirect network effects." Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate. In other words, the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A credit card, for example, is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it. To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand. Two-sided platforms therefore must take these indirect network effects into account before making a change in price on either side.

Sometimes indirect network effects require two-sided platforms to charge one side much more than the other. For two-sided platforms, "'the [relative] price structure matters, and platforms must design it so as to bring both sides on board.'" The optimal price might require charging the side with more elastic demand a below-cost (or even negative) price. With credit cards, for example, networks often charge cardholders a lower fee than merchants because cardholders are more price sensitive. In fact, the network might well lose money on the cardholder side by offering rewards such as cash back, airline miles, or gift cards. The network can do this because increasing the number of cardholders increases the value of accepting the card to merchants and, thus, increases the number of merchants who accept it. Networks can then charge those merchants a fee for every transaction (typically a percentage of the purchase price). Striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

B

Amex, Visa, MasterCard, and Discover are the four dominant participants in the credit-card market. Visa, which is by far the largest, has 45% of the market as measured by transaction volume. Amex and MasterCard trail with 26.4% and 23.3%, respectively, while Discover has just 5.3% of the market. Visa and MasterCard have significant structural advantages over Amex. Visa and MasterCard began as bank cooperatives and thus almost every bank that offers credit cards is in the Visa or MasterCard network. This makes it very likely that the average consumer carries, and the average merchant accepts, Visa or MasterCard. As a result, the vast majority of Amex cardholders have a Visa or MasterCard, but only a small number of Visa and MasterCard cardholders have an Amex. Indeed, Visa and MasterCard account for more than 432 million cards in circulation in the United States, while Amex has only 53 million. And while 3.4 million merchants at 6.4 million locations accept Amex, nearly three million more locations accept Visa, MasterCard, and Discover.

Amex competes with Visa and MasterCard by using a different business model. While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than other networks. Due to its superior rewards, Amex tends to attract cardholders who are wealthier and spend more money. Merchants place a higher value on these cardholders, and Amex uses this advantage to recruit merchants.

Amex's business model has significantly influenced the credit-card market. To compete for the valuable cardholders that Amex attracts, both Visa and MasterCard have introduced premium cards that, like Amex, charge merchants higher fees and offer cardholders better rewards. To maintain their lower merchant fees, Visa and MasterCard have created a sliding scale for their various cards— charging merchants less for low-reward cards and more for high-reward cards. This differs from Amex's strategy, which is to charge merchants the same fee no matter the rewards that its card offers. Another way that Amex has influenced the credit-card market is by making banking and card-payment services available to low-income individuals, who otherwise could not qualify for a credit card and could not afford the fees that traditional banks charge. . . .

Despite these improvements, Amex's business model sometimes causes friction with merchants. To maintain the loyalty of its cardholders, Amex must continually invest in its rewards program. But, to fund those investments, Amex must charge merchants higher fees than its rivals. Even though Amex's investments benefit merchants by encouraging cardholders to spend more money, merchants would prefer not to pay the higher fees. One way that merchants try to avoid them, while still enticing Amex's cardholders to shop at their stores, is by dissuading cardholders from using Amex at the point of sale. This practice is known as "steering."

Amex has prohibited steering since the 1950s by placing anti-steering provisions in its contracts with merchants. These anti-steering provisions prohibit merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on Amex cards; or promoting other cards more than Amex. The anti-steering provisions do not, however, prevent merchants from steering customers toward debit cards, checks, or cash.

C

In October 2010, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its anti-steering provisions violate §1 of the Sherman Act. After a 7-week trial, the District Court agreed that Amex's anti-steering provisions violate §1. It found that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders. Evaluating the effects on the merchant side of the market, the District Court found that Amex's anti-steering provisions are anticompetitive because they result in higher merchant fees.

The Court of Appeals for the Second Circuit reversed. It concluded that the credit-card market is one market, not two. Evaluating the credit card market as a whole, the Second Circuit concluded that Amex's anti-steering provisions were not anticompetitive and did not violate §1. We granted certiorari and now affirm.

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C. §1. This Court has long recognized that, "[i]n view of the common law and the law in this country" when the Sherman Act was passed, the phrase "restraint of trade" is best read to mean "undue restraint." *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 59-60 (1911). This Court's precedents have thus understood §1 "to outlaw only *unreasonable* restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (emphasis added).

Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable per se because they ""'always or almost always tend to restrict competition and decrease output.'"" *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988). Typically only "horizontal" restraints—restraints "imposed by agreement between competitors"—qualify as unreasonable per se. Id., at 730. Restraints that are not unreasonable per se are judged under the "rule of reason." Id., at 723. The rule of reason requires courts to conduct a fact-specific assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). The goal is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

In this case, both sides correctly acknowledge that Amex's anti-steering provisions are vertical restraints— i.e., restraints "imposed by agreement between firms at different levels of distribution." *Business Electronics*, supra, at 730. The parties also correctly acknowledge that, like nearly every other vertical restraint, the anti-steering provisions should be assessed under the rule of reason.

To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Here, the parties ask us to decide whether the plaintiffs have carried their initial burden of proving that Amex's anti-steering provisions have an anticompetitive effect. The plaintiffs can make this showing directly or indirectly. Direct evidence of anticompetitive effects would be "'proof of actual detrimental effects [on competition],'" *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986), such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.

Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's anti-steering provisions have caused anticompetitive effects in the credit-card market. To assess this evidence, we must first define the relevant market. Once defined, it becomes clear that the plaintiffs' evidence is insufficient to carry their burden.

A

Because "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law," *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466–467 (1992), courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.[7] "Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). Thus, the relevant market is defined as "the area of effective competition." Ibid. Typically this is the "arena within which significant substitution in consumption or production occurs" [citation omitted]. But courts should "combin[e]" different products or services into "a single market" when "that combination reflects commercial realities." *United States v. Grinnell Corp.*, 384 U.S. at 572.

As explained, credit-card networks are two-sided platforms. Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive

[7] The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market. See Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L. J. 135, 160 (1984) ("[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power").

pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.

To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. Newspapers that sell advertisements, for example, arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. But in the newspaper-advertisement market, the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. Because of these weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such.

But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually. To optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants.

Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as "suppl[ying] only one product"—transactions. [Klein, Lerner, Murphy, & Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L. J. 571, 580 (2006)]. . . . Tellingly, credit cards determine their market share by measuring the volume of transactions they have sold.[8]

Evaluating both sides of a two-sided transaction platform is also necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions. A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex. Only a company that had both cardholders and merchants willing to use its network could sell transactions and compete in the credit card market. Similarly, if a merchant accepts the four major credit cards, but a cardholder only uses Visa or Amex, only those two cards can compete for the particular transaction. Thus, competition cannot be accurately assessed by looking at only one side of the platform in isolation.[9]

For all these reasons, in two-sided transaction markets, only one market should be defined. Any other analysis would lead to """"mistaken inferences"""" of the kind that could """"chill the very conduct the antitrust laws are designed to protect."""" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993). Accordingly, we will analyze the two-sided market

[8] Contrary to the dissent's assertion, merchant services and cardholder services are not complements. A two-sided market is different from markets for complementary products, in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices. . . .

[9] Non-transaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers.

for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex's anti-steering provisions have anticompetitive effects.

B

The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market. The plaintiffs stake their entire case on proving that Amex's agreements increase merchant fees. We find this argument unpersuasive. As an initial matter, the plaintiffs' argument about merchant fees wrongly focuses on only one side of the two-sided credit-card market. As explained, the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market. They failed to do so.

1

The plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. As the District Court found, the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins. And the evidence about whether Amex charges more than its competitors was ultimately inconclusive.

Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. . . . As explained, Amex has historically charged higher merchant fees than these competitors because it delivers wealthier cardholders who spend more money. Amex's higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants. On the other side of the market, Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants. That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends.

In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's anti-steering provisions are the cause of any increases in merchant fees. Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted and, thus, Amex's anti-steering provisions do not apply. This suggests that the cause of increased merchant fees is not Amex's anti-steering provisions, but rather increased competition for cardholders and a corresponding marketwide adjustment in the relative price charged to merchants.

2

The plaintiffs did offer evidence that Amex increased the percentage of the purchase price that it charges merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on cardholder rewards. . . . [T]his evidence does not prove that Amex's anti-steering provisions gave it the power to charge anticompetitive prices. . . . This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." Brooke Group Ltd., 509 U. S., at 237. There is no such evidence in this case. The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%. "Where . . . output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." Brooke Group Ltd., supra, at 237. And, as previously explained, the plaintiffs did not show that Amex charged more than its competitors.

3

The plaintiffs also failed to prove that Amex's anti-steering provisions have stifled competition among credit-card companies. To the contrary, while these agreements have been in place, the credit-card market experienced expanding output and improved quality. Amex's business model spurred Visa and MasterCard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served. Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%.

Nor have Amex's anti-steering provisions ended competition between credit-card networks with respect to merchant fees. Instead, fierce competition between networks has constrained Amex's ability to raise these fees and has, at times, forced Amex to lower them. For instance, when Amex raised its merchant prices between 2005 and 2010, some merchants chose to leave its network. And when its remaining merchants complained, Amex stopped raising its merchant prices. In another instance in the late 1980s and early 1990s, competition forced Amex to offer lower merchant fees to "everyday spend" merchants—supermarkets, gas stations, pharmacies, and the like—to persuade them to accept Amex.

In addition, Amex's competitors have exploited its higher merchant fees to their advantage. By charging lower merchant fees, Visa, MasterCard, and Discover have achieved broader merchant acceptance—approximately 3 million more locations than Amex. This broader merchant acceptance is a major advantage for these networks and a significant challenge for Amex, since consumers prefer cards that will be accepted everywhere. And to compete even further with Amex, Visa and MasterCard charge different merchant fees for different types of cards to maintain their comparatively lower merchant fees and broader acceptance. Over the long run, this competition has created a trend of declining merchant fees in the credit-card market. In fact, since the first credit card was introduced in the 1950s, merchant fees—including Amex's merchant fees—have decreased by more than half.

Lastly, there is nothing inherently anticompetitive about Amex's anti-steering provisions. These agreements actually stem negative externalities in the credit-card market and promote interbrand competition. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance"—the promise of a frictionless transaction. A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants. This externality endangers the viability of the entire Amex network. And it undermines the investments that Amex has made to encourage increased cardholder spending, which discourages investments in rewards and ultimately harms both cardholders and merchants. Perhaps most importantly, anti-steering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance.

In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of proving that Amex's anti-steering provisions have anticompetitive effects. Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions. . . . Because Amex's anti-steering provisions do not unreasonably restrain trade, we affirm the judgment of the Court of Appeals.

It is so ordered.

BREYER, J., with whom GINSBURG, SOTOMAYOR, and KAGAN, J., join, dissenting: For more than 120 years, the American economy has prospered by charting a middle path between pure laissez-faire and state capitalism, governed by an antitrust law dedicated to the principle that markets, not individual firms and certainly not political power, produce the optimal mixture of goods and services. By means of a strong antitrust law, the United States has sought to avoid the danger of monopoly capitalism. Long gone, we hope, are the days when the great trusts presided unfettered by competition over the American economy.

This lawsuit is emblematic of the American approach. Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition over credit-card merchant fees by eliminating a contractual barrier with anticompetitive effects. The majority rejects that effort. But because the challenged contractual term clearly has serious anticompetitive effects, I dissent.

I

I agree with the majority and the parties that this case is properly evaluated under the three-step "rule of reason" that governs many antitrust lawsuits. Under that approach, a court looks first at the agreement or restraint at issue to assess whether it has had, or is likely to have, anticompetitive effects. In doing so, the court normally asks whether the restraint may tend to impede competition and, if so, whether those who have entered into that restraint have sufficient economic or commercial power for the agreement to make a negative difference. Sometimes, but not always, a court will try to determine the appropriate market (the market that the agreement affects) and determine whether those entering into that agreement have the power to raise prices above the competitive level in that market.

It is important here to understand that in cases under §1 of the Sherman Act (unlike in cases challenging a merger under §7 of the Clayton Act, 15 U. S. C. §18), it may well be unnecessary to undertake a sometimes complex, market power inquiry: "Since the purpose [in a Sherman Act §1 case] of the inquiries into . . . market power is [simply] to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Federation of Dentists*, supra, at 460–461.

Second, if an antitrust plaintiff meets the initial burden of showing that an agreement will likely have anticompetitive effects, normally the burden shifts to the defendant to show that the restraint in fact serves a legitimate objective.

Third, if the defendant successfully bears this burden, the antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer, i.e., that the agreement "on balance" remains unreasonable.

Like the Court of Appeals and the parties, the majority addresses only the first step of that three-step framework.

II

A

This case concerns the credit-card business. As the majority explains, that business involves the selling of two different but related card services. First, when a shopper uses a credit card to buy something from a participating merchant, the credit-card company pays the merchant the amount of money that the merchant's customer has charged to his card and charges the merchant a fee, say 5%, for that speedy-payment service. I shall refer to that kind of transaction as a merchant-related card service. Second, the credit-card company then sends a bill to the merchant's customer, the shopper who holds the card; and the shopper pays the card company the sum that merchant charged the shopper for the goods or services he or she bought. The cardholder also often pays the card company a fee, such as an annual fee for the card or an interest charge for delayed payment. I shall call that kind of transaction a shopper-related card service. The credit card company can earn revenue from the sale (directly or indirectly) of each of these services: (1) speedy payment for merchants, and (2) credit for shoppers. (I say "indirectly" to reflect the fact that card companies often create or use networks of banks as part of the process—but I have found nothing here suggesting that that fact makes a significant difference to my analysis.)

Sales of the two basic card services are related. A shopper can pay for a purchase with a particular credit card only if the merchant has signed up for merchant-related card services with the company that issued the credit card that the shopper wishes to use. A firm in the credit-card business is therefore unlikely to make money unless quite a few merchants agree to accept that firm's card and quite a few shoppers agree to carry and use it. In general, the more merchants that sign up with a particular card company, the more useful that card is likely to prove to shoppers and so the more shoppers will sign up; so too, the more shoppers that carry a particular card, the more useful that card is likely to prove to merchants (as it obviously helps them obtain the shoppers' business) and so the more merchants will sign up. Moreover, as a rough rule of thumb (and assuming constant charges), the larger the networks of paying merchants and paying shoppers that a card firm maintains, the larger the revenues that the firm will likely receive, since more payments will be processed using its cards. Thus, it is not surprising that a card company may offer shoppers incentives (say, points redeemable for merchandise or travel) for using its card or that a firm might want merchants to accept its card exclusively.

B

This case focuses upon a practice called "steering." American Express has historically charged higher merchant fees than its competitors. Hence, fewer merchants accept American Express' cards than its competitors'. But, perhaps because American Express cardholders are, on average, wealthier, higher-spending, or more loyal to American Express than other cardholders, vast numbers of merchants still accept American Express cards. Those who do, however, would (in order to avoid the higher American Express fee) often prefer that their customers use a different card to charge a purchase. Thus, the merchant has a monetary incentive to "steer" the customer towards the use of a different card. A merchant might tell the customer, for example, "American Express costs us more," or "please use Visa if you can," or "free shipping if you use Discover."

Steering makes a difference, because without it, the shopper does not care whether the merchant pays more to American Express than it would pay to a different card company—the shopper pays the same price either way. But if steering works, then American Express will find it more difficult to charge more than its competitors for merchant-related services, because merchants will respond by steering their customers, encouraging them to use other cards. Thus, American Express dislikes steering; the merchants like it; and the shoppers may benefit from it, whether because merchants will offer them incentives to use less expensive cards or in the form of lower retail prices overall.

In response to its competitors' efforts to convince merchants to steer shoppers to use less expensive cards, American Express tried to stop, or at least to limit, steering by placing anti-steering provisions in most of its contracts with merchants. It called those provisions "nondiscrimination provisions." They prohibited steering of the forms I have described above (and others as well). After placing them in its agreements, American Express found it could maintain, or even raise, its higher merchant prices without losing too many transactions to other firms. These agreements—the "nondiscrimination provisions"—led to this lawsuit.

C

In 2010 the United States and 17 States brought this antitrust case against American Express. They claimed that the "nondiscrimination provisions" in its contracts with merchants created an unreasonable restraint of trade. (Initially Visa and MasterCard were also defendants, but they entered into consent judgments, dropping similar provisions from their contracts with merchants). After a 7-week bench trial, the District Court entered judgment for the Government, setting forth its findings of fact and conclusions of law in a 97-page opinion.

Because the majority devotes little attention to the District Court's detailed factual findings, I will summarize some of the more significant ones here. Among other things, the District Court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions. In doing so, American Express did not take account of the possibility that large merchants would respond to the price increases by encouraging shoppers to use a different credit card because the nondiscrimination provisions prohibited any such steering. The District Court pointed to merchants' testimony stating that, had it not been for those provisions, the large merchants would have responded to the price increases by encouraging customers to use other, less-expensive cards.

The District Court also found that even though American Express raised its merchant prices 20 times in this 5year period, it did not lose the business of any large merchant. Nor did American Express increase benefits (or cut credit-card prices) to American Express cardholders in tandem with the merchant price increases. Even had there been no direct evidence of injury to competition, American Express' ability to raise merchant prices without losing any meaningful market share, in the District Court's view, showed that American Express possessed power in the relevant market.

The District Court also found that, in the absence of the provisions, prices to merchants would likely have been lower. It wrote that in the late 1990's, Discover, one of American Express' competitors, had tried to develop a business model that involved charging lower prices to merchants than the other companies charged. Discover then invited each "merchant to save money by shifting volume to Discover," while simultaneously offering merchants additional discounts "if they would steer customers to Discover." The court determined that these efforts failed because of American Express' (and the other card companies') "nondiscrimination provisions." These provisions, the court found, "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." Because the provisions eliminated any advantage that lower prices might produce, Discover "abandoned its low-price business model" and raised its merchant fees to match those of its competitors. This series of events, the court concluded was "emblematic of the harm done to the competitive process" by the "nondiscrimination provisions."

The District Court added that it found no offsetting procompetitive benefit to shoppers. Indeed, it found no offsetting benefit of any kind. American Express appealed, and the U. S. Court of Appeals for the Second Circuit held in its favor. The Court of Appeals did not reject any fact found by the District Court as "clearly erroneous." Rather, it concluded that the District Court had erred in step 1 of its rule-of-reason analysis by failing to account for what the Second Circuit called the credit-card business's "two-sided market" (or "two-sided platform").

III

The majority, like the Court of Appeals, reaches only step 1 in its "rule of reason" analysis. To repeat, that step consists of determining whether the challenged "nondiscrimination provisions" have had, or are likely to have, anticompetitive effects. Do those provisions tend to impede competition? And if so, does American Express, which imposed that restraint as a condition of doing business with its merchant customers, have sufficient economic or commercial power for the provision to make a negative difference?

A

Here the District Court found that the challenged provisions have had significant anticompetitive effects. In particular, it found that the provisions have limited or prevented price competition among credit-card firms for the business of merchants. That conclusion makes sense: In the provisions, American Express required the merchants to agree not to encourage customers to use American Express' competitors' credit cards, even cards from those competitors, such as Discover, dissenting that intended to charge the merchants lower prices. By doing so, American Express has "disrupt[ed] the normal price-setting mechanism" in the market. As a result of the provisions, the District Court found, American Express was able to raise merchant prices repeatedly without any significant loss of business, because merchants were unable to respond to such price increases by encouraging shoppers to pay with other cards. The provisions also meant that competitors like Discover had little incentive to lower their merchant prices, because doing so did not lead to any additional market share. . . . Consumers throughout the economy paid higher retail prices as a result, and they were denied the opportunity to accept incentives that merchants might otherwise have offered to use less-expensive cards. I should think that, considering step 1 alone, there is little more that need be said.

The majority, like the Court of Appeals, says that the District Court should have looked not only at the market for the card companies' merchant-related services but also at the market for the card companies' shopper-related services, and that it should have combined them, treating them as a single market. But I am not aware of any support for that view in antitrust law. Indeed, this Court has held to the contrary.

In *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610 (1953), the Court held that an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint. The Government in that case claimed that a newspaper's advertising policy violated the Sherman Act's "rule of reason.". . . [The Supreme Court] explained that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space." We then added:

> "This case concerns solely one of those markets. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan."

Here, American Express stands accused not of limiting or harming competition for shopper-related card services, but only of merchant-related card services, because the challenged contract provisions appear only in American Express' contracts with merchants. That is why the District Court was correct in considering, at step 1, simply whether the agreement had diminished competition in merchant-related services.

* * *

C

. . . [A] discussion of market definition was legally unnecessary at step 1. That is because the District Court found strong direct evidence of anticompetitive effects flowing from the challenged restraint. As I said, this evidence included Discover's efforts to break into the credit-card business by charging lower prices for merchant-related services, only to find that the "nondiscrimination provisions," by preventing merchants from encouraging shoppers to use Discover cards, meant that lower merchant prices did not result in any additional transactions using Discover credit cards. The direct evidence also included the fact that American Express raised its merchant prices 20 times in five years without losing any appreciable market share. It also included the testimony of numerous merchants that they would have steered shoppers away from American Express cards in response to merchant price increases (thereby checking the ability of American Express to raise prices) had it not been for the nondiscrimination provisions. It included the factual finding that American Express "did not even account for the possibility that [large] merchants would respond to its price increases by attempting to shift share to a competitor's network" because the nondiscrimination provisions prohibited steering. It included the District Court's ultimate finding of fact, not overturned by the Court of Appeals, that the challenged provisions "were integral to" American Express' "[price] increases and thereby caused merchants to pay higher prices."

As I explained above, this Court has stated that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects . . . can obviate the need for" those inquiries. That statement is fully applicable here. Doubts about the District Court's market-definition analysis are beside the point in the face of the District Court's findings of actual anticompetitive harm.

The majority disagrees that market definition is irrelevant. The majority explains that market definition is necessary because the nondiscrimination provisions are "vertical restraints" and "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first determines the relevant market." Ante, at n. 7. The majority thus, in a footnote, seems categorically to exempt vertical restraints from the ordinary "rule of reason" analysis that has applied to them since the Sherman Act's enactment in 1890. The majority's only support for this novel exemption is *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). But *Leegin* held that the "rule of reason" applied to the vertical restraint at issue in that case. See id., at 898–899. It said nothing to suggest that vertical restraints are not subject to the usual "rule of reason" analysis.

One critical point that the majority's argument ignores is that proof of actual adverse effects on competition is, a fortiori, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved. See *Indiana Federation of Dentists*, supra, at 460 ("[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition" (emphasis added)). The District Court's findings of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances. And so the majority's extensive discussion of market definition is legally unnecessary.

D

The majority's discussion of market definition is also wrong. . . . [T]he majority agrees with the Court of Appeals that the market for American Express' card services is special because it is a "two-sided transaction platform." The majority explains that credit-card firms connect two distinct groups of customers: First, merchants who accept credit cards, and second, shoppers who use the cards. The majority adds that "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use to the same credit-card network." And it explains that the credit-card market involves "indirect network effects," by which it means that shoppers want a card that many merchants will accept and merchants want to accept those cards that many customers have and use. From this, the majority concludes that "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market."

1

Missing from the majority's analysis is any explanation as to why, given the purposes that market definition serves in antitrust law, the fact that a credit-card firm can be said to operate a "two-sided transaction platform" means that its merchant-related and shopper-related services should be combined into a single market. . . . The majority defines the phrase as covering a business that "offers different products or services to two different groups who both depend on the platform to intermediate between them," where the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other" side of the platform. I take from that definition that there are four relevant features of such businesses on the majority's account: they (1) offer different products or services, (2) to different groups of customers, (3) whom the "platform" connects, (4) in simultaneous transactions.

What is it about businesses with those four features that the majority thinks justifies a special market definition approach for them? It cannot be the first two features—that the company sells different products to different groups of customers. Companies that sell multiple products to multiple types of customers are commonplace. . . . I have already explained that, ordinarily, antitrust law will not group the two non-substitutable products together for step 1 purposes.

Neither should it normally matter whether a company sells related, or complementary, products, i.e., products which must both be purchased to have any function, such as ignition switches and tires, or cameras and film. It is well established that an antitrust court in such cases looks at the product where the attacked restraint has an anticompetitive effect. The court does not combine the customers for the separate, non-substitutable goods and see if "overall" the restraint has a negative effect. . . .

The majority disputes my characterization of merchant related and shopper related services as "complements." See ante, n. 8. . . . I agree that two-sided platforms—at least as some academics define them—may be distinct from some types of complements in the respect the majority mentions (even though the services resemble complements because they must be used together for either to have value). But the distinction the majority mentions has nothing to do with the relevant question. The relevant question is whether merchant-related and shopper-related services are substitutes, one for the other, so that customers can respond to a price increase for one service by switching to the other service. As I have explained, the two types of services are not substitutes in this way. . . .

What about the last two features—that the company connects the two groups of customers to each other, in simultaneous transactions? That, too, is commonplace. Consider a farmers' market. It brings local farmers and local shoppers together, and transactions will occur only if a farmer and a shopper simultaneously agree to engage in one. Should courts abandon their ordinary step 1 inquiry if several competing farmers' markets in a city agree that only certain kinds of farmers can participate, or if a farmers' market charges a higher fee than its competitors do and prohibits participating farmers from raising their prices to cover it? Why? If farmers' markets are special, what about travel agents that connect airlines and passengers? What about internet retailers, who, in addition to selling their own goods, allow (for a fee) other goods producers to sell over their networks? Each of those businesses seems to meet the majority's four-prong definition.

Apparently as its justification for applying a special market-definition rule to "two-sided transaction platforms," the majority explains that such platforms "often exhibit" what it calls "indirect network effects." By this, the majority means that sales of merchant-related card services and (different) shopper-related card services are interconnected, in that increased merchant-buyers mean increased shopper-buyers (the more stores in the card's network, the more customers likely to use the card), and vice versa. But this, too, is commonplace. Consider, again, a farmers' market. The more farmers that participate (within physical and esthetic limits), the more customers the market will likely attract, and vice versa. So too with travel agents: the more airlines whose tickets a travel agent sells, the more potential passengers will likely use that travel agent, and the more potential passengers that use the travel agent, the easier it will likely be to convince airlines to sell through the travel agent. And so forth. Nothing in antitrust law, to my knowledge, suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good.

* * *

E

Put all of those substantial problems with the majority's reasoning aside, though. Even if the majority were right to say that market definition was relevant, and even if the majority were right to further say that the District Court should have defined the market in this case to include shopper-related services as well as merchant-related services, that still would not justify the majority in affirming the Court of Appeals. That is because, as the majority is forced to admit, the plaintiffs made the factual showing that the majority thinks is required.

Recall why it is that the majority says that market definition matters: because if the relevant market includes both merchant-related services and card-related services, then the plaintiffs had the burden to show that as a result of the nondiscrimination provisions, "the price of credit card transactions"—considering both fees charged to merchants and rewards paid to cardholders— "was higher than the price one would expect to find in a competitive market.". . .

The problem with this reasoning, aside from it being wrong, is that the majority admits that the plaintiffs did show this: they "offer[ed] evidence" that American Express "increased the percentage of the purchase price that it charges merchants . . . and that this increase was not entirely spent on cardholder rewards.". . .

In the face of this problem, the majority retreats to saying that even net price increases do not matter after all, absent a showing of lower output, because if output is increasing, "'rising prices are equally consistent with growing product demand.'" This argument, unlike the price argument, has nothing to do with the credit-card market being a "two-sided transaction platform," so if this is the basis for the majority's holding, then nearly all of the opinion is dicta. The argument is also wrong. It is true as an economic matter that a firm exercises market power by restricting output in order to raise prices. But the relevant restriction of output is as compared with a hypothetical world in which the restraint was not present and prices were lower. The fact that credit-card use in general has grown over the last decade, as the majority says, says nothing about whether such use would have grown more or less without the nondiscrimination provisions. And because the relevant question is a comparison between reality and a hypothetical state of affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the Sherman Act does not apply at all. In any event, there are features of the credit-card market that may tend to limit the usual relationship between price and output. In particular, merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders. Thus, higher credit-card merchant fees may have only a limited effect on credit card transaction volume, even as they disrupt the marketplace by extracting anticompetitive profits.

IV

A

For the reasons I have stated, the Second Circuit was wrong to lump together the two different services sold, at step 1. But I recognize that the Court of Appeals has not yet considered whether the relationship between the two services might make a difference at steps 2 and 3. That is to say, American Express might wish to argue that the nondiscrimination provisions, while anticompetitive in respect to merchant-related services, nonetheless have an adequate offsetting procompetitive benefit in respect to its shopper-related services. I believe that American Express should have an opportunity to ask the Court of Appeals to consider that matter. American

Express might face an uphill battle. A Sherman Act §1 defendant can rarely, if ever, show that a procompetitive benefit in the market for one product offsets an anticompetitive harm in the market for another.

* * *

B

The majority charts a different path. Notwithstanding its purported acceptance of the three-step, burden-shifting framework I have described, the majority addresses American Express' procompetitive justifications now, at step 1 of the analysis. And in doing so, the majority inexplicably ignores the District Court's factual findings on the subject.

The majority reasons that the challenged nondiscrimination provisions "stem negative externalities in the credit card market and promote interbrand competition." The "negative externality" the majority has in mind is this: If one merchant persuades a shopper not to use his American Express card at that merchant's store, that shopper becomes less likely to use his American Express card at other merchants' stores. The majority worries that this "endangers the viability of the entire [American Express] network," but if so that is simply a consequence of American Express' merchant fees being higher than a competitive market will support. . . . If American Express' merchant fees are so high that merchants successfully induce their customers to use other cards, American Express can remedy that problem by lowering those fees or by spending more on cardholder rewards so that cardholders decline such requests. What it may not do is demand contractual protection from price competition.

In any event, the majority ignores the fact that the District Court, in addition to saying what I have just said, also rejected this argument on independent factual grounds. It explained that American Express "presented no expert testimony, financial analysis, or other direct evidence establishing that without its [nondiscrimination provisions] it will, in fact, be unable to adapt its business to a more competitive market." It further explained that the testimony that was provided on the topic "was notably inconsistent," with some of American Express' witnesses saying only that invalidation of the provisions "would require American Express to adapt its current business model." After an extensive discussion of the record, the District Court found that "American Express possesses the flexibility and expertise necessary to adapt its business model to suit a market in which it is required to compete on both the cardholder and merchant sides of the [credit-card] platform." The majority evidently rejects these factual findings, even though no one has challenged them as clearly erroneous.

Similarly, the majority refers to the nondiscrimination provisions as preventing "free riding" on American Express' "investments in rewards" for cardholders. But as the District Court explained, "[p]lainly . . . investments tied to card use (such as Membership Rewards points, purchase protection, and the like) are not subject to free-riding, since the network does not incur any cost if the cardholder is successfully steered away from using his or her American Express card." This, I should think, is an unassailable conclusion: American Express pays rewards to cardholders only for transactions in which cardholders use their American Express cards, so if a steering effort succeeds, no rewards are paid. As for concerns about free riding on American Express' fixed expenses, including its investments in its brand, the District Court acknowledged that free-riding was in theory possible, but explained that American Express "ma[de] no effort to identify the fixed expenses to which its experts referred or to explain how they are subject to free riding.". . . Finally, the majority reasons that the nondiscrimination provisions "do not prevent Visa, MasterCard, or Discover from competing against [American Express] by offering lower merchant fees or promoting their broader merchant acceptance." But again, the District Court's factual findings were to the contrary. As I laid out above, the District Court found that the nondiscrimination provisions in fact did prevent Discover from pursuing a low merchant-fee business model, by "den[ying] merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." The majority's statements that the nondiscrimination provisions are procompetitive are directly contradicted by this and other factual findings.

+ + +

For the reasons I have explained, the majority's decision in this case is contrary to basic principles of antitrust law, and it ignores and contradicts the District Court's detailed factual findings, which were based on an extensive trial record. I respectfully dissent.

Burnett v. National Association of Realtors

4:19-cv-00332-SRB (W.D. Mo. 2022)

STEPHEN R. BOUGH, DISTRICT JUDGE: Before the Court are four motions for summary judgment filed by Defendants Keller Williams Realty, Inc. ("Keller Williams"); Re/Max, LLC ("Re/Max"); HomeServices of America, Inc., BHH Affiliates, LLC, and HSF Affiliates, LLC (collectively, "HomeServices Defendants"); Realogy Holding Corp. ("Realogy") (Doc. #928); and National Association of REALTORS® ("NAR") (collectively, "Defendants"). As set forth below, the motions are DENIED.

I. BACKGROUND

For the purpose of resolving the pending motions, the following facts are uncontroverted or deemed uncontroverted by the Court. Additional facts relevant to the parties' arguments are set forth in Section III. Only those facts and issues necessary to resolve the pending motions are discussed below, and they are simplified to the extent possible.

A. The Parties

Plaintiffs Rhonda Burnett, Scott Burnett, Ryan Hendrickson, Jerod Breit, Scott Trupiano, Jeremy Keel, Frances Harvey, Hollee Ellis, and Shelly Dreyer (collectively, "Plaintiffs") are individuals who sold their homes through the use of a Multiple Listing Service ("MLS"), discussed in more detail below. Plaintiffs bring this action on behalf of themselves, as well as all persons who listed properties on the relevant Multiple Listing Services and who paid a buyer broker commission from April 9, 2015, to present.

NAR is a trade association that operates local, state, and national real estate associations. Membership in a local association automatically enrolls a broker in the corresponding state and national associations. NAR adopts rules that govern its members through its Handbook on Multiple Listing Policy ("MLS Handbook") and Code of Ethics. NAR has 1.5 million members, 1,200 local associations or boards, and operates in all 50 states.

The HomeServices Defendants, Keller Williams, Realogy, and Re/Max (collectively, the "Franchisor Defendants") are national real estate broker franchisors that operate brokerage subsidiaries, franchisees, or affiliates. The Franchisor Defendants compete for brokerages and affiliated agents.

B. A Typical Home Sale

In a standard residential real estate transaction in the United States, a homeowner ("Seller") sells their home to a buyer ("Buyer"). Both Sellers and Buyer retain their own brokers. As compensation for their services, the Seller's broker ("Seller-Broker") receives compensation, or a commission, calculated as a percentage of a home's sale price. The Seller-Broker's commission is set out in the home's listing agreement. Further, in the United States, a standard listing agreement provides that the Seller-Broker will split or share their commission with the Buyer's broker ("Buyer-Broker"). The Seller-Broker and Buyer-Broker generally split commissions 50/50. The Franchisor Defendants receive a percentage of their affiliated brokers' commissions.

Most transactions in the United States are facilitated by the use of an MLS. An MLS is a database of properties listed for sale in a defined geographic region. Seller-Brokers and Buyer-Brokers use the MLS to publish and search for property listings. In 2020, 91% of homes sold were listed on an MLS. MLS membership is considered essential to brokers. Four MLS are at issue in this case: Kansas City MLS ("Heartland MLS"), St. Louis MLS ("MARIS MLS"), Springfield, Missouri MLS ("Southern Missouri Regional MLS"), and Columbia, Missouri MLS ("CBOR MLS") (collectively, "Subject MLS").

In order to list a property on an MLS, the Seller-Broker must be a participant of the MLS and abide by the MLS's rules. NAR requires that any MLS affiliated with NAR, including the Subject MLS, comply with NAR's governing rules, which include the MLS Handbook and Code of Ethics. Therefore, all Subject MLS participants are bound by NAR's MLS Handbook and Code of Ethics. The Franchisor Defendants operate within the Subject MLS.

C. The MLS and Cooperative Compensation

In 1996, NAR's Multiple Listing Issues and Policies Committee ("the MLS Committee") adopted a rule requiring that a Seller-Broker who lists on an MLS make blanket unilateral offers of commission to any Buyer Broker:

> In filing property with the multiple listing service, participants make blanket unilateral offers of compensation to the other MLS participants and shall therefore specify on each listing filed with the service the compensation being offered by the listing broker to the other MLS participants.

This rule is incorporated into NAR's MLS Handbook at Section 2-G-1 (hereinafter "Section 2-G-1").

Section 2-G-1 prohibits participants from "publish[ing] listings that do not include an offer of compensation" or "include general invitations . . . to discuss terms and conditions of possible cooperative relationships." "Entitlement" to a blanket unilateral offer of compensation "is based on being the procuring cause[,]" or bringing the buyer to the table, and is not "based on the hours an individual has worked or different services that the individual has provided." Compliance with Section 2-G-1 is mandatory in order to post listings on the MLS.

NAR's Code of Ethics also requires Seller-Brokers to compensate Buyer-Brokers: "In cooperative transactions REALTORS® shall compensate cooperating REALTORS®[.]" Article 3 of the Code of Ethics states that "REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest." Plaintiffs have put forth evidence indicating that "the public marketing of a listing indicates that the [Seller-Broker] has concluded that cooperation with other MLS participants is in their client's best interest." At the oral arguments held on these motions, the parties agreed there is no such thing as a non-cooperative transaction that is facilitated by an MLS. Additionally, the Code of Ethics requires that any negotiation of the cooperative compensation offer must occur before the property is shown and cannot be negotiated after that point.

The Franchisor Defendants require their franchisees to be members of NAR and/or abide by NAR's Code of Ethics. As part of a broker's employment with Keller Williams and Re/Max, they are required to maintain NAR membership, and therefore follow NAR's Code of Ethics and Rule 2-G-1. Since 2015, HSoA encouraged its franchisees to be members of NAR. BHH, a subsidiary of HSoA, requires its franchisees to "at all times comply with the Code of Ethics of the National Association of Realtors[.]" Until July 2022, Realogy's franchise agreements required its franchisees to follow NAR's Code of Ethics, "whether or not they are members of NAR," and encourages them to become members of NAR. Realogy's subsidiary, Coldwell Banker Gundaker, requires that its brokers are members of NAR. Realogy, in its 2020 annual filing with the United States Securities and Exchange Commission, states, "We are a member of many [MLS] . . . and a member of [NAR] . . . and, accordingly, are subject to each group's rules," and defines the term "we" as referring to Realogy Holdings Corporation and its subsidiaries.

The Franchisor Defendants' executives testified that cooperative compensation, codified by Section 2-G-1, is beneficial and a core component of organized real estate. Gino Blefari ("Blefari"), CEO of HSoA and Chairman of both HSF and BHH, testified that "coupled with the duty to cooperate, th[e] unconditioned offer of compensation is a chief rationale for the existence of the [MLS]" and "a core component of organized real estate[.]" Blefari also stated in a scripted training video: "The only way you can eliminate all competition is to include them." Gary Keller ("Keller"), founder and current Executive Chairman of Keller Williams, coined the term "co-opetition" to describe "cooperative competition" among "trade associations, local boards, and multiple listing services." Keller testified that "the reason real estate is so cooperative is because [NAR] and the MLS gave evolved into a system that inspires cooperation amongst competitors." Re/Max Founder and Chairman of the Board, Dave Lininger, testified that he believes sharing average commission rates publicly is beneficial.

NAR's CEO, Dale Stinson ("Stinson"), believes that there are "threats to the system" that include "commission-thirsty outsiders, broker/association and broker/MLS chafing, [and] data syndication offenders." To fight these threats, Stinson believes that "Brokers, Agents, Franchises, Independents, the National, State, and Local Associations, the Institutes, Societies, and Councils, and the MLSs" must "ORGANIZE AS ONE AND COMMIT TO EACH OTHER WITH URGENT RESOLVE." (emphasis in original). In discussing the benefits of "[o]rganized real estate," Stinson states, "Where else would the offer of cooperation and compensation have come from?"

Robert Moline ("Moline"), HSoA's prior President and COO, testified that he "always thought you could do real estate so much less expensive if" the United States adopted an "auctioneering model" that exists in Australia. Moline was interviewed for a report published by NAR, and discussed the dangers of "commissions spiral[ing] downward" if Buyers find ways to avoid using brokers, noting that brokerage fees in the United States are higher than other developed countries.

D. NAR's Clear Cooperation Rule

In 2019, NAR adopted the Clear Cooperation Rule. This rule requires all listings to be posted on the MLS within one "business day of marketing a property to the public," which includes "flyers displayed in windows, yard signs, digital marketing . . . and applications available to the general public." The Clear Cooperation Rule's rationale is that MLS participation "is procompetitive and proconsumer." If a Seller "refuses to permit the listing to be disseminated by the service," the Seller-Broker must still file it on the MLS but must include a "certification signed by the seller that he does not desire the listing to be disseminated by the [MLS]." NAR's position is that the Clear Cooperation Rule is "consistent with . . . the NAR Code of Ethics[,]" which requires cooperation with competitors when in the client's best interest, because "the public marketing of a listing indicates that the MLS Participant has concluded that cooperation with other MLS participants is in their client's best interests."

The HomeServices Defendants campaigned for NAR to adopt the Clear Cooperation Rule. Blefari stated that it was HSoA's opinion the Clear Cooperation Rule should be adopted because "[o]ff-MLS listings aren't good for consumers, and they aren't good for competition." Blefari stated that pocket listings, or houses listed privately and outside of an MLS, "threaten[] the fundamental concept of cooperation that is the bedrock of our industry[.]"Blefari encouraged recipients to share his message with any "managers or agents who are Directors of NAR, or members of the MLS Committee that will vote on this important rule" to garner support and "put a stop to wide use of pocket listings."

E. Training

The Franchisor Defendants provided training to brokers which directed them to offer a 6% commission rate, to be split equally among the Seller-Broker and the Buyer-Broker. The Franchisor Defendants used this 6% commission rate split in educational transaction models. For example, Re/Max training documents instructed brokers to develop their "Economic Model" and "define the 'average' commission that will come from each of [their] closings," including an example of a 6% commission rate per transaction, split 50/50 between the Seller-Broker and Buyer-Broker. Similarly, Keller Williams trained its brokers to develop an "economic model" which provided a "standard 6% commission" rate per transaction, split 50/50 between the Seller-Broker and Buyer-Broker. Additionally, the HomeServices Defendants circulated training materials from Intero, a California subsidiary, that instructed brokers to "[a]lways have 6% written in on ALL listing agreements" and, if they "have to give something," to "remember [they] always have to pay [the Buyer-Broker] a minimum of 2.5%."

Further, the Franchisor Defendants trained brokers to never lower their rates. For example, Re/Max trained brokers to "[h]ave the commission typed into the listing agreement" before speaking to Sellers, and to tell Sellers "'This is what my company charges.'" (Doc. #964-35, p. 4.) Re/Max franchises must "maintain . . . quality," including avoiding "[d]iscount[ing] rates," or the franchise may be sold. Keller Williams provided brokers with scripted responses to requests to lower commissions, stating that brokers "require a full 6 percent" to "do the advertising that [they] do" and that a "discount rate will not provide you with enough exposure to get you top dollarRealogy acknowledged that its franchisees compete with one another, and instructs franchisees to "avoid any action or discussion intended to eliminate or restrict competition" including discussions of "commission structures[.]" However, Realogy provided training to its franchisees and subsidiaries regarding commissions and trains its agent to tell clients they cannot cut commissions.

F. The Instant Action

The instant action's procedural history is set out in the Court's prior Orders and need not be repeated here. Only the facts and issues relevant to the resolution of the pending motions are discussed. Plaintiffs assert three claims against Defendants in their First Amended Complaint: (1) Count I: Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) Count II: Violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010 et seq.; and (3) Count III: Violation of the Missouri Antitrust Law, Mo. Rev. Stat. § 416.031. Plaintiffs allege Defendants adopted and imposed Section 2-G-1, an anticompetitive restraint, that inflated residential real estate commissions throughout Missouri in the Subject MLS.

On August 29, 2022, the Court granted HomeServices' motion to stay this case as to claims asserted by unnamed class members, pending appeal of the Court's denial of its motion to compel arbitration. (Doc. #916.) This Order does not address or dispose of any claims asserted by the unnamed class members against HomeServices. On August 29, 2022, Defendants filed the instant motions for summary judgment. Plaintiffs oppose the motions. The parties' arguments are addressed below.

II. LEGAL STANDARD

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of identifying "the basis for its motion, and must identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (cleaned up). If the moving party makes this showing, "the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial." Id. (quotation marks omitted). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Id. (quotation marks omitted).

III. DISCUSSION

Defendants move for summary judgment on Counts I-III. The Court will address the parties' arguments as to (A) Counts I and III, Plaintiffs' antitrust claims, and (B) Count II, Plaintiffs' MMPA claims, separately below.

A. Counts I & III, Antitrust Claims

Defendants argue that summary judgment is appropriate on Counts I and III, which allege violations of the Sherman Act and the Missouri Antitrust Law. Plaintiffs disagree, arguing that genuine issues of material fact preclude summary judgment. As both Counts I and III are analyzed under the same applicable legal standards,[8] the parties' arguments are addressed below as follows: (1) whether Plaintiffs have antitrust standing; (2) whether Plaintiffs have produced evidence of a conspiracy; (3) whether Plaintiffs have produced evidence that Section 2-G-1 restrains trade; and (4) whether Plaintiffs have produced evidence of an antitrust injury.

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete." *Associated Press v. United States*, 326 U.S. 1, 15 (1945). "To establish a claim under Section 1 of the Sherman Act, a plaintiff must demonstrate (1) that there was a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade; and (3) that the restraint affected interstate commerce." *Wholesale Alliance, LLC v. Express Scripts, Inc.*, 366 F. Supp. 3d 1069, 1076 (E.D. Mo. 2019) (citation omitted). As the parties have stipulated to the third element, the Court will address only the first two elements.

1. Standing

As a threshold issue, NAR asserts that Plaintiffs lack standing to assert Counts I and III. Plaintiffs allege they were harmed because they overpaid for the Buyer-Broker's services, which is provided for in the listing agreement as a share of the Seller-Broker's commission. NAR argues that Plaintiffs "did not directly purchase anything from Defendants[.]" NAR argues that Plaintiffs did not directly purchase the Buyer-Broker's services because the Buyer-Broker's commission comes from the Seller-Broker's commission and is not directly paid by the Seller. Plaintiffs

[8] See Mo. Rev. Stat. § 416.141 (stating the Missouri Antitrust Law "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes")

disagree, arguing that they are direct purchasers who have standing to pursue their claims under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). ***

Here, the Court finds that Plaintiffs have established a genuine dispute of material fact as to whether they are considered direct purchasers under *Illinois Brick*. Despite Defendants' contentions to the contrary, Plaintiffs have produced evidence showing that the Buyer-Broker's commission rates are negotiated between the Seller and the Seller-Broker, agreed to by the Seller, and set out in the Seller's listing agreement. The HomeServices Defendants and Keller Williams' expert witnesses acknowledge that "the seller pays for the buyer's agent and the seller's agent" with funds from "the closing."

Although Defendants argue that the Seller is not purchasing the Buyer-Broker's services, the record shows that the Seller must explicitly consent to the amount of the Buyer-Broker's commission. Defendants have not put forth any evidence of negotiations or contracts between the Seller-Broker and the Buyer-Broker. Accordingly, the Court finds that Plaintiffs have created a genuine dispute of material fact as to whether the Seller is the direct purchaser of the Buyer-Broker's commission.

2. A Contract, Combination, or Conspiracy

Defendants argue Plaintiffs cannot present evidence meeting the first element of their antitrust claims, or show the existence of a contract, combination, or conspiracy. Plaintiffs disagree, and argue they have presented direct evidence of a conspiracy among the Defendants-Section 2-G-1 itself.

In analyzing a Section 1 claim, the question is whether the contract or conspiracy "joins together separate decisionmakers . . . . such that the agreement deprives the marketplace of independent centers of decisionmaking." *Am. Needle, Inv. v. Nat'l Football League*, 560 U.S. 183, 195-96 (2010) (cleaned up) (citations and quotations omitted). Plaintiffs need not prove a formal agreement existed between the Defendants. *Interstate Cir. v. United States*, 306 U.S. 208, 227 (1939). All that is required is "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation and quotations omitted). The Sherman Act is violated where participants in a "widespread combination ha[ve] surrendered [their] freedom of action in the matter . . . and agreed to abide by the will of the association[.]" *Anderson v. Shipowners' Ass'n of Pacific Coast*, 272 U.S. 359, 364 (1926) (citation omitted). Trade association rules "in and of themselves [are] contracts in restraint of commerce [where] . . . they contain[] provisions designed to stifle competition in [that] . . . field." *Associated Press v. United States*, 326 U.S. 1, 11 (1945).

The Court finds that Plaintiffs have created a genuine dispute of material fact as to whether Section 2-G-1 and the Franchisor Defendants' adoption thereof is direct evidence of a conspiracy.[10] Here, the record creates a genuine question of material fact as to whether Defendants adhered to a common scheme. A reasonable jury could find that "the concerted conduct is both plainly documented and readily available[.]" *Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278, 289 (4th Cir. 2012).

Plaintiffs have produced evidence that Section 2-G-1 stifles competition among brokers by artificially inflating commission rates. Additionally, Plaintiffs have produced evidence that NAR

[10] Further, as the Court finds that Plaintiffs have presented evidence creating a genuine dispute of material fact as to whether Defendants conspired to restrain trade in the adoption and enforcement of Section 2-G-1, the Court need not address NAR and the HomeServices Defendants arguments that they cannot conspire with only themselves.

adopted Section 2-G-1 and the Franchisor Defendants required their franchisees to follow Section 2-G-1, either explicitly or through NAR's Code of Ethics.[11] Section 2-G-1 requires Seller-Brokers to offer Buyer-Brokers blanket unilateral offers of compensation. Although Defendants argue that cooperative compensation is required only when it is in the client's best interest, Plaintiffs have produced evidence indicating that Defendants' position is that it is always in the client's best interest to market a property on an MLS, subjecting it to Section 2-G-1. Additionally, at oral arguments, the parties agreed that all transactions facilitated by the MLS are cooperative transactions.

Further, Plaintiffs have presented evidence that Defendants provided uniform training to Seller-Brokers to obtain 6% commission rates and to split commissions equally with Buyer-Brokers. Because these commission offers are blanket offers and agreed to prior to listing the house, the Buyer-Broker will receive the same amount in commission regardless of the effort made, stifling competition.[12] The Court finds that Plaintiffs have produced sufficient evidence to create a genuine question of material fact as to whether Defendants' adoption and enforcement of Section 2-G-1 is a conspiracy to restrain trade, in violation of the Sherman Act.

The Franchisor Defendants argue that requiring NAR and MLS membership, and therefore requiring compliance with Section 2-G-1, cannot support a conspiracy as it was a result of independent business judgment. However, where direct evidence is used to show the existence of a conspiracy, a plaintiff need not present evidence to rule out independent action. Similarly, the Franchisor Defendants argue that Plaintiffs cannot show a conspiracy because they cannot be held liable for the conduct of their associated brokers, who negotiate and set commission rates.[13] However, the Franchisor Defendants misstate Plaintiffs' antitrust claims. Plaintiffs allege that the Franchisor Defendants restrain trade by enforcing policies and practices that artificially inflate commission rates. See *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1069 (D. Colo. 2004) (citing *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752, 773-74 (1984) ("When the parent controls, directs, or encourages the subsidiary's anticompetitive conduct, the parent engages in sufficient independent conduct to be held directly liable

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[11] The HomeServices Defendants and Realogy admit they require associated brokers to follow NAR's Code of Ethics, but argue that NAR's Code of Ethics does not require compliance with Section 2-G-1. However, a reasonable jury could find to the contrary. NAR's Code of Ethics Standard of Practice 16-15 states: "In cooperative transactions REALTORS® shall compensate cooperating REALTORS®[.]"

[12] NAR's Code of Ethics Standard of Practice 3-2 states "After a REALTOR® has submitted an offer to purchase or lease property, the listing broker may not attempt to unilaterally modify the offered compensation with respect to that cooperative transaction."

[13] The HomeServices Defendants argue that HSoA cannot be liable for the actions of BHH. The Court finds that Plaintiffs have presented sufficient evidence to create a genuine dispute of material fact as to whether all of the HomeServices Defendants engaged in the conspiracy discussed herein such that HSoA's liability is not derivative of BHH.

However, for the reasons discussed below, the Court also finds that Plaintiffs have presented sufficient evidence to create a genuine dispute of material fact as to whether the HomeServices Defendants are independently managed and have consolidated decision-making power, or entities capable of conspiring under § 1 of the Sherman Act. See *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196-97 (2010) (holding the determinative "question is whether the agreement joins together `independent centers of decisionmaking"" and finding entities were not capable of conspiring for § 1 purposes where they were each "a substantial, independently owned, and independently managed business"). For example, Robert Moline served as CEO of HSoA at some point from 2008 to 2017, and "[s]omewhere towards the end" was "given the title of CEO of HomeServices Residential Real Estate Brokerage or whatever, which is a nonexistent entity;" however, these titles "didn't matter" because, regardless of his position, he "kept doing the same things [he] was doing before." When asked if HSoA's subsidiaries and franchisees competed with one another, Moline responded, "[H]ow do you compete with yourself?"

as a single enterprise with the subsidiary under the Sherman Act.”)). As discussed above, Plaintiffs have presented evidence creating a genuine dispute of material fact as to whether Defendants encouraged or directed compliance with Section 2-G-1, resulting in the artificial inflation of commission rates. The effects of the brokers’ actions, or what commission rates the associated brokers actually used, do not bear on whether a conspiracy existed.

Finally, the Franchisor Defendants argue that they could not have conspired because they did not exist as entities when Section 2-G-1 came into effect. This is immaterial:

> It is elementary that an unlawful conspiracy may be and is often formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if arrived out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Interstate Cir., 306 U.S. at 227. Accordingly, the Court finds that Plaintiff have created a genuine dispute of material fact precluding summary judgment.

3. Unreasonable Restraint of Trade

The parties dispute whether Section 2-G-1 is an unreasonable restraint of trade. As a threshold matter, the Court must determine the applicable standard to analyze Section 2-G-1. “Whether an agreement unreasonably restraints trade is determined under one of two approaches: the per se standard or a standard that examines all of the circumstances, the so-called rule of reason test.” *Wholesale Alliance*, 366 F. Supp. 3d at 1076 (citing *Am. Express Co.*, 138 S.Ct. at 2283). Defendants contend that the rule of reason test, which involves a study of the relevant market and effects of the challenged restraint, is applicable here. Plaintiffs argue the per se standard is appropriate.

“Per se liability is reserved for only those agreements that are ‘so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.’” *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *Nat’l Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978)). “Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful.” Id. (citation omitted). “That price-fixing includes more than the mere establishment of uniform prices is clearly evident[.]” *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940).

Defendants argue the Court should not apply the per se rule because Section 2-G-1 does not explicitly set commission rates. Here, however, the fact that Section 2-G-1 does not explicitly set out acceptable commission rates is not dispositive. “Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.” *Socony*, 310 U.S. at 223 (emphasis added). Plaintiffs have produced evidence that Defendants have stabilized the price of residential real estate brokers’ services, as reflected through commission rates. For example, Plaintiffs have produced evidence that Defendants train associated brokers to set commission rates at 6%, to split commission equally among Buyer-Brokers and Seller-Brokers, and to never lower commissions. See, e.g., (Doc. #964-33, p. 4) (discussing a Re/Max training document which says: “Once you start cutting commissions, you can never stop. . . . Charge everyone the same and let them know it[.]”).

In addition to training, Plaintiffs have presented expert testimony showing that Section 2-G-1 had the effect of stabilizing commission rates. (Doc. #922-2, pp. 86-95) (noting that upwards of 90% of transactions on the Subject MLS offer buyer agent commissions of exactly 3% during the class period, with the exception of the MARIS MLS consistently offering 2.7%). Plaintiffs have also produced evidence that Section 2-G-1 creates a system that rewards all Buyer-Brokers similarly, despite their skill as a broker or the amount of effort expended in procuring the Buyer. Although it is true that a nominal commission of $1 would satisfy Section 2-G-1 and Defendants agree such nominal commission is mandated, Plaintiffs have produced evidence that no transaction within the Subject MLS took place using a nominal commission. Therefore, Defendants' argument is rejected.

Defendants also argue that application of the per se rule is inappropriate under *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). Defendants provide little explanation for why *Broadcast Music,* which dealt with blanket licensing fees in the music industry, is applicable here. In *Broadcast Music*, the Supreme Court found the blanket license "developed . . . out of the practical situation in the marketplace" where "users want unplanned, rapid, and indemnified access to" music and "owners want a reliable method of collecting for the use of their copyrights." Id. at 20. More importantly, the blanket license scheme in *Broadcast Music* was developed in concert with a consent decree imposed by the Department of Justice, among others, and the Supreme Court found this was a large factor in declining to apply the per se rule.

The rationale used to apply the rule of reason in *Broadcast Music* is not present here. The residential real estate market involves slower and more complex transactions than the music licensing industry. The transactions at issue here involve only two parties and only one product, or home, per transaction. Although an MLS can assist a transaction by making listings easily available to brokers that are members, the actual sale of the home takes place through a negotiated and written agreement. In contrast, the market in *Broadcast Music* involved quick transactions licensing one product to multiple consumers. And, notably, Section 2-G-1 has not been continually scrutinized by any government entity for antitrust implications, unlike the alleged restraint at issue in *Broadcast Music*. Accordingly, *Broadcast Music* is factually distinguishable and does not preclude the application of the per se rule.

To the contrary, the Court agrees with Plaintiffs and finds that the per se rule is applicable here. As discussed above, Plaintiffs have produced evidence, creating a genuine dispute of material fact, that Defendants implemented or enforced Section 2-G-1 with the purpose and effect of inflating or stabilizing broker commission rates. The record creates a genuine material fact as to whether Defendants have engaged in a horizontal price-fixing scheme, exactly the situation where applying the per se rule is appropriate. For this reason, the Court finds the per se rule is applicable here, and Plaintiffs have met their "burden of proving the unreasonableness of the restraint merely by proving the existence of substance of the restraint itself." *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 387 (8th Cir. 2007).[15]

IV. CONCLUSION

Accordingly, it is ORDERED that Defendants' motions for summary judgment are DENIED.

IT IS SO ORDERED.

[15] As the Court finds that the per se standard is applicable, the Court need not address the Parties' arguments regarding the rule of reason and whether the relevant market is a two-sided platform, as discussed in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). However, even if the rule of reason was applicable, the Court finds that Plaintiffs have produced evidence about the relevant market and effect of Section 2-G-1 that creates a genuine dispute of material fact as to whether Section 2-G-1 is an unreasonable restraint of trade.

INSTRUCTION NO. 22

To establish that any Defendant violated Section 1 of the Sherman Act in this case, the Class Plaintiffs must prove the following elements:

First, that a conspiracy existed to follow and enforce the Cooperative Compensation Rule in the Subject MLSs;

Second, that the Defendant sought to be held liable knowingly—that is, voluntarily and intentionally—joined that conspiracy;

Third, that the conspiracy had the purpose or effect of raising, inflating, or stabilizing broker commission rates paid by home sellers; and

Fourth, that the conspiracy caused the Class Plaintiffs to suffer injury to their property.

INSTRUCTION NO. 23

The Class Plaintiffs allege that the Defendants participated in a conspiracy to restrain trade by following and enforcing the Cooperative Compensation Rule in the Subject MLSs. A conspiracy is an agreement or understanding by two or more persons to accomplish some unlawful purpose or to accomplish a lawful purpose by unlawful means. For purposes of these instructions, "persons" may include corporations.

To show a conspiracy, the Class Plaintiffs must prove both of the following elements by a preponderance of the evidence:

First, that the alleged conspiracy existed; and

Second, that each Defendant sought to be held liable knowingly became a member of that conspiracy; knowingly means voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The basis of a conspiracy is an agreement or understanding between two or more persons. An agreement or understanding between two or more persons exists when they share a commitment to a common scheme. To establish the existence of a conspiracy, the evidence need not show that its members entered into any formal or written agreement. The agreement itself may have been entirely unspoken. A person can become a member without full knowledge of all of the details of the conspiracy, the identity of all of its members, or the parts such members played in the charged conspiracy. The members of the conspiracy need not necessarily have met together, directly stated what their object or purpose was to one another, or stated the details or the means by which they would accomplish their purpose. To prove a conspiracy existed, the evidence must show that the alleged members of the conspiracy came to an agreement or understanding among themselves to accomplish a common purpose.

A conspiracy may be formed without all parties coming to an agreement at the same time, such as where competitors, without previous agreement, separately accept invitations to participate in a plan to restrain trade. Similarly, it is not essential that all persons acted exactly alike, nor is it necessary that they all possessed the same motive for entering the agreement. It is also not necessary that all of the means or methods claimed by the Class Plaintiffs were agreed upon to carry out the alleged conspiracy, nor that all of the means or methods that were agreed upon were actually used or put into operation, nor that all the persons alleged to be members of the conspiracy were actually members. It is the agreement or understanding to restrain trade in the way alleged by the Class Plaintiffs that constitutes a conspiracy. Therefore, you may find a conspiracy existed regardless of whether it succeeded or failed.

The Class Plaintiffs may prove the existence of the alleged conspiracy through direct evidence, circumstantial evidence, or both. Direct evidence is explicit and requires no inferences to establish the existence of the alleged conspiracy.

Direct evidence of an agreement may not be available, and therefore a conspiracy also may be shown through circumstantial evidence. You may infer the existence of a conspiracy from the circumstances, including what you find the alleged members actually did and the words they used. Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have met or assembled together, does not by itself establish the existence of a conspiracy. If they acted similarly but independently of one another, without any agreement among them, then there would not be a conspiracy.

In determining whether an agreement or understanding between two or more persons has been proved, you must view the evidence as a whole and not piecemeal.

INSTRUCTION NO. 24

Plaintiffs contend that the Defendants engaged in similar conduct, namely that Keller Williams and HomeServices of America, Inc., and its subsidiaries BHH Affiliates, LLC and HSF Affiliates, LLC, along with Anywhere Real Estate, Inc., and RE/MAX LLC agreed to adopt or follow the Cooperative Compensation Rule and compelled their subsidiaries, affiliates, or franchisees to adopt or follow such a rule. Plaintiffs further contend that this conduct, when considered with other evidence, shows that a conspiracy existed among Defendants. The mere fact that Defendants have engaged in similar conduct does not by itself establish the existence of a conspiracy among Defendants. Their behavior may be no more than the result of the exercise of independent judgment in response to identical or similar market conditions. For example, everyone might open their umbrellas on a rainy day, but that similar behavior would not necessarily mean that they had agreed or conspired to open their umbrellas. A business may lawfully adopt the same prices, conditions of sale, or other practices, as its competitors as long as it does so independently and not as part of an agreement or understanding with one or more of its competitors. If Defendants acted similarly but independently of one another, without any agreement or understanding between two or more of them, then there would not be a conspiracy.

Thus, a defendant may make offers of compensation identical to those charged by its competitors without violating the Sherman Act. A defendant may even copy the offers of a competitor or follow and conform exactly to the compensation policies or changes of its competitors. Likewise, a defendant does not violate the Sherman Act by taking some action in the hope or belief that its competitors will follow, so long as it has not reached an agreement with its competitors. Parallel conduct, without more, does not violate the law.

You must decide whether Defendants' similar conduct was, more probably than not, the result of an agreement or understanding among them. In doing so, you may consider Defendants' similar conduct along with other evidence. You may infer that a conspiracy existed only if you find that the evidence, when viewed as a whole, makes it more likely that Defendants had an agreement or understanding with one another than that they acted independently of one another. In making that determination, you should consider the similar conduct against the entire background in which it took place. The evidence, when viewed all together, must satisfy you that it is more likely that Defendants' similar actions were the product of an agreement or understanding with one another than their own independent decisions.

If after considering all of the evidence, you conclude that Class Plaintiffs have shown that it was more likely than not that Defendants' similar conduct was the result of an agreement or understanding among them than their independent decisions, you must find for Class Plaintiffs on the question of whether Defendants participated in a conspiracy. If, after considering all of the evidence, you conclude that Class Plaintiffs failed to prove that a Defendant's similar conduct was more likely than not the result of an agreement or understanding with one or more of the other Defendants, then you must find against Class Plaintiffs and in favor of that Defendant on the question of whether that Defendant participated in a conspiracy.

INSTRUCTION NO. 25

Before you can find that any Defendant was a member of the conspiracy alleged by the Class Plaintiffs, the evidence must show that such Defendant knowingly joined in the unlawful plan at its inception, or some later time, with the intent to further the purpose of the conspiracy.

To act knowingly means to participate deliberately and not because of mistake, accident, or other innocent reason. A person may become a member of a conspiracy without full knowledge of all the details of the conspiracy, the identity of all its members, or the parts they played. Knowledge of the essential nature of the plan is enough. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way that helps the conspiracy succeed, does not thereby become a conspirator.

A person who knowingly joins an existing conspiracy, or who participates only in part of a conspiracy with knowledge of the overall conspiracy, is just as responsible as if he or she had been one of those who formed or began the conspiracy and participated in every part of it.

It is your duty to give separate, personal consideration to each individual defendant. In determining whether a Defendant was a member of the alleged conspiracy, you should consider only the evidence about that particular Defendant's statements and conduct, including any evidence of that Defendant's knowledge and participation in the events involved and any other evidence of that particular Defendant's participation in the conspiracy alleged.

You may not find that a Defendant was a member of a conspiracy based only on its association with or knowledge of wrongdoing, but it is a factor you may consider to determine whether a Defendant was a member of the alleged conspiracy.

If you find that a conspiracy existed, then the acts and statements of the conspirators are binding on all of those whom you find were members of the conspiracy.

Once you have found that a Defendant is a member of a conspiracy, it is presumed to remain a member and is responsible for all actions taken by all coconspirators during and in furtherance of the conspiracy until it is shown that the conspiracy has been completed or abandoned.

INSTRUCTION NO. 26

If you find that any Defendant engaged in a price-fixing conspiracy, it is not a defense that such Defendant acted with good motives, thought its conduct was legal, or that the conduct may have had some good results.

INSTRUCTION NO. 27

Evidence that Defendants actually engaged in price competition with each other in some manner has been admitted to assist you in deciding whether they entered into the alleged conspiracy to follow and enforce the Cooperative Compensation Rule in the Subject MLSs. If you find that such a conspiracy existed, it is no defense that Defendants actually competed in some respects with each other or failed to eliminate all competition between them. Similarly, a price-fixing conspiracy is unlawful even if it did not extend to all services or products sold by Defendants or did not affect all of their customers or transactions.

VERDICT FORM

1. Do you find that Class Plaintiffs have proved by a preponderance of the evidence that a conspiracy existed to follow and enforce the Cooperative Compensation Rule in the subject MLSs during the conspiracy period alleged in this case – April 29, 2015 through June 30, 2022?

YES X **NO** ______

If your answer to Question 1 is "Yes", proceed to Question 2. If your answer to Question 1 is "No", stop here and your deliberations are complete; do not answer any remaining questions on this Verdict Form, and proceed to the signature page.

2. Do you find that the conspiracy set forth in Question 1 had the purpose or effect of raising, inflating, or stabilizing broker commission rates paid by home sellers?

YES X **NO** ______

If your answer to Question 2 is "Yes", proceed to Question 3. If your answer to Question 2 is "No", stop here and your deliberations are complete; do not answer any remaining questions on this Verdict Form, and proceed to the signature page.

3. Which of the following corporations or entities do you find knowingly and voluntarily joined the conspiracy set forth in Question 1 with the purpose of furthering its goals?

National Association of Realtors	**YES**	X	**NO**	____
HomeServices of America, Inc.	**YES**	X	**NO**	____
BHH Affiliates, LLC	**YES**	X	**NO**	____

HSF Affiliates, LLC	**YES**	X	**NO**	
Keller Williams Realty, Inc.	**YES**	X	**NO**	
Anywhere Real Estate, Inc.	**YES**	X	**NO**	
RE/MAX LLC	**YES**	X	**NO**	

4. Do you find that the conspiracy set forth in Question 1 caused the Class Plaintiffs to pay more for real estate brokerage services when selling their homes than they would have paid absent that conspiracy?

YES X **NO** ______

If your answer to Question 4 is "Yes", proceed to Question 5 If your answer to Question 4 is "No", stop here and your deliberations are complete; do not answer any remaining questions on this Verdict Form, and proceed to the signature page.

5. State the amount of damages proved by the Class Plaintiffs.

$ 1,785,310,872

Please sign and date indicating that you unanimously agree on the above responses.

Tim Collins

Aaron James

Gary Schmidt

Jonathan Brown

Date: 10/31/2023

Federal Trade Commission v. Staples, Inc.

970 F.Supp. 1066 (D.D.C. 1997)

THOMAS F. HOGAN, District Judge. Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), seeks a preliminary injunction pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), to enjoin the consummation of any acquisition by defendant Staples, Inc., of defendant Office Depot, Inc., pending final disposition before the Commission of administrative proceedings to determine whether such acquisition may substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The proposed acquisition has been postponed pending the Court's decision on the motion for a preliminary injunction, which is now before the Court for decision after a five-day evidentiary hearing and the filing of proposed Findings of Fact and conclusions of law. For the reasons set forth below, the Court will grant the plaintiff's motion. This Memorandum Opinion constitutes the Court's *Findings of Fact* and conclusions of law.

BACKGROUND

*** Defendants are both corporations which sell office products—including office supplies, business machines, computers and furniture—through retail stores, commonly described as office supply superstores, as well as through direct mail delivery and contract stationer operations. Staples is the second largest office superstore chain in the United States with approximately 550 retail stores located in 28 states and the District of Columbia, primarily in the Northeast and California. In 1996 Staples' revenues from those stores were approximately $4 billion through all operations. Office Depot, the largest office superstore chain, operates over 500 retail office supply superstores that are located in 38 states and the District of Columbia, primarily in the South and Midwest. Office Depot's 1996 sales were approximately $6.1 billion. OfficeMax, Inc., is the only other office supply superstore firm in the United States.

On September 4, 1996, defendants Staples and Office Depot, and Marlin Acquisition Corp. ("Marlin"), a wholly-owned subsidiary of Staples, entered into an "Agreement and Plan of Merger" whereby Marlin would merge with and into Office Depot, and Office Depot would become a wholly-owned subsidiary of Staples. *** Pursuant to the Hart-Scott-Rodino Improvements Act of 1976, 15 U.S.C. § 18a, Staples and Office Depot filed a Premerger Notification and Report Form with the FTC and Department of Justice on October 2, 1996. ***

On March 10, 1997, the Commission voted 4-1 to challenge the merger and authorized commencement of an action under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), to seek a temporary restraining order and a preliminary injunction barring the merger. Following this vote, the defendants and the FTC staff negotiated a consent decree that would have authorized the merger to proceed on the condition that Staples and Office Depot sell 63 stores to OfficeMax. However, the Commission voted 3-2 to reject the proposed consent decree on April 4, 1997. The FTC then filed this suit on April 9, 1997, seeking a temporary retraining order and preliminary injunction against the merger pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), pending the completion of an administrative proceeding pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 12, 21. ***

DISCUSSION

I. Section 13(B) Standard for Preliminary Injunctive Relief

Section 7 of the Clayton Act, 15 U.S.C. § 18, makes it illegal for two companies to merge "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Whenever the Commission has reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act, the FTC may seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality. See Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b). However, in a suit for preliminary relief, the FTC is not required to prove, nor is the Court required to find, that the proposed merger would in fact violate Section 7 of the Clayton Act. The determination of whether the acquisition actually violates the antitrust laws is reserved for the Commission and is, therefore, not before this Court. The only question before this Court is whether the FTC has made a showing which justifies preliminary injunctive relief.

Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), provides that "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond." Courts have interpreted this to mean that a court must engage in a two-part analysis in determining whether to grant an injunction under section 13(b). (1) First, the Court must determine the Commission's likelihood of success on the merits in its case under Section 7 of the Clayton Act, and (2) Second, the Court must balance the equities.

A. Likelihood of Success on the Merits

Likelihood of success on the merits in cases such as this means the likelihood that the Commission will succeed in proving, after a full administrative trial on the merits, that the effect of a merger between Staples and Office Depot "may be substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act. The Commission satisfies its burden to show likelihood of success if it "raises questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the Commission in the first instance and ultimately by the Court of Appeals." *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991). ***

In order to determine whether the Commission has met its burden with respect to showing its likelihood of success on the merits, that is, whether the FTC has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals and that there is a "reasonable probability" that the challenged transaction will substantially impair competition, the Court must consider the likely competitive effects of the merger, if any. Analysis of the likely competitive effects of a merger requires determinations of (1) the "line of commerce" or product market in which to assess the transaction, (2) the "section of the country" or geographic market in which to assess the transaction, and (3) the transaction's probable effect on competition in the product and geographic markets. See *United States v. Marine Bancorporation*, 418 U.S. 602, 618-23 (1974).

II. The Geographic Market

One of the few issues about which the parties to this case do not disagree is that metropolitan areas are the appropriate geographic markets for analyzing the competitive effects of the proposed merger. A geographic market is that geographic area "to which consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition." *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994). In its first amended complaint, the FTC identified forty-two such metropolitan areas as well as future areas which could suffer anti-competitive effects from the proposed merger. Defendants have not challenged the FTC's geographic market definition in this proceeding. Therefore, the Court will accept the relevant geographic markets identified by the Commission.

III. The Relevant Product Market

In contrast to the parties' agreement with respect to the relevant geographic market, the Commission and the defendants sharply disagree with respect to the appropriate definition of the relevant product market or line of commerce. As with many antitrust cases, the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market.

The Commission defines the relevant product market as "the sale of consumable office supplies through office superstores,"[7] with "consumable" meaning products that consumers buy recurrently, i.e., items which "get used up" or discarded. For example, under the Commission's definition, "consumable office supplies" would not include capital goods such as computers, fax machines, and other business machines or office furniture, but does include such products as paper, pens, file folders, post-it notes, computer disks, and toner cartridges. The defendants characterize the FTC's product market definition as "contrived" with no basis in law or fact, and counter that the appropriate product market within which to assess the likely competitive consequences of a Staples-Office Depot combination is simply the overall sale of office products, of which a combined Staples-Office Depot accounted for 5.5% of total sales in North America in 1996. In addition, the defendants argue that the challenged combination is not likely "substantially to lessen competition" however the product market is defined. After considering the arguments on both sides and all of the evidence in this case and making evaluations of each witness's credibility as well as the weight that the Court should give certain evidence and testimony, the Court finds that the appropriate relevant product market definition in this case is, as the Commission has argued, the sale of consumable office supplies through office supply superstores.

The general rule when determining a relevant product market is that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962); see also *United States v. E.I. du Pont de Nemours and Co.*, 351 U.S. 377, 395 (1956). Interchangeability of use and cross-elasticity of demand look to the availability of substitute commodities, *i.e.* whether there are other products offered to consumers which are similar in character or use to the product or products in question, as well as how far buyers will go to substitute one commodity for another. ***

[7] The Commission also offered an alternative product market, that of the sale of consumable office supplies through retail stores to small businesses and individuals with home offices.

Whether there are other products available to consumers which are similar in character or use to the products in question may be termed "functional interchangeability." See, *e.g., E.I. du Pont de Nemours*, 351 U.S. at 399. This case, of course, is an example of perfect "functional interchangeability." The consumable office products at issue here are identical whether they are sold by Staples or Office Depot or another seller of office supplies. A legal pad sold by Staples or Office Depot is "functionally interchangeable" with a legal pad sold by Wal-Mart. A post-it note sold by Staples or Office Depot is "functionally interchangeable" with a post-it note sold by Viking or Quill. A computer disk sold by Staples-Office Depot is "functionally interchangeable" with a computer disk sold by CompUSA. No one disputes the functional interchangeability of consumable office supplies. However, as the government has argued, functional interchangeability should not end the Court's analysis.

*** [T]he Commission has argued that a slight but significant increase in Staples-Office Depot's prices will not cause a considerable number of Staples-Office Depot's customers to purchase consumable office supplies from other non-superstore alternatives such as Wal-Mart, Best Buy, Quill, or Viking. On the other hand, the Commission has argued that an increase in price by Staples would result in consumers turning to another office superstore, especially Office Depot, if the consumers had that option. Therefore, the Commission concludes that the sale of consumable office supplies by office supply superstores is the appropriate relevant product market in this case, and products sold by competitors such as Wal-Mart, Best Buy, Viking, Quill, and others should be excluded.

The Court recognizes that it is difficult to overcome the first blush or initial gut reaction of many people to the definition of the relevant product market as the sale of consumable office supplies through office supply superstores. The products in question are undeniably the same no matter who sells them, and no one denies that many different types of retailers sell these products. After all, a combined Staples-Office Depot would only have a 5.5% share of the overall market in consumable office supplies. Therefore, it is logical to conclude that, of course, all these retailers compete, and that if a combined Staples-Office Depot raised prices after the merger, or at least did not lower them as much as they would have as separate companies, that consumers, with such a plethora of options, would shop elsewhere.

The Court acknowledges that there is, in fact, a broad market encompassing the sale of consumable office supplies by all sellers of such supplies, and that those sellers must, at some level, compete with one another. However, the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes. The Supreme Court has recognized that within a broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). With respect to such submarkets, the Court explained "[b]ecause Section 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce,' it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." *Id.* There is a possibility, therefore, that the sale of consumable office supplies by office superstores may qualify as a submarket within a larger market of retailers of office supplies in general.

The Court in *Brown Shoe* provided a series of factors or "practical indicia" for determining whether a submarket exists including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* Since the Court described these factors as "practical indicia" rather than requirements, subsequent cases have found that submarkets can exist even if only some of these factors are present.

The Commission discussed several of the *Brown Shoe* "practical indicia" in its case, such as industry recognition, and the special characteristics of superstores which make them different from other sellers of office supplies, including distinct formats, customers, and prices. Primarily, however, the FTC focused on what it termed the "pricing evidence," which the Court finds corresponds with *Brown Shoe's* "sensitivity to price changes" factor. First, the FTC presented evidence comparing Staples' prices in geographic markets where Staples is the only office superstore, to markets where Staples competes with Office Depot or OfficeMax, or both. Based on the FTC's calculations, in markets where Staples faces no office superstore competition at all, something which was termed a one firm market during the hearing, prices are 13% higher than in three firm markets where it competes with both Office Depot and OfficeMax. The data which underly this conclusion make it compelling evidence. Prices were compared as of January 1997, which, admittedly, only provides data for one specific point in time. However, rather than comparing prices from only a small sampling or "basket" of goods, the FTC used an office supply sample accounting for 90% of Staples' sales and comprised of both price sensitive and non price sensitive items. The FTC presented similar evidence based on Office Depot's prices of a sample of 500 items, also as of January 1997. Similarly, the evidence showed that Office Depot's prices are significantly higher—well over 5% higher, in Depot-only markets than they are in three firm markets. ***

The FTC also pointed to internal Staples documents which present price comparisons between Staples' prices and Office Depot's prices and Staples' prices and OfficeMax's prices within different price zones.[9] The comparisons between Staples and Office Depot were made in August 1994, January 1995, August 1995, and May 1996. Staples' prices were compared with OfficeMax's prices in August 1994, July 1995, and January 1996. For each comparison, Staples calculations were based on a fairly large "basket" or sample of goods, approximately 2000 SKUs containing both price sensitive and non-price sensitive items. Using Staples' data, but organizing it differently to show which of those zones were one, two, or three firm markets, the FTC showed once again that Staples charges significantly higher prices, more than 5% higher, where it has no office superstore competition than where it competes with the two other superstores. ***

This evidence all suggests that office superstore prices are affected primarily by other office superstores and not by non-superstore competitors such as mass merchandisers like Wal-Mart, Kmart, or Target, wholesale clubs such as BJ's, Sam's, and Price Costco, computer or electronic stores such as Computer City and Best Buy, independent retail office supply stores, mail orders firms like Quill and Viking, and contract stationers. Though the FTC did not present the Court with evidence regarding the precise amount of non-superstore competition in each of Staples'

[9] It was established at the hearing that Staples and Office Depot do not maintain nationally uniform prices in their stores. Instead, both companies currently organize their stores into price zones which are simply groups of one or more stores that have common prices.

and Office Depot's one, two, and three firm markets, it is clear to the Court that these competitors, albeit in different combinations and concentrations, are present in every one of these markets. ***

The evidence with respect to the wholesale club stores is consistent. *** For example, Staples' maintains a "warehouse club only" price zone, which indicates a zone where Staples exists with a warehouse club but without another office superstore. The data presented by the Commission on Staples' pricing shows only a slight variation in prices (1%-2%) between "warehouse club only" zones and one superstore markets without a warehouse club. Additionally, in May 1996, two price comparison studies done by Staples, first using 2,084 SKUs including both price sensitive and non-price sensitive items and then using only 244 SKUs of price sensitive items, showed that prices in the "club only" zones, on average, were over 10% higher than in zones where Staples competes with Office Depot and/or OfficeMax.

There is also consistent evidence with respect to computer and/or consumer electronics stores such as Best Buy. For example, Office Depot maintains a separate price zone, which it calls "zone 30," for areas with Best Buy locations but no other office supply superstores. However, the FTC introduced evidence, based on a January 1997 market basket of "top 500 items by velocity," that prices in Office Depot's "zone 30" price zone are almost as high as in its "non-competitive" price zone, the zone where it does not compete with another office superstore.

There is similar evidence with respect to the defendants' behavior when faced with entry of another competitor. The evidence shows that the defendants change their price zones when faced with entry of another superstore, but do not do so for other retailers. For example, Staples changed its price zone for Cincinnati to a lower priced zone when Office Depot and OfficeMax entered that area. *** There is no evidence that zones change and prices fall when another non-superstore retailer enters a geographic market.

Though individually the FTC's evidence can be criticized for looking at only brief snapshots in time or for considering only a limited number of SKUs, taken together, however, the Court finds this evidence a compelling showing that a small but significant increase in Staples' prices will not cause a significant number of consumers to turn to non-superstore alternatives for purchasing their consumable office supplies. Despite the high degree of functional interchangeability between consumable office supplies sold by the office superstores and other retailers of office supplies, the evidence presented by the Commission shows that even where Staples and Office Depot charge higher prices, certain consumers do not go elsewhere for their supplies. This further demonstrates that the sale of office supplies by non-superstore retailers are not responsive to the higher prices charged by Staples and Office Depot in the one firm markets. This indicates a low cross-elasticity of demand between the consumable office supplies sold by the superstores and those sold by other sellers. ***

Another of the "practical indicia" for determining the presence of a submarket suggested by *Brown Shoe* is "industry or public recognition of the submarket as a separate economic entity." The Commission offered abundant evidence on this factor from Staples' and Office Depot's documents which shows that both Staples and Office Depot focus primarily on competition from other superstores. The documents reviewed by the Court show that the merging parties evaluate their "competition" as the other office superstore firms, without reference to other retailers, mail order firms, or independent stationers. In document after document, the parties refer to, discuss, and make business decisions based upon the assumption that "competition" refers to other office superstores only. For example, Staples uses the phrase "office superstore industry" in strategic planning documents. Staples' 1996 Strategy Update refers to the "Big Three" and "improved relative competitive position" since 1993 and states that Staples is "increasingly recognized as [the] industry leader." A document analyzing a possible acquisition of OfficeMax referenced the "[b]enefits from pricing in [newly] noncompetitive markets," and also the fact that there was "a potential margin lift overall as the industry moves to 2 players." ***

For the reasons set forth in the above analysis, the Court finds that the sale of consumable office supplies through office supply superstores is the appropriate relevant product market for purposes of considering the possible anti-competitive effects of the proposed merger between Staples and Office Depot. The pricing evidence indicates a low cross-elasticity of demand between consumable office products sold by Staples or Office Depot and those same products sold by other sellers of office supplies. This same evidence indicates that non-superstore sellers of office supplies are not able to effectively constrain the superstores prices, because a significant number of superstore customers do not turn to a non-superstore alternative when faced with higher prices in the one firm markets. In addition, the factors or "practical indicia" of *Brown Shoe* support a finding of a "submarket" under the facts of this case, and "submarkets," as *Brown Shoe* established, may themselves be appropriate product markets for antitrust purposes. 370 U.S. at 325. ***

IV. Probable Effect on Competition

After accepting the Commission's definition of the relevant product market, the Court next must consider the probable effect of a merger between Staples and Office Depot in the geographic markets previously identified. One way to do this is to examine the concentration statistics and HHIs within the geographic markets. If the relevant product market is defined as the sale of consumable office supplies through office supply superstores, the HHIs in many of the geographic markets are at problematic levels even before the merger. Currently, the least concentrated market is that of Grand Rapids-Muskegon-Holland, Michigan, with an HHI of 3,597, while the most concentrated is Washington, D.C. with an HHI of 6,944. In contrast, after a merger of Staples and Office Depot, the least concentrated area would be Kalamazoo-Battle Creek Michigan, with an HHI of 5,003, and many areas would have HHIs of 10,000. The average increase in HHI caused by the merger would be 2,715 points. The concentration statistics show that a merged Staples-Office Depot would have a dominant market share in 42 geographic markets across the country. The combined shares of Staples and Office Depot in the office superstore market would be 100% in 15 metropolitan areas. It is in these markets the post-merger HHI would be 10,000. In 27 other metropolitan areas, where the number of office superstore competitors would drop from three to two, the post-merger market shares would range from 45% to 94%, with post-merger HHIs ranging from 5,003 to 9,049. Even the lowest of these HHIs indicates a "highly concentrated" market.

*** [T]hough the Supreme Court has established that there is no fixed threshold at which an increase in market concentration triggers the antitrust laws, *see, e.g.*, *United States v. Philadelphia National Bank*, 374 U.S. 321, 363-65 (1963), this is clearly not a borderline case. The pre-merger markets are already in the "highly concentrated" range, and the post-merger HHIs show an average increase of 2,715 points. Therefore, the Court finds that the plaintiff's have shown a likelihood of success on the merits. With HHIs of this level, the Commission certainly has shown a "reasonable probability" that the proposed merger would have an anti-competitive effect.

The HHI calculations and market concentration evidence, however, are not the only indications that a merger between Staples and Office Depot may substantially lessen competition. Much of the evidence already discussed with respect to defining the relevant product market also indicates that the merger would likely have an anti-competitive effect. The evidence of the defendants' own current pricing practices, for example, shows that an office superstore chain facing no competition from other superstores has the ability to profitably raise prices for consumable office supplies above competitive levels. The fact that Staples and Office Depot both charge higher prices where they face no superstore competition demonstrates that an office superstore can raise prices above competitive levels. The evidence also shows that defendants also change their price zones when faced with entry of another office superstore, but do not do so for other retailers. Since prices are significantly lower in markets where Staples and Office Depot compete, eliminating this competition with one another would free the parties to charge higher prices in those markets, especially those in which the combined entity would be the sole office superstore. In addition, allowing the defendants to merge would eliminate significant future competition. Absent the merger, the firms are likely, and in fact have planned, to enter more of each other's markets, leading to a deconcentration of the market and, therefore, increased competition between the superstores. ***

By showing that the proposed transaction between Staples and Office Depot will lead to undue concentration in the market for consumable office supplies sold by office superstores in the geographic markets agreed upon by the parties, the Commission establishes a presumption that the transaction will substantially lessen competition. ***

V. Entry Into the Market

*** If the defendants' evidence regarding entry showed that the Commission's market-share statistics give an incorrect prediction of the proposed acquisition's probable effect on competition because entry into the market would likely avert any anti-competitive effect by acting as a constraint on Staples-Office Depot's prices, the Court would deny the FTC's motion. The Court, however, cannot make such a finding in this case.

The defendants argued during the hearing and in their briefs that the rapid growth in overall office supply sales has encouraged and will continue to encourage expansion and entry. *** There are problems with the defendants' evidence, however, that prevent the Court from finding in this case that entry into the market by new competitors or expansion into the market by existing firms would likely avert the anti-competitive effects from Staples' acquisition of Office Depot. For example, while it is true that all office superstore entrants have entered within the last 11 years, the recent trend for office superstores has actually been toward exiting the market rather than entering. Over the past few years, the number of office superstore chains has dramatically dropped from twenty-three to three. All but Staples, Office Depot, and OfficeMax have either closed or been acquired. The failed office superstore entrants include very large, well-known retail establishments such as Kmart, Montgomery Ward, Ames, and Zayres. A new office superstore would need to open a large number of stores nationally in order to achieve the purchasing and distribution economies of scale enjoyed by the three existing firms. Sunk costs would be extremely high. Economies of scale at the local level, such as in the costs of advertizing and distribution, would also be difficult for a new superstore entrant to achieve since the three existing firms have saturated many important local markets. For example, according to the defendants' own saturation analyses, Staples estimates that there is room for less than two additional superstores in the Washington, D.C. area and Office Depot estimates that there is room for only two more superstores in Tampa, Florida.

The Commission offered Office 1 as a specific example of the difficulty of entering the office superstore arena. Office 1 opened its first two stores in 1991. By the end of 1994, Office 1 had 17 stores, and grew to 35 stores operating in 11 Midwestern states as of October 11, 1996. As of that date, Office 1 was the fourth largest office supply superstore chain in the United States. Unfortunately, also as of that date, Office 1 filed for Chapter 11 bankruptcy protection. Brad Zenner, President of Office 1, testified through declaration, that Office 1 failed because it was severely undercapitalized in comparison with the industry leaders, Staples, Office Depot, and OfficeMax. In addition, Mr. Zenner testified that when the three leaders ultimately expanded into the smaller markets where Office 1 stores were located, they seriously undercut Office 1's retail prices and profit margins. Because Office 1 lacked the capitalization of the three leaders and lacked the economies of scale enjoyed by those competitors, Office 1 could not remain profitable.

For the reasons discussed above, the Court finds it extremely unlikely that a new office superstore will enter the market and thereby avert the anti-competitive effects from Staples' acquisition of Office Depot. ***

The defendants' final argument with respect to entry was that existing retailers such as Sam's Club, Kmart, and Best Buy have the capability to reallocate their shelf space to include additional SKUs of office supplies. While stores such as these certainly do have the power to reallocate shelf space, there is no evidence that they will in fact do this if a combined Staples-Office Depot were to raise prices by 5% following a merger. In fact, the evidence indicates that it is more likely that they would not. For example, even in the superstores' anti-competitive zones where either Staples or Office Depot does not compete with other superstores, no retailer has successfully expanded its consumable office supplies to the extent that it constrains superstore pricing. Best Buy attempted such an expansion by creating an office supplies department in 1994, offering 2000 SKUs of office supplies, but found the expansion less profitable than hoped for and gave up after two years. For these reasons, the Court also cannot find that the ability of many sellers of office supplies to reconfigure shelf space and add SKUs of office supplies is likely to avert anti-competitive effects from Staples' acquisition of Office Depot. The Court will next consider the defendants' efficiencies defense.

VI. Efficiencies

Whether an efficiencies defense showing that the intended merger would create significant efficiencies in the relevant market, thereby offsetting any anti-competitive effects, may be used by a defendant to rebut the government's prima facie case is not entirely clear. *** The Supreme Court, however, in *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 579 (1967), stated that "[p]ossible economies cannot be used as a defense to illegality in section 7 merger cases." There has been great disagreement regarding the meaning of this precedent and whether an efficiencies defense is permitted. Assuming that it is a viable defense, however, the Court cannot find in this case that the defendants' efficiencies evidence rebuts the presumption that the merger may substantially lessen competition or shows that the Commission's evidence gives an inaccurate prediction of the proposed acquisition's probable effect. ***

Defendants' submitted an "Efficiencies Analysis" which predicated that the combined company would achieve savings of between $4.9 and $6.5 billion over the next five years. In addition, the defendants argued that the merger would also generate dynamic efficiencies. For example, defendants argued that as suppliers become more efficient due to their increased sales volume to the combined Staples-Office Depot, they would be able to lower prices to their other retailers. Moreover, defendants argued that two-thirds of the savings realized by the combined company would be passed along to consumers.

Evaluating credibility, as the Court must do, the Court credits the testimony and Report of the Commission's expert, David Painter, over the testimony and Efficiencies Study of the defendants' efficiencies witness, Shira Goodman, Senior Vice President of Integration at Staples. *** First, the Court notes that the cost savings estimate of $4.947 billion over five years which was submitted to the Court exceeds by almost 500% the figures presented to the two Boards of Directors in September 1996, when the Boards approved the transaction. ***

The Court also finds that the defendants' projected "Base Case" savings of $5 billion are in large part unverified, or at least the defendants failed to produce the necessary documentation for verification. *** For example, defendants' largest cost savings, over $2 billion or 40% of the total estimate, are projected as a result of their expectation of obtaining better prices from vendors. However, this figure was determined in relation to the cost savings enjoyed by Staples at the end of 1996 without considering the additional cost savings that Staples would have received in the future as a stand-alone company. Since Staples has continuously sought and achieved cost savings on its own, clearly the comparison that should have been made was between the projected future cost savings of Staples as a stand-alone company, not its past rate of savings, and the projected future cost savings of the combined company. Thus, the calculation in the Efficiencies Analysis included product cost savings that Staples and Office Depot would likely have realized without the merger. In fact, Mr. Painter testified that, by his calculation, 43% of the estimated savings are savings that Staples and Office Depot would likely have achieved as stand-alone entities.

There are additional examples of projected savings, such as the projected savings on employee health insurance, which are not merger specific, but the Court need not discuss every example here. However, in addition to the non-merger specific projected savings, Mr. Painter also revealed problems with the defendants' methodology in making some of the projections. For example, in calculating the projected cost savings from vendors, Staples estimated cost savings for a selected group of vendors, and then extrapolated these estimated savings to all other vendors. Mr. Painter testified that, although Hewlett Packard is Staples' single largest vendor, it was not one of the vendors used for the savings estimate. In addition, the evidence shows that Staples was not confident that it could improve its buying from Hewlett Packard. Yet, Staples' purchases and sales of Hewlett Packard products were included in the "all other" vendor group, and defendants, thereby, attributed cost savings in the amount of $207 million to Hewlett Packard even though Staples' personnel did not believe that they could, in fact, achieve cost savings from Hewlett Packard.

In addition to the problems that the Court has with the efficiencies estimates themselves, the Court also finds that the defendants' projected pass through rate—the amount of the projected savings that the combined company expects to pass on to customers in the form of lower prices—is unrealistic. *** [I]n this case the defendants have projected a pass through rate of two-thirds of the savings while the evidence shows that, historically, Staples has passed through only 15-17%. Based on the above evidence, the Court cannot find that the defendants have rebutted the presumption that the merger will substantially lessen competition by showing that, because of the efficiencies which will result from the merger, the Commission's evidence gives an inaccurate prediction of the proposed acquisition's probable effect. Therefore, the only remaining issue for the Court is the balancing of the equities.

VII. The Equities

Where, as in this case, the Court finds that the Commission has established a likelihood of success on the merits, a presumption in favor of a preliminary injunction arises. Despite this presumption, however, once the Court has determined the FTC's likelihood of success on the merits, it must still turn to and consider the equities. *** There are two types of equities which the Court must consider in all Section 13(b) cases, private equities and public equities. In this case, the private equities include the interests of the shareholders and employees of Staples and Office Depot. The public equities are the interests of the public, either in having the merger go through or in preventing the merger. An analysis of the equities properly includes the potential benefits, both public and private, that may be lost by a merger blocking preliminary injunction. ***

The strong public interest in effective enforcement of the antitrust laws weighs heavily in favor of an injunction in this case, as does the need to preserve meaningful relief following a full administrative trial on the merits. "Unscrambling the eggs" after the fact is not a realistic option in this case. Both the plaintiff as well as the defendants introduced evidence regarding the combined company's post-merger plans, including the consolidation of warehouse and supply facilities in order to integrate the two distribution systems, the closing of 40 to 70 Office Depot and Staples stores, changing the name of the Office Depot stores, negotiating new contracts with manufacturers and suppliers, and, lastly, the consolidation of management which is likely to lead to the loss of employment for many of Office Depot's key personnel. As a result, the Court finds that it is extremely unlikely, if the Court denied the plaintiff's motion and the merger were to go through, that the merger could be effectively undone and the companies divided if the agency later found that the merger violated the antitrust laws. *** The public equities raised by the defendants simply do not outweigh those offered by the FTC. ***

Turning finally to the private equities, the defendants have argued that the principal private equity at stake in this case is the loss to Office Depot shareholders who will likely lose a substantial portion of their investments if the merger is enjoined. The Court certainly agrees that Office Depot shareholders may be harmed, at least in the short term, if the Court granted the plaintiff's motion and enjoined the merger. This private equity alone, however, does not suffice to justify denial of a preliminary injunction.

The defendants have also argued that Office Depot itself has suffered a decline since the incipiency of this action. It is clear that Office Depot has lost key personnel, especially in its real estate department. This has hurt this year's projected store openings. The defendants argue, therefore, that Office Depot, as a separate company, will have difficulty competing if the merger is enjoined. While the Court recognizes that Office Depot has indeed been hurt or weakened as an independent stand-alone company, the damage is not irreparable. ***

CONCLUSION

*** In light of the undeniable benefits that Staples and Office Depot have brought to consumers, it is with regret that the Court reaches the decision that it must in this case. This decision will most likely kill the merger. The Court feels, to some extent, that the defendants are being punished for their own successes and for the benefits that they have brought to consumers. In effect, they have been hoisted with their own petards. In addition, the Court is concerned with the broader ramifications of this case. The superstore or "category killer" like office supply superstores are a fairly recent phenomenon and certainly not restricted to office supplies. There are a host of superstores or "category killers" in the United States today, covering such areas as pet supplies, home and garden products, bed, bath, and kitchen products, toys, music, books, and electronics. Indeed, such "category killer" stores may be the way of retailing for the future. It remains to be seen if this case is sui generis or is the beginning of a new wave of FTC activism. For these reasons, the Court must emphasize that the ruling in this case is based strictly on the facts of this particular case, and should not be construed as this Court's recognition of general superstore relevant product markets. *** The FTC's motion for a preliminary injunction shall be granted.