
Supreme Court of the State of New York
Appellate Division – Second Department

Docket No.:
2023-09496

M.V.B. COLLISION, INC. d/b/a MID ISLAND COLLISION,
as assignee of JERONE SEALY,

Plaintiff-Appellant,

- against -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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ISSUES PRESENTED BY APPEAL

An insurance company was obligated to negotiate the cost of automobile repairs in “good faith,” to pay the prevailing competitive price in the relevant “repair market,” and to identify a reasonably convenient provider who could have restored the car to pre-loss condition for the price asserted by the insurer. Evidence in the summary judgment record reflected that the insurance company instructed its agents to not negotiate the cost of repairs at all, defined the relevant repair market in bad faith, and did not identify another facility who could have performed the repairs at the insurer’s price. Should the Supreme Court’s grant of summary judgment be reversed?

STATEMENT OF FACTS

Mid Island Collision Invests in Offering Quality Automotive Repairs.

Mid Island Collision (“Mid Island”) is a large collision center in the automotive repair industry,¹ located in Nassau County and drawing customers from all over the tri-state area. *See* A1082. In terms of revenue, on an annual basis between 2019 and 2020 it earned approximately \$20 million. *See* A1096. But running the business is not cheap. To provide its professional services, Mid Island employs forty to fifty technicians, most of whom earn between \$25 and \$50 per hour on their own, and some earn in the vicinity of \$300,000 per year. *See* A141-42. Original Equipment Manufacturers (“OEMs”) also conduct periodic audits to ensure Mid Island’s employees have the appropriate training, certifications, and equipment. *See* A1184; A1205. And the requirements for training, equipment and costs only rise with time. *See* A1099.

These costs have risen not just as a function of a rising tide in the economy, but because of an explosion of sophistication in automobile engineering, in particular. By way of example, in the last decade automobiles have become infused with collision avoidance technology. “The alignment, the steering, the mechanical mechanisms in the car, the unbodies. Every bit of the car has become a point of impact for safety and liability,” Mid Island’s owner has explained. “There’s nothing

¹ *See* A1132.

on these cars any longer that you can play with.” *See* A143. So even on what some consider “low-end” cars, these “less expensive brands [too] have now become complicated.” *See* A142.

To keep up with the costs of doing business, Mid Island posts labor rates that are sufficient to recoup its expenses and turn a reasonable profit. *See* A161-62. In 2019, this labor rate was \$125 per hour. *See* A107. By contrast, repairs performed directly at a dealer will ordinarily yield no less than \$200 per hour. *See* A162.

Jerone Sealy Suffers a Car Accident and Hires Mid Island for Repairs, the Cost of Which State Farm Substantially Underestimates.

On May 2, 2019, Jerone Sealy was exiting a highway in his one-year-old Honda when he was rear-ended by a car that left the scene of the accident. *See* A390. He hired Mid Island to repair the vehicle at its \$125 per hour labor rate. *See* A265. Without the insurance company deeming the car a total loss, and with the obligation to fully restore the vehicle to its pre-loss condition, 11 NYCRR 216.7(b)(1), Mid Island proceeded. It issued a preliminary estimate for the repair of Mr. Sealy’s vehicle, which estimated a cost of \$34,830.17. *See* A217. In response, the following day, State Farm still did not declare the car a total loss but instead informed Mr. Sealy that it was only offering \$3,538.90—which, with his \$1,000 deductible, it claimed would be “sufficient” to repair the car to its pre-accident condition. *See* A469. In the process, it told the insured that it had “negotiat[ed] in good faith” with

Mid Island. *Id.* Had Mr. Sealy accepted this offer, that would have ended the negotiation and the extent of his coverage.

On June 4, 2019, despite its prior claims about what would be enough to repair the car, State Farm now said in a new Notice of Rights letter that “\$7090.05 plus your deductible of \$1000.00 is sufficient to repair your vehicle...” *See* A504 (emphasis added). Yet fifteen days later it changed its representation once again—this time, in yet another new Notice of Rights letter, it informed the insured that “\$10,655.92 plus your deductible of \$1000” was now the correct number. *See* A506 (emphasis added).

Though State Farm claims that its rising estimates revealed good faith negotiations, there was a darker underbelly to this type of negotiation. State Farm tacitly acknowledged that its first representation to its insured undervalued the cost of repair by nearly 70%. *Compare* A469 and A506. And on one facet of the repairs, it never budged: it would only offer Mid Island about \$50 per hour for labor—60% lower than Mid Island’s price. *See* A288, A296, A304, and A314.

Contrary to Insurance Regulations Requiring Good Faith Negotiations, State Farm Admits that It Offers One-Price-Fits-All Labor Rates—and Bases the Self-Serving Price on Bad Faith Considerations.

As discovery revealed, State Farm stuck to its \$50 per hour offer because of a provision listed on page 18 of its policy with the insured. That provision states that it will pay the cost to repair a covered vehicle based, in relevant part, on “the

prevailing competitive price.” *See* A335. Though the term is not capitalized—and thus is not addressed in the policy’s opening section for “Definitions” (A320-23)—State Farm then defines “prevailing competitive price” in a fashion that rests heavily on its own good faith. It would deem a price to be “prevailing,” State Farm said, if a “survey made by us” reflected that it drew a consensus in “the repair market” in the area. *See* A335. It expressed this definition in full as follows:

The prevailing competitive price means prices charged by a majority of the repair market in the area where the covered vehicle is to be repaired as determined by a survey made by us. If asked, we will identify some facilities that will perform the repairs at the prevailing competitive price. The estimate will include parts sufficient to restore the covered vehicle to its pre-loss condition. *You agree with us that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.*

See A335 (emphasis in original).

With this policy-language in hand, State Farm proceeded to anchor its “survey” to a company called Certified Collateral Corporation Information Services (“CCC”). *See* A1127 (identifying that it “reviewed industry data, including that compiled by ... “CCC”—and identifying no source other than that). *See also* A9. CCC is a company that provides automotive repair data without differentiating providers by quality or size, without distinguishing between insurer or repair facility

completion, and without filtering for repairs completed for large-scale fleet or municipal customers who “are historically below market-average rates” (*see* A1212)—and which instead provides the data with a warning that it not be used as a labor rate survey. “This report,” CCC cautions, “is not a labor rate survey.” *See* A1344-45.

By relying on CCC, State Farm then proceeds to define “the repair market” so broadly that a multi-million-dollar company like Mid Island would be grouped together with tiny and unsophisticated garages or others who historically provide below market-average rates—focusing only on whether the estimates emerged from a car repairer on Long Island. *See* A1060 (“I understand that CCC collects data from estimates concerning the labor rate in geographic markets,” and referencing “average labor rates ... in Nassau and Suffolk count[ies]”). *See also* A1139 at ¶52 (“CCC can aggregate labor rate data from repair facilities as the labor rate must be used to multiply it by the number of labor hours on estimates to calculate the labor amounts for repairs”). Defining “the repair market” with this breadth had a natural effect on the way it calculated the prevailing rate within the industry, because it relied upon a simple average. *See, e.g.,* A43 (describing methodology of dividing gross labor amounts by total hours input into the CCC program). Averaging “the repair market” with this “survey,” State Farm created a \$50 price point—an amount that fell below rates that courts had sustained for Mid Island as “fair and reasonable”

nearly twenty years prior. *See* A1236 (sustaining \$55 per hour in 2003); A1227 (sustaining \$65 per hour in 2007); A1224 (sustaining \$65 per hour in 2007).

The Dispute Over the Repair Bill Culminates in Litigation.

While State Farm and Mid Island have disputed multiple components of the repair of this vehicle, by far the biggest source of economic disagreement is the labor rate. The dispute between State Farm and Mid Island culminated in the present lawsuit for breach of contract, where Mid Island took an assignment from its customer to seek coverage from the insurance company to pay down the repair bill. *See* A264. *See also* A16-20. After discovery closed, State Farm sought summary judgment, arguing in relevant part that it negotiated in good faith and that paying \$50 per hour on labor comported with its contract with Mr. Sealy. *See* A30-50. Mid Island opposed the motion—arguing that State Farm’s alleged good faith was belied by one of its own agents, by the New York State regulations governing the negotiation of automotive repairs, prior payment history, and a conflict between State Farm’s practices and the instruction from the Second Circuit in the landmark *Nick’s Garage v. Progressive Casualty Ins. Co.*, 875 F.3d 107, 120 (2d Cir. 2017). *See* A1238-54.

**Supreme Court Grants Summary Judgment Based Upon a Credibility
Determination of Competing Experts and a Misapplication of New York
Insurance Regulations.**

On August 10, 2023, the Supreme Court of the State of New York, County of Nassau (McCormack, J.), granted summary judgment. *See* A4-14. It held that State Farm carried its initial summary judgment burden in light of State Farm’s policy’s definition of “prevailing competitive price” and its showing that \$50 per hour was competitive according to CCC data and as endorsed by State Farm’s expert. *See* A9. In response, the Supreme Court held, Mid Island did not meet its burden to demonstrate a genuine question of fact—for one of its experts failed to attach records to his report that deprived the report of evidentiary value, another expert’s report was too vague and conclusory to have evidentiary value, and the third—while it “might have raised an issue of fact ... [regarding State Farm’s] good faith”—failed to fend off summary judgment because of other reports by this expert that were contradictory. *See* A13.

The present appeal follows. *See* A16. Because there is a genuine question of fact whether State Farm exercised good faith in negotiating the payment for repairs of Mr. Sealy’s vehicle, the Supreme Court’s dismissal should be reversed and the matter should be remanded for trial.

ARGUMENT

SUPREME COURT’S GRANT OF SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THE RECORD EVIDENCE PRESENTS A QUESTION OF FACT OVER THE INSURANCE COMPANY’S GOOD FAITH.

“A covenant of good faith and fair dealing is implied in all contracts, encompassing any promises which a reasonable person in the position of the promisee would be justified in understanding were included and which are not inconsistent with the terms of the contract.” *Turkat v. Lalezarian Devs., Inc.*, 52 A.D.3d 595, 596 (2d Dept. 2008). *See also Twinkle Play Corp. v. Alimar Props Ltd.*, 186 A.D.3d 1447, 1448 (2d Dept. 2020).

Informing what the duty of good faith means in New York’s automotive repair industry, the Insurance Department codifies a rule designed to promote the fair and fast adjustment of insurance claims. Upon receipt of a notice of claim, “negotiations shall commence and a good faith offer of settlement, sufficient to repair the vehicle to its condition immediately prior to the loss, shall be made [by the insurance company] within ... six [business] day[s]...” *See* 11 NYCRR 216.7(b)(1). This comports more broadly with the “basic goal” of reaching price-agreements “promptly” for the benefit of consumers. *See* 11 NYCRR 216.7(b)(7).

Contrary to these goalposts, this case reflects an expression of a practice by State Farm of substantially underfunding the cost of automobile repairs in order to

reduce payouts on claims. To that end, they offer to pay for fewer services than are necessary to repair cars to their pre-loss condition, and they offer a perverse one-price-fits-all labor rate that would eliminate the incentive to offer high quality repairs. These practices unfolded in real time against Mid Island in this case as, even according to State Farm’s own numbers, its opening offer of what it told its insured would be “sufficient to repair [the] vehicle” was nearly 70% less than what it ultimately acknowledged to be necessary to restore the car to pre-loss condition. *Compare* A469 and A506. Far outside the “six-day” rule for making good faith offers to settle, and contrary to the goal of “promptly” adjusting automotive repairs, the lapse between the first and last offers here spanned longer than an entire month. *Id.*

Yet more troubling than the estimate’s delay was its gross amount. State Farm offered a labor rate that took no account of the quality of the services available at a firm like Mid Island, instead offering the same labor rate to Mid Island that it would offer a shop of half the size or skill—\$50 per hour. *See* A42. *See also* A9. Far from being steeped in the implied covenant of good faith, this one-price-fits-all stance exalted insurance company profits above the ordinary incentive structure of the market economy: if it were acceptable, this standard would incentivize body shops to skimp on quality, knowing they are guaranteed the same labor rate as quality shops; and enterprising shop owners would be discouraged from running state-of-

the-art facilities, because they would be guaranteed the same labor rate as the poorly trained and decrepit. If this one-price-fits-all approach were truly an expression of the “good faith” required for automotive repairs in New York, in fact, the biggest loser of all would be the consumer—who would face reduced choice in the market for repair-work, as the ordinary constellation of quality in the marketplace would follow uniform prices down to the least common denominator.

Nevertheless, the Supreme Court held that the breach of contract claim against State Farm should be dismissed on summary judgment—with no genuine dispute of fact—because its insured had signed a contract acceding to the one-price-fits-all scheme. *See* A9-10. In particular, listed on page 18 of its insurance policy with its insured, State Farm provided that it would pay the “prevailing competitive price” for repairs—and then defined that term to mean the price that prevails over a majority of shops in “the repair market” as “determined by a survey made by us.” *See* A335. Yet as the method for defining “the repair market” and conducting the “survey” remains anchored to the covenant of good faith, this provision is less an answer to the claim of bad faith than the weapon through which State Farm expressed it.

A. State Farm’s Reliance on CCC Violated *Nick’s Garage* and The Terms of Its Own Contract.

State Farm’s conduct sported the same type of impropriety that the Second Circuit highlighted in the landmark case of *Nick’s Garage v. Progressive Ins. Co.*,

875 F.3d 107 (2d Cir. 2017). There, as here, the “Insurer argue[d] ... that its method for determining the prevailing labor rates [was] reasonable so as to satisfy contractual obligations.” *Id.* at 120. And there, as here, the contract limited the insurer’s payout obligations to a “prevailing labor rate” as determined by a guide that surveyed the insurer’s “ability to reach agreed prices for repair with shops in the marketplace.” *Id.* Yet as the Second Circuit noticed, this methodology for evaluating the market suffered “a fundamental flaw”:

An insurer such as Progressive may command a very large volume of business. The fact that repair shops may accept a labor rate paid by a particular insurer that may bring the shop a large volume of business does not demonstrate that the shop, or shops generally, would accept the same rate in dealing with another insurer or a customer who has only one car to be repaired.

Id. at 120-21.

A behemoth like State Farm occupies the same market-dominant terrain as Progressive did in *Nick’s Garage*, and its reliance on the Certified Collateral Corporation (“CCC”) to establish the “prevailing” labor rate suffers a similarly fatal flaw. In both cases, the industry is populated by market dominant payors—large insurance companies—who can compel shops to accept artificially low labor rates due to the “large volume of business” that they control. *Id.* at 120-21. And thus the “prevailing” rate of labor becomes a tautology: companies like State Farm pay \$50 per hour because that is the alleged going-rate in the market; yet that is the alleged

going-rate in the market because that is what it is willing to pay. As *Nick's Garage* recognized, questions of good faith present a genuine dispute of fact in the face of such a tautological equation.

Indeed, this tautology is only more troubling in the face of CCC than the “Reference Guide” in *Nick's Garage*. That is because CCC itself offers its data with an express caveat: that “[t]his report is *not* a labor rate survey.” See A1344-45 (emphasis added). Yet a “survey” is precisely what State Farm’s contract with its insured required. See A335. For purposes of a genuine dispute over good faith, the upshot of State Farm’s conduct is straightforward: in promising a “survey made by us,” it relied upon a *non*-survey made by *others*. See A9 (“To determine the prevailing competitive rates, State Farm relied upon ... CCC”). Proving good faith beyond genuine dispute would demand more.

Emphasizing the bad faith associated with its “prevailing rate” tautology is the obvious self-serving effect it has on prices—as shown in the record. Unlike an ordinary market, State Farm’s methodology prevents prices from keeping up with inflation or productivity. That is because any first-mover shop attempting to keep pace with inflation, for example, would by definition depart from what “prevail[ed]” under State Farm’s “survey” of old prices, and would thus not be covered for payment.

This unnatural pressure against rising prices causes market distortions like those confronting the trial court here: multiple courts had reviewed Mid Island’s practices and had sustained their labor rates between 2003 and 2007—at “fair and reasonable” rates in excess of what the Court sustained here in 2023. *See* A1236 (sustaining \$55 per hour in 2003); A1227 (sustaining \$65 per hour in 2007); A1224 (sustaining \$65 per hour in 2007). For the sake of perspective, between 2007 and the August 2023 date of the decision, the Consumer Price Index in cities for used cars and trucks grew by nearly 30%.² The S&P 500 grew by 217%.³ Yet according to State Farm’s “good faith” estimate, endorsed by the Supreme Court, the price of labor at Mid Island should have fallen.

Ultimately, linking up the tautological approach to prices with its self-serving effects for State Farm, and acknowledging how this process is barred by the very terms of State Farm’s contract with its insured, the question of its “good faith” was

² *See* FRED Economic Data, St. Louis Federal Reserve, *Consumer Price Index for All Urban Consumers: Used Cars and Trucks in U.S. City Average*, available at: <https://fred.stlouisfed.org/series/CUSR0000SETA02#0> (showing index movement from 148.3 to 191.078 between January 1, 2003 and August 1, 2023). The Court may take judicial notice of such CPI statistics. *See, e.g., Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 19-20 (2d Dept. 2009).

³ On January 1, 2007 the S&P 500 opened at 1418.03. *See* Yahoo! Finance Historical Data available at: <https://finance.yahoo.com/quote/%5EGSPC/history?period1=788947200&period2=1489820400&interval=1mo&filter=history&frequency=1mo>. On August 9, 2023 it opened at 4501.57. *See* Yahoo! Finance Historical Data available at: <https://finance.yahoo.com/quote/%5EGSPC/history/?period1=1691539200&period2=1691625600>. Again, the Court may take judicial notice of such historical stock prices. *See, e.g., Ganino v. Citizens Utilities Co.*, 228 F.3d 154, fn. 8 (2d Cir. 2000).

sufficiently genuine to raise a factual question rather than one to be decided on summary judgment.

B. State Farm’s Bad Faith Was Reinforced by New York State Insurance Regulations.

New York’s insurance regulations governing “good faith” are not susceptible to State Farm’s conduct here, which in the name of boosting insurance company profits would effectuate a freeze in industry prices that would depart from economic reality. As the Second Department, Appellate Term, has recognized, an insurance company offering a given price for repairs must identify another shop that was not only (a) “reasonably convenient” for the consumer, but also (b) of sufficient quality to “repair the vehicle ‘to its condition immediately prior to the loss...’” *See Nadel v. Allstate Ins. Co.*, 36 Misc.3d 17, 18-20 (2d Dept. App. Term 2012) (quoting Insurance Department Regulations 11 NYCRR §216.7[b][1] and citing Ops. Gen. Counsel NY Ins. Dept. No. 08-07-09 [July 2008]). This requirement—that the “amount offered [be] actually sufficient to cover the cost of repairing the vehicle to its pre-loss condition”—goes above and beyond an insurer’s attempt to show its own “honest and fair state of mind” for purposes of good faith. *Nick’s Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 118-19 (2d Cir. 2017).

As prices remain unnaturally stagnant over time, this showing becomes increasingly difficult. While shops might exist that would accept flatlined prices,

those prices become further and further removed from ordinary business costs that rise with inflation—such that shops that would accept these low prices are run too cheaply to meet the lofty task of repairing a car to its pre-loss condition. *See, e.g.*, A141-42, A1099, A1184, and A1205 (highlighting expensive nature of offering Mid Island’s services to the public). Again, this is not mere theory: as the Supreme Court recognized, the motion practice in this case spanned “a combined four expert reports ... and over 80 exhibits.” *See* A7. Yet not a single one identified a convenient body shop or collision center that could successfully repair Jerone Sealy’s car for the prices State Farm offered.

As in *Nadel*, this should have carried one natural consequence: that the “defendant failed to meet its initial burden of establishing its entitlement to judgment as a matter of law....” *Nadel*, 36 Misc.3d at 20.

The Supreme Court’s decision simply did not grapple with this requirement. And State Farm’s motion papers confirm the extent to which its treatment of these regulations was misguided. According to State Farm, New York’s regulations cannot require an insurer to actually identify a suitable alternative facility for repairs, for such a third-party facility would be saddled with “insufficient photo evidence” and an unfair gap in time—which in this case lasted three years. *See* A1264-65. But these arguments crumble under scrutiny.

First, State Farm’s argument does not fairly grapple with *Nadel*. In *Nadel*, the Appellate Term described the interplay between the obligation to identify another suitable facility, on one hand, and the prohibition against insurance companies steering customers to other shops. It reconciled this friction through the commonsense point that while an insurer is “prohibited from recommending a repair facility if the insured does not request a recommendation, it is not barred in ... *litigation* from identifying that facility, since [by that time] there is no longer an issue as to [steering].” *See Nadel*, 36 Misc.3d at 20 (emphasis added). If, post-repair, insurance companies seeking summary judgment in litigation *still* did not need to identify alternative suitable facilities, then this entire discussion in *Nadel* would have been superfluous.

Second, whatever the limitations are of photographic evidence and the passage of time, those are the same constraints that confronted State Farm in, say, hiring an expert to evaluate the repairs in this case—something it was nevertheless capable of accomplishing. *See, e.g.*, A1052 (2023 expert report relying on, *inter alia*, estimates, supplements, claim files, and “photos of the covered vehicle and repair process[es]”).

Third—and most practically—by complaining of how unfair this identification-burden would be, State Farm glosses over the unfairness of avoiding it. New York’s requirement that insurers identify an alternative facility that could

successfully complete the repairs serves a useful purpose: if State Farm claims to Mid Island that within its price constraints a competitor could repair the car to pre-loss condition, then Mid Island can investigate that claim and subject the competitor to scrutiny in court. This saves judges and jurors from having to decide cases in the abstract and forces the parties to litigate economic disputes in the real world. And that is ultimately what this case is about: not whether other repairmen in Long Island would take \$50 per hour from an insurance company to work on a car, but whether shops accepting \$50 per hour are actually capable of achieving the lofty task set out in New York law—to repair cars fully to their pre-loss condition. *See* 11 NYCRR 216.7(b)(1). State Farm failed to identify a single facility that could accomplish that task.

C. A Genuine Factual Dispute Emerged From the Expert Report of Richard Curcio.

A genuine factual dispute over State Farm’s “good faith” also sprouted from the face of Richard Curcio’s expert report. Consider the treatment of this fact by the Supreme Court itself. On the central question of good faith, Mid Island offered a smoking-gun expert report of an appraiser who had been hired by State Farm, and who nevertheless said that while he “never had a problem dealing with [Mid Island], and found that they negotiated in good faith[,] State Farm ... did not allow him to negotiate with [Mid Island] on anything” and instead adopted the goal of taking

“every step possible to delay and impede claims in order to punish [Mid Island] for advocating on behalf of its customers.” *See* A12-13. *See also* A1170-71.

As acknowledged by the trial court, this “might have raised an issue of fact because State Farm is required by insurance regulations to negotiate in good faith.” *See* A13. But it granted summary judgment anyway because other evidence undermined Mr. Curcio’s credibility: a different and older report from this expert showed him negotiating “line by line” with Mid Island which, the Supreme Court said, “seems to completely contradict his affidavit.” *See* A13.

This type of credibility determination might make for a cogent analysis by factfinders after trial. But it is not the province of a judge deciding a motion for summary judgment. *See, e.g., Kovacic v. Griffin*, 170 A.D3d 1143, 1144 (2d Dept. 2019) (denying summary judgment, because “conflicting expert opinions raise credibility issues which are to be resolved by the factfinder”). *See also Schultheis v. Arcate*, 216 A.D.3d 1018, 1019 (2d Dept. 2023) (“A motion for summary judgment should not be granted ... where there are issues of credibility”). The Supreme Court’s clear violation of the rule against credibility-determinations—acknowledging that an expert “might have raised an issue of fact” but for the court’s view of his credibility—mandates reversal of the summary judgment grant.

In the end, “[g]ood faith refers to the insurance company’s ... honest and fair state of mind.” *Nick’s Garage*, 875 F.3d at 119. Mr. Curcio clearly places State

Farm’s “honest and fair state of mind” in genuine dispute, and the Supreme Court erred in resolving that dispute based upon its view of his credibility.

D. A Genuine Factual Dispute Clouds the “Good Faith” with which State Farm Defined “the Repair Market.”

Finally, the grant of summary judgment should be reversed because of the clear and genuine dispute of fact about whether State Farm used good faith in defining “the repair market.” *See* A335. A “market” is a group of “products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.” *See, e.g., AD/SAT, a Div. of Skylight Inc. v. Associated Press*, 920 F. Supp. 1287, 1297 (S.D.N.Y. 1996) (quotations omitted) (analyzing markets for purposes of antitrust). A touchstone of determining whether two products fall within the same market is whether “customers would respond to a small price change in [one] by changing to another....” *Id.*

Good faith would have thus required State Farm to define the relevant market as the group of collision centers with whom Mid Island was “reasonabl[y] intercharbgeab[le]” according to its “price, use and qualit[y].” *Id.* Yet the evidence suggests it acted otherwise, defining Mid Island’s “market” with such a broad brush that it shifted prices—and the insurance company’s payout obligations—unreasonably downward.

According to State Farm, the “prevailing” price it opted to pay Mid Island was based upon a broad survey of claims in Nassau and Suffolk counties and then dividing gross labor amounts by total hours input into the CCC program. *See, e.g.*, A43. *See also* A1060 (“I understand that CCC collects data from estimates concerning the labor rate in geographic markets,” and referencing “average labor rates ... in Nassau and Suffolk count[ies]”). The obvious shortcoming of defining the market this broadly—i.e. every car repairer on Long Island with access to CCC—is that it glosses over critical differences between shops and customers in the broad category of automotive repairs that nevertheless operate in separate markets. As one expert for Mid Island explained, in the CCC methodology that State Farm uses, “there is no distinction between insurer or repair facility completion,” “no way of eliminating estimates completed for fleet or municipal customers which are historically below market-average rates,” and a failure to “distinguish the level of training, investment or size of the repair facility...” *See* A1212.⁴

⁴ The Supreme Court noted that this expert failed to attach to his report certain items that she claimed were attached. However, this was not germane to the expert’s discussion of CCC—which instead of being based upon an unattached document was based upon her prior experience and industry knowledge, which included an advisory role to CCC itself. *See* A1210. *See also* *People v. Bryson*, 101 A.D.3d 478, 479 (1st Dept. 2012) (permitting expert testimony that was “beyond the knowledge of the typical juror” where expert was “sufficiently qualified to give this testimony, based on his practical experience, and he did not convey any hearsay to the jury”). Here the expert’s qualifications and experience with CCC were not challenged.

Analyzed in terms of how a consumer might “respond to a small price change,” *AD/SAT*, 920 F. Supp. at 1297, what is notable is that State Farm accuses Mid Island of being grossly overpriced⁵—yet instead of this causing “customers [to] respond ... by changing to another [facility]” as would occur in a confined “market” (*id.*), Mid Island “brings in an estimated \$20 million in annual revenue, ... is valued at approximately \$250 million,” and is so popular that it “employs roughly fifty ... technicians...” *See* A34. Drawing all inferences against the movant at summary judgment, as required, this alleged mismatch between price and popularity has a straightforward explanation: Mid Island offers a prevailing price within “the repair market” that State Farm has not properly defined.

Ultimately, State Farm has an incentive to draw an overbroad definition of the “market” in order to anchor quality facilities to prices that work for low-level garages, which either would not offer services at those prices to non-municipal clients such as Mr. Sealy, or are not trained and equipped to handle the nature and extent of repairs necessary to restore Mr. Sealy’s vehicle back to “its pre-loss condition” as contemplated in the contract. Whether it drew this line in good faith reflects a genuine dispute of fact, and thus summary judgment should have been denied.

⁵ See, e.g., A35 (claiming it charges more than double the prevailing rate).

CONCLUSION

For these reasons, we respectfully request that the trial court's dismissal of Mr. Jesberger's defamation claim arising out of allegations of theft be reversed, with costs.

Dated: Garden City, New York
May 16, 2024

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

This brief complies with the type-volume limitation of the Second Department's Rules of Procedure, as provided in 22 NYCRR 1250.8(j). It contains less than 14,000 words – specifically 5273; its line spacing is double-spaced; and it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, font size 14 (12 for footnotes).

Supreme Court of the State of New York
Appellate Division – Second Department



M.V.B. COLLISION, INC. d/b/a MID ISLAND COLLISION,
as assignee of JERONE SEALY,

Plaintiff-Appellant,

- against -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Respondent.

-
1. The index number of the case in the court below is 600718/2020.
 2. The full names of the original parties are set forth above. There have been no changes.
 3. This action was commenced in Supreme Court of the State of New York, Nassau County.
 4. The action was commenced on or about January 16, 2020 by filing of a Summons and Verified Complaint. Issue was then joined on or about March 16, 2020 by service of an Answer.
 5. The nature and object of the action involves: torts.
 6. The appeal is from an Order of the Honorable James P. McCormack, Dated August 9, 2023 and entered on August 10, 2023.
 7. The appeal is being perfected on the appendix method.

CITATIONS

AD/SAT v. Associated Press

United States District Court for the Southern District of New York

February 29, 1996, Decided ; February 29, 1996, FILED

94 Civ. 6655 (PKL), 95 Civ. 2469 (PKL)

Reporter

920 F. Supp. 1287 *; 1996 U.S. Dist. LEXIS 2291 **; 1996-1 Trade Cas. (CCH) P71,341; 1996 WL 87247

AD/SAT, A DIVISION OF SKYLIGHT, INC., Plaintiff, - against - ASSOCIATED PRESS, NEWSPAPER ASSOCIATION OF AMERICA, NATIONAL NEWSPAPER NETWORK, THE NEWARK STAR-LEDGER, THE BIRMINGHAM NEWS COMPANY, THE OAKLAND PRESS CO., THE NEWS & OBSERVER PUBLISHING COMPANY, OKLAHOMA PUBLISHING COMPANY, THE LEXINGTON HERALD-LEDGER, DAYTON NEWSPAPERS, INC., COX ENTERPRISES, INC., BALTIMORE SUN CO., INC., and ADVANCE PUBLICATIONS, INC., Defendants. AD/SAT, A DIVISION OF SKYLIGHT, INC., Plaintiff, - against - DONALD E. NEWHOUSE, Defendant.

filed motions for summary judgment pursuant to [Fed. R. Civ. P. 56](#). The district court granted summary judgment and denied plaintiffs' later motion to supplement the complaint pursuant to [Fed. R. Civ. P. 15](#), holding that (a) an attempted monopolization claim required proof that defendants engaged in predatory conduct, and the pre-announcement of a product or service constituted predatory conduct only when the announcement was knowingly false; (b) defendants' pre-announcement was not knowingly false, because the antitrust laws did not condemn a newspaper for informing its advertisers that it was terminating its relationship with its delivery service due to prohibitive costs, and then subsequently informing the advertisers about alternative sources of delivery; and (c) since plaintiffs' proposed amendment would not alter matters, granting the amendment would be pointless.

Core Terms

newspapers, advertisers, affiliation, delivery, pricing, conspiracy, monopoly, monopolization, termination, electronic, costs, predatory, network, relevant market, overnight, papers, summary judgment motion, summary judgment, competitors, leveraging, transmission, markets, monopoly power, no evidence, variable, deliver, alleged conspiracy, boycott, Sherman Act, announcement

Outcome

The court granted summary judgment to defendants.

LexisNexis® Headnotes

Case Summary

Procedural Posture

Defendants, various media organizations, in an antitrust case filed a motion for summary judgment pursuant to [Fed. R. Civ. P. 56](#) on plaintiff newspaper advertising delivers' claim that defendants were monopolizing the newspaper advertising delivery system.

Overview

Plaintiffs sued defendants, alleging monopoly, attempted monopoly, and conspiracy, all in violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#) Defendants

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary

Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary
Judgment > Supporting Materials > General Overview

[HN1](#) **Supporting Materials, Discovery Materials**

[Fed. R. Civ. P. 56\(c\)](#) provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, and this burden will be satisfied if the movant can point to an absence of evidence to support an essential element of the nonmoving party's claim. If the movant satisfies its burden under [Fed. R. Civ. P. 56\(c\)](#), the nonmoving party must then, pursuant to [Fed. R. Civ. P. 56\(e\)](#), set forth specific facts showing that there is a genuine issue for trial.

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > Materiality of Facts

[HN2](#) **Summary Judgment, Burdens of Proof**

In assessing the record to determine whether there is a genuine issue as to any material fact, the evidence of the non-movant is to be believed, and all reasonable inferences are to be drawn in its favor. However, to survive a [Fed. R. Civ. P. 56](#) motion for summary judgment in an antitrust litigation, the non-moving party must set forth facts that tend to preclude an inference of permissible conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Market
Definition > Relevant Market > Geographic Market
Definition

Antitrust & Trade Law > Regulated
Practices > Market Definition > Relevant Market

[HN3](#) **Monopolies & Monopolization, Actual Monopolization**

A party has monopoly power if it has a power of controlling prices or unreasonably restricting competition. The primary indicator of monopoly power is market share. Other factors to consider include the strength of competition in the market, barriers to entry into the market, and the probable development of the industry. Before considering the factors necessary to determining whether a defendant has monopoly power in a relevant market, a federal district court must define the market. The relevant market may be either a geographic market, or a product or service market. In this case the parties concede that the geographic market is the United States, but contest the definition of the relevant service market.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated
Practices > Market Definition > Relevant Market

[HN4](#) **Antitrust & Trade Law, Sherman Act**

In a Sherman Act, [15 U.S.C.S. § 1 et seq.](#), antitrust action, the relevant market consists of products that are reasonably interchangeable in terms of price, use and qualities. Products or services need not be identical to be considered reasonably interchangeable; that determination requires consideration of the cross-elasticity of both demand and supply. If customers respond to a small price change in a product by changing to another product, then there is a high cross-elasticity of demand, and the products are reasonably interchangeable (and therefore compete in the same market). Cross-elasticity of supply refers to the extent to which producers are willing to shift their resources from supplying a product or service in one market to doing so in another in response to price changes in the second market. Determining cross-elasticity of supply also requires consideration of new, start-up entities which may enter a market.

Antitrust & Trade Law > ... > Actual
Monopolization > Anticompetitive & Predatory
Practices > General Overview

Antitrust & Trade Law > ... > Monopolies &
Monopolization > Attempts to Monopolize > General
Overview

[HN5](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

In order to prove an attempted monopolization claim, a plaintiff must show that a defendant engaged in predatory conduct.

Antitrust & Trade Law > ... > Actual
Monopolization > Anticompetitive & Predatory
Practices > General Overview

Civil Procedure > ... > Summary
Judgment > Supporting Materials > General
Overview

[HN6](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

Pre-announcement of a product or service constitutes predatory conduct only when the announcement is knowingly false.

Antitrust & Trade Law > ... > Actual
Monopolization > Anticompetitive & Predatory
Practices > General Overview

[HN7](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

A predatory pricing scheme is the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition. A plaintiff, in attempting to establish a predatory pricing scheme, must first show that the prices charged by a defendant are below an appropriate measure of its costs.

Antitrust & Trade Law > Sherman Act > General

Overview

Antitrust & Trade Law > ... > Actual
Monopolization > Anticompetitive & Predatory
Practices > General Overview

Antitrust & Trade Law > ... > Actual
Monopolization > Anticompetitive & Predatory
Practices > Predatory Pricing

[HN8](#) **Antitrust & Trade Law, Sherman Act**

In an antitrust action, the appropriate measure of cost in a predatory pricing case is average variable cost. Thus, when a seller prices below reasonably anticipated average variable cost predatory pricing is presumed, and prices above average variable cost are presumed non-predatory.

Antitrust & Trade Law > ... > Actual
Monopolization > Anticompetitive & Predatory
Practices > General Overview

[HN9](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

Although the relationship between a firm's prices and its marginal costs provides the best single determinant of predatory pricing, there are circumstances when a federal district court should refuse to apply marginal cost. This is so because when a firm's marginal costs cannot be determined from conventional accounting methods, application of marginal cost to predatory pricing claims may produce administrative difficulties for courts.

Antitrust & Trade Law > Sherman Act > General
Overview

[HN10](#) **Antitrust & Trade Law, Sherman Act**

The federal antitrust laws are designed to protect competition, not competitors.

Antitrust & Trade Law > ... > Actual
Monopolization > Anticompetitive & Predatory
Practices > General Overview

Evidence > Inferences & Presumptions > General

Overview

[HN11](#)  Actual Monopolization, Anticompetitive & Predatory Practices

A successful predatory pricing claim requires a plaintiff to demonstrate that a defendant had a dangerous probability of recouping its investment in below-cost pricing. For recoupment to occur, the below cost pricing must be able to drive competitors from the market, allowing the offender to obtain enough market power to sustain monopoly prices long enough to earn in excess profits what they earlier gave up in below-cost prices. Determining the likelihood of recoupment of predatory losses requires a close analysis of the structure and conditions of the relevant market. If such analysis reveals a market which is highly diffuse and competitive, or where new entry is easy, then a reasonable jury may not conclude that the alleged scheme would maintain monopoly pricing for a sustained period of time because monopoly pricing is only possible with monopoly power.

[Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[HN12](#)  Actual Monopolization, Anticompetitive & Predatory Practices

In an antitrust case, the cost of capital should not be considered in determining whether a defendant has priced below average variable cost.

[Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview](#)

[HN13](#)  Actual Monopolization, Anticompetitive & Predatory Practices

Monopoly leveraging is where a party uses its monopoly power in one market to distort or affect competition in another market. A defendant need not monopolize or even attempt to monopolize the second market to be liable for monopoly leveraging. However, there must be a tangible harm to competition in the second market.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview](#)

[Patent Law > ... > Defenses > Inequitable Conduct > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview](#)


[Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview](#)

[HN14](#)  Monopolies & Monopolization, Actual Monopolization

In antitrust law, a "tying" claim involves the tying of the sale of one product or service to the sale of another product or service for which the seller has a monopoly.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview](#)

[HN15](#)  Monopolies & Monopolization, Actual Monopolization

A party which takes advantage of its resources and its good will does not, in doing so, violate the antitrust laws.

[Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview](#)

Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[HN16](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

The exercise of monopoly power is necessary to sustain a monopoly leveraging claim.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN17](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

In antitrust law, monopoly leveraging is where a party uses its monopoly power in one market to distort or affect competition in another market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Inferences & Presumptions > General Overview

[HN18](#) **Monopolies & Monopolization, Actual Monopolization**

An antitrust claim for unlawful monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton

Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

[HN19](#) **Clayton Act, Claims**

The right of private parties to file claims under the federal antitrust laws derives from two sections of the Clayton Act, [15 U.S.C.S. § 12 et seq.](#) Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), provides in relevant part that any person who is injured in his business or property by reason of anything forbidden in the antitrust laws may sue in any federal district court in the United States, and may recover threefold the damages he sustained. In relevant part, section 16 of the Clayton Act, [15 U.S.C.S. § 26](#), states that any person is entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the federal antitrust laws.

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private
Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private
Actions > Standing > Requirements

Antitrust & Trade Law > Sherman Act > General
Overview

Commercial Law (UCC) > Sales (Article
2) > Remedies > General Overview

[HN20](#) **Sherman Act, Remedies**

A literal reading of §§ 4 and 6 of the Clayton Act, [15 U.S.C.S. §§ 15](#) and [26](#), would provide a remedy to any person who has suffered an injury-in-fact from an antitrust violation. However, one step courts have taken to narrow the class of plaintiffs who may bring private antitrust actions is to require a showing of antitrust injury as a necessary, but not sufficient, condition of antitrust standing. Because an antitrust injury must be of the type which the antitrust laws were intended to prevent, an injury to competition is required. Once an injury to competition is established, there are limits on who may sue to remedy that injury, since the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), was enacted to assure customers the benefits of price competition, and federal precedent has emphasized the central interest in protecting the economic freedom of competitors in the relevant market.

Civil Procedure > ... > Preclusion of
Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of
Judgments > General Overview

Civil Procedure > ... > Preclusion of
Judgments > Estoppel > General Overview

[HN21](#) **Estoppel, Collateral Estoppel**

Under the doctrine of collateral estoppel, which is also known as issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Antitrust & Trade Law > Sherman Act > General

Overview

Antitrust & Trade Law > ... > Monopolies &
Monopolization > Conspiracy to
Monopolize > Sherman Act

[HN22](#) **Antitrust & Trade Law, Sherman Act**

[Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), forbids every contract, combination or conspiracy, in restraint of trade or commerce among the several states. A threshold determination a court must make on a motion for summary judgment in a [§ 1](#) case is whether or not a reasonable jury could find that there was some form of concerted action between two or more legally distinct economic entities. Only after an illegal agreement is shown will a court consider whether the agreement constituted an unreasonable restraint of trade, whether per se or under the rule of reason.

Antitrust & Trade Law > ... > Monopolies &
Monopolization > Conspiracy to
Monopolize > General Overview

Evidence > Inferences & Presumptions > General
Overview

[HN23](#) **Monopolies & Monopolization, Conspiracy to Monopolize**

To permit the inference of concerted action in an antitrust case, a plaintiff must present direct or circumstantial evidence which reasonably tends to prove that each defendant had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of
Law > Appropriateness

Criminal Law & Procedure > ... > Inchoate
Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies &
Monopolization > Conspiracy to
Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing &
Restraints of Trade > Horizontal Refusals to

Deal > General Overview

Civil Procedure > Judgments > Summary
Judgment > General Overview

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Implausible Claims

Civil Procedure > Judgments > Summary
Judgment > Evidentiary Considerations

Contracts Law > Defenses > Ambiguities &
Mistakes > General Overview

Criminal Law & Procedure > ... > Inchoate
Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > General
Overview

[HN24](#) [↓] **Entitlement as Matter of Law, Appropriateness**

Absent an express agreement, if the factual context indicates that a defendant in an antitrust case lacked a rational motivation to join an alleged boycott, then summary judgment is appropriate. A conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence. Even if there is a motivation to conspire, if the refusal to deal is consistent with a defendant's independent economic interest, more must be shown by the plaintiff to survive a summary judgment motion. A plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Evidence of conduct that is as consistent with permissible conduct as with illegal conspiracy (i.e. "parallel conduct") is insufficient.

Antitrust & Trade Law > Regulated
Practices > Trade Practices & Unfair
Competition > General Overview

[HN25](#) [↓] **Regulated Practices, Trade Practices & Unfair Competition**

A newspaper's decision to terminate a service which was both costing it money and not bringing in revenue,

coupled with another decision to install an alternative service for free, are examples of independent conduct undertaken for valid business reasons.

Antitrust & Trade Law > ... > Price
Discrimination > Defenses > General Overview

Criminal Law & Procedure > ... > Inchoate
Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies &
Monopolization > Conspiracy to
Monopolize > General Overview

[HN26](#) [↓] **Price Discrimination, Defenses**

The antitrust laws do not condemn a newspaper for informing its advertisers that it is terminating its relationship with its delivery service due to probative costs, and then subsequently informing the advertisers about alternative sources of delivery. Nor is the alleged statement of one newspaper employee sufficient to support an inference of conspiracy.

Antitrust & Trade Law > Sherman Act > General
Overview

[HN27](#) [↓] **Antitrust & Trade Law, Sherman Act**

A rational trier of fact in an antitrust case cannot find liability under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), if the plaintiff offers no evidence to cast doubt on the defendant's legitimate business explanations for its action.

Civil Procedure > ... > Pleadings > Amendment of
Pleadings > General Overview

Civil Procedure > Pleading &
Practice > Pleadings > Supplemental Pleadings

[HN28](#) [↓] **Pleadings, Amendment of Pleadings**

[Fed. R. Civ. P. 15\(d\)](#) provides that upon motion of a party a federal district court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be

supplemented. The decision to grant or deny a motion pursuant to [Fed. R. Civ. P. 15\(d\)](#) rests within the discretion of the district court. Absent undue delay, bad faith, dilatory tactics, undue prejudice to the party to be served with the proposed pleading, or futility, the motion should be freely granted.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

[HN29](#) Pleadings, Amendment of Pleadings

When a proposed amended complaint, tendered after the granting of [Fed. R. Civ. P. 56](#) summary judgment, will not alter the finding that a plaintiff failed to provide evidence that tends to exclude the possibility of independent action, supplementing the complaint is futile. In such a case, a [Fed. R. Civ. P. 15](#) motion to supplement the complaint may be denied.

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Judges: **[**3]** Peter K. Leisure, U.S.D.J.

Opinion by: Peter K. Leisure

Opinion

[*1292] OPINION AND ORDER

LEISURE, *District Judge:*

AD/SAT alleges that defendant Associated Press ("AP") has violated [Section 2](#) of the Sherman Act, see [15 U.S.C. § 2](#), by (1) attempting to monopolize the alleged market of electronic transmission of advertisements to newspapers; (2) engaging in monopoly leveraging; and (3) monopolizing the news and wire services markets. In addition, AD/SAT alleges that all defendants in this action have: (1) conspired to boycott plaintiff, in violation of [Section 1](#) of the Sherman Act, see [15 U.S.C. § 1](#); and

(2) conspired to monopolize the alleged market of electronic transmission of advertising to newspapers, in violation of [section 2](#) of the Sherman Act. See [15 U.S.C. § 2](#). Pursuant to [Fed. R. Civ. P. 56](#), AP moves for summary judgment as to AD/SAT's Sherman Act [§ 2](#) claims against it. In addition, all defendants move for summary judgment as to AD/SAT's Sherman Act [§§ 1](#) and [2](#) conspiracy claims against them. Finally, AD/SAT moves for reconsideration of this Court's April 24, 1995 decision granting defendant the *Lexington Herald-Leader's* motion for summary judgment. Based **[**4]** on the following reasons, the Court grants all defendants' motions in their entirety, and denies AD/SAT's motion for reconsideration.

BACKGROUND

This case is about the business of delivering advertisements from advertisers to newspapers. Traditionally, advertisements have been delivered from the advertiser, or advertising agency, to the newspaper by one of several means of physical delivery, including regular mail, messenger service, and overnight delivery service (such as Federal Express). By choosing to spend advertising dollars advertising in newspapers, as opposed to other alternatives such as television and radio, advertisers trigger the demand for delivery service, and they also typically select the means of delivery. In addition, advertisers normally bare the costs of delivery. At the current time, over 80% of all newspaper ads are delivered by overnight services such as Federal Express, with messenger service being the next most popular means of delivery.

An alternative means of delivering newspaper advertisements is electronic transmission. Electronic delivery of advertising involves the transmission of copy from advertisers to newspapers via satellite or terrestrial **[**5]** (i.e. land-based) means. Two of the parties in this litigation, AD/SAT and AP, deliver advertisements to newspapers over satellite networks. AD/SAT has been engaged exclusively in this activity since 1986, and it delivers its ads over a satellite network owned and operated by AP. AP, a cooperative association whose members consist of over 1,500 United States newspapers, is primarily engaged in the collection, assembly and distribution to newspapers of news and photographs. Recently, however, AP also began to deliver ads to newspapers electronically, also using its satellite network. Unlike the physical carriers such as Federal Express, which engage in a wide variety of delivery services, AD/SAT's and AP's services

currently focus exclusively on the delivery of ads to newspapers. AD/SAT argues that AP's entrance into the business, which allegedly occurred with unlawful conspiratorial assistance from the remaining defendants in this litigation, violated the antitrust laws.

Defendant Newspaper Association of America ("NAA") is a non-profit trade association whose membership consists primarily of general circulation daily newspapers in the United States. NAA has 1,500 member newspapers **[**6]** in the United States and Canada. Its mission is to promote the interests of the newspaper industry, in part by encouraging the development of technological and marketing innovations that will enhance the efficiency and profitability of newspapers. Traditionally, one problem for advertisers advertising in newspapers has been the cumbersome billing process for placing a single ad in multiple newspapers. Formed in the spring of 1994, defendant Newspaper National Network ("NNN") is a limited partnership among a wholly-owned subsidiary of NAA and 48 of the 50 largest newspapers in the United States by circulation. To help overcome the perception of newspaper advertising as inefficient and cumbersome relative to other multi-market media competitors such **[*1293]** as television and radio, NNN has attempted to facilitate the simultaneous placement of advertising, at competitive prices, in all newspaper markets an advertiser wishes to reach. NNN has contracted with Publicitas Advertising Services, Inc. ("Publicitas") to serve as its "one order/one bill" clearing house for processing multi-newspaper insertion orders. NNN's goal is to attract new advertisers to newspapers, and it is therefore targeting **[**7]** five categories of national advertisers which typically spend less than five percent of their advertising budgets on newspapers ads.

The remaining defendants are individual newspapers or groups of newspapers, and one individual. Defendant Advance Publications, Inc. is owned by the Newhouse family. Defendant Donald E. Newhouse, the president of Advance, was, during times relevant in this litigation, a member of the Board of Directors of AP, and the volunteer Chairman of NAA. Through wholly owned subsidiaries, Advance owns defendants Newark Morning Ledger Co., which publishes *The Star-Ledger*, and The Birmingham News Company, which publishes *The Birmingham News*.¹

Cox Newspapers, Inc., a wholly-owned subsidiary of

¹Advance owns 24 other newspapers, none of which are defendants in the instant action.

defendant Cox Enterprises, Inc. ("CEI"), publishes fourteen newspapers of general circulation. One of these newspapers is the *Dayton Daily News*, a Dayton, Ohio newspaper of general circulation, which **[**8]** is owned by defendant Dayton Newspaper, Inc. ("DNI"), a wholly-owned subsidiary of Cox Newspapers. David Easterly, the president of CEI, is a member of the AP Board of Directors, and was a member of an AP Board ad hoc committee which assisted AP's management in investigating and planning AP's entry into the electronic advertisement business.

Defendant Oklahoma Publishing Company publishes an independent daily newspaper called the *Daily Oklahoman* in Oklahoma City, Oklahoma. Defendant the News & Observer Publishing Company publishes the *News & Observer*. Finally, defendant Oakland Press Company publishes *The Oakland Press*, a daily newspaper in Oakland County, Michigan.²

A. The **[**9]** AD/SAT System

The AD/SAT system requires advertisers or advertising agencies to deliver a hard copy (or Velox) of an advertisement to one of two AD/SAT transmittal stations, which are located in Los Angeles and New York. The ad is then scanned into AD/SAT's system, and transmitted to the designated newspapers via the AP owned and operated satellite network. Next, the ad is received at each newspaper by an AP satellite dish, and forwarded to an AD/SAT installed and owned recorder, which produces a hard copy of the ad. Each recorder, which is essentially a high speed facsimile machine, costs approximately \$ 62,000, with additional equipment, necessary to make the recorder operational, costing another \$ 30,000.

AD/SAT's revenue is generated from service fees charged to both newspapers and advertisers. Advertisers are charged per ad transmission, and the amount per transmission decreases as the number of sites to which the ad is sent increases.³ Because the

²As noted *infra* p. 10, the Court granted defendant the *Lexington Herald-Leader's* motion for summary judgment nearly a year ago. On May 19, 1995, pursuant to a joint motion of AD/SAT and defendant *Baltimore Sun*, this Court issued an Order dismissing the *Baltimore Sun* from this action with prejudice.

³Under the rate card effective prior to the filing of the instant motion, which had been in effect since August 1991, if an advertiser wishes to send a single ad to a single paper on the same day, the fee is \$ 90. The best possible price per

costs of sending an ad to a single location over the AD/SAT system is much higher than physical delivery of a single ad, the system favors advertisers who send an identical ad to many different locations. Indeed, from its beginnings **[**10]** AD/SAT targeted national advertisers.

[*1294] All newspapers which joined the AD/SAT network before 1989 pay an annual affiliation fee of \$ 7,500, while newspapers which affiliated with AD/SAT after that date pay an annual fee between \$ 4,500 and \$ 12,500, depending upon the size of the paper's circulation. In addition, newspapers pay reception fees for each ad received. Depending upon the affiliation agreement, which may have a duration of between three to five years, papers are charged either a flat rate of \$ 28 per ad, or \$ 25 **[**11]** for national ads and \$ 20 for retail ads. Certain newspaper affiliates do not pay a reception fee for retail ads.

Of the 50 largest papers in the United States, 48 are AD/SAT affiliates, and of the next 100 largest, 60 are AD/SAT affiliates. While AD/SAT, at least through the date of the filing of this motion, continues to move more ads electronically than any other supplier, it still only delivers a small percentage of all ads placed in newspapers. In addition, AD/SAT has been unable to expand its network of newspaper affiliates. Because of the high fixed costs associated with the recorders, AD/SAT could not afford to waive the high reception and affiliation fees it demanded from newspapers. Therefore, expansion of the newspaper network to additional newspapers could not occur because the limited number of ads received would not justify the high costs. And, because of the limited size of the network, sending ads over the network remained very expensive to advertisers, who would often be compelled to pay quite a high per ad transmission fee. This lack of volume of ads sent over the network continued the necessity of retaining the high affiliation and reception fees to cover the fixed **[**12]** costs.

As early as 1990, AD/SAT recognized that the high costs associated with its system would preclude growth. At that time, the then-president of the company, Richard Atkins, made a conscious decision to stop acquiring recorders, and pursue converting the AD/SAT system to a digital one where much less expensive computers

advertisement is \$ 11.70, which applies if the advertiser wishes to have the ad delivered to 76 or more newspapers. However, as will be discussed *infra* p. 19-20, in recent years AD/SAT has often worked out special rates for its larger customers.

could be used as receivers. However, as a result of financial difficulties experienced by its former owner, AD/SAT's movement into the newly developing digital market was extremely slow. Indeed, for the next several years AD/SAT's business stagnated.

On March 8, 1994, Skylight, Inc. purchased AD/SAT for roughly \$ 4.1 million, including the assumption of certain liabilities. The new management, recognizing the existing problems, had plans to "revitalize and expand" the business, which, they assert, would have occurred but for the actions of AP and the other defendants.

B. *The Development of AdSEND*

AP began to contemplate entering the business of electronic delivery of advertising in 1991. AP had recently introduced PhotoStream, a high speed, satellite-based digital delivery system for the transmission of news photographs to newspapers, and saw the electronic **[**13]** delivery of advertising as a natural extension.

AP's approach to the business has been quite different from AD/SAT's. The approach is premised on the belief that unless AP's service could compete, both in price and service, with Federal Express and the other overnight delivery services which currently dominate the market, it could not build the network necessary to succeed. Therefore, AP installs reception equipment at the newspapers for free and does not charge the newspapers anything to receive an ad. Like the traditional approach to the business taken by Federal Express and others, all costs associated with the delivery of ads to newspapers are borne by the advertisers.

AP's business plan was approved by its Board in early April 1994, and the project, AP AdSEND, was announced to the public shortly thereafter, on April 25, 1994. The AdSEND system enables advertisers to transmit ads from the computers upon which they were created to the newspaper computers in digital form.⁴ Thus, no hard copy of the ad is created until outputted on the newspaper's imaging equipment, meaning that the ad arrives at the newspaper as a first-generation **[*1295]** image, as though it had been printed by the advertiser **[**14]** and physically delivered.

⁴ The ad is actually first transmitted to AP's technical center in Cranbury, New Jersey, which is the AP AdSEND Hub. AP's central computer then checks to ensure that there have been no transmission errors, and sends the ad to the newspapers.

While confident with its technical ability to deliver advertisements, AP, as a newcomer, knew very little about its advertising clients or the business of advertising in general. Therefore, along with conducting its own research, AP sought regular advice and assistance from NAA. The primary contact with the NAA was Newhouse, who, as mentioned above, was also an AP Board member, and the president of Advance. Before AdSEND was publicly announced, Newhouse helped arrange meetings between AP and NAA officials. After learning about AdSEND through these meetings, NAA began to encourage and support AP's efforts to enter the advertisement delivery business. After public announcement of the project, AP requested and received approval from NAA to participate **[**15]** in several NAA-sponsored conferences which focused on NAA's "one order/one bill" project. As discussed more fully below, this relationship between AP, Newhouse, and the NAA is at the heart of AD/SAT's conspiracy claim.

AD/SAT and AP are not the only companies which deliver ads electronically. Companies such as DigiFlex, Ad eXpress, AdStar, AdLink and Business Link are already in the market, advertisers are beginning to develop their own systems, and there is evidence that the regional Bell companies may soon enter the market.

C. *Prior Proceedings*

Plaintiff appeared before this Court on September 14, 1994 seeking a temporary restraining order preventing AP from initiating its AdSEND program. The Court declined to issue the TRO, but ordered the parties to appear before the Court on September 23, 1994, at which time plaintiff's application for a preliminary injunction barring AP and those in active concert with it from initiating, providing, supplying, engaging in, contributing to or participating in the AdSEND program was denied. On April 24, 1995, this Court issued an Opinion and Order, granting the summary judgment motion of defendant the *Lexington Herald-Leader*.

[16] DISCUSSION**

I. *Summary Judgment in General*

Fed. R. Civ. P. 56(c) provides **HN1**[↑] that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." See [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, see [Adickes v. S.H. Kress & Co.](#), 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970), and this burden will be satisfied if the movant can point to an absence of evidence to support an essential element of the nonmoving party's claim. See [Goenaga v. March of Dimes Birth Defects Found.](#), 51 F.3d 14, 18 (2d Cir. 1995); [Celotex](#), 477 U.S. at 317 (failure of proof concerning essential element of nonmovant's claim renders all other facts immaterial). If the movant satisfies its burden under [Rule 56\(c\)](#), the nonmoving party must then "set forth specific facts showing that there is a genuine **[**17]** issue for trial." [Fed. R. Civ. P. 56\(e\)](#); see [Celotex](#), 477 U.S. at 317 & n.3.

HN2^[↑] In assessing the record to determine whether there is a genuine issue as to any material fact, the evidence of the non-movant is to be believed, and all reasonable inferences are to be drawn in its favor. See [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). However, to survive a motion for summary judgment in an antitrust litigation, the non-moving party must set forth facts that tend to preclude an inference of permissible conduct. See [Capital Imaging v. Mohawk Valley Medical Ass'n](#), 996 F.2d 537, 542 (2d Cir.), cert. denied, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993) (citing [Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.](#), 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)).

[*1296] II. AD/SAT's Sherman Act [§ 2](#) Attempted Monopolization Claim

[Section 2](#) of the Sherman Act makes it unlawful for any person to attempt to monopolize any part of interstate trade or commerce. See [15 U.S.C. § 2](#). To succeed on its [§ 2](#) attempted monopolization claim, AD/SAT must establish (1) that AP has engaged in predatory or anticompetitive **[**18]** conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. See [Spectrum Sports, Inc. v. McQuillan](#), 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993).

A. Dangerous Probability of Achieving Monopoly Power

AP argues that AD/SAT's [§ 2](#) attempted monopolization claim cannot succeed because there is not a dangerous probability that it will achieve monopoly power. **HN3**^[↑]

"A party has monopoly power if it has 'a power of controlling prices or unreasonably restricting competition.'" [Hayden Pub. Co., Inc. v. Cox Broadcasting Corp.](#), 730 F.2d 64, 68 (2d Cir. 1984) (quoting [United States v. E.I. duPont de Nemours & Co.](#), 351 U.S. 377, 389, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)). The primary indicator of monopoly power is market share. See [Twin Lab., Inc. v. Weider Health & Fitness](#), 900 F.2d 566, 570 (2d Cir. 1990). Other factors to consider include the strength of competition in the market, barriers to entry into the market, and the probable development of the industry. See [International Distrib. Ctrs., Inc. v. Walsh Trucking Co., Inc.](#), 812 F.2d 786, 792 (2d Cir.) (citing [Hayden Pub.](#), 730 F.2d at 68-69), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, **[**19]** 107 S. Ct. 3188 (1987). Before considering the factors necessary to determining whether a defendant has monopoly power in a relevant market, the Court must define the market.⁵ See [Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp.](#), 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965) (in a [§ 2](#) attempted monopolization claim, definition of relevant market necessary to determine defendant's ability to lessen or destroy competition). The relevant market may be either a geographic market, or a product or service market. In this case the parties concede that the geographic market is the United States, but contest the definition of the relevant service market.

In its First Amended Complaint, AD/SAT states that the relevant market in this action is the electronic **[**20]** transmission of newspaper advertising. See Plaintiff's First Amended Complaint P 22.⁶ While some of the

⁵ In the appropriate case, market definition may be decided on summary judgment. See [Belfiore v. New York Times Co.](#), 826 F.2d 177, 180-81 (2d Cir. 1987), cert. denied, 484 U.S. 1067, 98 L. Ed. 2d 994, 108 S. Ct. 1030 (1988).

⁶ Actually, AD/SAT's complaint alleges that the transmission of ads to newspapers is a relevant market, and that the electronic transmission of ads is the relevant submarket in this case. The Supreme Court has stated that within broad product markets "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, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). The required analysis does not change whether a particular product market is deemed a market or a submarket. See [H.J., Inc. v. International Tel. & Tel. Corp.](#), 867 F.2d 1531, 1540 (8th Cir. 1989) ("The same proof which establishes the existence of a relevant product market also shows . . . the existence of a product submarket."). Academic commentators have argued that the use of the term submarket draws no meaningful distinction,

language is ambiguous, in its opposition papers to defendants' motions, AD/SAT appears to alter its definition of the relevant market in this action. Relying on the affidavit of its expert witness, Dr. William S. Comanor, AD/SAT limits its definition to a "rush" market for advertisement delivery, where only providers which can deliver ads in less than three hours compete. See Affidavit of William S. Comanor in Opposition to Summary Judgment Motion ("Comanor Aff.") PP 8, 10.

[21]** Regardless, neither relevant market offered by AD/SAT is persuasive. Rather, consistent with the conclusion offered by this Court in denying AD/SAT's motion for a preliminary injunction, the Court finds that the relevant market in this action is the delivery of advertisements by any means.

[*1297] The Supreme Court, in [duPont, 351 U.S. at 404](#), defined [HN4](#) [↑] the relevant market as consisting of "products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." *Id.*; see also [Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-28, 5 L. Ed. 2d 580, 81 S. Ct. 623 \(1961\)](#) (relevant market defined as the "areas of effective competition" within which defendant operates); Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, [90 Colum. L. Rev. 1805, 1806 \(1990\)](#) ("definition of relevant market' is an attempt to describe the array of firms that currently produces or potentially will produce products that are sufficiently close substitutes to take business away from any firm or group of firms that attempts to exercise market power."). Products or services need not be identical to be considered **[**22]** reasonably interchangeable. See [duPont, 351 U.S. at 394](#) ("where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others."). Rather, determination of whether a product or service is reasonably interchangeable requires consideration of the cross-elasticity of both demand and supply. If customers would respond to a small price change in a product by changing to another product, then there is a high cross-elasticity of demand between the products. In such a case, the products are reasonably interchangeable, and therefore compete in the same market. See [United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#); [Brown Shoe, 370 U.S. at 325](#); [DuPont, 351 U.S.](#)

and only serves to create confusion. See 2A Phillip E. Areeda et al., *Antitrust Law*, P533 (1995). The Court agrees, and restricts itself to use of the term "market".

[at 400](#). Cross-elasticity of supply refers to "the extent to which producers will be willing to shift their resources from supplying a product or service in one market to supplying a product or service in a different market in response to price changes in the second market." Associated Press' Memorandum of Law in Support of Summary Judgment at 23 (citing [Telerate \[**23\] Sys., Inc. v. Caro, 689 F. Supp. 221, 237-38 \(S.D.N.Y. 1988\)](#)). Determining the cross-elasticity of supply also requires consideration of new, start-up entities which may enter a market.⁷

The evidence supports the conclusion that the relevant market in this case is the delivery of advertisements by any means. First, it is undisputed by both AD/SAT and AP that currently the predominant method of advertisement delivery **[**24]** is provided by overnight services such as Federal Express. AD/SAT's President David Hilton so stated in his deposition. See Deposition of David A. Hilton at 822. Indeed, a business plan prepared by AD/SAT's own consultants, Bain & Company, found that over 80% of all ad delivery services is provided by overnight carriers. See DX⁸ 2 at 750; Deposition of Sam Rovit at 315.⁹

Considering the extensive financial resources and existing capital, both human and physical, possessed by overnight carriers as Federal Express and the United States Postal Service, it is not surprising that they deliver such a large percentage of the ads sent to newspapers. Whatever their limitations, these services have developed and earned reputations for dependability and timeliness.

⁷ AP internal documents reveal that AP officers, when stating they hoped to "capture" the market, often were referring to the electronic delivery market. For antitrust purposes, however, the relevant market is determined by reasonable interchangeability, as evidenced by cross-elasticity of demand and supply, not by laymen's comments made in a competitive business environment. See [Nobel Scientific Indus. v. Beckman Instruments, 670 F. Supp. 1313, 1318-19 \(D. Md. 1986\)](#), *aff'd*, [831 F.2d 537, 538 \(4th Cir. 1987\)](#), *cert. denied*, [487 U.S. 1226, 101 L. Ed. 2d 920, 108 S. Ct. 2886 \(1988\)](#).

⁸ Exhibits are identified as PX for plaintiff's exhibit and DX for defendants' exhibit.

⁹ A marketing study prepared in March 1994 for AP by Clark, Martire & Bartolomeo, Inc. found that 84% of advertisements were delivered by overnight services. See Affidavit of Hillary Lane, Esq. Ex. 115 at 9. See also Affidavit of Almarin Phillips in Support of Summary Judgment ("Phillips Aff.") at P 13.

[25]** Since its inception, as revealed by the deposition testimony of its founder and first president, Neil Hayden, AD/SAT understood **[*1298]** that it is in competition with Federal Express and other overnight couriers. See Deposition of Neil S. Hayden at 178. While it is true that AD/SAT viewed AP and other electronic delivery providers as its primary competition, because it viewed electronic delivery as the wave of the future, the Bain Report reveals that AD/SAT knew that capture of some of the customers of the overnight couriers was necessary to the expansion of AD/SAT's network, which was essential to AD/SAT's survival.

AD/SAT, however, has been unable to compete in that market because its high capital costs have precluded it from pricing its service at rates comparable to Federal Express and other physical delivery sources. While overnight carriers such as Federal Express charge advertisers \$ 7 to \$ 15 per ad, see Affidavit of Patrick T. O'Brien in Support of Summary Judgment ("O'Brien Aff.") Ex. D at 7,8, AD/SAT charges advertisers between \$ 20 and \$ 30 for each non-express ad delivered. Once the affiliation and reception fees charged to newspapers are added to the total cost, it **[**26]** is obvious that AD/SAT's prices are not competitive with overnight carriers. The fact that, nearly a decade after AD/SAT began delivering ads electronically, over 80% of ads are still delivered by physical means, with messenger service being the next most popular means of delivery, indicates that AD/SAT's inability to price competitively with physical carriers precluded it from succeeding in its goal to expand the size of its network, and the volume of ads it delivered. While it is true that electronic delivery of ads provides benefits which physical delivery cannot provide -- such as greater speed and reliability in all weather conditions -- the continued dependence upon physical means of delivery is evidence that, unless priced competitively, electronic services will not be accepted by the market.

In contrast to AD/SAT, AP entered the market knowing that a pricing scheme which was competitive with the overnight carriers is essential to success. See Affidavit of Terry M. Walcott, Esq., in Opposition to Summary Judgment ("Walcott Aff.") Ex. 123 at 3, 6; O'Brien Aff. P 8. As noted above, newspapers pay nothing to receive ads over the AdSEND system. In addition, advertisers, depending **[**27]** upon the number of ads sent in a given year, pay between \$ 4 and \$ 8 for ads delivered within a 12-hour period, and \$ 6 and \$ 12 for ads delivered within a 4-hour period. See AP's Reply Memorandum in Support of Summary Judgment at 11 n.11. AP realized the key to success would be quickly to

establish a large network of advertisers and papers using AdSEND. The only way to achieve this goal was to provide a more effective service at competitive prices.

AD/SAT's primary objection to AP's argument that AdSEND's pricing structure reveals a high cross-elasticity of demand in the delivery of advertisements by any means market centers around the fees charged by AP for ads delivered within one hour. AD/SAT concludes that because AP charges \$ 40 per ad for ads delivered within one hour, regardless of the volume of ads sent, "AP effectively acknowledges that there is a distinct class of buyers who cannot use overnight delivery methods and is willing to pay substantially more for rush delivery." AD/SAT supplements this conclusion by noting that, according to its rate cards, it charges a premium price of \$ 58 for ads delivered within three hours. In essence, as stated above, AD/SAT appears **[**28]** to be arguing that these "rush" services, for which all parties admit there is no non-electronic substitute deliverer, constitutes a separate market.

For several reasons, the Court is not persuaded by this argument. First, despite the statements made by Dr. Comanor, see Comanor Aff. P 33, the Court finds that AD/SAT has not identified a class of advertisers for which this service is a regular necessity. Indeed, AD/SAT has supplied no evidence that even one advertiser requires rush delivery on a regular basis. Certainly it is true that there will be a certain class of situations where express service is needed -- namely, when advertisers, by some happenstance, fail to get an ad prepared in a timely fashion. But this is insufficient to create a market for the service. Considering that for years AD/SAT was the exclusive provider of this rush service, if it were anything but an emergency remedy used occasionally by a wide range of advertisers, one would think that AD/SAT **[*1299]** would have prospered. However, the opposite happened. AD/SAT's own acknowledgment of the need to increase the volume of its deliveries by reducing its fees in order to survive indicates that there is not a steady **[**29]** class of advertisers who need regular express service.

It is true that AP projects that 30% of its ads will be delivered on a rush schedule, and a premium price of \$ 40 per ad will be charged for such service. Again, however, there is no evidence that any advertisers will use the rush service on a regular basis. Indeed, AP's strategy is to price its four-hour and overnight service at levels comparable to the dominant overnight carriers. The availability of a rush service, without evidence that there is a class of advertisers who will regularly use it, is

simply a supplemental feature of AP's service which is intended to convince advertisers to use AP's service, as opposed to Federal Express or another deliverer.¹⁰ This does not create a separate market for antitrust purposes because products or services need not be fungible to compete in the same market. See United States v. Continental Can Co., 378 U.S. 441, 449, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964) (relevant market defined not by product fungibility, but by meaningful competition).

[30]** AD/SAT's current contracts with some of its larger advertiser clients reveals that its rush service is simply an additional aspect of a larger package to attract advertiser customers. In many of these contracts the advertiser does not pay any additional fee for rush delivery, up to a certain number of advertisements. See Hilton Aff. Ex. E. (reproducing six AD/SAT contracts which support stated proposition). For example, AD/SAT's current contract with Lord & Taylor, one of its major clients, provides that Lord & Taylor will pay an annual fee of \$ 184,000, which entitles Lord & Taylor to send up to 8,250 ads. Of those 8,250 ads, 800 may be sent priority service at no extra charge, with a \$ 20 premium per ad beginning thereafter. From this it seems evident that AD/SAT's rush service is simply one aspect of a larger package of services which AD/SAT offers in an attempt to succeed in the competition for advertiser dollars.

In sum, both AD/SAT and AP admit that they are in competition with non-electronic ad delivery providers. Furthermore, AP, after studying the ad delivery business before entering the market, has priced its service to compete with Federal Express and other physical **[**31]** deliverers. Therefore, the Court finds high cross-elasticity of demand in the market of the delivery of advertisements by any means. Because AD/SAT cannot identify any class of advertisers which consistently depend upon the availability of rush services which only electronic deliverers can provide, the premium charged for such services does not create a separate market. Rather, the ability to provide rush delivery is simply an additional feature of the overall service for an advertiser to consider in choosing which ad deliverer to use.

The Court also finds high cross-elasticity of supply in this market. As mentioned above, the current dominant

deliverers of newspaper ads, the overnight carriers, are large companies with great financial strength and businesses which extend well beyond this market. It is simply implausible to think that the development and implementation of AP AdSEND could drive these competitors out of the ad delivery business. It certainly could not drive them completely out of business. Therefore, even if driven out of the ad delivery business, if AP attempted to exercise market power by raising prices to supracompetitive levels, the overnight carriers could easily **[**32]** and quickly reenter the market.

In addition, the barriers to entry into this market, as AD/SAT conceded in its First Amended Complaint, are low.¹¹ As noted **[*1300]** supra p. 9, not only are electronic deliverers such as DigiFlex, Ad eXpress, AdStar, AdLink and Business Link already in the market, but advertisers are beginning to develop their own systems, and there is evidence that the regional Bell companies may soon enter the market. In short, there is high cross-elasticity of supply in the market defined by the Court.

[33]** Having determined that the relevant market in this case is the delivery of advertisements by any means, it is evident that AP lacks sufficient monopoly power to allow AD/SAT's § 2 attempted monopolization claim to survive the instant motion.¹² Reviewing the

¹¹ Paragraph 23 of the First Amended Complaint states:

At present, the market for the transmission of newspaper advertising, as well as the electronic transmission submarket thereof, is characterized by low concentration, vigorous competition, rapid technological development, and ease of entry relative to the three other relevant markets, in which Associated Press occupies a monopoly position. Up to the time of the announcement by Associated Press of its intention to enter the transmission market, newspapers have acted according to their interest in receiving the best possible product at the lowest possible price, and have entered into no arrangements or agreements to foreclose competition on the merits by competitors in the transmission market and the electronic transmission submarket.

Setting aside the merits of AD/SAT's conspiracy argument contained in this paragraph, which will be discussed *infra* part V.A., AD/SAT concedes that barriers to entry are low.

¹⁰ Following AD/SAT's reasoning, because AP's rush service delivers ads in one hour, and AD/SAT's rush service takes three hours, it appears that the Court would be compelled to treat each of these as separate market.

¹² AD/SAT's arguments in support of its attempted monopolization claim, as they must, do not attempt to establish that there is a reasonable likelihood of monopolization of the market defined by the Court, but rather assumes a market restricted to electronic delivery. See PI's.

factors to consider in determining market power which were set forth *supra* p. 12, the Court first notes that AP, a new entrant into a market where over 80% of all ads are delivered by overnight carriers, obviously possesses an insignificant market share. While the Court of Appeals for the Second Circuit is unwilling to base market power determinations solely on market share data, see *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 128 (2d Cir.), cert. denied, 454 U.S. 968, 70 L. Ed. 2d 384, 102 S. Ct. 512 (1981), such data is treated as strong evidence of the absence or presence of market power. See *id.* Many courts in the Second Circuit have found market shares of less than 50% or even 60% insufficient to support an attempted monopolization claim. See *id.* (citing cases). In *Twin Lab.*, 900 F.2d at 569, the Second Circuit stated that "we have held that a 33% market share [**34] does not even approach the level required for dangerous probability of success." (citing *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980)).

Another factor to consider in determining monopoly power, competition in the market, also weighs heavily against AD/SAT's attempted monopolization claim when one considers the strength of competitors such as the overnight carriers. In addition, as mentioned above, the barriers to entry into the market are low. See *United States v. Waste Management, Inc.*, 743 F.2d 976, 983-84 (2d Cir. 1984) (in market where barriers to entry were insubstantial, projected 48.8% market share of company after merger insufficient to support a finding of monopoly [**35] power).¹³ Finally, while predictions about developments in this industry would be speculative at this time, assuming, as AD/SAT and AP do, that electronic transmission is the wave of the future, the low barriers to entry for providers using this method of delivery does not create any inference that AdSEND will establish market power.

AD/SAT cannot show that there is a dangerous probability of AP achieving monopoly power in the delivery of newspaper advertising market. Therefore, an

Opp. at 80.

¹³ It is true that both AP and AD/SAT view electronic delivery as the wave of the future. And, AP's own records indicate that it expects to achieve deep market penetration among larger-volume advertisers. See PX 175. However, a firm's market share is measured "when it undertakes the challenged anticompetitive conduct." *Walsh Trucking*, 812 F.2d at 791. Therefore, standing alone, AD/SAT's reliance on AP's projected market share is not persuasive evidence.

essential element of its § 2 attempted monopolization claim fails [**36] and, accordingly, summary judgment is appropriate.

B. Predatory or Anticompetitive Conduct

HN5^[↑] In order to prove an attempted monopolization claim, a plaintiff must show that a defendant engaged in predatory conduct. In this case, AD/SAT asserts that AP engaged in such conduct by (1) prematurely announcing and implementing the AdSEND [**1301] program; (2) engaging in predatory pricing; (3) leveraging its news and photo monopolies; and (4) participating in a concerted refusal to deal with other defendants. The leveraging and refusal to deal claims are discussed in sections III and V, respectively, of this Opinion and Order. The Court will now address, separately, the premature announcement, essential facilities, and predatory pricing claims.

1. Premature Announcement of AdSEND

AD/SAT asserts that AP engaged in anticompetitive conduct in furtherance of its attempt to monopolize the market by prematurely announcing and implementing AdSEND, "at a time when AP knew that AdSEND was not and would not be functional," Pl's. Opp. at 82-83, with the "express purpose of foreclosing competition from AD/SAT and other electronic delivery services." *Id.* at 83. The facts of this case do [**37] not support such a claim. When publicly announcing AdSEND on April 25, 1994, AP stated that the program would be tested over the summer and launched in September. Testing was done in the summer, and while glitches remained in the system throughout the fall of 1994, see PX 775, 778, 786, the system was operating successfully shortly after the time AP projected. See Affidavit of Thomas Brettingten in Support of Summary Judgment PP 4-8. Regardless, as conceded by AD/SAT, **HN6**^[↑] pre-announcement of a product or service constitutes predatory conduct only when the announcement is knowingly false. See *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1128-30 (7th Cir.), cert. denied, 464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983); see also *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287-88 & n.41 (2d Cir. 1979) (unless it amounts to deception, advertising by competitor with significant market share showing product in best light cannot be anticompetitive conduct), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980). There is no evidence in this case to support the claim that AP knowingly made false statements in announcing AdSEND, [**38] and there is some evidence to contradict it. See PX 775 (document indicates that AP

officer involved with AdSEND unaware of production problems).

2. Predatory Pricing

HN7 [↑] A predatory pricing scheme is "the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 86 (2d Cir. 1981), cert. denied, 455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982) (quoting 3 P. Areeda & D. Turner, *Antitrust Law* P 711b, at 151). The Supreme Court recently held that, in attempting to establish a predatory pricing scheme, a plaintiff must first show that the prices charged by a defendant are "below an appropriate measure of its [] costs." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2587 (1993). However, in *Brooke Group*, the Court, as it had before, declined to resolve the lower courts' conflict over the appropriate measure of costs. See 113 S. Ct. at 2587 n.1; see also Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, ****39** 117, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); Matsushita, 475 U.S. at 585 n.8.

The total cost of production may be divided into two rough categories -- fixed costs, which are borne by the firm whatever level of output it produces, and variable costs, which vary with the level of output. See Northeastern Tel., 651 F.2d at 88. Fixed costs typically include some management expenses, interest on bonded debt, depreciation occasioned by obsolescence, property taxes, insurance and other irreducible overhead. Variable costs typically include such items as materials, fuel, labor, use-depreciation, royalties and license fees, and repair and maintenance. Average variable cost is the sum of all variable costs divided by the level of output. Marginal cost is the increase in variable cost that results from an extra unit of output.

Fixed and variable costs are considered backward-looking "accounting costs," because they are "determined using data generated by conventional accounting methods." See *id.* at 87. In other words, they can be ***1302** determined by looking at financial reports, such as a balance sheet. On the other hand, marginal cost "cannot be determined using data generated by conventional ****40** accounting methods." *Id.* Rather, marginal cost is determined by taking a forward-looking view of the firm, and has therefore been described as an "economist's construction." *Id.*

Another cost which cannot be determined by traditional accounting methods, but which is normally considered by a firm in making decisions regarding future activity, is the cost of capital. "The term "cost of capital" is widely used in the literature of investment decision-making and generally refers to the minimum rate of return which a firm requires as a condition for undertaking an investment." Victor Brudney & William W. Bratton, *Brudney and Chirelstein's Corporate Finance* 449 (4th Ed. 1993). If the rate of return on a proposed investment exceeds this rate of return, then the investment should be accepted by the firm, and if the investment is accepted, the value of the firm increases. See *id.* Because determination of the rate of return of a proposed investment requires assessing the risk of the proposed investment, see *Comanor Aff.* P 21, determining the cost of capital requires assessing the risk of the proposed investment. Thus, while cost of capital is a tool with which a manager can ****41** measure the wisdom of a proposed investment, the tool, and the projected possible outcomes of the proposed investment, are all matters of art, not science.

The Second Circuit has held, following the test set forth by Phillip Areeda & Donald F. Turner, see Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 716-18 & 733 (1975), that **HN8** [↑] the appropriate measure of cost in a predatory pricing case is average variable cost. See Northeastern Tel., 651 F.2d at 88 (2d Cir. 1981). Thus, when a seller prices below reasonably anticipated average variable cost predatory pricing is presumed, see Irvin Indus., Inc. v. Goodyear Aerospace Corp., 974 F.2d 241, 245 (2d Cir. 1992) (citing Areeda & Turner), and prices above average variable cost are presumed non-predatory. See Northeastern Tel., 651 F.2d at 88.

Application of the *Northeastern Telephone* rule is fairly straightforward in a typical predatory pricing case. However, the facts of this case allow AD/SAT to make an argument which purports to follow the rule, yet circumvents it. AP is a new entrant into the newspaper advertising delivery business. ****42** Both AD/SAT and AP agree that the appropriate time from which to calculate the costs of the AdSEND program is when it was presented to the AP Board for approval. Because variable costs, by definition, are those avoidable costs incurred as a result of an increase in output, where a new business is being considered all costs are avoidable and therefore variable. Thus, all costs associated with AdSEND are variable because the AP Board could have decided not to pursue the program at

all and thereby avoided all of AdSEND's costs. See Deposition of Almarin Phillips at 80, 81, 83, 89-91, 184-86, 190. From the universal premise that "all costs are variable," AD/SAT argues that AP's cost of capital with respect to AdSEND is a variable cost, and therefore, following *Northeastern Telephone*, should be considered in determining whether or not the program is predatorily priced. From this, AD/SAT concludes that the AdSEND program is predatorily priced if AP's projected internal rate of return for the investment is lower than its projected cost of capital.

AD/SAT's conclusion is inconsistent with the reasoning offered by the *Northeastern Telephone* Court to support its conclusion that **[**43]** the appropriate measure of cost in a predatory pricing case is average variable cost. In reaching this conclusion, the *Northeastern Telephone* Court acknowledged, following *Areeda & Turner*, that **HN9** **[↑]** "the relationship between a firm's prices and its marginal costs provides the best single determinant of predatory pricing." *Northeastern Tel.*, 651 F.2d at 88. The Court, however, refused to apply marginal cost. Again following *Areeda & Turner*, the Court reasoned that because it cannot be determined from conventional accounting methods, see *id.*, application of marginal cost to predatory pricing claims would produce administrative difficulties for courts.

[*1303] By refusing to apply the best determinant of predatory pricing due to its difficulty of application, the *Northeastern Telephone* Court took a cautious approach to predatory pricing schemes which is consistent with the Supreme Court's approach. It must be remembered that **HN10** **[↑]** the antitrust laws are designed to protect competition, not competitors. See *Brown Shoe*, 370 U.S. at 320. Under normal circumstances, the lowering of prices stimulates competition. Because "the mechanism by which a firm engages in predatory pricing," is **[**44]** also lowering prices, a mistaken inference of predatory pricing is extremely costly because it ""chill[s] the very conduct the antitrust laws are designed to protect."" *Brooke Group*, 113 S. Ct. at 2589 (quoting *Cargill*, 479 U.S. at 122 n.17 (quoting *Matsushita*, 475 U.S. at 594)). Taking a cautious approach is an especially appropriate response to the instant theory of predatory pricing offered by AD/SAT. By asking the Court to consider cost of capital in determining predatory pricing, AD/SAT is asking the Court to evaluate the risks associated with, and the value of, AP's AdSEND venture. Because determining the risk of an investment requires sophisticated business judgment, the exercise of which still cannot afford a certain answer, such activity by this Court could

indeed ""chill the very conduct the antitrust laws are designed to protect."" *Id.* In short, a firm's use of cost of capital is a means of measuring the wisdom of an investment, and the Court declines the invitation to review the wisdom of AP's decision to launch AdSEND.

Even if the Court were to agree with AD/SAT that cost of capital should be considered in determining whether AdSEND is predatorily **[**45]** priced, a reasonable jury still could not find AP liable for predatory pricing. **HN11** **[↑]** A successful predatory pricing claim requires a plaintiff to demonstrate that a defendant "had a dangerous probability of recouping its investment in below-cost pricing." *Brooke Group*, 113 S. Ct. at 2588. For recoupment to occur, the below cost pricing must be able to drive competitors from the market, see *id.* at 2589, allowing the offender to obtain enough market power to sustain "[monopoly] prices long enough to earn in excess profits what they earlier gave up in below-cost prices." *Matsushita*, 475 U.S. at 590-91. Determining the likelihood of recoupment of predatory losses requires, among other considerations, "a close analysis of . . . the structure and conditions of the relevant market." See *Brooke Group*, 113 S. Ct. at 2589. If such analysis reveals a market which is "highly diffuse and competitive, or where new entry is easy," see *id.*, then a reasonable jury could not conclude that the alleged scheme would maintain monopoly pricing for a sustained period of time because monopoly pricing is only possible with monopoly power. See *id.* Indeed, if competitors of the business pricing **[**46]** below cost are not driven out of the market, then the "predatory pricing produces lower aggregate prices in the market", and "the unsuccessful predation is in general a boon to consumers." *Id.* at 2588.

Because the relevant market in this case is the delivery of advertising to newspapers by any means, the Court finds that even if the AdSEND program is predatorily priced, AP would be unable to recoup its losses. The market in this case is highly competitive. It is extremely unlikely that AP could predatorily price AdSEND and drive competitors out of the market, thus allowing AP to price AdSEND at monopoly prices. Even if that occurred, no reasonable juror could find that AP could sustain monopoly power long enough to recoup its losses. As noted above, the business of the overnight carriers is not limited to the delivery newspaper advertisements. Thus, an AP predatory pricing scheme would not drive them entirely out of business, meaning that reentry by the overnight carriers would be easy and quick if AP began to charge monopoly prices. Again to repeat, the barriers of entry into this market are low,

which provides further evidence that AP's predatory pricing scheme could not succeed, **[**47]** as monopoly prices would result in new competitors entering the market. In short, considerations of the relevant market in this case mandate summary disposition of AD/SAT's **[*1304]** predatory pricing claim. See [Brooke Group, 113 S. Ct. at 2589](#).¹⁴

[48]** In summary, because [HN12](#)^[↑] cost of capital should not be considered in determining whether AP has priced below average variable cost, AD/SAT cannot show that the AdSEND program was predatorily priced. In addition, even if predatorily priced, because the relevant market is the delivery of advertisements by any means, AD/SAT cannot show a dangerous probability of recoupment.

III. AD/SAT's [Section 2 Monopoly Leveraging Claim](#)

In its First Amended Complaint, AD/SAT alleges that AP leveraged its monopoly power in the wire services news transmission market and the wire services photo transmission market to unlawfully gain a competitive advantage in the electronic delivery of newspaper advertising submarket. See First Amended Complaint P 32.¹⁵ AP assumed for the purposes of this motion that it

¹⁴ The Court notes in passing that AP contends that, even if cost of capital is considered, AdSEND is not priced below cost. Dr. Comanor concluded that AdSEND was priced below cost upon finding that the program's cost of capital, between 19% and 24%, was higher than its projected internal rate of return ("IRR") of 16.5%. However, in determining the IRR, Dr. Comanor presumed that after a five year period the AdSEND program would have "no residual value remaining." See Comanor Aff. P 12. In so doing, he followed the five-year planning period developed in AP's business plan. See PX 211. However, "most, if not all, finance textbooks . . . state that a continuing value should be included in the calculation of IRR's." Phillips Aff. P 7 (citing Brealey & Myers, *Principles of Corporate Finance* 96 4th ed. (1991) and Copeland et al., *Valuation: Measuring and Managing the Value of Companies* 207 (1990)). Because the issue is not clear, the Court will not resolve whether Dr. Comanor or Dr. Phillips is correct. However, assuming Dr. Comanor is correct, meaning that AdSEND is priced below cost, the Court notes that his conclusion depends upon AdSEND having no value in five years. Given this, the Court views with even more skepticism AD/SAT's assertion that there is a dangerous probability that AP could recoup the losses it suffered in predatorily pricing AdSEND.

¹⁵ In its First Amended Complaint AD/SAT also alleges that AP leveraged its monopoly power in the satellite transmission

has monopolies in the wire services news and photo markets.

[49]** The Second Circuit first recognized a separate [§ 2](#) claim for monopoly leveraging in [Berkey Photo, 603 F.2d at 274](#). [HN13](#)^[↑] "Monopoly leveraging is where a party uses its monopoly power in one market to distort or affect competition in another market." [Ortho Diagnostic Sys., Inc. v. Abbott Lab., Inc., 822 F. Supp. 145, 153 \(S.D.N.Y. 1993\)](#); see [Twin Lab., 900 F.2d at 571](#). A defendant need not monopolize or even attempt to monopolize the second market to be liable for monopoly leveraging. See [Virgin Atl. Airways, Ltd. v. British Airways, PLC, 872 F. Supp. 52, 65 \(S.D.N.Y. 1994\)](#).¹⁶ However, there must be a "tangible harm to competition" in the second market. [Twin Lab., 900 F.2d at 571](#); see [Berkey Photo, 603 F.2d at 276](#) (citing [Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 608-09, 97 L. Ed. 1277, 73 S. Ct. 872 \(1953\)](#)) (substantial amount of competition in second market must be foreclosed).

[50]** Dicta in the *Twin Lab.* case called into question the applicability of a *Berkey Photo* monopoly leveraging claim in a case which does not involve a tying allegation. See also [Soap Opera Now, Inc. v. Network Pub. Corp., 737 F. Supp. 1338, 1344 \(S.D.N.Y. 1990\)](#) (citing *Twin Lab.* for the stated proposition). [HN14](#)^[↑] In antitrust law, a "tying" claim **[*1305]** involves the tying of the sale of one product or service to the sale of another product or service for which the seller has a monopoly. For example, in [International Salt Co., Inc. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 \(1947\)](#), the seller had patents on two machines for utilization of salt products. Because these patents

newspaper services market to gain advantage in the electronic delivery of advertisements market. See *id.* However, in its memorandum of law in opposition to summary judgment, this allegation is not discussed. See Pl's. Opp. at 59-62. Therefore, the Court deems it waived.

¹⁶ It has been suggested by academic commentators that, after the Supreme Court decisions in [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#), and [Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\)](#), monopolization or a dangerous threat of monopolization of the second market is necessary for a monopoly leveraging claim to succeed. See [International Audiotext Network v. American Tel. & Tel. Co., 893 F. Supp. 1207, 1212 n.4 \(S.D.N.Y. 1994\)](#) (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, P 626.1 (Supp. 1993)). However, the District Courts of the Second Circuit continue to follow *Berkey Photo*.

created a limited monopoly, leases which required purchasers to buy the seller's salt as well as his machines were declared an unlawful restraint of trade in violation of [§ 1](#) of the Sherman Act because competition in the relevant salt market was foreclosed. See [id. at 395-96](#). The instant case does not involve "tying" because there is no evidence that AP is conditioning any of its other services on the use of AdSEND. Following the suggestion by the Second Circuit in *Twin Lab.*, the Court **[**51]** views with skepticism AD/SAT'S monopoly leveraging claim.

The evidence supplied by AD/SAT to support its claim does not convince the Court that its skepticism is unwarranted. The *Berkey Photo* Court emphasized that a firm "does not violate [§ 2](#) simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market." [Berkey Photo, 603 F.2d at 276](#). AD/SAT's purported evidence of monopoly leveraging indicates that any benefits AP may have in the advertising delivery business are lawful. Of the seven examples of leveraging listed by AD/SAT on page 61 of its memorandum in opposition to summary judgment, numbers one, three, four, and five will be discussed here.¹⁷ AD/SAT's first example of leveraging is that AP subsidized the cost of advertisement reception equipment, for which it does not charge newspapers, through member-owner assessments. There is simply no proof that this happened. Moreover, AP asserts that it keeps title to the equipment, and merely allows papers to use it in order to join the AdSEND **[**52]** network. Therefore, this assertion cannot support a monopoly leveraging claim. As a third example, AD/SAT states that AP leveraged off its preexisting satellite network to convince advertisers that it could offer access to all United States newspapers. As a fourth example, AD/SAT states that AP used its bureau chiefs and news and photo personnel to solicit advertisers and newspapers for AdSEND. None of these examples can sustain a monopoly leveraging claim because they do not turn on AP's being a monopoly in the original markets.¹⁸ Indeed, this is simply normal business

development which is to be expected by any competitor entering a new **[*1306]** business. [HN15](#)^[↑] AP may be taking advantage of its resources and its good will, but doing so does not violate the antitrust laws.

[53]** AD/SAT also alleges that AP unlawfully leveraged off its monopolies by reminding its members that using AdSEND would be good for them because they are member owners. First, the Court notes that AD/SAT offers no support to defend this claim. To the extent that this claim collapses with AD/SAT's conspiracy allegations, it will be discussed below. See *infra* part V.A. Again, however, it should be clear that this conduct is not an exertion of monopoly influence because it does not turn on AP having a monopoly in either the news or photo markets. In addition, it does not affect competition in the electronic delivery of advertisement market. Therefore, the Court grants AP's motion for summary judgment as to AD/SAT's monopoly leveraging claim.

use and maintenance of the AP owned satellite system as also one for monopoly leveraging. This conclusion follows from AD/SAT's argument that in order to compete in the electronic ad delivery market a business "must either gain access to the network, for which AP is charging monopoly prices when it allows access at all, or incur substantial expense to create duplicate facilities, which will then be used to solicit the business of the very newspapers that own the AP satellite network." PI's. Opp. at 81-82. AP charges AD/SAT \$ 730,000 annually for the use of its satellite, while charging itself \$ 75,000. AD/SAT's argument fails for several reasons. First, AD/SAT provides no evidence that AP has a monopoly in the satellite market. Therefore, because [HN16](#)^[↑] the exercise of monopoly power is necessary to sustain a monopoly leveraging claim, see [Berkey Photo, 603 F.2d at 284](#), AD/SAT's must fail. Second, AP is providing access to its satellite system. While AD/SAT claims that access is afforded only by paying monopoly prices, the Court notes that the contracts governing this relationship between AD/SAT and AP were first entered into in 1986, and were favorably renegotiated by AD/SAT in 1991. Thus, absent evidence of an actual monopoly in the satellite market, the Court assumes that the price AP charges AD/SAT for use of its satellite network is the market rate. Finally, even if the prices AP charges AD/SAT to use its satellite network were the exercise of monopoly power, because the relevant market in this case is the delivery of newspaper advertisements by any means, AD/SAT's monopoly leveraging claims still must fail. It is simply not necessary either to gain access to AP'S network, or to build duplicate facilities, in order to compete in this market. See [Ortho Diagnostic, 822 F. Supp. at 153](#) [HN17](#)^[↑] ("monopoly leveraging is where a party uses its monopoly power in one market to distort or affect competition in another market.") (emphasis added).

¹⁷For a discussion of numbers two and six, which are based on conspiracy allegations, see *infra* part V. For a discussion of number seven, which deals with the allegedly premature announcement of AdSEND, see *supra* part II.B.1.

¹⁸Although not presented as such, the Court interprets AD/SAT's claim that AP is charging it monopoly prices for the

IV. Unlawful Monopolization of the News and Photo Markets

AD/SAT also asserts a [§ 2](#) unlawful monopolization claim. [HN18](#)^[↑] A claim for unlawful monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [Ortho Diagnostic, \[**54\] 822 F. Supp. at 153](#) (quoting [Grinnell, 384 U.S. at 570-71](#)).

In this case, AD/SAT argues that AP's entry into the advertising delivery market was a "defensive strategy" employed to prevent others, including AD/SAT, from entering the news and photo markets, thereby protecting AP's existing monopolies in those markets. AD/SAT finds justification for its argument from internal AP documents, which include statements like the following: "Once someone else has built a network for digital delivery of advertising, they will have in place the infrastructure to deliver anything else." PX 36 (internal memorandum from AP vice president John Reid to AP president Lou Boccardi).

The Court first notes that this claim was not pleaded in AD/SAT's First Amended Complaint. AP only conceded that it monopoly power in the news and photo markets for the purposes of this motion. It is improper for AD/SAT to attempt to prove an essential element of a claim not in its complaint by way of this concession.

Regardless, the monopolization claim must fail because AD/SAT lacks standing to assert it. [HN19](#)^[↑] The right of private parties to file claims under the federal antitrust laws derives from two sections of the [\[**55\]](#) Clayton Act. [15 U.S.C. § 12 et seq.](#) Section 4 of the Clayton Act provides in relevant part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue there for in any district court in the United States . . . and shall recover threefold the damages by him sustained." [15 U.S.C. § 15](#). In relevant part, section 16 of the Clayton Act states that "any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." [15 U.S.C. § 26](#). [HN20](#)^[↑] A literal reading of these sections would provide a remedy to "any person" who has suffered an injury-in-fact from an antitrust violation. However, one step courts have taken to narrow the class of plaintiffs who may bring private antitrust actions is to require a showing of antitrust injury as a necessary, but not

sufficient, condition of antitrust standing. See [Cargill, 479 U.S. at 111](#). Because an antitrust injury must be of the type which the antitrust laws were intended to prevent, see [id. at 109](#); [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \[**56\] \(1979\)](#), an injury to competition is required. See [id. at 488](#). Once an injury to competition is established, the Supreme Court has limited who may sue to remedy that injury. According to the Court in [Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters, et al., 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#), the "Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of [competitors] in the [\[**1307\]](#) relevant market." [id. at 538](#).

Under the *Associated General* rule, AP can only cause antitrust injury to AD/SAT through activity in a market in which AD/SAT is either a customer or a competitor. Therefore, because AD/SAT is admittedly neither a customer nor a competitor in either the news or photo markets, it lacks standing to sue AP for monopolization of the news and photo markets. Hence, its monopolization claim must fail. AD/SAT attempts to avoid this conclusion by theorizing that AP is protecting its monopolies in those markets through its anticompetitive activities in a market in which AD/SAT does compete, the ad delivery [\[**57\]](#) market. However, if anticompetitive activity by AP, and antitrust injury to AD/SAT, is occurring in the ad delivery market, then the appropriate response by AD/SAT are claims against AP for monopoly and attempted monopoly of this market. In fact, AD/SAT has made the latter claim and cannot make the former. AD/SAT lacks standing to bring this monopolization claim, and therefore summary judgment is granted to AP.

V. The Sherman Act Conspiracy Claims

Before addressing whether or not the defendants entered any unlawful agreements to refuse to deal or boycott AD/SAT under [§ 1](#) of the Sherman Act, or to monopolize the relevant market under [§ 2](#) of the Sherman Act, the Court will address two related, threshold arguments advanced by AD/SAT to support its claim of conspiracy.

The two threshold arguments center around the claim that simply by developing and implementing the AdSEND program, AP is necessarily engaging in concerted action within the meaning of the Sherman

Act. ¹⁹ First, AD/SAT's asserts that the Supreme Court's decision in [Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#), has collateral estoppel effect on any arguments defendants **[**58]** may make to establish that AD/SAT has not proven a conspiracy in this case. In *Associated Press*, the Supreme Court found that two AP by-laws, which had the effect of preventing all newspapers who were not AP members from buying news from AP or any of its members, and therefore restrained competition in the newspaper publishing field, violated [§§ 1](#) and [2](#) of the Sherman Act. The Court held that "arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose." *Id.* at 19.

HN21[↑] Under the doctrine of collateral estoppel, which is also known as issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving **[**59]** a party to the first case." [Remington Rand Corp. v. Amsterdam-Rotterdam Bank, 68 F.3d 1478, 1485 \(2d Cir. 1995\)](#) (quoting [Burgos v. Hopkins, 14 F.3d 787, 789 \(2d Cir. 1994\)](#) (quoting [Allen v. McCurry, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 \(1980\)](#))). In this case, an AP by-law is not at issue. Moreover, this case involves an alleged conspiracy surrounding the electronic transmission of advertising. The 1945 *Associated Press* case does not preclude litigation of whether such a conspiracy exists. Therefore, collateral estoppel does not serve as a bar to defendants in this case.

As a second argument, AD/SAT asserts that, even if the *Associated Press* decision does not preclude litigation of the conspiracy issue in this case, decisions holding that "conduct of an association adversely affecting competitors is joint action by the association's members," see Pl's. Opp. at 46-47, compel this Court, without reviewing the evidence, to find a conspiracy in this case. The argument does not persuade. While it is true that AD/SAT cites several cases contain dicta which states that associations are inherently conspiratorial, careful review of these cases reveals **[**60]** that they are distinguishable from the instant situation. All of the cases AD/SAT relies upon

involve situations where an association is regulating the conduct of its **[*1308]** members, through an explicit agreement (i.e. a by-law or some other formal action), as to an area of activity in which the members are in competition. See [Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 496-97, 100 L. Ed. 2d 497, 108 S. Ct. 1931 \(1988\)](#); [United States v. Topco Assocs., Inc., 405 U.S. 596, 601-02, 92 S. Ct. 1126, 31 L. Ed. 2d 515 \(1972\)](#) (by-laws effectively limit competition by allocating geographic territories among members); [Fashion Originators' Guild v. Federal Trade Comm'n., 312 U.S. 457, 462-63, 85 L. Ed. 949, 61 S. Ct. 703 \(1941\)](#) (rules and policies of Guild anti-competitive); [Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1384](#) (9th Cir.) (Article of NFL Constitution precluding franchise from locating within 75 miles of another franchise without consent of that franchise anti-competitive), *cert. denied sub nom. Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, LTD, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984)*. This case does not involve the regulation by an association of an area **[**61]** of activity in which its members are in competition. Rather, it involves AP supplying a service, the electronic delivery of advertisements, to its members. Therefore, the Court finds the decisions of this and other Circuit Courts holding that associations are not "walking conspiracies," [Consolidated Metal Prods., Inc. v. American Petroleum Inst., 846 F.2d 284, 293-94 \(5th Cir. 1988\)](#), persuasive. See [Wilk v. American Medical Ass'n, 895 F.2d 352, 374 \(7th Cir.\), cert. denied, 498 U.S. 982, 112 L. Ed. 2d 524, 111 S. Ct. 513 \(1990\)](#) (trade association, even when setting industry standards, not by definition a "walking conspiracy"); see also [Capital Imaging, 996 F.2d at 544 \(2d Cir. 1993\)](#) (in case involving conduct of a trade association, court searched for agreement among association's members). Because the *Associated Press* case does not have collateral estoppel effect, and because associations such as AP are not by definition antitrust conspiracies, AD/SAT must establish a conspiracy in this case by proving the existence of an agreement.

A. Sherman Act [§ 1](#) Conspiracy

[Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), **HN22**[↑] forbids "every contract, combination . . . **[**62]** or conspiracy, in restraint of trade or commerce among the several States." A threshold determination a court must make on a motion for summary judgment in a [§ 1](#) case is whether or not a reasonable jury could find that there was some form of concerted action between two or more legally distinct economic entities. See [Capital](#)

¹⁹ Assuming this argument succeeds, AD/SAT asserts that the liability of NAA and the newspaper defendant turns upon whether they participated in or ratified the AdSEND program. See Pl's. Opp. at 52.

Imaging, 996 F.2d at 542. Only after an illegal agreement is shown will a court consider whether the agreement constituted an unreasonable restraint of trade, whether *per se* or under the rule of reason. See *id.*²⁰

[**63] In Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) the Supreme Court held that HN23[↑] to permit the inference of concerted action, a plaintiff must present direct or circumstantial evidence which reasonably tends to prove that each defendant "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 764 (quoting Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)), *cert. denied*, 451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981). According to AD/SAT, in this case the "common scheme" to which all defendants have "consciously" agreed is a refusal to deal with AD/SAT. In deciding whether a defendant was a member of an unlawful conspiracy, its refusal to deal cannot be viewed in isolation, but must be viewed in its factual context. See Matsushita, 475 U.S. at 587 (discussing First Nat'l Bank of Ariz. v. [*1309] Cities Serv. Co., 391 U.S. 253, 288-89, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)). The practical obstacles to implementing the conspiracy is part of the factual context. See *id.* at 588. HN24[↑] Absent an express agreement, if the factual context indicates that a [****64**] defendant lacked a rational motivation to join the alleged boycott, then summary judgment is appropriate. See *id.*; Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir.) ("a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence."), *cert. denied*, 484 U.S. 977, 98 L. Ed. 2d 487, 108 S. Ct. 489 (1987); see also Eastman Kodak, 504 U.S. at 468-69 (applying Matsushita rule that summary judgment

appropriate if theories make no economic sense to non-conspiracy antitrust claims). Even if there is a motivation to conspire, if the refusal to deal is consistent with a defendant's independent economic interest, more must be shown by the plaintiff to survive a summary judgment motion. A plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588 (quoting Monsanto, 465 U.S. at 764); see Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 70 (2d Cir. 1988) (section 1 does not prohibit independent business actions and decisions); AD/SAT, a division [****65**] of Skylight, Inc. v. Associated Press, 885 F. Supp. 511, 519 (S.D.N.Y. 1995). Evidence of conduct that is as consistent with permissible conduct as with illegal conspiracy (i.e. "parallel conduct") is insufficient. See Matsushita, 475 U.S. at 588; Apex Oil, 822 F.2d at 252.

The Court finds that none of the defendants had a rational motivation to join the alleged conspiracy.²¹ In addition, all defendants had valid independent reasons for making the decisions they did. However, because the motivations for and explanations of the actions taken by the newspaper defendants are different from, although related to, NAA and NNN, the Court will first discuss AD/SAT'S claims as applied to the newspaper defendants, and then as applied to the NAA and the NNN. Finally, the Court will discuss AD/SAT's claims against Donald Newhouse and Advance.

[**66] 1. *The Newspaper Defendants*

According to AD/SAT, the newspapers joined AP in a concerted refusal to deal with AD/SAT in order to drive it out of business. The refusal to deal, AD/SAT argues, would reduce competition in the electronic delivery of advertising market, which would provide AdSEND with a competitive advantage.²² Finally, the profits AP earned

²⁰ Typically, § 1 cases are analyzed under the rule of reason, which requires the factfinder "to weigh all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). In a limited number of cases, conduct which is so plainly harmful to competition will be declared *per se* illegal. See *id.* at 49-50. Examples of *per se* illegality include horizontal and vertical price fixing, the division of a market into territories, certain tying arrangements, and some group boycotts involving concerted refusals to deal with a competitor. See Capital Imaging, 996 F.2d at 542-43 (citing cases).

²¹ Because liability for conspiracy requires an agreement between at least two distinct economic entities, see supra p. 43, the Court need not, and does not, separately review AP's conduct to see if it had a motive to conspire. That is, even if AP had a motivation to conspire, because the Court finds that no other defendant had a rational motivation to conspire, necessarily AP has no potential co-conspirators. Therefore, AP's conduct with respect to the conspiracy claims is only discussed as it relates to other defendants.

²² In fact, AD/SAT appears to state that the purpose of the illegal agreement is to create a monopoly for AdSEND so that

by way of this competitive advantage would benefit the newspapers by allowing AP to reduce each paper's annual AP membership dues.

The Court finds **[**67]** three problems with this theory. First, the practical barriers to the conspiracy succeeding in its anticompetitive goals destroys any rational reason a newspaper might have to participate. At the time of the filing of this motion, 48 of the 50 largest newspapers by circulation were AD/SAT affiliates. In addition, 60 of the next 100 largest papers were also affiliates. To reach its purported goal of reducing competition in the market, this alleged conspiracy would have to be able to disable AD/SAT's ability to compete. In order for this to happen, the larger **[*1310]** circulation papers would have to join the conspiracy. However, because AD/SAT's service is more cost effective for national advertisers sending a single ad to multiple newspapers, and because national ads supply a greater source of revenue to larger circulation newspapers, these larger papers have limited reason to boycott AD/SAT. Therefore, in light of the lack of incentive for larger papers to join the conspiracy, it would be irrational for the smaller market newspaper defendants in this case to join the conspiracy because it would be unlikely to produce the desired results.

Second, even if AD/SAT could be eliminated from the **[**68]** market, because the Court finds the relevant market in this case to be the delivery of advertisements by any means, it is extremely unlikely that competition would be affected in a measurable amount. Without such a reduction in competition, the newspaper's goal in joining the alleged agreement -- reducing AP membership dues by way of anticompetitive pricing -- could not be met. Therefore, there is no economic reason to join the alleged boycott.

Finally, and most important, even if this implausible scheme could succeed, the Court wonders how much joy it would bring the newspapers. As recognized by the Supreme Court over forty years ago, see [Times-Picayune, 345 U.S. at 604](#), and as is still true today, revenue from advertising is the primary source of income for newspapers. Therefore, it is in a newspaper's interest to make advertising in newspapers

AP can earn monopoly profits, and pass these profits to the papers by way of reducing membership dues. See Pl's. Opp. at 70. While a [§ 2](#) conspiracy does require monopolization of the market as a goal, because [§ 1](#) only requires an adverse effect on competition, see [Capital Imaging, 996 F.2d at 543](#), the Court assumes AD/SAT's theory, as applied to its [§ 1](#) claim, is so limited.

as attractive as possible to advertisers, who have various alternative media in which to advertise their products, including television, radio, and billboards. One way to make advertising in newspapers attractive to advertisers is to reduce the advertiser's costs. Typically, advertisers bear the costs associated with delivering ads to **[**69]** newspapers. In theory, in a free market economy, the cost of delivering ads decreases as competition in the delivery market increases. Therefore, while it makes sense for the papers to want AP's AdSEND to enter the delivery market because it increases competition, it does not make sense to exclude AD/SAT from the market.²³

[70]** As demonstrated in the following paragraphs, even if the newspapers do have a motive to conspire, each newspaper defendant who terminated, or attempted to terminate, its AD/SAT affiliation agreement had independent business reasons for doing so. Because AD/SAT has offered no evidence which "tends to exclude the possibility" that these business reasons explain the defendants conduct, summary judgment is appropriate for all newspaper defendants.

a. *Newark Morning Ledger Co.*

The *Star-Ledger*, which, in 1986, became the first AD/SAT affiliate, is published in Newark, New Jersey, within close proximity of the strong advertising base in New York City. Therefore, while still receiving ads from overnight couriers and electronic deliverers (including

²³ AD/SAT criticized this Court's Opinion and Order granting summary judgment to the *Lexington Herald-Leader* because it failed to acknowledge evidence intended to prove that the papers believed it rational to help AP achieve a monopoly. Specifically, AD/SAT presented a statement apparently made by Jerry Tillis, a vice president of marketing for Knight-Ridder, that because current delivery services, including AD/SAT, were in disarray, there was a great opportunity for AP to enter the market, and by so doing it could mean a major offset in the AP dues structure. See PX 25. This evidence is not probative. First, it amounts to nothing more than encouragement for a new competitor to enter the ad delivery market, which is in the interest of all newspapers and is conduct the antitrust laws are designed to protect. It is true that AP papers may have a special interest in AP making a successful entry into the market. However, because papers survive based upon generating profits, not decreasing their AP membership dues, their overriding interest is in decreasing advertiser costs, which is effected through competition. In addition, the Court notes that this statement was not made by a defendant in this action, and is not therefore probative of any defendant's intention.

AD/SAT and AP AdSEND), the *Star-Ledger* is able to receive a great proportion of its ads by using several relatively inexpensive messenger services. See Declaration of Mark Herrick ("Herrick Decl.") PP 3-6, 7. While the prices paid for these services varies depending upon the service provider and the number of pick-ups, all are substantially less expensive for the *Star-Ledger* than receiving ads over the AD/SAT network.

[71] [*1311]** After receiving another invoice for the \$ 7,500 AD/SAT annual affiliation fee in January 1993, Mark Herrick, the director of marketing and advertising at the *Star-Ledger*, decided not to pay the fee. Herrick states that he thought the fee was too expensive, and wanted to renegotiate with AD/SAT. See Newhouse Defendants' Rule 3(g) Reply P 58. It is unclear what discussions, if any, occurred between the *Star-Ledger* and AD/SAT from January to August 1993. However, in a meeting with AD/SAT officials, including then-President Richard Atkins, Herrick stated that he believed AD/SAT'S service was too expensive, and asked that the affiliation agreement be renegotiated, and the still-unpaid 1993 affiliation fee be waived. See Deposition of Mark Herrick at 19-20; Deposition of John C. Langstine at 420-21; PX 1043. In response, Atkins stated that AD/SAT intended not to eliminate but to increase the *Star-Ledger's* annual affiliation fee to \$ 12,500. See PX 1043.

However, at the same meeting, Atkins introduced a discount group proposal for the Newhouse newspapers, which would allow all of the papers to become AD/SAT affiliates, and require each paper to pay an annual affiliation **[**72]** fee of \$ 6,000, and a per ad transmission fee of \$ 25. See PX 1042. Herrick stated that he did not have the authority to make such decisions, but would pass the proposal on to his superiors to get their response. The proposal was ultimately rejected.

No further discussion of the unpaid 1993 affiliation fee occurred until after current-president Hilton and the new owners of AD/SAT began to review old invoices and realized that neither the 1993 nor the 1994 affiliation agreements had been paid. After an exchange of letters regarding the affiliation fees between AD/SAT and the *Star-Ledger* during the summer of 1994, on August 19, 1994, Herrick sent written proposed amendments to the affiliation agreement to Hilton. The amendments proposed that the unpaid affiliation fees be forgiven, future affiliation fees be eliminated, and the notice period for termination be reduced from nine months to

seven days. See DX 91. On December 28, 1994, after this lawsuit was filed, AD/SAT formally rejected the proposal and demanded payment of the unpaid affiliation fees, but also promised to provide their own proposal to the *Star-Ledger* in the near future. See DX 371. No proposal had **[**73]** been made at the time this motion was filed. The *Star-Ledger* eventually paid the affiliation fees, and presently remains an AD/SAT affiliate and receives ads over the network.

The only evidence AD/SAT supplies to support its claim that the *Star-Ledger* was a member of the alleged conspiracy is that Donald Newhouse, the president of Advance, which owns the *Star-Ledger*, knew about AP's plan to enter the ad delivery business several months before the August 1993 meeting between Herrick and the AD/SAT officers. This fact is offered to explain why the *Star-Ledger* refused to deal with AD/SAT and why the Newhouse papers rejected the group proposal offered by AD/SAT.²⁴

For several reasons, the Court finds this argument insufficient to survive the *Star-Ledger's* motion for summary judgment. First, it is not at all clear that the *Star-Ledger* refused **[**74]** to deal with AD/SAT. All of the evidence suggests that in refusing to pay the annual affiliation fee, Herrick was attempting, admittedly in an unorthodox fashion, to renegotiate the *Star-Ledger's* agreement with AD/SAT. In light of the costs the paper was paying to use AD/SAT's service, attempting to renegotiate makes good business sense. While AD/SAT may believe that the requests made by the paper, including elimination of the affiliation fees and reduction of the notice of termination period to seven days, were unreasonable to the point of not constituting good faith negotiations, the Court notes that AdSEND is free to a paper, and the termination period is thirty days.

Even if these actions by Herrick did constitute a refusal to deal, considering the *Star-Ledger* had other, more cost-effective means of receiving ads, it had a valid business reason for ending its relationship with **[*1312]** AD/SAT. The mere fact that Newhouse knew about AP's plans before the August 1993 meeting does not tend to exclude the possibility that Herrick's decision on behalf of the *Star-Ledger* was an independent one. There is no evidence that Newhouse and Herrick spoke about AdSEND before the meeting. **[**75]** Both deny that they had. Regardless, without evidence of what might

²⁴ For a discussion of whether or not the refusal to accept the group deal constitutes an unlawful restraint of trade, see *infra* part V.A.3.

have been said, a conspiracy cannot be built on sheer speculation. Therefore, summary judgment is granted to the *Star-Ledger*.

b. *The Birmingham News Company*

The Birmingham News entered into a five-year AD/SAT affiliation agreement on January 1, 1990. See AD/SAT Rule 3(g) Statement P 193. The agreement required *The Birmingham News* to pay a \$ 10,000 annual affiliation fee in addition to \$ 25 for each national ad and \$ 20 for each retail ad. See *id.* In the third or fourth week of May 1994, Tom Lager, the director of sales and Marketing at the paper, received an invoice for the annual \$ 10,000 affiliation fee. Lager had previous experience with AD/SAT because the *Omaha World Herald* was an AD/SAT affiliate when he was its director of advertising. In that capacity, on December 6, 1991, Lager sent written notice of termination of affiliation to AD/SAT on behalf of the *Omaha World Herald*. See DX 308. That decision was made after Lager and others at the *Omaha World Herald* reviewed the volume of ads sent over the AD/SAT network, and found the service too costly. See Declaration [**76] of Thomas Lager ("Lager Decl.") P 8.

After receiving *The Birmingham News's* annual affiliation invoice in May 1994, Lager, who began working for the paper in January 1994, reviewed the paper's reception log, which recorded how many ads, and from what advertisers, were sent over the AD/SAT network. His review revealed that relatively few ads were being delivered over the network, and the majority were sent by a single advertiser. See *id.* P 9. From this, Lager concluded that the paper's affiliation with AD/SAT did not make financial sense. While Lager did not make formal calculations at the time, later computation reveals that, considering reception fees and affiliation fees, *The Birmingham News* was paying nearly \$ 70 per ad sent over the AD/SAT network. See Newhouse Defendants' Rule 3(g) Statement P 82. After his superior, Victor Hanson III, accepted his recommendation that the paper not renew its affiliation agreement, on June 6, 1994, Lager sent written notice of termination to AD/SAT. See DX 373. Lager concedes that before he sent the termination letter he had seen documents which discussed AdSEND, but states that they did not enter into his decision regarding [**77] AD/SAT. See Lager Decl. P 24.

AD/SAT asks this Court to infer that *The Birmingham News* was part of the alleged conspiracy based upon: (1) a statement from Christopher D. Wood, AD/SAT's

vice president of technical operations, that, after unplugging AD/SAT'S service, the paper later reconnected the service to receive two "rush" ads it could not have otherwise received; (2) the paper's termination of its affiliation after the announcement of AdSEND; (3) the paper's ownership by Donald Newhouse; and (4) a letter to Victor Hanson from Publicitas, NAA's one order/one bill clearing agent.

Even assuming Wood's statement is true, while it might go to show that the decision to terminate AD/SAT was not a display of perfect business judgment, it certainly does not, as the antitrust conspiracy laws require, tend to exclude the possibility that Lager decided to terminate the AD/SAT affiliation because ads sent over the network were costing the paper nearly \$ 70 an ad. Termination of the affiliation agreement after the announcement of AdSEND also fails to meet the *Monsanto* test of tending to exclude independent conduct because it shows, at best, parallel conduct after an invitation [**78] to conspire. As noted in the discussion concerning the *Star-Ledger*, the mere fact that *The Birmingham News* is a Newhouse newspaper does not tend to exclude the possibility that the decision to terminate was an independent business decision. Finally, the letter from Publicitas CEO Bill Howard to Hanson, which followed up on a conversation between the two, would not allow a reasonable juror to infer a conspiracy because the letter explicitly states that Publicitas's working with the paper was not contingent upon the paper's [*1313] use of AdSEND. See PX 473. The Court grants *The Birmingham News's* motion for summary judgment.

c. *The Cox Defendants*

Of the over fifteen newspapers owned by either defendant CEI or its subsidiary Cox Newspapers, only four ever entered affiliation agreements with AD/SAT. These are the *Dayton Daily News* (owned by defendant DNI), *The Atlanta Journal/Constitution* ("AJC"), *The Palm Beach Post*, and the *Austin-American Statesman*. The AJC and *The Palm Beach Post* remain AD/SAT affiliates, and are also experimenting with AdSEND. AD/SAT concedes that the *Austin-American Statesman's* decision to terminate its affiliation [**79] was not the product of any conspiracy. See Deposition of Christopher D. Wood at 733. Prior to cancelling its affiliation agreement, the *Dayton Daily News* paid AD/SAT an annual affiliation fee of \$ 7,500 plus reception fees of \$ 20 to \$ 25 per advertising transmission. The paper is now receiving electronically transmitted ads from both Ad eXpress and AdSEND.

AD/SAT offers the following as evidence to implicate CEI and the *Dayton Daily News* into the alleged conspiracy: (1) the president of Cox, David Easterly, was a member of the *ad hoc* committee overseeing the AdSEND program; (2) on June 16, 1994, AP officers met with Cox advertising executives, and at the conclusion of the meeting, Cathleen Coffey of Cox directed the Cox Newspapers affiliated with AD/SAT to "review their contracts."; (3) the *Dayton Daily News* gave its notice of intent to cancel its AD/SAT affiliation agreement on August 3, 1994; and (4) notes written by AD/SAT president David Hilton, after a conversation with *Dayton Daily News* advertising director Pat Keil, that the paper's decision to use AdSEND was a "corporate one," meaning that it was made not at a local level, but by higher officers within **[**80]** CEI or Cox.

The *Dayton Daily News* submits that its decision to terminate AD/SAT was made locally by Keil for legitimate business reasons. For several reasons, the Court is persuaded by this explanation. First, Keil submits that she made her decision to terminate the agreement before the June 16 meeting, which she did not attend. Second, while it may be that the decision to use AdSEND was a "corporate" one, the evidence does not support an inference from this fact that there was also a corporate decision to boycott AD/SAT. Of the only four Cox papers who were ever solicited by AD/SAT to become affiliates, two continue to use AD/SAT, and the third terminated long before the alleged conspiracy began for legitimate business reasons. The Court finds that AD/SAT presented no evidence tending to exclude the possibility that the *Dayton Daily News's* decision to terminate its AD/SAT affiliation was not independent action. Therefore, the Court grants summary judgment as to AD/SAT's [§ 1](#) claims against the DNI and CEI.

d. *News & Observer Publishing Company*

The *News & Observer*, which entered its AD/SAT affiliation agreement on August 15, 1986, decided to temporarily unplug its **[**81]** AD/SAT recorder in February 1993, due to renovations at the paper which caused space limitations. See Affidavit of Richard Lee Henderson ("Henderson Aff.") P 4. Richard Lee Henderson, the vice president in charge of sales and marketing at the *News & Observer*, noticed that he received no complaints from advertisers that the paper had disconnected AD/SAT's service. See *id.* [PP 5-6](#). In the fall of 1993, Henderson learned that AD/SAT's corporate parent was filing for bankruptcy. Believing this to be valid grounds for termination of the agreement, a

decision was made by Henderson, advertising director James McClure, and W.L. "Mack" McCormick, the local sales manager, to terminate the agreement. This decision was communicated to AD/SAT by a letter from McCormick, dated November 23, 1993. See PX 926. AD/SAT'S Atkins believed that the bankruptcy was insufficient grounds for termination. Because McCormick and the others from the *News & Observer* disagreed, on January 20, 1994, McCormick wrote AD/SAT again and reconfirmed the paper's intention to exercise its right to terminate. See PX 929. This letter was written five days after Lawrence Blasko of AP visited the paper **[**82]** and introduced AdSEND. See PX 65. However, because AD/SAT, through its lawyers, continued to contest **[*1314]** the *News & Observer's* right to terminate, the paper, after consulting with its lawyers, decided it would be cheaper to pay the \$ 7500 affiliation fee rather than engage in a legal battle. See Henderson Aff. P 11. Upon AD/SAT'S insistence that the agreement so required, the recorder was re-installed at the paper. See [id. at P 14](#).

AD/SAT's attempt to implicate the *News & Observer* in its conspiracy relies on the following: (1) the paper's president, Frank Daniels, Jr., was Chairman of the Board of AP during the development, approval, and implementation of AdSEND; (2) five days after Blasko's visit, the paper re-confirmed its decision to terminate its relationship with AD/SAT; and (3) a conversation between an AD/SAT president Hilton and Daniels on June 15, 1994, during which Daniels allegedly said "I don't think we'll be doing business together, we're a beta [test] site for AdSEND."

The evidence shows that the *News & Observer*, because it was unsatisfied with AD/SAT's service, expressed its intent to terminate its affiliation agreement well before anyone from **[**83]** the paper had heard of AdSEND. AD/SAT presents no evidence to support an inference that Daniels was involved in, or even knew about, the decision to terminate, which was made in 1993, long before the June 15, 1994 phone conversation. [HN25](#)[↑] A paper's decision to terminate a service which was both costing it money and not bringing in revenue, coupled with another decision to install an alternative service for free, are examples of independent conduct undertaken for valid business reasons. AD/SAT has supplied no evidence tending to exclude this possibility. Therefore, the Court grants summary judgment as to AD/SAT's [§ 1](#) conspiracy claim against the *News & Observer*.

e. *The Oklahoma Publishing Company*

The *Daily Oklahoman* sent AD/SAT a written notice of termination on November 1, 1993. See Affidavit of David L. Thompson ("Thompson Aff.") P 7, Ex. B. ²⁵ In 1993, the *Daily Oklahoman* received 154 ads over the AD/SAT system. See *id.* P 4. Considering the per transmission fee and the affiliation fee, this cost the paper approximately \$ 67 per ad. See *id.* There is no evidence that David L. Thompson, the advertising director at the *Daily Oklahoman*, had even **[**84]** heard of the AdSEND program until several weeks after its formal announcement on April 25, 1994. See *id.* P 11.

The facts which AD/SAT attempts to rest its conspiracy claim against the *Daily Oklahoman* are very weak. First, AD/SAT shows that the paper, in the summer and fall of 1994, informed some of its larger advertisers that it had both terminated its relationship with AD/SAT and installed AP's AdSEND. See PX 1182, 1186. Also, AD/SAT asserts that the failure to renegotiate with AD/SAT is evidence of the *Daily Oklahoman's* involvement in the conspiracy. Finally, AD/SAT reports that an employee of the paper stated to an AD/SAT executive that she would "rather stay on the AD/SAT network because of the speed of the service." PX 1183.

None of these facts would allow a reasonable juror to conclude that the *Daily Oklahoman* **[**85]** was a member of a conspiracy to boycott AD/SAT. [HN26](#)^(↑) The antitrust laws do not condemn a newspaper for informing its advertisers that it is terminating its relationship with its delivery service due to probative costs, and then subsequently informing the advertisers about alternative sources of delivery. Nor is the alleged statement of one newspaper employee sufficient to support an inference of conspiracy. There is no evidence that this employee was involved in the decision to end the AD/SAT affiliation. Assuming the statement was made and was true, the mere fact that the employee liked the service does not support an inference of participation in a concerted refusal to deal with the goal of driving AD/SAT out of business. Finally, a failure to reconsider an earlier decision to terminate the AD/SAT affiliation because of its cost is not evidence of conspiratorial conduct, especially when one considers that the offer to reconsider did not include a marked reduction in cost. The Court grants the *Daily Oklahoman's* motion **[*1315]** for summary judgment as to AD/SAT [§ 1](#) claim against it.

f. *The Oakland Press Company*

The Oakland Press signed an affiliation agreement with AD/SAT **[**86]** on October 15, 1993. See Declaration of Alfred Derusha ("Derusha Decl.") P 5, Ex. A. The agreement, which requires AD/SAT to install the reception equipment, contained a provision allowing either party to terminate the agreement without penalty if the other side was in material default of any of its obligations under the agreement. In negotiating the agreement, then-AD/SAT president Atkins promised to install the equipment within 30 days. See Declaration of James W. Lowe P 4, Ex. B. More than 30 days later, on October 20, 1993, Atkins wrote a letter to Alfred Derusha, the advertising director of *The Oakland Press*, which said that AD/SAT would "get to work right away on installation of the equipment." *Id.* P 5, Ex. C. Because the equipment still had not been delivered and installed, on May 17, 1994, Derusha wrote Atkins a letter which said that because AD/SAT was in material default, the paper was terminating the affiliation agreement. See *id.* P 6, Ex. D. AD/SAT's new president Hilton, responding by letter on May 20, argued that *The Oakland Press* had no right to terminate the agreement, and stated that the equipment was being delivered. See *id.* P 8, Ex. F.

[87]** These facts would not allow a reasonable juror to find that *The Oakland Press* was a member of the alleged conspiracy to boycott. As with all newspaper defendants, *The Oakland Press* simply ended a relationship with an ad delivery service which charged it substantial fees, and replaced that service with one that was free. This certainly appears to be a legitimate, independent business decision. Moreover, AD/SAT'S failure to install the reception equipment in a timely fashion is further evidence that *The Oakland Press's* decision was an independent one.

AD/SAT attempts to support its [§ 1](#) conspiracy claim against the paper through the affidavit of Randall S. Winston, Esq., an attorney for AD/SAT at the relevant time. Winston stated that Robert G. Waddell, Esq., an attorney for *The Oakland Press*, told him two months after the affiliation agreement was terminated that the reason for the termination was so that the paper could participate in AP's program. See Affidavit of Randall S. Winston, Esq. P 3. This evidence does not tend to exclude the possibility that *The Oakland Press* terminated its agreement as part of a concerted refusal to deal with AD/SAT. First, the **[**88]** statement is hearsay. Second, the statement does not provide evidence of a conspiracy to boycott AD/SAT, but simply

²⁵ AD/SAT first responded to the notice of termination in a letter dated September 28, 1994. The letter asked the *Daily Oklahoman* to reconsider its decision. See PX 693.

acknowledges a decision to switch to a better service. Third, hand-written notes taken by Winston during his meeting with Waddell indicate that concern over the terms of the AD/SAT affiliation agreement, and not the presence of AP's AdSEND, was the reason for termination of the AD/SAT affiliation. See Supplemental Declaration of James W. Lowe, Esq. PP 4, 5, Ex. C, D. Fourth, it is undisputed that, even after its letter expressing a desire to terminate the original affiliation agreement, *The Oakland Press* remained interested in negotiating a new, more favorable, affiliation agreement with AD/SAT until the commencement of this lawsuit. See *id.* Ex. C; Derusha Decl. PP 14-16, 19. Finally, while *The Oakland Press* admits that it permitted AP to install AdSEND equipment in January 1995, eight months after termination of its AD/SAT affiliation, there is no evidence that an affiliation agreement with AP has been signed, or that any ads have been sent via AdSEND. See *id.* P 18. Therefore, as to AD/SAT's § 1 claim against it, the Court grants summary judgment **[**89]** to *The Oakland Press*.

2. NAA and NNN

Unlike the newspapers, NAA and NNN are not direct participants in the ad delivery business. They do not create, deliver or receive ads. Therefore, unlike the newspapers, a decision to boycott AD/SAT is neither a decision to attempt to eliminate a supplier, nor a decision to threaten a relationship with a group (advertisers) upon which it financially depends by subjecting that group to an ad deliverer (AP AdSEND) which has an unfair competitive advantage. However, despite these differences, NAA and NNN have something in common with the **[*1316]** newspapers -- they too lack a rational motivation to join the alleged conspiracy.

Considering that a central goal of NAA is to encourage technological development in the newspaper industry in order to increase the profitability of papers, and considering that NNN was created with the more specific goal of increasing the newspaper industry's declining share of advertising dollars, neither NAA nor NNN, so long as they are adhering to these goals, have a rational motivation to join the alleged conspiracy. It is counter to the goals of both organizations to work to eliminate one competitor in a market, while **[**90]** simultaneously supporting another which is nearly a year away from being operational, when competition would result in advertisers receiving the best service.

AD/SAT concedes that NAA, after an initial meeting with AP executives in August 1993, made it clear that, while

it would cooperate with AP's effort to develop an electronic ad delivery system, it could not "exclude other groups from providing this service." PX 519; see *also* PX 28. However, AD/SAT alleges that, after meetings between top AP executives and NAA president Cathie Black and her staff, which were arranged by Donald Newhouse, NAA reversed its position and began to boycott AD/SAT.

There is ample evidence to show that NAA encouraged AP when AdSEND was in the development stage. See PX 21, 27, 28, 29, 46, 48, 61, 68, 104. In addition, after the announcement of AdSEND, NAA allowed AP to give brief presentations about AdSEND at NNN regional meetings. See PX 17, 254, 261.²⁶ However, AD/SAT must show that NAA and NNN participated in an anticompetitive refusal to deal with it. The evidence indicates, however, that not only did NAA continue to promote other electronic deliverers beyond AP's AdSEND, see Affidavit **[**91]** of Patricia Farren, Esq. Ex. K, NAA 1-4, 510-11, but AD/SAT as well. See NAA and NNN Rule 3(g) Reply at 9.1, 9.5, 9.6, 9.8.

In sum, there is no evidence which shows that NAA and NNN were part of a conspiracy to boycott AD/SAT.²⁷ Summary **[**92]** judgment as to the § 1 conspiracy claims against NAA and NNN is granted.

3. Donald Newhouse

According to AD/SAT, Donald Newhouse sits at the center of the alleged conspiracy. As president and part

²⁶ AD/SAT alleges that NAA encouragement of AP's entrance into the market amounted to an endorsement of AdSEND, and apparently an implicit rejection of other ad deliverers. While the evidence does not support this conclusion, even if true an antitrust conspiracy is not established. In *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989), the Court citing the holding in *Consolidated Metal*, 846 F.2d at 292, stated that "when a trade association provides information (there, gives a seal of approval) but does not constrain others to follow its recommendations, it does not violate the antitrust laws." *Id.* at 399. In this case, there is no evidence that NAA constrained its members to take any action with respect to either AD/SAT or AdSEND.

²⁷ The strongest argument AD/SAT supplies to support NAA and NNN's involvement in the alleged conspiracy is a letter from Publicitas, NNN's "one order/one bill" clearing house which suggests a bundling of service between "one order/one bill" and AdSEND. However, written comments on the letter from NAA officials indicate that this idea of Publicitas, which is not a defendant in this action, was rejected. See PX 540.

owner of Advance, which owns 24 newspapers, including the *Star-Ledger* and *The Birmingham News*, a member of the AP Board, and the voluntary chairman of NAA during the time when AdSEND was developed, Newhouse certainly had ample opportunity to assist AP by conspiring with it to destroy competition. However, like the newspapers, NAA, and NNN, he did not have a rational motivation to do so. **[**93]** As both a newspaper owner and chairman of NAA, a primary interest for Newhouse is making newspaper advertising attractive to advertisers. Encouraging and assisting AP in its effort to enter the delivery market is certainly consistent with this interest. Joining a conspiracy to refuse to deal with AD/SAT in an effort to drive it out of business is not.

None of the evidence offered by AD/SAT implicates Newhouse in the alleged conspiracy to boycott. First, AD/SAT cites to an August 2, 1993 letter from Newhouse to AP president Louis Boccardi, which stated **[*1317]** that AP should move quickly if it plans to get into the ad delivery business because "there is a window of opportunity which AdSat [sic] might close if too much time goes by." PX 2. This statement simply encourages AP to quickly enter a market which AD/SAT might foreclose from competition. Because this statement encourages competition, it cannot be support for a finding of an agreement to restrain competition.

AD/SAT also asserts that Newhouse joined the alleged conspiracy by introducing AdSEND to several major advertisers. Considering that Newhouse is an AP Board member, and considering that he believed AdSEND to be a good product **[**94]** of general benefit to the newspaper industry, his actions are not surprising. More importantly, introducing a new competitor to a market's customers is conduct which the antitrust laws are designed to protect.

In addition, AD/SAT argues that rejection of the group proposal offered by AD/SAT to the Newhouse newspapers in August 1993, *see supra* part V.A.1.a, is sufficient evidence to allow it to survive Newhouse's summary judgment motion. In his affidavit in opposition to the motion, AD/SAT president Hilton states that Herrick of the *Star-Ledger* informed him that the decision to reject the group proposal was made by Newhouse. *See* Hilton Aff. P 38. For several reasons, rejection of the group proposal is insufficient to create a genuine issue of material fact. First, there is direct evidence that decision making within the Newhouse newspapers is made at a local, paper by paper, level. *See* Declaration of Donald Newhouse PP 5, 7-9.

Therefore, group proposals such as this one would not be considered. *See id.*; DX 368 at ADS 016353. AD/SAT supplies no evidence in contradiction. Even if the group proposal were considered by the Newhouse newspapers, remembering that it still **[**95]** included substantial affiliation fees for each newspaper, it would be unreasonable to infer a conspiracy to boycott from refusing to accept such a deal. Finally, the fact of the matter is that seven Newhouse papers which were included in the group proposal remain AD/SAT affiliates. Therefore, rejection of the group proposal is not evidence of a concerted refusal to deal.

In its effort to implicate Newhouse in the conspiracy, AD/SAT relies most heavily on his retirement speech at the April 1994 NAA convention. In the speech Newhouse encouraged NAA members to "work with Associated Press and help our cooperative perfect its ability to transmit ads digitally from the advertisers' computer to our computer." PX 535 at 12. In addition, he said that "NAA is working with the Associated Press as AP develops a computer to computer advertising transmission system which will remove a barrier to the use of newspapers." *Id. at 21*. The speech also stressed the importance of collective action within the newspaper industry. *See id. at 17*.

Perhaps the most telling aspect of the speech is what it does not contain -- any reference at all to AD/SAT. AD/SAT's opposition papers attempt to imply **[**96]** that AD/SAT was mentioned, if not by name, by quoting a part of the speech where Newhouse says: "We must identify useful technology -- work to perfect it and develop the concepts that most effectively take advantage of it. We must not let our competitors have the advantage of creating the playing field and controlling the gateway." *Id. at 15*. First, it is not at all clear that this statement was meant to refer to AD/SAT. Because the newspapers are not competitors with AD/SAT, it seems unlikely that the statement would be in reference to AD/SAT. Finally, even if AD/SAT were an intended reference, it at most indicates that the newspaper industry must encourage competition with AD/SAT, not exclude it from the market through a group boycott.

By asking newspapers to work with AP, Newhouse, like NAA and NNN, is simply encouraging and assisting a new competitor in the market. By accepting Newhouse's invitation to work with AP, newspapers are not at the same time agreeing to refuse to deal with AD/SAT. The evidence reveals that papers can use more than one electronic delivery system. *See* DX 74; Deposition of

Richard Atkins at 827-28.²⁸

[97] [*1318]** In sum, the evidence provided does not permit the Court to find that the actions of Newhouse in support of AP's development and marketing of AdSEND constitutes participation in a refusal to deal with AD/SAT in restraint of trade. Therefore, the Court grants Newhouse's motion for summary judgment as to the [§ 1](#) claim against him. The Court also grants summary as to AD/SAT's [§ 1](#) claim against Advance.²⁹ Finally, having granted all other defendants summary judgment as to AD/SAT'S [§ 1](#) claim, the Court grants AP'S motion for the same relief.

B. AD/SAT's Sherman Act [§ 2](#) Conspiracy Claim

Because, as discussed *supra* part V.A, the Court finds that all defendants lack a **[**98]** rational motivation to conspire, and because the evidence supplied reveals that all defendants had valid, independent reasons for their activities in relation to both AD/SAT and AP, the Court finds that AD/SAT cannot show that the newspapers, NAA, NNN, Newhouse, or Advance had a specific intent to monopolize. See [Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 189 \(2d Cir. 1992\)](#) [HN27](#)^[↑] (rational trier of fact cannot find [§ 2](#) liability if plaintiff offers no evidence to cast doubt on defendant's legitimate business explanations for its action). See [Hayden](#), 879 F.2d at 1019. Therefore, the Court grants summary judgment to all defendants as to AD/SAT's [§ 2](#) conspiracy to monopolize claim.

VI. AD/SAT's Motion for Reconsideration

Based upon the reasons stated in this Court's April 24, 1995 Opinion and Order, and based upon this Opinion

²⁸It is true that Newhouse encouraged the newspapers to engage in "collective action." However, as pointed out in Newhouse's reply brief, see Joint Reply Memorandum of Newhouse Defendants at 30-32, the goals of this collective action included "removing barriers to advertising," see PX 535 at 17, and "satisfying the demand of advertisers for greater efficiency and effectiveness." *Id. at 11*. There is nothing in these statements which could be interpreted as anticompetitive, and certainly nothing which indicates participation in a scheme to boycott AD/SAT.

²⁹AD/SAT only ties Advance to this litigation by stating that "Advance caused its newspapers to do business with AD/SAT." First Amended Complaint P 13. Summary judgment is appropriate for Advance because AD/SAT, in opposing summary judgment "may not rest upon the mere allegations or denials" of a pleading. [Fed. R. Civ. P. 56\(e\)](#).

and Order, AD/SAT's motion for reconsideration of this Court's decision to grant summary judgment to the *Lexington Herald-Leader* is denied.

CONCLUSION

For the reasons stated above, AP's motion for summary judgment as to AD/SAT's Sherman Act [§ 2](#) claims against it is GRANTED. The summary judgment motions of all defendants **[**99]** as to AD/SAT's Sherman Act [§§ 1](#) and [2](#) conspiracy claims are GRANTED. AD/SAT's motion for reconsideration is DENIED. The actions are DISMISSED.

SO ORDERED.

New York, New York

February 29, 1996

Peter K. Leisure

U.S.D.J.

MEMORANDUM ORDER

LEISURE, *District Judge*:

On December 11, 1995, plaintiff AD/SAT filed a motion, pursuant to [Fed. R. Civ. P. 15\(d\)](#), for leave to file a first supplemental complaint. This motion was filed while the summary judgment motions of all defendants were *sub judice*. On December 19, 1995, this Court issued an order stating that it would not consider plaintiff's motion to supplement its complaint until after a decision was rendered in the summary judgment motions. Having granted the summary judgment motions of all defendants in their entirety, for the following reasons, the Court now denies AD/SAT's motion for leave to file a first supplemental complaint.

DISCUSSION

[Rule 15\(d\) of the Federal Rules of Civil Procedure](#) provides, [HN28](#)^[↑] in relevant part: "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions **[**100]** or occurrences or events which have happened since the date of the pleading sought to be supplemented."

The decision to grant or deny a motion pursuant to [Rule 15\(d\)](#) rests within the discretion of the District Court. See [Quarantino v. Tiffany & Co., 71 F.3d 58, 66 \(2d Cir. 1995\)](#). "Absent undue delay, bad faith, dilatory tactics, undue prejudice to the party to be served with the proposed pleading, or *futility*, the motion should be freely granted." *Id.* (emphasis added) (citing [Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 \(1962\)](#)).

AD/SAT requests leave of the Court to add three additional subparagraphs to paragraph 29 of its First Amended Complaint (the "Complaint"). Paragraph 29 of the Complaint delineates "the means and conduct employed by Associated Press and its coconspirators to accomplish said monopolization, attempt to monopolize, and conspiracy to monopolize and restrain trade unreasonably, known at this time to AD/SAT, includes at least the following." See First Amended Complaint P 29. The three supplemental subparagraphs all provide information on events which allegedly occurred after AD/SAT filed its opposition papers to defendants' **[**101]** motions for summary judgment. ¹ F i r s t , subparagraph 29(j) accuses AP of unlawful activity by refusing to renegotiate a contract which charges AD/SAT \$ 730,000 annually for use of its satellite network. As noted in the Opinion and Order of this Court granting defendants' motions for summary judgment (the "Opinion and Order"), AD/SAT provides no evidence that the price AP charges AD/SAT to use its satellite network is anticompetitive. See Opinion and Order Granting Defendants' Motions for Summary Judgment at n.18. In addition, because the relevant market in this case is the delivery of ads by any means, even if AP were charging AD/SAT monopoly prices for access to its satellite network, competition would not be harmed. See *id.* Therefore, allowing AD/SAT to supplement its complaint with subparagraph 29(j) would be futile.

[102]** Proposed subparagraph 29(k) lists over fifteen small market newspapers which have taken adverse action to AD/SAT since July 13, 1995, the date which AD/SAT filed its papers in opposition to defendants' summary judgment motion. The Court notes that none of these newspapers are defendants in this action. All of the defendants in this action supplied valid independent

reasons for taking action adverse to AD/SAT. Because AD/SAT, in attempting to support its antitrust conspiracy claims, did not provide evidence tending to exclude the possibility that defendants' actions were independent, see [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#), the Court granted summary judgment to all defendants. Because supplementing the Complaint with this subparagraph would not cure AD/SAT's failure to provide such evidence, it would be futile.

Proposed subparagraph 29(l) states that since the filing of AD/SAT's opposition papers to defendants' motions, "various newspapers, acting as part and in furtherance of the conspiracy . . . have advised and instructed advertisers not to do business with AD/SAT, and to transfer business and to do business **[**103]** with AP AdSEND." PI's. Mem. at 5. However, none of the newspapers listed in proposed subparagraph 29(l) are defendants in this action. Again, [HN29](#)[↑] because this subparagraph would not alter the Court's finding that, as to the defendants in this action, AD/SAT has failed to provide evidence that tends to exclude the possibility of independent action, see [Monsanto, 465 U.S. at 768](#), supplementing the Complaint with this evidence would be futile.

CONCLUSION

Because it would be futile for AD/SAT to supplement the Complaint with proposed subparagraphs 29(j)-(l), the Court denies AD/SAT's [Rule 15\(d\)](#) motion. For the reasons stated in the Opinion and Order, the actions are dismissed.

SO ORDERED.

New York, New York

February 29, 1996

Peter K. Leisure

U.S.D.J.

End of Document

¹The three subparagraphs are presented in their entirety in AD/SAT's motion papers. See plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Complaint ("PI's. Mem.") at 3-5.



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Declined to Follow by [In re Securities Litigation BMC Software, Inc.](#), S.D.Tex., October 1, 2001

228 F.3d 154

United States Court of Appeals, Second Circuit.

Joseph A. GANINO, Robert E. Creighton,
Louise A. Creighton, William J. Fray, The
Estate of [Norman Garand](#), The Garand Family
Partnership, A. John Kalil, Reza Najafzadeh,
Jeffrey T. Norton, Rebecca L. Norton, John
Norton, Matthew Norton, Laura Norton,
Alice M. Tobin and Brantley H. Tudor,
individually and on behalf of a class of persons
similarly situated, Plaintiffs–Appellants,

v.

CITIZENS UTILITIES COMPANY,
[Leonard Tow](#), Livingston E. Ross, and
Robert J. Desantis, Defendants–Appellees.

Docket No. 99–7904

|

Argued April 10, 2000.

|

Decided Sept. 06, 2000.

|

As Amended Sept. 11, 2000.

Synopsis

Investors brought securities fraud suit alleging that corporation reported fees received in 1995 as 1996 income. The United States District Court for the District of Connecticut, [Warren W. Eginton, J.](#), [56 F.Supp.2d 222](#), dismissed suit, and investors appealed. The Court of Appeals, [Katzmann](#), Circuit Judge, held that: (1) complaint alleged material misrepresentations, and (2) remand was required to determine whether complaint adequately pled scienter.

Vacated in part, reversed in part and remanded with instructions.

West Headnotes (23)

[1] **Securities Regulation** 🔑 **Fraud and Manipulation**

Section 10(b) bars conduct involving manipulation or deception, manipulation being practices that are intended to mislead investors by artificially affecting market activity, and deception being misrepresentation, or nondisclosure intended to deceive. Securities Exchange Act of 1934, § 10(b), [15 U.S.C.A. § 78j\(b\)](#).

[20 Cases that cite this headnote](#)

[2] **Securities Regulation** 🔑 **Connection with purchase or sale**
Securities Regulation 🔑 **Manipulative, Deceptive or Fraudulent Conduct**

To state claim under § 10(b) and corresponding Rule 10b–5, plaintiff must plead that defendant, in connection with purchase or sale of securities, made materially false statement or omitted material fact, with scienter, and that plaintiff's reliance on defendant's action caused injury to plaintiff. Securities Exchange Act of 1934, § 10(b), [15 U.S.C.A. § 78j\(b\)](#); [17 C.F.R. § 240.10b–5](#).

[203 Cases that cite this headnote](#)

[3] **Securities Regulation** 🔑 **Misrepresentation**
Securities Regulation 🔑 **Nondisclosure**

At pleading stage, plaintiff satisfies materiality requirement of Rule 10b–5 by alleging statement or omission that reasonable investor would have considered significant in making investment decisions; it is not sufficient to allege that investor might have considered misrepresentation or omission important. Securities Exchange Act of 1934, § 10(b), [15 U.S.C.A. § 78j\(b\)](#); [17 C.F.R. § 240.10b–5](#).

[314 Cases that cite this headnote](#)

[4] Securities Regulation 🔑 Pleading

Investor alleging Rule 10b-5 claim need not assert that investor would have acted differently if accurate disclosure was made. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

38 Cases that cite this headnote

[5] Securities Regulation 🔑 Materiality

Omitted fact may be immaterial, under Rule 10b-5, if information is trivial, or is so basic that any investor could be expected to know it. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

54 Cases that cite this headnote

[6] Securities Regulation 🔑 Materiality of violation

There is no single numerical or percentage benchmark for determining whether misstatement of revenue is material for purposes of Rule 10b-5 claim. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

21 Cases that cite this headnote

[7] Securities Regulation 🔑 Administrative rules and regulations

Securities and Exchange Commission (SEC) Staff Accounting Bulletin (SAB) does not have force of law.

7 Cases that cite this headnote

[8] Securities Regulation 🔑 Administrative rules and regulations

Securities and Exchange Commission (SEC) Staff Accounting Bulletin (SAB) regarding factors that could cause misstatements of quantitatively small amounts to be material was persuasive guidance for evaluating materiality of alleged misrepresentation; SAB was thoroughly reasoned and consistent with existing law.

19 Cases that cite this headnote

[9] Securities Regulation 🔑 Materiality of violation

Misstatements of income can be material, under Rule 10b-5, because earnings reports are among the pieces of data that investors find most relevant to their investment decisions. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

38 Cases that cite this headnote

[10] Securities Regulation 🔑 Materiality of violation

Materiality of misstatement, for purposes of Rule 10b-5 claim, is determined in light of circumstances existing at time alleged misstatement occurred. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

31 Cases that cite this headnote

[11] Securities Regulation 🔑 Financial or periodic reports; accounting data and valuations

In determining whether corporation's alleged failure to report fees in quarter received was misstatement under Rule 10b-5, it was appropriate to compare fees to not only annual, but also quarterly financial results. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

16 Cases that cite this headnote

[12] Securities Regulation 🔑 Materiality of violation

Alleged misrepresentation of \$10.1 million of fees received in 1995 as 1996 income was material, as required to plead Rule 10b-5 claim; the \$6.9 million of 1995 fees booked during first quarter of 1996 equaled 17.7% of reported after-tax net income and 11.7% of pre-tax net income for that quarter, and the \$10.1 million reflected in 1996 Second Quarter Form 10-Q amounted

to 11.9% of after-tax net income and 8% of pre-tax net income for first six months of 1996. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

6 Cases that cite this headnote

[13] Evidence 🔑 Economic data

Federal Civil Procedure 🔑 Matters considered in general

Summary Judgment 🔑 Motion to dismiss

District court may take judicial notice of well-publicized stock prices without converting motion to dismiss into motion for summary judgment.

93 Cases that cite this headnote

[14] Federal Civil Procedure 🔑 Construction of pleadings

On motion to dismiss Rule 10b-5 suit for failure to state claim, district court should have inferred, from allegation that corporation's earnings and earnings per share fell in particular month, that price per share dropped correspondingly. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

36 Cases that cite this headnote

[15] Securities Regulation 🔑 Materiality of violation

Under “truth on the market” corollary to “fraud on the market” theory, misrepresentation is immaterial if information is already known to market because misrepresentation cannot then defraud the market; defendant may rebut presumption that its misrepresentations have affected market price of its stock by showing that truth of matter was already known, but corrective information must be conveyed to public with degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by alleged misstatements. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

101 Cases that cite this headnote

[16] Federal Civil Procedure 🔑 Fact issues

Truth-on-the-market defense is intensely fact-specific and is rarely appropriate basis for dismissing § 10(b) complaint for failure to plead materiality. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

81 Cases that cite this headnote

[17] Federal Civil Procedure 🔑 Fact issues

Whether corporation's disclosures before class period had already transmitted all relevant information about fee deal to market, rendering alleged inflation of 1996 income using 1995 fees immaterial, was fact-specific inquiry and inappropriate basis for dismissing § 10(b) complaint for failure to state claim. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

20 Cases that cite this headnote

[18] Federal Civil Procedure 🔑 Fraud, mistake and condition of mind

Complaint alleging securities fraud must plead fraud with particularity. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

31 Cases that cite this headnote

[19] Securities Regulation 🔑 Scienter, Intent, Knowledge, Negligence or Recklessness

Intent to deceive, manipulate or defraud, required to support Rule 10b-5 claim, can be established either by alleging facts to show that defendants had both motive and opportunity to commit fraud, or by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

213 Cases that cite this headnote

[20] Securities Regulation 🔑 **Scienter**

Although speculation and conclusory allegations will not suffice to plead intent requirement of Rule 10b-5 claim, great specificity is not required, provided plaintiff alleges enough facts to support strong inference of fraudulent intent. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

77 Cases that cite this headnote

[21] Securities Regulation 🔑 **Scienter**

Private Securities Litigation Reform Act (PSLRA) did not eliminate option of pleading scienter by alleging that defendant had motive and opportunity to commit fraud. Private Securities Litigation Reform Act of 1995, § 1 et seq., 15 U.S.C.A. § 78a note.

61 Cases that cite this headnote

[22] Securities Regulation 🔑 **Scienter**

Motive to commit fraud, for purposes of pleading rule 10b-5 claim, entails concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged; general allegations that defendants acted in their economic self-interest are not enough. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

43 Cases that cite this headnote

[23] Securities Regulation 🔑 **In general; control persons**

To make out prima facie case of control person liability under Securities Exchange Act, plaintiff must show primary violation by controlled person and control of primary violator by targeted defendant, and show that controlling person was in some meaningful sense a culpable participant in the fraud perpetrated by controlled person. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a).

41 Cases that cite this headnote

Attorneys and Law Firms

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Before: [NEWMAN](#), [KEARSE](#), and [KATZMANN](#), Circuit Judges.

Opinion

[KATZMANN](#), Circuit Judge:

The plaintiffs-appellants appeal from a final judgment of the United States District Court for the District of Connecticut (Warren W. Eginton, *Senior Judge*), granting the defendants-appellees' motion to dismiss the Second Amended Complaint (the "Complaint") for failure to state a claim under Sections 10(b)¹ and 20(a)² of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b) & 78t(a), and Rule 10b-5³ promulgated thereunder, 17 C.F.R. § 240.10b-5. The district court held: (1) the misrepresentations regarding certain payments amounting ***158** to 1.7% of total annual revenue were immaterial as a matter of law; (2) the lack of share price movement following the release of corrective information was evidence of immateriality; and (3) the Complaint was defective as to one or more of the other elements of a Rule 10b-5 suit. For the reasons that follow, we reverse in part, vacate in part, and remand with instructions.

I. BACKGROUND*A. Factual Background*

The plaintiffs in this action purchased or acquired the common stock of Citizens Utilities Company ("Citizens" or the "Company"), the corporate defendant, between May 7, 1996 and August 7, 1997 (the "Class Period"). Alleging that Citizens' share price was fraudulently inflated during the Class Period, the plaintiffs seek to represent the class of all purchasers of Citizens common stock during the Class Period in this action against Citizens and three of its senior officers. The following allegations are drawn from their Complaint, which we accept as true for purposes of this appeal.

Citizens is a publicly traded communications and public services company. As of 1995, Citizens had reported over fifty consecutive years of increased revenue, earnings, and earnings per share, a fact which it emphasized in its public comments. In 1995, however, Citizens would not receive approximately \$38 million in revenue from Pacific Bell. In order to continue to report increased earnings, the Company had to find another source of revenue.

That replacement source was Hungarian Telephone & Cable Corporation (“HTCC”), a U.S. company which provides telephone services in Hungary under telecommunications concessions from the Hungarian government. The concession contracts require HTCC to meet certain construction milestones. Failure to do so would subject HTCC to fines, reduction of its exclusivity period, or abrogation of the contracts. Unprofitable since its inception, HTCC by 1995 lacked the necessary funds to satisfy its contractual requirements and began looking for a source of financing. Beginning in May 1995, HTCC and Citizens (through a wholly owned subsidiary of Citizens) entered into a series of agreements under which Citizens agreed in 1995 to make and/or guarantee loans to HTCC. In consideration for these loans and guarantees, Citizens received substantial fees (the “Financial Support Fees” or the “Fees”), consisting primarily of HTCC stock and options. In addition, Citizens also provided management consulting services to HTCC.

1. *Allegations of Material Misrepresentations*

Although Citizens earned and received approximately \$10.1 million in Financial Support Fees from HTCC in 1995, Citizens, according to the Complaint, fraudulently recognized this sum as 1996 first and second quarter income without proper disclosure. Because Citizens' 1995 annual financial statement (“1995 Form 10–K”) filed with the Securities and Exchange Commission (the “SEC”) stated that Citizens “ha[d] been compensated for ... guarantees and financial support [to HTCC],” investors were allegedly misled into believing that the \$10.1 million booked in 1996 was new income, unrelated to the 1995 HTCC loan and guarantee transactions. *See* 15 U.S.C. § 78m(a)(2) (requiring quarterly and annual financial reports to be filed with the SEC); 17 C.F.R. § 240.13a–13(a).

a. *May 7, 1996 Announcement of 1996 First Quarter Financial Results and First Quarter Form 10–Q*

On May 7, 1996, Citizens publicly announced an after-tax net income of \$38.9 million for the first quarter of 1996, up 15% from the corresponding period in 1995. These results were reflected in its 1996 first quarter financial statement (“First Quarter Form 10–Q”). The defendants *159 did not disclose that “as much as \$6.9 million of the \$38.9 million ... was HTCC related income which was deceptively ‘stored’ by Citizens” until the first quarter of 1996. According to the Complaint, the defendants also concealed the fact that this \$6.9 million made up most if not all of the reported 15% increase during the first quarter of 1996.

b. *August 15, 1996 Press Release and 1996 Second Quarter Form 10–Q*

On August 15, 1996, Citizens issued another press release announcing “record ... profits for the three- and six-month periods ended June 30, 1996,” with the second quarter's net income of \$46.3 million representing a 10% increase over the comparable period in the preceding year. Citizens attributed this growth to “continuous above-average growth in volume and profitability in each of its sectors, particularly telecommunications.” These results were reflected in its 1996 second quarter financial report (“Second Quarter Form 10–Q”). The Complaint charges that the August 15, 1996 press release and the 1996 Second Quarter Form 10–Q both failed to disclose that “approximately \$10 million of the \$85.1 million of reported income for the six months ended June 30, 1996 was HTCC related income” which should have been recognized in 1995. The Complaint states that the defendants also concealed the fact that this approximately \$10 million accounted for the full 10% increase in income for the first six months of 1996 over the comparable period in 1995.

c. *Subsequent Financial Statements and Press Releases*

The \$10.1 million of Financial Support Fees were also reported as part of the year-to-date earnings in Citizens' 1996 Third Quarter Form 10–Q, 1996 Form 10–K, and accompanying press releases. An additional \$11.2 million of Fees were booked in the last quarter of 1996 and reflected in the 1996 year-end statement (“1996 Form 10–K”). In total, the Fees at issue added up to approximately \$22 million, or

1.7% of Citizens' total revenue for 1996. As with the Form 10-Qs for the first two quarters of 1996, the defendants did not disclose in the Third Quarter Form 10-Q, 1996 Form 10-K, and accompanying press releases that the reported income included HTCC Fees earned and received in 1995.

On April 30, 1997, Citizens issued a press release announcing lower than expected earnings for the first quarter of 1997. These results were reflected in the Company's 1997 First Quarter Form 10-Q. Neither document attributed the drop in income to the decrease in HTCC Fees. Instead, according to the Complaint, the press release misleadingly focused on rising expenses. Beginning in or about May 1997, industry analysts began to report weaknesses in Citizens' earnings position. Their predictions were confirmed by Citizens in August 1997 with the filing of its 1997 Second Quarter Form 10-Q, which also disclosed that the reported income for the first two quarters of 1996 included material income from HTCC.

d. Other Misrepresentations

The defendants allegedly made other material misrepresentations. According to the Complaint, the defendants failed to disclose that the Fees were non-recurring income, in violation of a Generally Accepted Accounting Principle (“GAAP”)⁴ that *160 companies report “extraordinary, unusual or infrequently occurring events and transactions.” See generally Accounting Principles Board (“APB”) Opinion No. 30, ¶¶ 19–24 (1973) (explaining “Criteria for Extraordinary Items”). The defendants also allegedly concealed Citizens' control over HTCC and in fact, by employing “cost accounting,” which under GAAP is appropriately used only to reflect a registrant's investment in a company the registrant does not dominate, Citizens falsely represented that it exercised no such control over HTCC. See generally APB Opinion No. 18, ¶¶ 5–17 (1971). According to the Complaint, Citizens' secret domination of HTCC was all the more significant because the Fees were paid in the form of HTCC stock and options, the price of which Citizens could manipulate using its influence over HTCC.

2. *Scienter Allegations*

The Complaint alleges that the defendants made the purported misrepresentations knowingly or recklessly. That is, defendants Leonard Tow and Robert DeSantis, senior officers of Citizens, believed throughout most of 1995 that a

new source of income was needed to replace revenue from Pacific Bell that ceased in 1994. However, by the end of 1995, after the HTCC Fees were already paid in, Citizens found that it was able to meet earnings projections even without the Fees. Not only were the HTCC Fees not needed in 1995 to replace lost revenue from Pacific Bell, but if Citizens had recognized the HTCC Fees in 1995, the Fees would have so increased Citizens' 1995 earnings that the Company would have difficulty meeting expectations for increased earnings in 1996. See *id.* Thus, according to the Complaint, the defendants manipulated the recognition of the Fees in order to manage the income trend.

The defendants allegedly had other corporate and personal motives to maintain an artificial earnings growth trend, thus propping up Citizens' share price. In 1996, Citizens engaged in a stock-for-stock acquisition of another company and placed a debenture offering to finance its telecommunications expansion. Both of these transactions, the Complaint states, were well-served by an inflated stock price. As to the individual defendants, Livingston Ross (also a senior Citizens officer) and DeSantis purportedly engaged in insider trading during the Class Period, and all three individual defendants benefitted by securing their executive privileges.

B. *Procedural History*

In 1988 the plaintiffs filed this action, asserting violations of § 10(b) of the Exchange Act and the corresponding Rule 10b-5 against all defendants, and violation of § 20(a) of the Exchange Act against the individual defendants as persons controlling Citizens. The plaintiffs also sought to certify this action as a class action under [Rule 23 of the Federal Rules of Civil Procedure](#). The defendants moved to dismiss the Complaint in its entirety, arguing that: (1) the nondisclosures at issue were immaterial because the information was already publicly available; (2) the plaintiffs failed to plead scienter with particularity; (3) the amount of Fees they allegedly “deceptively stored” was immaterial as a matter of law since it comprised a *de minimis* 1.7% of Citizens' total pre-tax revenues during the class period; (4) the plaintiffs' allegations of GAAP violations, without corresponding fraudulent intent, failed to state a claim; and (5) the Complaint failed to state a § 20(a) claim because the underlying § 10(b)/ Rule 10b-5 charges are not viable.

The district court granted the defendants' motion to dismiss. See *161 *Ganino v. Citizens Utilities Co.*, 56 F.Supp.2d 222 (D.Conn.1999). Focusing on the issue of materiality, the court quoted a newspaper article which observed that “ [m]ost

auditors—and their corporate clients—define materiality as any event or news that might affect a company's earnings, positively or negatively, by 3% to 10% [it] has become standard practice in corporate America. Thus, if a particular charge or event doesn't meet the 3% to 10% level, companies feel they don't have to disclose it.' ” *Id.* at 226 (alteration in original) (quoting Elizabeth MacDonald, *SEC Readies New Rules for Companies About What is “Material” for Disclosure*, Wall St. J., Nov. 3, 1998, at A2). Applying this 3% to 10% range, the court held that “the amount in issue here—1.7% of Citizens' revenues for the relevant time period, pursuant to GAAP—is immaterial as a matter of law.” *Id.* at 227. In addition, the court found that the lack of change in Citizens' stock price following the filing of the 1997 Second Quarter Form 10–Q on August 7, 1997, to be evidence of immateriality. *See id.*

Because the alleged misrepresentations were held to be legally immaterial, the court found it unnecessary to discuss the other grounds for dismissal urged by the defendants. It stated summarily that “[n]evertheless, the Court has thoroughly examined [the other] elements [of a Rule 10b–5 claim] and plaintiffs' supporting authority, and holds that such would not change the outcome of this case.” *Id.* This appeal followed.

II. DISCUSSION

We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiffs' favor. *See Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir.2000); *Koppel v. 4987 Corp.*, 167 F.3d 125, 130 (2d Cir.1999) (internal quotation omitted). We uphold a dismissal only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* (internal quotation marks and citations omitted).

A. The § 10(b)/Rule 10b–5 Claims

1. Prima Facie Case

[1] [2] Section 10(b) of the Exchange Act bars conduct “involving manipulation or deception, manipulation being practices ... that are intended to mislead investors by artificially affecting market activity, and deception being misrepresentation, or nondisclosure intended to deceive.” *Field v. Trump*, 850 F.2d 938, 946–47 (2d Cir.1988) (internal

quotation marks and citation omitted); *see Press v. Chemical Inv. Serv. Corp.*, 166 F.3d 529, 538 (2d Cir.1999). To state a claim under § 10(b) and the corresponding Rule 10b–5, a plaintiff must plead that the defendant, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiff's reliance on the defendant's action caused injury to the plaintiff. *See In re Carter–Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 155–56 (2d Cir.1998); *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 808 (2d Cir.1996); *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir.1995).

The plaintiffs' principal contentions on appeal are that the district court erred in deciding that the Complaint failed to allege material misrepresentations and scienter. Neither they nor the defendants interpret the district court's dismissal of the Rule 10b–5 claims as having any other basis. Accordingly, we consider only the elements of materiality and scienter.

2. Materiality

[3] [4] [5] At the pleading stage, a plaintiff satisfies the materiality requirement of Rule 10b–5 by alleging a statement or omission that a reasonable investor would have considered significant in making investment decisions. *See *162 Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (adopting the standard in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976), for § 10(b) and Rule 10b–5 actions); *Glazer v. Formica Corp.*, 964 F.2d 149, 154–55 (2d Cir.1992). “ [T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.’ ” *Basic*, 485 U.S. at 231–32, 108 S.Ct. 978 (quoting *TSC Indus.*, 426 U.S. at 449, 96 S.Ct. 2126). It is not sufficient to allege that the investor might have considered the misrepresentation or omission important. On the other hand, it is not necessary to assert that the investor would have acted differently if an accurate disclosure was made. *Cf. Folger Adam Co. v. PMI Indus., Inc.*, 938 F.2d 1529, 1533–34 (2d Cir.1991) (holding that jury charge which may have misled jury to believe that information is material only if it is outcome-determinative was error). An omitted fact may be immaterial if the information is trivial, *see Basic*, 485 U.S. at 231, 108 S.Ct. 978 (citation omitted), or is “so basic that any investor could be expected to know it,” *Levitin v. PaineWebber, Inc.*, 159 F.3d 698, 702 (2d Cir.1998) (internal quotation marks omitted), *cert. denied*, 525 U.S. 1144, 119 S.Ct. 1039, 143 L.Ed.2d 47 (1999). Therefore, whether an

alleged misrepresentation or omission is material necessarily depends on all relevant circumstances of the particular case.

Materiality is a mixed question of law and fact. See *TSC Indus.*, 426 U.S. at 450, 96 S.Ct. 2126. We have held that, when presented with a Rule 12(b)(6) motion, “a complaint may not properly be dismissed ... on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.” *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir.1985); see *Azzielli v. Cohen Law Offices*, 21 F.3d 512, 518 (2d Cir.1994).

a. Numerical Benchmark

[6] The district court held that the alleged misrepresentations of the HTCC Fees as having been received in 1996 were immaterial as a matter of law because the Fees amounted to only 1.7% of Citizens' 1996 total revenue. The plaintiffs and the SEC, as amicus curiae, contend that the court's exclusive reliance on a single numerical or percentage benchmark to determine materiality was error. Their position is supported by ample authority. In *Basic*, the Supreme Court expressly rejected the use of a numerical formula:

A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.

Basic, 485 U.S. at 236 & n. 14, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (citing House Committee on Interstate and Foreign Commerce, Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, 95th Cong., 1st Sess., at 327 (Comm. Print 1977)); see also FASB, Statement of Financial Accounting Concepts No. 2, ¶ 125 (1980) (“[M]agnitude by itself, without regard to the nature of the item and the circumstances in which the judgment has to be made, will not generally be a sufficient basis for a materiality judgment.”).

Following *Basic*, we have consistently rejected a formulaic approach to assessing the materiality of an alleged misrepresentation. For example, in *Press*, we considered

when failure to disclose the specifics *163 of a securities markup⁵ would be material. See *Press*, 166 F.3d at 534–37. Under § 10(b) of the Exchange Act, a seller has a duty to disclose the details of a markup if the markup is “excessive.” See *id.* at 534. We declined in that case to establish a specific range beyond which a markup would be deemed “excessive,” holding instead that courts must assess a broad range of factors. See *id.* at 535. In *Glazer*, we rejected the notion that merger talks are not material as a matter of law unless the discussions had ripened into an agreement-in-principle on price and structure. *Glazer*, 964 F.2d at 156. We held that the materiality of merger negotiations depends on the specific facts of each case. See *id.* See also *In re Home Health Corp. of America, Inc. Sec. Litig.*, No. Civ. A. 98–834, 1999 WL 79057, at *6–7 (E.D.Pa. Jan. 29, 1999) (declining to hold immaterial as a matter of law failure to report loss of a *de minimis* percentage of total revenue where qualitative factor rendered the loss significant); *In re Kidder Peabody Sec. Litig.*, 10 F.Supp.2d 398, 410 (S.D.N.Y.1998) (relying on *Basic* and declining to hold as a matter of law that misstatements affecting profits by no more than 2.54% were immaterial).

[7] [8] With respect to financial statements, the SEC has commented that various “[q]ualitative factors may cause misstatements of quantitatively small amounts to be material.” SEC Staff Accounting Bulletin (“SAB”) No. 99, 64 Fed.Reg. 45150, 45152 (1999) (to be codified at 17 C.F.R. pt. 211, subpt. B) (representing interpretations and practices followed by the SEC's Division of Corporation Finance and the Office of the Chief Accountant in administering disclosure requirements of federal securities law).⁶ Of particular relevance to this action are the following:

- whether the misstatement masks a change in earnings or other trends
- whether the misstatement hides a failure to meet analysts' consensus expectations for the enterprise[.]

Id. Unlike, for example, a rule promulgated by the SEC pursuant to its rulemaking authority, see 15 U.S.C. § 78w(a), SAB No. 99 does not carry with it the force of law. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 1662–63, 146 L.Ed.2d 621 (2000) (explaining that interpretations contained in opinion letters, like those in policy statements, agency manuals, and enforcement guidelines, which are not, for example, the result of a formal adjudication or notice-and-comment process, lack the force

of law); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) (stating that courts may give less weight to guidelines than to administrative regulations which Congress has declared shall have the force of law or to regulations which, under the enabling statute, may themselves supply the basis for imposition of liability) (superseded by statute on other grounds). Nonetheless, because SEC staff accounting bulletins “constitute a body of experience and informed judgment,” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and SAB No. 99 is thoroughly reasoned and consistent with existing law—its non-exhaustive list of factors is simply an application of the well-established *Basic* analysis to misrepresentations of financial results—we find it persuasive guidance for evaluating the materiality of an alleged misrepresentation. See *Christensen*, 529 U.S. 576, 120 S.Ct. at 1663 (quoting *164 *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161); *Gilbert*, 429 U.S. at 125, 97 S.Ct. 401.

The two Court of Appeals cases cited by the district court support the approach we take here. In *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539 (8th Cir.1997), the Eighth Circuit held that the alleged misrepresentations, which amounted to 2% of total assets, were immaterial as a matter of law “[t]aken in context.” *Id.* at 547 (emphasis added). The court did not rely on the single numerical benchmark, but also took into consideration the fact that the case involved a high-risk/high-yield investment, and that the risk factors had been prominently disclosed in a prospectus. *Id.* at 542–43, 547. Similarly, in *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir.1996), the First Circuit Court of Appeals considered whether a 3% to 9% drop in quarterly revenue was immaterial as a matter of law. It stated, in dicta, that “[w]here a variable, *although material*, is of only minor predictive value, disclosure of a rough estimate of that variable’s value can obviate the need for more specific disclosure.” *Id.* at 633 (emphasis added). The clear implication of this statement is that a 3% to 9% drop may be material depending on the circumstances. To the extent that the two district court decisions also cited in the opinion below adopted a bright-line test for materiality, we disagree with their approach. See *Shuster v. Symmetricon, Inc.*, No. 94–20024, 1997 WL 269490, at *8 (N.D.Cal. Feb. 25, 1997); *Ferber v. Travelers Corp.*, 802 F.Supp. 698, 708 (D.Conn.1992).

b. Relevant Line Item

[9] The plaintiffs argue that the district court erred by comparing the Fees to Citizens’ total revenue instead of total

income. In so holding, the district court mistakenly believed that the plaintiffs’ argument rested on an invalid accounting principle:

Although defendants assert that the amount of plaintiffs’ alleged nondisclosure amounts to \$6.9 million, or approximately 2% of Citizens’ revenues, plaintiffs[] allege that this statement was inaccurate by 15.78% because Citizens used GAAP principles, rather than Equity Accounting.⁷

Ganino, 56 F.Supp.2d at 224 (emphasis added). In fact, however, the plaintiffs’ contentions with respect to the booking of the 1995 Fees as 1996 income depended not so much on the use of equity accounting as on the characterization of the Fees as income rather than revenue. Misstatements of income could be material because “earnings reports are among the pieces of data that investors find most relevant to their investment decisions.” *In re Burlington Coat Factory*, 114 F.3d at 1420 n. 9; see *In re Kidder Peabody*, 10 F.Supp.2d at 410. The Complaint alleged that the Fees were “pre-tax income (revenue for which there was no corresponding expense)” and repeatedly compared the Fees *165 to the “Net Income” line item on the Form 10–Qs. Whether the plaintiffs will be able to prove that the Fees had no offsetting expenses—and therefore can be properly recorded as income—is an issue of fact that cannot be decided at this stage of the litigation. On a motion to dismiss, the allegations in the Complaint must be accepted as true. Accordingly, the Fees should be treated as and compared to Citizens’ pre-tax income.

The defendants do not dispute that the items in issue should be compared to like items on the corporate financial statement. On the contrary, they themselves point to numerous cases that did exactly that. See, e.g. *Parnes*, 122 F.3d at 545 (comparing reserves for dubious accounts receivable to total assets); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 715 & n. 15 (3d Cir.1996) (comparing loss reserves, which for accounting purposes “most immediately” affects income, to total income for relevant period); *Glassman*, 90 F.3d at 633 (comparing dollar amount of backlog orders, a revenue item, to total revenues); *Ferber*, 802 F.Supp. at 707 (comparing real estate investments to total “invested assets”); *In re First Chicago Corp. Sec. Litig.*, 769 F.Supp. 1444, 1454 (N.D.Ill.1991) (comparing allegedly risky real estate loan to total real estate loan portfolio for year). Rather, the defendants challenge the assertion that the Fees went directly to Citizens’ bottom line

as income, a factual dispute that cannot be resolved without further development of the record.

c. *Relevant Timeframe*

We next consider the relevant timeframe. The plaintiffs, joined by the SEC, maintain that the court should have considered the impact of the alleged misrepresentations on all misstated items in the financial statement for all relevant periods, not only for the year as a whole. In this case, the Complaint alleged that substantial portions of the income reported during the first two quarters of 1996 were in fact the 1995 Fees. Accordingly, the plaintiffs and the SEC contend that the court should have assessed the impact of the Fees on Citizens' quarterly income. The defendants argue that the court correctly compared the Fees to annual results only, because the plaintiffs theorized that the defendants deferred recognition of the Fees in order to maintain Citizens' annual growth trend.

[10] We reject the defendants' contention. Materiality is determined in light of the circumstances existing at the time the alleged misstatement occurred. *See Pommer v. Medtest Corp.*, 961 F.2d 620, 625 (7th Cir.1992); *City Nat'l Bank of Fort Smith v. Vanderboom*, 422 F.2d 221, 230 (8th Cir.1970); *Spielman v. General Host Corp.*, 402 F.Supp. 190, 194 (S.D.N.Y.1975) ("The determination of materiality is to be made upon all the facts as of the time of the transaction and not upon a 20–20 hindsight view long after the event." (footnote omitted)), *aff'd*, 538 F.2d 39 (2d Cir.1976). Thus, we held in *Kaiser–Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843 (2d Cir.1952), that an overstatement of fourth quarter earnings was not rendered immaterial simply because profits for the year as a whole were not affected by the misrepresentation because "the prospective purchaser was entitled to a full disclosure of all the facts that were known to the Corporation at the time the [financial statement] was issued." *See also Glassman*, 90 F.3d at 633 (comparing quarterly results); *SEC v. Keller Indus., Inc.*, 342 F.Supp. 654, 657 n. 5 (S.D.N.Y.1972) (recognizing that a publicly filed interim quarterly report can be actionable under Rule 10b–5 if it contains material misstatements).

[11] Citizens' own press releases implicitly acknowledge the significance of quarterly financial statements. For example, its May 7, 1996 press release touted first quarter results as a predictor of annual performance, stating that the Company was "well on its way toward its 52nd consecutive year of

increased revenues, net income and earnings per share." *See also* 5B Arnold S. Jacobs, *Litigation and Practice* *166 under Rule 10b–5 § 61.02[c], at 3–193 (West 1999) (noting that a company's decision to issue press release may show that company thought the data significant). Therefore, we think it appropriate to compare the Fees to not only annual, but also quarterly financial results.

d. *This Complaint*

[12] Applying the foregoing principles to this action, we conclude that the Complaint alleged material misrepresentations in the 1996 First and Second Quarter Form 10–Qs and corresponding press releases, namely, the alleged misrepresentation of \$10.1 million of Fees received in 1995 as 1996 income. The \$6.9 million of 1995 Fees booked during the first quarter of 1996 equaled 17.7% of Citizens' reported after-tax net income (\$38.9 million), and 11.7% of its pre-tax net income (\$58.78 million) for that quarter. The \$10.1 million reflected in the 1996 Second Quarter Form 10–Q amounted to 11.9% of after-tax net income (\$85.15 million), and 8% of pre-tax net income (\$126.62 million) for the first six months of 1996. We believe it is inappropriate to determine at this stage of the litigation that these substantial amounts, both in absolute terms and as percentages of total net income for the respective quarters, were immaterial as a matter of law.

Aside from the magnitude of the overstatements, the Complaint alleged that the defendants deceptively stored the Fees until 1996 in order to manage the Company's 1995 and 1996 income, and that they did so in order to conceal Citizens' failure to meet analysts' expectations and to sustain its 51–year earnings trend. The Complaint asserted that the \$6.9 million of Fees reported in the First Quarter Form 10–Q accounted for "a substantial portion, if not all, of the increase in income for the first quarter 1996 compared to the first quarter of 1995[.]" Moreover, according to the Complaint, analysts' projections of Citizens' "income for the first six (6) months of 1996 were met and exceeded only as a result of th[e] additional HTCC-related income, and the increase in income for the first six months of 1996 compared to the first six months of 1995 was due *entirely* to the income recognized from HTCC." Viewed in this context, it cannot be said that no reasonable investor would have considered the misreporting of 1995 Fees as 1996 income to be significant or to have altered the total mix of information affecting their investment decisions. We therefore conclude that the

Complaint alleged material misrepresentations. We need not and do not decide whether the purported misstatements regarding Citizens' control of HTCC and the non-recurring nature of the Fees are also material.

e. *Market Response*

[13] The defendants urge us to affirm the district court's decision based on the lack of movement in Citizens' stock price after it filed its 1997 Second Quarter Form 10-Q on August 7, 1997, which the court held was "significant evidence" that none of the alleged misstatements of income were material to the investing public.⁸ *Ganino*, 56 F.Supp.2d at 227. According to the Complaint, on that date Citizens first publicly acknowledged that the reported income for the first and second quarters of 1996 included substantial payments from HTCC. The plaintiffs challenge *167 this evidence, noting that Citizens' stock price did experience a "precipitous drop" in May 1997, when reports of Citizens' poor earnings outlook first emerged.

[14] The Complaint alleges only that earnings and earnings per share fell in May 1997, not price per share. However, drawing all reasonable inferences in favor of the non-moving party, as we must, we infer that Citizens' price per share dropped correspondingly in May 1997. In granting the defendants' motion to dismiss, the court did not draw this inference and did not appropriately resolve the disputed factual issue of whether the alleged misrepresentations adversely affected Citizens' share price during the Class Period. Cf. *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir.1997) (declining, on a summary judgment motion, to infer that allegedly material statements were false "from the movement of stock price alone ... given the abundance of market variables"). We therefore vacate the district court's decision to the extent it held that the steadiness of Citizens' stock price after August 7, 1997 proved that the misreporting of 1995 Fees as 1996 income was immaterial.

f. *"Truth on the Market" Doctrine*

[15] Because of the factual dispute over Citizens' share price, we also reject the defendants' attempt to rely on the so-called "truth on the market" corollary to "fraud on the market" as a basis for affirming the district court's decision. Under this corollary, a misrepresentation is immaterial if the information is already known to the market because the misrepresentation

cannot then defraud the market. See *Provenz v. Miller*, 102 F.3d 1478, 1492 (9th Cir.1996); *Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc.*, 3 F.3d 208, 213-14 (7th Cir.1993); cf. *Rodman v. Grant Found.*, 608 F.2d 64, 70 (2d Cir.1979) ("In determining whether [proxy statement] constituted full and adequate disclosure, the district court properly took into account information already in the public domain and facts known or reasonably available to the shareholders."). A defendant may rebut the presumption that its misrepresentations have affected the market price of its stock by showing that the truth of the matter was already known. See *Provenz*, 102 F.3d at 1492 & n. 4; *Associated Randall Bank*, 3 F.3d at 213-14; cf. *Basic*, 485 U.S. at 248, 108 S.Ct. 978 (presumption of reliance in a fraud-on-the-market case may be rebutted by proving that "the 'market makers' were privy to the truth"). However, the corrective information must be conveyed to the public "with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by" the alleged misstatements. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir.1989).

[16] The truth-on-the-market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a § 10(b) complaint for failure to plead materiality. Cf. *Provenz*, 102 F.3d at 1493 (noting that summary judgment based on the "truth on the market" doctrine is appropriate only if defendants show that "no rational jury could find that the market was misled" (internal quotation marks omitted)). The two cases cited by the defendants do not hold otherwise, as both were decided at later stages of litigation after the parties had presented substantial evidence. See *In re Convergent Tech. Sec. Litig.*, 721 F.Supp. 1133, 1138-39 (N.D.Cal.1988) (deciding motion for summary judgment); *Beissinger v. Rockwood Computer Corp.*, 529 F.Supp. 770, 781-82 (E.D.Pa.1981) (deciding post-trial motion for involuntary dismissal).

[17] Here, the defendants argue that the alleged inflation of 1996 income using the 1995 Fees was immaterial because Citizens' disclosures before Class Period had already transmitted all relevant information about the HTCC deal to the market. But as explained above, the evidence on *168 which they rely—the lack of movement in the Citizens share price after August 1997—is in dispute. Moreover, on the present record, it cannot be said that no reasonable investor could have been misled by Citizens' statement in its 1995 Form 10-Q that it "ha[d] been compensated" for its loans and

guarantees to HTCC, into believing that Citizens' 1996 First and Second Quarter Form 10-Qs included no HTCC Fees.

The defendants also argue that HTCC's SEC filings during the Class Period contained sufficient accurate information to neutralize any misleading impressions created by Citizens' financial reports. They note that as early as April 1996, one month before the Class Period, HTCC had correctly disclosed when it paid the Fees to Citizens—\$6.9 million in options in 1995 and \$3.2 million in stock in February 1996. Their argument is untenable for two reasons. First, whatever dubious merit this argument may have, the defendants themselves have undermined it. They appear to have conceded, in the section of their brief discussing scienter, that the Fees were in fact recognized as 1996 income following a GAAP rule governing loan guarantee fees. *See FASB, Emerging Issues Task Force Abstract No. 85-20* (“the guarantor should recognize fee income over the guarantee period”). Given that the Complaint alleges that at least a portion of the financial support that Citizens provided to HTCC took the form of direct loans, not loan guarantees, and that the Fees should have been reported as 1995 income, the plaintiffs have satisfied their burden of pleading a material misrepresentation. Second, even assuming that HTCC's disclosures were factually accurate, we cannot decide on the present record whether those disclosures were conveyed with sufficient “intensity and credibility” as to dispel the false impression created by Citizens' alleged misrepresentations. Therefore, we decline to affirm the district court's opinion based on the “truth on the market” doctrine.⁹

B. Scienter

Next, the plaintiffs appeal to the extent the court ruled that they failed to plead scienter. Because we cannot discern from the opinion below whether the district court found the scienter allegations defective, we remand with the following comments on the proper pleading standard. *See, e.g., Cosgrove v. Sears, Roebuck, & Co.*, 191 F.3d 98, 102 (2d Cir.1999) (remanding for explanation of district court's basis for awarding costs); *Etuk v. Slattery*, 936 F.2d 1433, 1446-47 (2d Cir.1991) (remanding for further consideration or clarification). The district court should review the Complaint to determine whether it meets our Circuit's pleading requirements for scienter as to each of the defendants.

1. Pleading Requirements

[18] [19] [20] It is well-settled in this Circuit that a complaint alleging securities fraud must satisfy the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *See Chill v. General Elec. Co.*, 101 F.3d 263, 267 (2d Cir.1996); *Acito*, 47 F.3d at 52; *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129-30 (2d Cir.1994); *Goldman*, 754 F.2d at 1069-70. Rule 9(b) provides that “[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally.” *Chill*, 101 F.3d at 267; *Goldman*, 754 F.2d at 1070. The requisite state of mind in a Rule 10b-5 action is “an intent to deceive, manipulate or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Such intent can be established “either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by *169 alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.” *Shields*, 25 F.3d at 1128; *see Acito*, 47 F.3d at 52; *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268-69 (2d Cir.1993). Although speculation and conclusory allegations will not suffice, neither do we require “great specificity” provided the plaintiff alleges enough facts to support “a strong inference of fraudulent intent.” *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84 (2d Cir.1999); *see Chill*, 101 F.3d at 267 (internal quotation marks omitted); *Acito*, 47 F.3d at 53; *Shields*, 25 F.3d at 1128-29; *In re Time Warner*, 9 F.3d at 268; *cf. Press*, 166 F.3d at 538 (affirming denial of a motion to dismiss where plaintiff “barely alleged” scienter).

[21] The defendants contend that the Private Securities Litigation Reform Act (“PSLRA”), P.L. 104-67, 109 Stat. 737 (1995), eliminated the option of pleading scienter by alleging that a defendant had motive and opportunity to commit fraud. We disagree.

The PSLRA tracks the first portion of our test requiring facts that support a strong inference of intent to promote a fraud:

In any private action arising under this title ... the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u-4(b)(2). However, the PSLRA did not expressly adopt our two distinct ways for pleading the requisite intent. On the contrary, the managers of H.R. 1058 (the PSLRA bill) stated that “[b]ecause the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit's case law interpreting this pleading standard.”

H.R.Rep. No. 104–369, at 41 (1995), *reprinted in* 1995 U.S.C.A.N. 730, 740. The legislative record, however, does not end there.

In part because of the quoted language in the Conference Report, the President vetoed H.R. 1058. *See* 141 Cong. Rec. 38194 (1995).¹⁰ During the subsequent Congressional debate to override the veto, major supporters of the bill, including its original sponsors, refuted the Conference Report, explaining that H.R. 1058 in fact *codified* the Second Circuit standard. *See, e.g.*, 141 Cong. Rec. 38323 (1995) (statement of Sen. Domenici) (“[I]t is the Second Circuit’s pleading standard.”); 141 Cong. Rec. 38228 (1995) (statement of Sen. Dodd) (“We have met the second circuit’s standard here”); 141 Cong. Rec. 37802 (1995) (statement of Rep. Lofgren) (“The President says he supports the second circuit standard for pleading.... That is what is included in this bill.”). Their understanding was later explicitly and prominently endorsed in the Joint Explanatory Statement of the Committee of Conference in connection with passage of the Securities Litigation Uniform Standards Act (the “Uniform Standards Act”), P.L. 105–353, 112 Stat. 3227 (1998):

[I]t was the intent of Congress, as was expressly stated during the legislative debate on the [PSLRA], and particularly during the debate on overriding the President’s veto, that the [PSLRA] establish a heightened uniform Federal standard on pleading requirements *based upon the pleading standard applied by the Second Circuit Court of Appeals.*

*170 H. Rep. No. 105–803, at 15 (1998) (emphasis added) This legislative history leaves no doubt that the PSLRA “heightened the requirement for pleading scienter to the level used by the Second Circuit.” *Press*, 166 F.3d at 537–38; *see also Stelman*, 174 F.3d at 84.¹¹

2. This Complaint

Although the Complaint need only plead scienter by alleging either motive and opportunity, or conscious or reckless misbehavior, the plaintiffs contend that the Complaint does both. The Complaint alleges that the defendants consciously or recklessly failed to disclose the following material facts: (1) the Fees recognized in 1996 were earned and received in 1995; (2) a material portion of Citizens’ 1996 first and second quarter income consisted of the non-recurring Fees; (3) Citizens and HTCC were related parties; (4) Citizens’ 1996 income was inflated by unearned management fees; and (5) Citizens improperly used equity accounting with respect to its

transactions with HTCC. On remand, the district court should consider whether any of these allegations, if true, would give rise to a strong inference of the defendants’ intent to commit fraud.

[22] As to motive and opportunity, opportunity is not disputed. However, the defendants challenge the sufficiency of the motive allegations. Motive “entail[s] concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.” *Shields*, 25 F.3d at 1130. General allegations that the defendants acted in their economic self-interest are not enough. *See, e.g., id.* at 1130 (defendants’ alleged motive of prolonging executive benefits does not support a strong inference of fraudulent intent); *Chill*, 101 F.3d at 268 (allegation that defendant desired to justify substantial investment by creating appearance of investment profit fails to plead scienter). The Complaint asserts that the defendants had three motives: to maintain its 51–year trend of increased earnings; to maintain an artificially high stock price to ensure a favorable stock-for-stock acquisition of another company; and to facilitate its debenture offering. In addition, the Complaint alleges that two of the three individual defendants engaged in insider trading during the Class Period and secured their executive benefits. Whether any of these allegations plead a cognizable motive under Rule 10b–5 should be determined by the district court in the first instance. Of course, if the court decides on remand that the Complaint successfully pleaded the defendants engaged in conscious or reckless misbehavior, it need not also consider the motive and opportunity prong of scienter.

3. The § 20(a) Claim

[23] To make out a prima facie case under § 20(a) of the Exchange Act, a plaintiff “must show a primary violation [here, the alleged Rule 10b–5 violations] by the controlled person [here, Citizens] and control of the primary violator by the targeted defendant [here, the individual defendants], and show that the controlling person was in some meaningful sense a culpable participant in the fraud perpetrated by the controlled person.” *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472 (2d Cir.1996).

In this case, the district court dismissed the § 20(a) claim against the individual defendants upon ruling that the Complaint failed to plead the primary Rule 10b–5 violations. Because we remand the Rule 10b–5 claims, we also vacate the dismissal of the § 20(a) cause of action and remand *171 to the district court for further consideration.

respect to materiality, and remand for further consideration of the scienter allegations and the § 20(a) claim.

CONCLUSION

For the reasons explained above, the judgment of the district court dismissing the Complaint for failure to state a claim is hereby vacated. We reverse the district court's holding with

All Citations

228 F.3d 154, Fed. Sec. L. Rep. P 91,210

Footnotes

1 Section 10 of the Exchange Act provides, in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

...

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[15 U.S.C. § 78j\(b\)](#).

2 Section 20(a) of the Exchange Act provides, in relevant part:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

[15 U.S.C. § 78t\(a\)](#).

3 Rule 10b–5, entitled “Employment of manipulative or deceptive device,” makes it unlawful “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.”

[17 C.F.R. § 240.10b–5](#).

4 Generally Accepted Accounting Principles (“GAAP”) are the official standards adopted by the American Institute of Certified Public Accountants (the “AICPA”), a private professional association, through three successor groups it established: the Committee on Accounting Procedure, the Accounting Principles Board (the “APB”), and the Financial Accounting Standards Board (the “FASB”). See *PNC Bancorp, Inc. v. Commissioner of Internal Revenue*, 212 F.3d 822, 825 n. 1 (3d Cir.2000); *Amerada Hess Pipeline Corp. v. Federal Energy Regulatory Comm’n*, 117 F.3d 596, 601 (D.C.Cir.1997); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1421 n. 10 (3d Cir.1997); *Providence Hosp. of Toppenish v. Shalala*, 52 F.3d 213, 219 n. 7 (9th Cir.1995). GAAP does not prescribe a fixed set of rules, but rather represent “the range of reasonable alternatives that management can use.” *In re Burlington Coat Factory*, 114 F.3d at 1421 n. 10 (citing *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544, 99 S.Ct. 773, 58 L.Ed.2d 785 (1979)). The SEC treats the FASB's standards as authoritative. See *PNC Bancorp*, 212 F.3d at 825 n. 1.

5 “A markup is the difference between the price charged to a customer for a security and the prevailing market price for the security.” *Press*, 166 F.3d at 533 n. 2.

6 The defendants argue that we should not apply [SAB No. 99](#) to this case because it was promulgated after the events at issue here and “is not intended to change current law or guidance in the accounting or auditing literature.” [SAB No.](#)

99, 64 Fed.Reg. 45150, 45152. However, the fact that SAB No. 99 did not alter the existing law or guidance is a reason to consider it in this case, not to refrain from doing so.

7 In a footnote, the court explained:

Equity Accounting compares HTCC's gross pre-tax revenues to Citizens' net after-tax revenues. Each of the percentages set forth by plaintiffs use this accounting principle. The Court finds, however, that this approach is economically unsound and fails to take into account generally accepted accounting principles. As defendants have noted, such reasoning is to compare apples with oranges.

Id. at n. 1. We have a different understanding of the accounting concepts. Equity accounting is itself a GAAP principle and is a form of accounting that is most appropriately used "by an investor whose investment in voting stock gives it the ability to exercise significant influence over operating and financial policies of an investee." Accounting Principles Board Opinion No. 18, ¶ 18.17 (1972); see also Abraham J. Brilloff, *Unaccountable Accounting* 48–49, 243 (1972) (discussing APB Opinion No. 18). Ownership "of 20% or more of the voting stock of an investee should lead to a presumption that in the absence of evidence to the contrary an investor has the ability to exercise significant influence over the investee." *Id.* In that circumstance, the investing company is required to report its percentage share of the investee's income or loss on its own financial statement. See generally *id.* ¶ 18.19. Equity accounting does not compare a company's gross pre-tax revenues to its net after-tax revenues.

8 The New York Stock Exchange data mentioned in the opinion below were not attached to the Complaint as an exhibit or incorporated by reference into the Complaint. Nevertheless, the district court may take judicial notice of well-publicized stock prices without converting the motion to dismiss into a motion for summary judgment. See *Fant v. Perelman*, Nos. 97 Civ. 8435, 97 Civ. 8436, 1999 WL 199078, at *5 (S.D.N.Y. Apr. 9, 1999); *Comas v. Merrill Lynch & Co.*, No. 92 Civ. 6560, 1993 WL 800778, at *4 n. 2 (S.D.N.Y. July 2, 1993); cf. *Cerasani v. Sony Corp.*, 991 F.Supp. 343, 354 n. 3 (S.D.N.Y.1998) (taking judicial notice of widespread press coverage of a criminal trial). Moreover, the movement of Citizens' stock price is integral to the plaintiffs' fraud-on-the-market theory. See *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir.1991).

9 Each of the parties have submitted and have asked that judicial notice be taken of various HTCC financial statements filed with the SEC. We need not decide the propriety of taking judicial notice of such materials because they would not affect the outcome of this case and, therefore, we do not rely on them.

10 The conferees' reading of the PSLRA also conflicted with the understanding held by some of the bill supporters at the time. See, e.g., 141 Cong. Rec. 35238 (1995) (statement of Sen. D'Amato) ("The legislation creates a uniform standard for complaints that allege securities fraud. This standard is already the law in New York."); 141 Cong. Rec. 35300 (1995) (statement of Sen. Grams) (expressing particular support for various provisions of H.R. 1058, including "[c]odification of the pleading standard adopted by the second circuit court of appeals").

11 The legislative record of the Uniform Standards Act also disclaimed footnote 23 of the Conference Report of the PSLRA, which rejected "in the pleading standard certain language relating to motive, opportunity, or recklessness" based on Second Circuit case law. H.R.Rep. No. 104–369, at 48 n. 23, reprinted in 1995 U.S.C.C.A.N. 730, 747 n. 23. That footnote was "inserted at the last minute [by a committee staffer] without [the committee's] knowledge." 141 Cong. Rec. H10782 (daily ed. Oct. 13, 1998) (statement of Rep. Markey); see 141 Cong. Rec. E2246 (daily ed. Oct. 20, 1998) (statement of Rep. Dingell).



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Sunrise Acupuncture PC v. Tri-State Consumer Ins. Co.](#), N.Y.Sup.App.Term, March 21, 2014

61 A.D.3d 13, 871 N.Y.S.2d 680, 2009 N.Y. Slip Op. 00351

****1 Kingsbrook Jewish Medical
Center, as Assignee of Thresiamm
Valiyaparambil, et al., Respondents**
v
Allstate Insurance Company, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
2007-11668, 3644/07
January 20, 2009

CITE TITLE AS: Kingsbrook
Jewish Med. Ctr. v Allstate Ins. Co.

SUMMARY

Appeal from an order of the Supreme Court, Nassau County (Geoffrey J. O'Connell, J.), dated November 15, 2007. The order, insofar as appealed from, granted that branch of plaintiffs' motion which was for summary judgment on the third cause of action asserted by plaintiff White Plains Hospital Center, as assignee of George Hafford.

[Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.](#), 2007 NY Slip Op 34402(U), affirmed.

HEADNOTES

Evidence Judicial Notice

Diagnosis and Procedure Codes Key Published by United States Department of Health and Human Services

(1) The diagnosis and procedure codes key published by the United States Government on its Department of Health and Human Services (HHS) Web site was properly given judicial notice (*see* CPLR 4511 [b]) in plaintiff hospital's action to recover assigned no-fault medical benefits from

defendant insurer. Upon request of a party, a court may take judicial notice of federal, state and foreign government acts, resolutions, ordinances and regulations, including those of their officers, agencies and governmental subdivisions. Judicial notice is not strictly limited to the constitutions, resolutions, ordinances and regulations of government, but may apply to other public documents that are generated in a manner which assures their reliability. The HHS diagnosis and procedure codes key is of sufficient authenticity and reliability that it may be given judicial notice. The accuracy of the codes key was not contested by plaintiff, and was not subject to courtroom fact-finding. The fact that the code system might not be readily understood by the lay public was of no significance, as the information was proffered for judicial notice not on the basis of being generally understood by the public, but rather, on the basis of its reliable source.

Insurance

No-Fault Automobile Insurance

First-Party Benefits—Lack of Coverage Defense

(2) Plaintiff hospital was entitled to summary judgment in its action to recover assigned no-fault medical benefits from defendant insurer, as defendant failed to pay or deny the claim within 30 days of receiving it, and the attorney affirmation submitted by defendant in support of its claim that the treatment afforded by plaintiff to its assignor was unrelated to the assignor's motor vehicle accident failed to raise a triable issue of fact. Although the court took judicial notice of the diagnosis and procedure codes key published by the United States Government on its Department of Health and Human Services Web site and provided by defense counsel, who claimed in his affirmation that *14 the assignor's diagnoses and treatment as defined by the codes key could not have been related to the accident, the affirmation failed to set forth any basis on which to conclude that counsel was a medical expert qualified to render an opinion on causality. Defendant offered no medical expert affidavit to explain the codes, the diagnoses and, most importantly, the causation or exacerbation, or lack of causation or exacerbation of conditions, in relation to the motor vehicle accident. The mere deciphered codes, in and of themselves, were insufficient.

RESEARCH REFERENCES

Am Jur 2d, Automobile Insurance §§ 383, 523–525, 527, 559;
Am Jur 2d, Evidence §§ 24, 25, 128.

Carmody-Wait 2d, Presentation of the Case §§ 56:28, 56:29,
56:31.

Couch on Insurance (3d ed) §§ 171:57, 171:61, 171:62,
198:39.

McKinney's, CPLR 4511 (b).

NY Jur 2d, Evidence and Witnesses §§ 22, 26, 33; NY Jur 2d,
Insurance §§ 1786–1788, 1800, 1928, 1929.

ANNOTATION REFERENCE

See ALR Index under Automobile Insurance; Health and
Human Services Department; Judicial Notice; No-Fault
Insurance.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: judicial /2 notice /s code & hhs

APPEARANCES OF COUNSEL

Stern & Montana, LLP, New York City (*Richard Montana* of
counsel), for appellant.

Joseph Henig, P.C., Bellmore, for respondents.

OPINION OF THE COURT

Dillon, J.

We are asked to determine whether the definition of diagnosis and procedure codes adopted by the United States Department of Health and Human Services (hereinafter HHS) as part of its regulatory authority may be a proper subject for judicial notice under [CPLR 4511](#). If so, we must also determine whether the defined diagnostic codes, in and of themselves, permit a finding that a patient's hospital care and treatment is wholly outside the scope of no-fault automobile coverage. Until now, we are not *15 aware of any appellate court that has addressed the issue of whether the diagnosis and procedure codes key of the United States government can be judicially noticed by courts, so that it may then be used to decipher no-fault billing forms.

I. Relevant Facts

On July 3, 2006, George Hafford was injured in an automobile accident and received treatment at the plaintiff White Plains Hospital Center (hereinafter White Plains Hospital) from **2 the date of the accident until August 22, 2006. Hafford was insured by the defendant, Allstate Insurance Company (hereinafter Allstate), under an automobile liability insurance policy that contained a no-fault endorsement. White Plains Hospital rendered a bill for its services to Hafford in the total sum of \$26,979.83. Hafford assigned to White Plains Hospital the right to seek reimbursement from Allstate for the amount billed.

On November 7, 2006, White Plains Hospital, as assignee of Hafford, mailed to Allstate by certified mail, return receipt requested, NF-5 and UB-92 forms demanding payment of the sum of \$26,979.83. The UB-92 form contained code numbers to identify the diagnoses that had been made of Hafford's conditions and the treatments provided to him in furtherance of the diagnoses. The delivery of the forms to Allstate on November 8, 2006 is not at issue. White Plains Hospital alleges that pursuant to [Insurance Law § 5106 \(a\)](#) and [11 NYCRR 65-3.8 \(a\) \(1\)](#), Allstate's payment of no-fault benefits became due on December 8, 2006, but Allstate failed to make payment or issue a denial of claim.

This action ensued. Allstate's answer to the complaint set forth 11 affirmative defenses, including the “fourth” affirmative defense that the injuries for which Hafford received treatment did not arise out of the use or operation of an insured motor vehicle and, as such, are not covered by its policy of insurance.

The plaintiffs moved for summary judgment, submitting, in connection with the third cause of action asserted by White Plains Hospital, documentary evidence to establish the service by White Plains Hospital upon Allstate of the required billing documents for no-fault reimbursement and Allstate's failure to either pay the claim or issue an appropriate denial. Allstate opposed the motion and, by cross motion, sought summary judgment in its favor dismissing the complaint. With respect to the third cause of action asserted by White Plains Hospital, Allstate *16 argued that it was entitled to summary judgment on the ground that the treatment afforded to Hafford was unrelated to his motor vehicle accident. Specifically, Allstate's counsel provided the court with the diagnosis and procedure codes key from the official Web site of HHS, Centers for Medicare and Medicaid Services. Allstate requested that the Supreme Court take judicial notice of the codes and their definitions, as public

documents. According to the codes key, Hafford's diagnoses and treatment at White Plains Hospital included rapid heart rate associated with infection, acute and chronic respiratory failure, heart damage caused by alcoholism, convulsions, potassium deficiency, blood poisoning, brain damage caused by lack of oxygen, and expectoration of blood. Allstate's counsel argued, without a supporting affidavit from a medical expert, that these code-defined conditions could not have been related to the automobile accident or, at least, raised an issue of fact as to whether the conditions arose from the accident.

The plaintiffs opposed Allstate's cross motion for summary judgment by raising two principal arguments in connection with the third cause of action. First, White Plains Hospital argued that the interpretation of the billing codes cannot be judicially noticed as it does not rest upon knowledge or sources widely accepted as unimpeachable. Second, White Plains Hospital argued that Allstate's counsel was not qualified as a medical expert to render an opinion on whether the hospital's care and treatment was, or was not, related to the underlying automobile accident.

In the order appealed from dated November 15, 2007, the Supreme Court held, with respect to the third cause of action, that White Plains Hospital established its demand upon proper forms that Allstate pay the sum of \$26,979.83, and that Allstate failed to pay the claim or issue a denial of claim within the required 30 days thereafter (2007 NY Slip Op 34402[U]). With respect to Allstate's opposition and the cross motion, the Supreme Court implicitly took judicial notice of the HHS codes key and held that counsel's affirmation, which argued that invoiced treatment was unrelated to the automobile accident, was medically insufficient. The Supreme Court, inter alia, granted that branch of the plaintiffs' motion which was for summary judgment on the third cause of action asserted by White *3 Plains Hospital. For the reasons set forth below, we affirm the order insofar as appealed from.

***17 II. The Payment of First-Party Benefits Under Insurance Law § 5106**

Article 51 of the Insurance Law is known as the “Comprehensive Motor Vehicle Insurance Reparations Act” and is commonly referred to as the “No-Fault Law.” The purpose and objective of this statute is to “ ‘assure claimants of expeditious compensation for their injuries through prompt payment of first-party benefits without regard to fault and without expense to them’ ” (New York Hosp. Med. Ctr. of Queens v Motor Veh. Acc. Indem. Corp., 12 AD3d 429, 430

[2004], quoting *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 225 [1986]).

Section 5106 of article 51 is entitled “Fair claims settlement” and provides, in pertinent part, that

“(a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.”

Pursuant to the statutory and regulatory framework governing the payment of no-fault benefits, insurance companies are required either to pay or deny a claim for first-party benefits within 30 days of receipt of the claim (see Insurance Law § 5106 [a]; 11 NYCRR 65-3.8 [a] [1]; [c]; *Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 563 [2008]; *Hospital for Joint Diseases v New York Cent. Mut. Fire Ins. Co.*, 44 AD3d 903 [2007]; *New York & Presbyt. Hosp. v Progressive Cas. Ins. Co.*, 5 AD3d 568, 569 [2004]). Within 10 business days after receipt of the claim notice, the insurer may send an initial request for verification of the claim (see 11 NYCRR 65-3.5 [a]). After receipt of verification, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt (see 11 NYCRR 65-3.5 [b]). The 30-day period in which to either pay or deny a claim is *18 extended where the insurer makes a request for additional verification within the requisite 15-day time period (see *Montefiore Med. Ctr. v Government Empls. Ins. Co.*, 34 AD3d 771 [2006]; *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 31 AD3d 512 [2006]). Thus, a timely additional verification request tolls the insurer's time within which to pay or deny a claim (see *Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d at 563; *New York & Presbyt. Hosp. v Countrywide Ins. Co.*, 44 AD3d 729, 730 [2007]).

Eleven years ago, the New York Court of Appeals carved out a narrow exception to the requirement that an insurer must pay or deny a claim within the 30-day period prescribed

by the No-Fault Law. The Court of Appeals held that an insurer “may assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident” (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]; see *Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d at 563). The Court stressed, however, that the lack of coverage “exceptional exemption” does not apply where the insurer claims that the hospital treatments were medically excessive, since the defense of medical excessiveness seeks to excuse only part, but not all, of the no-fault benefits (90 NY2d at 199, 202). Thus, where an insurer alleges excessive treatment as a basis for denying coverage, a denial of claim must be served within the ****4** time-sensitive deadline of the No-Fault Law, at least as to the portion of the demand that is deemed excessive.

Two years later in *Mount Sinai Hosp. v Triboro Coach* (263 AD2d 11 [1999]), this Court applied the *Central General Hospital* rationale and, in so doing, explained that the insurer who asserts entitlement to the “exceptional exemption” must “come forward with proof in admissible form to establish ‘the fact’ or the evidentiary ‘found[ation for its] belief’ that the patient’s treated condition was unrelated to his or her automobile accident” (*id.* at 19-20). This Court determined that in applying *Central General Hospital*, “the question of whether an injury was entirely preexisting (i.e., not covered) or was in whole or in part the result of an insured accident (i.e., covered) is hybrid in nature, and cannot be resolved *without recourse to the medical facts*” (*id.* at 19 [emphasis added]).

This Court further emphasized that the underlying purpose of the No-Fault Law would be undermined if a plaintiff hospital were required to prove as a threshold matter that a patient’s ***19** condition was caused by the accident and unrelated to his or her entire medical history. Under such circumstances, “insurers would be motivated to refrain from issuing timely disclaimers in order to impose such an onerous threshold burden upon claimants” (*id.* at 20). The burden of proving the lack of a nexus between an accident and medical treatment therefore falls upon the insurer seeking to deny payment (*id.* at 19-20).

Against this backdrop, the judicially noticed admissibility of the proffered diagnosis and procedure codes key published by HHS, and whether the deciphered codes, if admitted, establish that medical diagnosis and treatment was or was not related in whole or in part to Hafford’s automobile accident, assumes dispositive significance to the resolution of this appeal.

III. Judicial Notice

CPLR 4511 (b) provides that upon request of a party, a court may take judicial notice of federal, state, and foreign government acts, resolutions, ordinances, and regulations, including those of their officers, agencies, and governmental subdivisions. While the concept of judicial notice is elastic (see Richardson, Evidence § 52 [Prince 10th ed]) and applicable to a wide range of subject matter, official promulgations of government appear to be particularly appropriate for judicial notice, given the manner that CPLR 4511 expressly singles them out for such treatment.

Judicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability. Thus, the concept has been applied to census data (see *Affronti v Crosson*, 95 NY2d 713, 720 [2001]; *Buffalo Retired Teachers 91-94 Alliance v Board of Educ. for City School Dist. of City of Buffalo*, 261 AD2d 824, 827 [1999]; *Mackston v State of New York*, 126 AD2d 710 [1987]), agency policies (see *Matter of Albano v Kirby*, 36 NY2d 526, 532 [1975]), certificates of corporate dissolution maintained by the Secretary of State (see *Brandes Meat Corp. v Cromer*, 146 AD2d 666, 667 [1989]), the resignation of public officials (see *Matter of Soronen v Comptroller of State of N.Y.*, 248 AD2d 789, 791 [1998]; *Matter of Maidman*, 42 AD2d 44, 47 [1973]), legislative proceedings (see *Outlet Embroidery Co. v Derwent Mills*, 254 NY 179, 183 [1930]), legislative journals (see *Browne v City of New York*, 213 App Div 206, 233 [1925]), the consumer price index (see ***20** *Sommers v Sommers*, 203 AD2d 975, 976 [1994]; *City of Hope v Fisk Bldg. Assoc.*, 63 AD2d 946, 947 [1978]), the location of real property recorded with a clerk (see *Andy Assoc. v Bankers Trust Co.*, 49 NY2d 13, 23-24 [1979]), death certificates maintained by the Department of Health (see *Matter of Reinhardt*, 202 Misc 424, 426 [1952]), and undisputed court records and files (see e.g. *Perez v New York City Hous. Auth.*, 47 AD3d 505 [2008]; *Walker v City of New York*, 46 AD3d 278, 282 [2007]; *Matter of Khatibi v Weill*, 8 AD3d 485 [2004]; *Matter of Allen v Strough*, 301 AD2d 11, 18 [2002]). Even material derived from official government Web sites may be the subject of judicial notice (see *Munaron v Munaron*, 21 Misc 3d 295 [Sup Ct, Westchester County 2008]; *Parrino v Russo*, 19 Misc 3d 1127[A], 2008 NY Slip Op 50925 [U] [Civ Ct, Kings County 2008]; *Nairne v Perkins*, 14 Misc 3d 1237[A], 2007 NY Slip Op 50336[U]

[Civ Ct, Kings County 2007]; *Proscan Radiology of Buffalo v Progressive Cas. Ins. Co.*, 12 Misc 3d 1176[A], 2006 NY Slip Op 51242 [U] [Buffalo City Ct 2006]).

White Plains Hospital argues that the codes key available on the HHS Web site does not qualify for judicial notice by relying upon the language of this Court in *Ptasznik v Schultz* (247 AD2d 197 [1998]). In *Ptasznik*, then-Justice Albert Rosenblatt defined the test for judicial notice as “whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentially proven” (*id.* at 198, citing *Hunter v New York, Ontario & W. R.R. Co.*, 116 NY 615 [1889]). White Plains Hospital maintains that code numbers which require deciphering do not constitute general information widely accepted by the average layperson. However, *Ptasznik* discusses specifically, and the universe of case law recognizes generally, two disjunctive circumstances where information may be judicially noticed. The first is when information “rests upon *knowledge* . . . [that is] widely accepted” (*Ptasznik v Schultz*, 247 AD2d at 198 [emphasis added]) such as calendar dates, geographical locations, and sunrise times (*id.* at 199). The second “rests upon . . . *sources* [that are] widely accepted and unimpeachable” (*id.* at 198 [emphasis added]), such as reliable uncontested governmental records.

(1) Here, the diagnosis and procedure codes key maintained by the United States Government on its HHS Web site is of sufficient authenticity and reliability that it may be given judicial notice. The accuracy of the codes key is not contested by White Plains Hospital, and is not subject to courtroom fact-finding (*see* *21 *Affronti v Crosson*, 95 NY2d at 720). The fact that the code system might not be readily understood by the lay public is of no significance, as the information is proffered for judicial notice not on the basis of being generally understood by the public, but rather, on the basis of its reliable source.

We hold, therefore, that the diagnosis and procedure codes key published by the United States Government on its HHS Web site may properly be given judicial notice (*see* CPLR 4511 [b]), as the key is reliably sourced and its accuracy not contested.

Using the codes key in evidence, the appellant, Allstate, accurately deciphered for the Supreme Court the medical diagnoses and treatments administered by White Plains Hospital to Hafford during the course of Hafford's hospital stay.

IV. The Medical Evidentiary Value of the Deciphered Codes

The plaintiffs established their prima facie entitlement to summary judgment on the third cause of action asserted by White Plains Hospital to recover no-fault benefits on behalf of its assignor, Hafford (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), by submitting the prescribed statutory billing forms, the affidavit of its biller, the certified mail receipt, and the signed return receipt card referencing the patient and the forms (*see Westchester Med. Ctr. v Allstate Ins. Co.*, 53 AD3d 481 [2008]; *Westchester Med. Ctr. v Countrywide Ins. Co.*, 45 AD3d 676 [2007]; *Hospital for Joint Diseases v New York Cent. Mut. Fire Ins. Co.*, 44 AD3d at 904; *New York & Presbyt. Hosp. v Travelers Prop. Cas. Ins. Co.*, 37 AD3d 683, 683-684 [2007]). Unlike negligence actions where plaintiffs must prove causation, plaintiffs seeking to recover first party no-fault payments bear no such initial burden, as causation is presumed (*see Mount Sinai Hosp. v Triboro Coach*, 263 AD2d at 20; *Bronx Radiology, P.C. v New York Cent. Mut. Fire Ins. Co.*, 17 Misc 3d 97, 99 [2007]).

In opposition, Allstate relies upon the judicially-noticed diagnosis and procedure codes key published by HHS to argue, via an attorney's affirmation, that care and treatment rendered to Hafford by White Plains Hospital was causally unrelated to Hafford's automobile accident. **5

(2) Allstate has failed to come forward with proof in admissible form, as is its burden in opposing summary judgment (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *22 *Mount Sinai Hosp. v Triboro Coach*, 263 AD2d at 19-20), to raise a triable issue as to “ ‘the fact or founded belief that the alleged injury does not arise out of an insured incident’ ” (*Mount Sinai Hosp. v Triboro Coach*, 263 AD2d at 19, quoting *Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997] [emphasis omitted]; *see New York & Presbyt. Hosp. v Selective Ins. Co. of Am.*, 43 AD3d 1019, 1020 [2007]). While the existence of the diagnostic codes and the clinical definitions of Hafford's treated medical conditions may not be in dispute, the question of whether such conditions were wholly unrelated to his automobile accident or not exacerbated by the accident “cannot be resolved without recourse to the medical facts” (*Mount Sinai Hosp. v Triboro Coach*, 263 AD2d at 19). Here, Allstate's counsel, in his affirmation, failed to set forth any basis on which to conclude

that he was a medical expert qualified to render an opinion on causality (see *Contacare, Inc. v CIBA-Geigy Corp.*, 49 AD3d 1215 [2008]; *Hofmann v Toys "R" Us, NY Ltd. Partnership*, 272 AD2d 296 [2000]). No physician or other medical expert affidavit was included in Allstate's submissions to explain the codes, the diagnoses and, most importantly, the causation or exacerbation, or lack of causation or exacerbation of conditions, in relation to the subject automobile accident. The mere deciphered codes, in and of themselves, are insufficient.

We acknowledge that there are rare but recognized instances where medical issues can be resolved by a trier of fact without resort to expert opinion. A classic example is if a surgeon leaves a foreign object inside a patient's body, the absence of the surgeon's proper exercise of care and skill speaks for itself without the need for an expert (see *Kambat v St. Francis Hosp.*, 89 NY2d 489, 496 [1997]). Here, Allstate argues that no medical expert affidavit is required (see *St. Luke's Roosevelt Hosp. v Allstate Ins. Co.*, 303 AD2d 743, 744 [2003]) as "the codes speak for themselves and merely require the application of simple logic." We do not agree. The deciphered codes identify Hafford's diagnoses and treatments but do not address causality. Certain of the deciphered codes such as infection, acute respiratory failure, convulsions, and expectoration of blood are not necessarily conditions unrelated to an automobile accident. An expert's affidavit is required for a court to conclude the absence of proximate causality as to these conditions (see *Mount Sinai Hosp. v Triboro Coach*, 263 AD2d at 19) or to at least find a nonspeculative question of fact as to causality (see *State Farm Mut. Auto. Ins. Co. v Stack*, 55 AD3d 594 [2008]; *New York & Presbyt. Hosp. v Selective Ins. Co. of Am.*, 43 AD3d at 1020). *23 The remaining coded conditions, which on their face might appear unrelated to an automobile accident, could conceivably represent exacerbations of preexisting conditions in the absence of expert medical opinion attesting otherwise. Exacerbations of preexisting conditions are covered by the No-Fault Law (see *Wolf v Holyoke Mut. Ins. Co.*, 3 AD3d 660, 660-661 [2004]; *Mount Sinai Hosp. v Triboro Coach*, 263 AD2d at 18).

Allstate's submissions therefore suffer from an inescapable paradox. If the diagnostic codes pertain to conditions unrelated to Hafford's accident, Allstate was required to submit an affidavit from a medical expert (see *Mount Sinai Hosp. v Triboro Coach*, 263 AD2d at 19). If, on the other hand, the diagnostic codes represent conditions related to the accident, then Allstate was required to either pay the no-fault claim, or deny payment on other grounds, within 30 days of receiving the demand (see *Insurance Law § 5106 [a]*; 11 NYCRR 65-3.8 [a] [1]; *Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d at 563; *Hospital for Joint Diseases v New York Cent. Mut. Fire Ins. Co.*, 44 AD3d at 903; *New York & Presbyt. Hosp. v Progressive Cas. Ins. Co.*, 5 AD3d at 569). Either way, Allstate failed to raise a triable issue of fact in admissible evidentiary form sufficient to warrant denial of summary judgment in favor of White Plains Hospital on the third cause of action.

Based upon the foregoing, we conclude that the Supreme Court properly granted that branch of the plaintiffs' motion which was for summary judgment on the third cause of action **6 asserted by White Plains Hospital.

To the extent that Allstate argues that the branch of its cross motion which was for summary judgment dismissing the third cause of action should have been granted, this contention is not properly before this Court as Allstate's notice of appeal limited the scope of the appeal to that part of the Supreme Court's order which awarded summary judgment to White Plains Hospital on the third cause of action (see *CPLR 5515 [1]*; *Spencer v Crothall Healthcare, Inc.*, 38 AD3d 527, 528 [2007]; *Yannotti v Four Bros. Homes at Heartland Condominium I*, 24 AD3d 659, 660-661 [2005]).

Accordingly, we affirm the order insofar as appealed from.

Fisher, J.P., Miller and Eng, JJ., concur.

Ordered that the order is affirmed insofar as appealed from, with costs.

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170 A.D.3d 1143, 96 N.Y.S.3d
677, 2019 N.Y. Slip Op. 02326

****1** Barbara Kovacic, as Mother and
Natural Guardian of Roko Anthony John
Kovacic, an Infant, et al., Respondents,

v

Todd R. Griffin, M.D., et al.,
Appellants, et al., Defendant.

Supreme Court, Appellate Division,
Second Department, New York
2016-07683, 29337/09
March 27, 2019

CITE TITLE AS: Kovacic v Griffin

HEADNOTE

Physicians and Surgeons
Malpractice
Prenatal Care

Kaufman Borgeest & Ryan LLP, Valhalla, NY (Jacqueline Mandell of counsel), for appellant Todd R. Griffin.
Simmons Jannace DeLuca, LLP, Hauppauge, NY (William T. Collins III of counsel), for appellant Lauri E. Budnick.
Brown Gruttadaro Gaujean Prato, PLLC, White Plains, NY (Bridget K. Dahle and Katherine W. Dandy of counsel), for appellants University Associates in Obstetrics & Gynecology and others.
Barasch McGarry Salzman & Penson, New York, NY (Dana Cutting and Dominique Penson of counsel), for respondents.

In an action to recover damages for medical malpractice and lack of informed consent, etc., the defendant Todd R. Griffin, the defendant Lauri E. Budnick, and the defendants University Associates in Obstetrics & Gynecology, University Faculty Practice Corporation and J. Gerald Quirk separately appeal ***1144** from an order of the Supreme Court, Suffolk County (Joseph Pastorella, J.), dated May 24, 2016. The order denied those defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them.

Ordered that the order is affirmed, with one bill of costs payable by the appellants appearing separately and filing separate briefs.

The plaintiffs commenced this action to recover damages for medical malpractice and lack of informed consent arising out of prenatal care received by the plaintiff mother and the subsequent labor and delivery of the infant plaintiff. The plaintiff mother's prenatal care was overseen by, among others, the defendant J. Gerald Quirk, who was employed by the defendant University Associates in Obstetrics & Gynecology, University Faculty Practice Corporation (hereinafter together the University defendants). The infant plaintiff was delivered at Stony Brook University Hospital (hereinafter the hospital) on August 18, 2007. When the plaintiff mother arrived at the hospital, her care was supervised by the defendant Laurie E. Budnick; the delivery took place shortly after Budnick's shift ended and the defendant Todd R. Griffin's shift began. Griffin, Budnick, and the University defendants separately moved for summary judgment dismissing the complaint insofar as asserted against each of them. The Supreme Court denied the separate motions, and those defendants appeal.

Griffin, Budnick, and the University defendants each met their prima facie burden of demonstrating their entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against each of them by submitting affirmations from experts who asserted that the defendant physicians acted in accordance with good and accepted medical practice and did not deviate from the proper standard of care in the treatment they rendered to the plaintiffs. However, in opposition, the plaintiffs submitted an expert affidavit from a physician who was board certified in obstetrics and gynecology who opined that each of the defendant physicians departed from good and accepted practice in their treatment of the plaintiff mother during the prenatal care period and the ensuing labor and delivery of the infant plaintiff. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Feinberg v Feit*, 23 AD3d 517, 519 [2005]; see *Dray v Staten Is. Univ. Hosp.*, 160 AD3d 614, 618 [2018]), since conflicting expert opinions raise credibility issues which are to be resolved by the factfinder (see *Guctas v Pessolano*, 132 AD3d 632, 633 [2015]). In light of the ***1145** conflicting expert opinions submitted here, we agree with the Supreme Court's denial of the defendants' separate motions for summary judgment dismissing the complaint insofar as

asserted against each of them (see *Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2017]; *Keesler v Small*, 140 AD3d 1021, 1023 [2016]).

The defendants' remaining contentions are without merit. Balkin, J.P., Chambers, Roman and Hinds-Radix, JJ., concur.

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36 Misc.3d 17, 948 N.Y.S.2d
517, 2012 N.Y. Slip Op. 22087

****1** Hayden Nadel, Respondent

v

Allstate Insurance Company, Appellant.

Supreme Court, Appellate Term, Second
Department, 9th and 10th Judicial Districts
April 2, 2012

CITE TITLE AS: Nadel v Allstate Ins. Co.

SUMMARY

Appeal from an order of the District Court of Nassau County, First District (Fred J. Hirsh, J.), dated January 10, 2011. The order denied defendant's motion for summary judgment.

HEADNOTE

[Insurance](#)
[Automobile Insurance](#)
Cost of Repairs

Where plaintiff insured and defendant insurer were unable to agree on the estimated cost of repairs to plaintiff's damaged automobile, and defendant paid plaintiff the amount estimated by its adjuster, which was less than the actual repair cost incurred by plaintiff, defendant failed to establish a prima facie case for summary judgment in plaintiff's breach of contract action, since it did not demonstrate that it had undertaken good faith negotiations with plaintiff or his designated representative (*see* Insurance Department Regulations [11 NYCRR] § 216.7). To comply with the regulations, defendant had to establish that a repair facility "reasonably convenient" (including, e.g., both in distance and in time required to repair) to plaintiff existed, and that such facility would be able to repair the vehicle "to its condition immediately prior to the loss" (Insurance Department Regulations [11 NYCRR] § 216.7 [b] [1]) for the amount of its offer. While an insurer is statutorily prohibited from recommending a repair facility if the insured does not request a recommendation (*see* Insurance Law § 2610 [b]),

defendant was not barred from identifying that facility, since there was no longer an issue as to whether defendant was "steering" plaintiff to a particular facility.

RESEARCH REFERENCES

Am Jur 2d, Automobile Insurance §§ 374, 418, 584.

Couch on Insurance (3d ed) §§ 156:43, 247:24, 247:26.

McKinney's, Insurance Law § 2610 (b).

11 NYCRR 216.7 (b) (1).

NY Jur 2d, Insurance §§ 1732, 1746, 2067–2070.

ANNOTATION REFERENCE

See ALR Index under Automobile Collision Insurance.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: insur! /s repair! /4 vehicle car auto! /p negotiation

*18 APPEARANCES OF COUNSEL

Rivkin Radler LLP, Uniondale (*Michael P. Versichelli* and *Melissa M. Murphy* of counsel), for appellant. *Steven F. Goldstein, LLP*, Carle Place (*Steven F. Goldstein* and *Gina M. Arnedos* of counsel), for respondent.

OPINION OF THE COURT

Memorandum.

Ordered that the order is affirmed, without costs.

Plaintiff filed a claim with defendant, his insurer, for coverage under his automobile insurance policy after his car sustained damage in a motor vehicle accident. His car was inspected by defendant's claims adjuster, who submitted an estimate in the amount of \$3,831.94, before the deduction of the applicable deductible. Plaintiff chose to have his car repaired by MVB Collision, Inc., doing business as Mid-Island Collision, Inc. (Mid-Island), which estimated the repair costs to be \$10,428.10. The parties were unable to reach an agreed price, and defendant ultimately sent plaintiff two checks for a total sum of \$3,331.94. After plaintiff had Mid-Island repair his car, he commenced this breach of contract action against defendant.

Defendant moved for summary judgment, alleging that it did not breach the insurance policy because it did not have an obligation to pay the excess charges imposed by the repair facility which plaintiff had chosen. Plaintiff opposed the motion, contending that the question of whether defendant was liable for the excess amount was a factual question which must be **2 determined on a “case-by-case” basis. The District Court denied defendant's motion.

Insurance Department Regulations (11 NYCRR) part 216, entitled “Unfair Claims Settlement Practices and Claim Cost Control Measures,” governs an insurer's conduct in the auto repair process, and provides specific rules for the processing of first-party motor vehicle physical damage claims and third-party property damage claims arising under motor vehicle liability insurance contracts (*see* Insurance Department Regulations [11 NYCRR] § 216.0 [a]). Insurance Department Regulations (11 NYCRR) § 216.7 sets forth the standards for prompt, fair and equitable settlement of motor vehicle physical damage claims. The pertinent provision of the regulation states that, where an insurer decides to inspect a car prior to repair, “negotiations shall commence and a good faith offer of settlement, *19 sufficient to repair the vehicle to its condition immediately prior to the loss, shall be made” to the insured's designated representative and may also be made to the insured, if there is no designated representative (*see* Insurance Department Regulations [11 NYCRR] § 216.7 [b] [1]). The regulation further provides that the negotiations “must be conducted in good faith, with the basic goal of promptly arriving at an agreed price with the insured or the insured's designated representative” (Insurance Department Regulations [11 NYCRR] § 216.7 [b] [7]). If, after negotiations, the parties cannot reach an “agreed price,” which is defined as “the amount agreed to by the insurer and the insured, or their representatives, as the reasonable cost to repair damages to the motor vehicle resulting from the loss, without considering any deductible or other deductions” (Insurance Department Regulations [11 NYCRR] § 216.7 [a] [1]), the insurer must furnish the insured with a prescribed notice of rights letter (*see* Insurance Department Regulations [11 NYCRR] § 216.7 [b] [14] [i]) indicating the insurer's offer, and providing that, upon the insured's request, the insurer can recommend a repair shop that will make the repairs at a cost equal to the insurer's estimate. The notice of rights letter further states that, if such request has not already been made, the insured must sign an attached disclosure statement in order to enable the insurer to recommend a repair shop (*see* Insurance Department

Regulations [11 NYCRR] § 216.12). The disclosure statement advises the insured that, pursuant to Insurance Law § 2610, the insurer cannot require that the repairs be made at a particular shop. As noted, the notice of rights letter must be furnished to the insured if the parties cannot reach an “agreed price” (*see* Insurance Department Regulations [11 NYCRR] § 216.7 [b] [14] [i]), and provides the insurer with an opportunity to identify a repair shop that will repair the vehicle at the insurer's estimate and, in conformity with Insurance Law § 2610 (b), to recommend such shop only upon the insured's express request.

On July 16, 2008, the Superintendent of Insurance issued an opinion letter which, among other things, construed what constituted a “good faith negotiation” under Insurance Department Regulations (11 NYCRR) § 216.7 (b) (7). It stated that “a good faith negotiation need not result in an ultimate agreement on a settlement amount provided that a repair shop, reasonably convenient to the claimant, is able to repair the vehicle for the amount the insurer offers in settlement” (Ops Gen Counsel NY Ins Dept No. 08-07-09 [July 2008]). The letter also stated that

*20 “the insurer is not obligated to pay for any repair cost that exceeds the amount of the good faith offer required pursuant to 11 NYCRR § 216.7(b)(1). In such a circumstance, if the insured elects to repair **3 the vehicle at another facility at a higher repair cost, the insurer is not financially responsible for the excess cost above the amount of the insurer's offer” (*id.*), although the reasonableness of the insurer's offer is ultimately subject to judicial review.

A December 31, 2008 opinion letter issued by the Superintendent of Insurance further stated that there was “no requirement that either side move off its respective initial position in a negotiation, and an insurer is not required to alter its initial negotiating position on labor rates, or any other negotiable issue, provided that its position is taken in good faith” (Ops Gen Counsel NY Ins Dept NY Dept No. 08-12-09 [Dec. 2008]).

Giving due deference to the Insurance Department's interpretation of its own regulations as set forth in its opinion letters (*see e.g. LMK Psychological Servs., P.C. v State Farm Mut. Auto. Ins. Co.*, 12 NY3d 217 [2009]), we find that, in order to establish a prima facie case for summary judgment, defendant was required to comply with the regulatory mandate by demonstrating that it had undertaken good faith negotiations with plaintiff or his designated representative. In doing so, it had to establish,

in support of its motion for summary judgment, that a facility “reasonably convenient” (including, e.g., both in distance and in time required to repair) to plaintiff existed, and that such facility would be able to repair the vehicle “to its condition immediately prior to the loss” (Insurance Department Regulations [11 NYCRR] § 216.7 [b] [1]) for the amount of its offer (see Ops Gen Counsel NY Ins Dept No. 08-07-09 [July 2008]). We note that while defendant is statutorily prohibited from recommending a repair facility if the insured does not request a recommendation (see Insurance Law § 2610 [b]), it is not barred in this litigation from identifying that facility, since there is no longer an issue as to whether defendant was “steering” plaintiff to a particular facility (see generally *Allstate Ins. Co. v Serio*, 98 NY2d 198 [2002]).

As defendant failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), its motion was properly denied, albeit for reasons other than those stated by the District Court. In view of the foregoing, we need not reach plaintiff’s remaining contentions.


*21 Accordingly, the order is affirmed.

Molia, J.P., Nicolai and LaCava, JJ., concur.

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 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Northway Medical Center Condo v. Hartford Financial Services Group, Inc.](#), S.D.N.Y., January 10, 2022
875 F.3d 107

United States Court of Appeals, Second Circuit.

NICK'S GARAGE, INC., Plaintiff-Appellant,

v.

PROGRESSIVE CASUALTY INSURANCE COMPANY, National Continental Insurance Company, [Progressive Advanced Insurance Company](#), Progressive Direct Insurance Company, Progressive Max Insurance Company, Progressive Northern Insurance Company, Progressive Preferred Insurance Company, Progressive Specialty Insurance Company, Defendants-Appellees.

Docket No. 15-1426-cv

|
August Term, 2016

|
Argued: September 19, 2016

|
Decided: November 8, 2017

Synopsis

Background: Automobile repair shop, as assignee of its customers, filed state court action alleging that customers' automobile insurer and related entities failed to pay sufficient funds to fulfill their obligation to return damaged vehicles to pre-accident condition, and engaged in deceptive practices in claims processing. After removal, the United States District Court for the Northern District of New York, [D'Agostino, J.](#), 2015 WL 1481683, entered summary judgment in defendants' favor, and shop appealed.

Holdings: The Court of Appeals, [Leval](#), Circuit Judge, held that:

[1] shop adequately pled damages required to state breach of contract claim;

[2] insurer conclusory assertion that shop had not produced evidence to support its claim failed to demonstrate inadequacy of shop's evidence or its entitlement to judgment as matter of law;

[3] fact issues remained as to whether non-original equipment manufacturer (OEM) parts were sufficient to repair damaged vehicles to their pre-loss condition;

[4] fact issues remained as to whether labor rate that insurer paid was reasonably calculated and within prevailing market rate;

[5] insurer complied with policy requirement that it pay paint and refinishing material costs;

[6] fact issues remained as to whether shop's charges for hazardous waste disposal were extraneous and unnecessary;

[7] fact issues remained as to whether shop's charges for accessing database containing repair information constituted overhead;

[8] fact issues remained as to whether insurer engaged in misleading practices concerning labor rates; and

[9] insurer did not mislead its insureds as to their right to use repair shop of their choice.

Affirmed in part, vacated in part, and remanded.

West Headnotes (22)

[1] **Federal Courts**  Summary judgment

Federal Courts  Summary judgment

Court of Appeals reviews district court's grant of summary judgment de novo, resolving all ambiguities and drawing all reasonable factual inferences in favor of party against whom summary judgment is sought. *Fed. R. Civ. P.* 56(a).

13 Cases that cite this headnote

[2] **Summary Judgment**  Genuine Issue or Dispute as to Material Fact

Genuine issue of material fact exists, precluding summary judgment, if evidence is such that reasonable jury could return verdict for nonmoving party. *Fed. R. Civ. P. 56(a)*.

[329 Cases that cite this headnote](#)

[3] Summary Judgment 🔑 Burden of Proof

Party seeking summary judgment bears burden of demonstrating absence of genuine issue of material fact. *Fed. R. Civ. P. 56(a)*.

[342 Cases that cite this headnote](#)

[4] Summary Judgment 🔑 Essential elements; burden of proof at trial

Where burden of persuasion at trial would be on non-moving party, party moving for summary judgment may satisfy his burden of production in either of two ways: (1) by submitting evidence that negates essential element of non-moving party's claim, or (2) by demonstrating that non-moving party's evidence is insufficient to establish essential element of non-moving party's claim. *Fed. R. Civ. P. 56*.

[146 Cases that cite this headnote](#)

[5] Contracts 🔑 Grounds of action

To state claim for breach of contract under New York law, complaint must allege: (1) formation of contract between parties; (2) performance by plaintiff; (3) failure of defendant to perform; and (4) damages.

[49 Cases that cite this headnote](#)

[6] Insurance 🔑 Pleading

Under New York law, automobile repair shop, as insureds' assignee, adequately pled damages required to state breach of contract claim against automobile insurer by alleging that insurer failed to pay it cost of returning their vehicles to pre-accident condition, as required by insureds' automobile policies.

[3 Cases that cite this headnote](#)

[7] Insurance 🔑 Burden of proof

Under New York law, insured alleging that its automobile insurer breached policy provision obligating it to bring vehicle to its pre-loss condition bears burden at trial of establishing reasonable cost of repairs necessary to bring vehicle to its pre-loss condition.

[8] Summary Judgment 🔑 Burden of Proof

When defendant moves for summary judgment, it is defendant who must show entitlement to judgment, notwithstanding that, at trial, plaintiff will have burden of proving every element of its claim. *Fed. R. Civ. P. 56*.

[16 Cases that cite this headnote](#)

[9] Summary Judgment 🔑 Any evidence

Mere assertion by defendant moving for summary judgment that plaintiff has not produced any evidence to support essential element of plaintiff's claim does not satisfy burden that summary judgment rule imposes, unless defendant also shows that plaintiff was obligated by discovery demand or court order to produce evidence or that he voluntarily undertook to make showing. *Fed. R. Civ. P. 56(a)*.

[43 Cases that cite this headnote](#)

[10] Summary Judgment 🔑 Form and Requisites

Party seeking summary judgment has obligation to identify those portions of record that it believes demonstrate absence of genuine issue of material fact. *Fed. R. Civ. P. 56(a)*.

[87 Cases that cite this headnote](#)

[11] Summary Judgment 🔑 Automobile insurance

Insurer's conclusory assertion that automobile repair shop had not produced evidence to support its claim, as its customers' assignee, that insurer breached its obligation under policy to return damaged vehicles to pre-accident condition by

refusing to pay for labor hours necessary to repair vehicles did not demonstrate inadequacy of shop's evidence or insurer's entitlement to judgment as matter of law, and thus did not warrant entry of summary judgment in insurer's favor, even though shop had burden of establishing at trial insufficient payment of labor hours, where insurer made no mention in its motion of shop's claims for deficiencies in payment for labor hours. *Fed. R. Civ. P. 56(a)*.

[12] Insurance 🔑 Questions of law or fact
Summary Judgment 🔑 Claims and settlement practices; bad faith

Genuine issue of material fact as to whether non-original equipment manufacturer (OEM) parts were sufficient to repair damaged vehicles to their pre-loss condition precluded summary judgment on claim by automobile repair shop, as its customers' assignee, that insurer breached its obligation under policy to return damaged vehicles to pre-accident condition by refusing to pay for OEM parts. *Fed. R. Civ. P. 56(a)*.

1 Case that cites this headnote

[13] Insurance 🔑 Amounts Payable; Extent of Damage or Loss

Under New York law, requirement that automobile insurer negotiate in good faith to return damaged vehicle to its pre-loss condition is additional requirement, over and above contractual requirement to pay cost of repairing vehicle to pre-loss condition, not substitute for it, and thus insurer's evidence of good faith negotiation does not negate claim that amounts insurer paid failed to satisfy its contractual obligations. *N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(7)*.

1 Case that cites this headnote

[14] Summary Judgment 🔑 Automobile insurance

Genuine issue of material fact as to whether labor rate that automobile insurer paid for repairs to its insureds' vehicles was reasonably calculated

and within prevailing market rate at all relevant times precluded summary judgment on claim by automobile repair shop, as its customers' assignee, that insurer breached its obligation under policy to pay for cost of returning vehicles to their pre-loss condition by failing to pay its labor rate.

[15] Insurance 🔑 Amounts Payable; Extent of Damage or Loss

Under New York law, automobile insurer complied with policy requirement that it pay paint and refinishing material costs "as reasonably determined by [insurer]" through use of estimating software to determine costs of paint and refinishing materials, even though automobile repair shop used different estimating software, where shop did not dispute reasonableness of insurer's use of estimating software.

[16] Insurance 🔑 Questions of law or fact
Summary Judgment 🔑 Automobile insurance

Genuine issue of material fact as to whether automobile repair shop's charges for hazardous waste disposal were extraneous and unnecessary precluded summary judgment on claim by automobile repair shop, as its customers' assignee, that insurer breached its obligation under policy to pay for cost of returning vehicles to their pre-loss condition by failing to pay hazardous waste charges.

[17] Insurance 🔑 Questions of law or fact
Summary Judgment 🔑 Automobile insurance

Genuine issue of material fact as to whether automobile repair shop's charges for accessing database containing repair information constituted overhead precluded summary judgment on claim by automobile repair shop, as its customers' assignee, that insurer breached its obligation under policy to

pay for cost of returning vehicles to their pre-loss condition by failing to pay database charges.

1 Case that cites this headnote

[18] Antitrust and Trade Regulation 🔑 Nature and Elements

Under New York law, to state claim for deceptive business practices under General Business Law, plaintiff must allege that defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as result of allegedly deceptive act or practice. *N.Y. General Business Law § 349*.

99 Cases that cite this headnote

[19] Antitrust and Trade Regulation 🔑 Representations, assertions, and descriptions in general

Antitrust and Trade Regulation 🔑 Omissions and other failures to act in general; disclosure

Under New York law, to violate General Business Law, deceptive business practice, whether representation or omission, must be likely to mislead reasonable consumer acting reasonably under circumstances. *N.Y. General Business Law § 349*.

39 Cases that cite this headnote

[20] Antitrust and Trade Regulation 🔑 Questions of law or fact
Summary Judgment 🔑 Unfair trade practices and consumer protection

Genuine issues of material fact as to whether automobile insurer engaged in misleading practices concerning labor rates it paid repair shops, and whether insureds received sufficient amount of money to repair their vehicles to pre-loss condition precluded summary judgment on claim by automobile repair shop, as its customers' assignee, that insurer violated New York statute governing consumer protection from deceptive acts and practices by failing to pay prevailing competitive labor rates it was

required to pay under its policies. *N.Y. General Business Law § 349*.

11 Cases that cite this headnote

[21] Antitrust and Trade Regulation 🔑 Insurance

Under New York law, automobile insurer did not mislead its insureds as to their right to use repair shop of their choice, in violation of statute prohibiting deceptive business practices, by allegedly limiting payment to what it could pay at other repair shops and refusing to pay automobile repair shop's reasonable charges, where insurer clearly advised insureds of their right to use shop of their choice. *N.Y. General Business Law § 349*.

3 Cases that cite this headnote

[22] Antitrust and Trade Regulation 🔑 Exclusive and Concurrent Remedies or Laws

Insurance 🔑 Nature and form of remedy

Under New York law, Insurance Law provision prohibiting insurers from engaging in unfair claim settlement practices did not preclude claims against automobile insurer under General Business Law provision prohibiting deceptive acts and practices, even though Insurance Law provision did not provide for private cause of action. *N.Y. General Business Law § 349(a)*; *N.Y. Insurance Law § 2601*.

12 Cases that cite this headnote

*110 Appeal from the United States District Court for the Northern District of New York

Attorneys and Law Firms

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Kymerly Kochis (Veronica M. Wayner on the brief), Sutherland Asbill & Brennan LLP, New York, NY, for Defendants-Appellees.

Before: LEVAL and LOHIER, Circuit Judges, and KORMAN, District Judge.*

Opinion

LEVAL, Circuit Judge:

Plaintiff, Nick's Garage, Inc. (“Garage” or “Plaintiff”), appeals from the judgment of the United States District Court for the Northern District of New York (D’Agostino, J.) granting summary judgment in favor of the Defendants, Progressive Casualty Insurance Company and related entities (collectively, the “Insurer”).¹ Garage, an *111 automobile repair shop, brought these claims as assignee of its customers against the Insurer for breach of contract and deceptive business practices under [New York General Business Law \(“GBL”\) § 349](#). Garage alleges that Insurer failed to pay sufficient funds to fulfill its obligation to return the damaged vehicles to pre-accident condition, and engaged in deceptive practices in claims processing. The district court granted summary judgment in favor of Defendants, finding that there were no genuine issues of material fact, and furthermore, as to its claims of deceptive business practices, that such claims were also precluded by [New York Insurance Law § 2601](#).

We conclude that the district court erred in part in granting summary judgment to Insurer on Garage's breach of contract claims. Insurer failed to show its entitlement to judgment for costs relating to labor hours, parts, labor rates, electronic database access, and hazardous waste removal charges, and the absence of genuine disputes of material fact on these issues. Summary judgment should have been denied for those categories. On the other hand, Insurer demonstrated its entitlement to judgment, and Garage failed to raise a genuine dispute of material fact, on Insurer's payments for paint material costs; the district court properly granted summary judgment to Insurer on that category of claims.

We also conclude that the district court erred in part in granting summary judgment to Insurer on Garage's GBL claims. There is a question of material fact on Garage's claim that Insurer engaged in deceptive practices concerning its labor rates payments, and that claim is not precluded by [N.Y. Ins. Law § 2601](#). On the other hand, the district court properly granted summary judgment to Insurer on Garage's GBL claim that Insurer misled customers regarding their ability to use the repair shop of their choice.

Accordingly, we affirm the judgment in part, vacate the judgment in part, and remand to the district court for further proceedings.

I. BACKGROUND

Plaintiff Garage is an automobile repair shop in Syracuse, New York. Defendant Insurer issues auto insurance policies in New York. From 2007 to 2011, Garage repaired various vehicles that had suffered damage for which the vehicle owners submitted damage claims to Insurer.

The vehicle owners made Garage their designated representative to negotiate with Insurer for coverage of repairs, and assigned their insurance claims to Garage. The assignors fall into two categories: (i) “First-Party Assignors” are Insurer policyholders; and (ii) “Third-Party Assignors” are owners of vehicles that were damaged by Insurer's policyholders. Garage, as assignee, brings claims on behalf of 26 First-Party Assignors and 11 Third-Party Assignors. All of the assignors signed a form captioned, *Authorization and Guideline for Repairs*, undertaking to pay to Garage the balance of its charges for the repairs if Insurer did not pay Garage's full charges. All of the assignors assigned to Garage related claims and rights arising from the property damage insurance claims, and all First-Party assignors assigned their rights under the specified insurance policies to Garage.

[Insurance Law § 2601](#) and Regulation 64, which is Part 216 of the New York State Insurance Department Regulations, provide context for the interactions between repair shops and insurance companies. [Section 2601](#) prohibits insurers from “engag[ing] in unfair claim settlement practices,” and specifies various acts which, when “committed without just cause *112 and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices.” [N.Y. Ins. Law § 2601\(a\)](#). Such acts include “knowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverages at issue,” and “not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted.” *Id.* [§ 2601\(a\)\(1\), \(4\)](#).

Under Regulation 64, when a claim is made, the insurer may inspect the car, and must negotiate in good faith with the insured or the insured's designated representative and make “a good faith offer of settlement, sufficient to repair the vehicle to its condition immediately prior to the loss.” [11 N.Y.C.R.R. § 216.7\(b\)\(1\)](#). If after such negotiations the parties cannot reach an “[a]greed price”—*i.e.*, “the amount agreed ... as

the reasonable cost to repair damages to the motor vehicle resulting from the loss,” *id.* § 216.7(a)(1)—then the insurer must send the insured a prescribed notice of rights letter, which states the insurer's offer and indicates that, upon the insured's request, the insurer is able to recommend a shop to perform the repairs at the stated offer price, *id.* §§ 216.7(b)(14)(i), 216.12.

For the vehicles in the instant case, the typical interaction between Garage and Insurer proceeded as follows: Owners brought the damaged vehicles to Garage seeking an estimate on the necessary repairs; Garage inspected the vehicles and sent Insurer an estimate of the repairs Garage determined were necessary to return the vehicles to their pre-accident condition. Insurer then sent a Managed Repair Representative (“MRR”) to inspect the vehicle and provided an estimate as to the cost to repair the vehicle to pre-loss condition. Garage responded by sending Insurer a notice of deficiencies, identifying items that were omitted or insufficient in Insurer's estimates and informing Insurer that there was no agreed upon amount for the repairs. This process was sometimes repeated with supplements if additional damage was discovered during the course of the repair. Garage would repair the vehicles after it had received the estimate from Insurer.

As relevant to this appeal, Garage brings two categories of claims. For Plaintiff's first category of claims, which it brings as assignee of First-Party Assignors, Garage claims that Insurer breached its contractual obligations to the First-Party Assignors by failing to pay the amount necessary to return the vehicles to their pre-accident condition, leaving the First-Party Assignors liable to Garage for the balance of the repair cost to the extent that Garage's charge exceeded Insurer's payment. Garage alleges five categories of underpayments: (1) failing to allow for sufficient labor hours to make necessary repairs; (2) failing to pay for original equipment manufacturer (“OEM”) parts when the non-OEM parts suggested by Insurer were inadequate to return the vehicle to pre-accident condition; (3) paying insufficient labor rates; (4) failing to pay the amount necessary for paint materials; (5) failing to pay for charges for accessing an electronic database and removing hazardous waste.

As relevant here, Insurer's insurance policy provides:

Limits of Liability

1. The limit of liability for loss to a covered auto, non-owned auto, or custom parts or equipment is the lowest of:

- c. the amount necessary to repair the damaged property to its pre-loss condition reduced by the applicable deductible; or....

***113** 2. Payments for loss to a covered auto, non-owned auto, or custom parts or equipment are subject to the following provisions:

- d. In determining the amount necessary to repair damaged property to its pre-loss condition, the amount to be paid by [Insurer]:

- i. will not exceed the prevailing competitive labor rates charged in the area where the property is to be repaired and the cost of repair or replacement parts and equipment, as reasonably determined by [Insurer]; and

- ii. will be based on the cost of repair or replacement parts and equipment which may be new, reconditioned, remanufactured, or used, including, but not limited to:

- (a) original manufacturer parts or equipment; and

- (b) nonoriginal manufacturer parts or equipment.

Confidential App. 31–32 (emphasis omitted).

For its second category of claims, Garage alleges that Insurer violated [GBL § 349](#) by engaging in deceptive acts in handling the claims of both the First-Party Assignors and Third-Party Assignors. Specifically, Garage claims Insurer misled consumers by falsely representing to them that it was willing to pay prevailing competitive labor rates, and by misrepresenting consumers' ability to obtain repairs at the shop of their choice.

Garage originally filed this suit in New York State Supreme Court. On May 10, 2012, Insurer removed to federal court, which had diversity jurisdiction pursuant to [28 U.S.C. § 1332](#). On February 27, 2013, the district court granted in part Insurer's motion to dismiss, dismissing Garage's claims for *quantum meruit* and those [GBL § 349](#) claims that were barred by the statute of limitations. *Nick's Garage, Inc. v. Progressive*

Cas. Ins. Co., No. 5:12-CV-777, 2013 WL 718457 (N.D.N.Y. Feb. 27, 2013).

On September 23, 2013, Garage filed an amended complaint. On March 31, 2015, the district court granted Insurer's motion for summary judgment as to all of Garage's claims. *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, No. 5:12-CV-777, 2015 WL 1481683 (N.D.N.Y. Mar. 31, 2015). The district court found that Garage failed to raise a genuine dispute of material fact that could support its claims that Insurer breached its contractual obligations to the First-Party assignors as to any of the categories of costs identified. *Id.* at *6–10. As to Garage's GBL § 349 claims, the district court found that Garage failed to raise a genuine dispute of material fact that could support its claims that Insurer engaged in materially misleading practices, and found in the alternative that these claims were precluded by N.Y. Ins. Law § 2601. *Id.* at *10–15.

II. DISCUSSION

[1] [2] We review a district court's grant of summary judgment de novo, “resolv[ing] all ambiguities and draw[ing] all [reasonable] factual inferences in favor of the party against whom summary judgment is sought.” *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (per curiam) (quoting *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)). For the court to grant summary judgment, the movant must “show[] 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). A genuine issue of material fact exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *114 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[3] [4] The movant bears the burden of “demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). “Where, as here, the burden of persuasion at trial would be on the non-moving party ... the party moving for summary judgment may satisfy his burden of production under Rule 56 in either of two ways: (1) by submitting evidence that negates an essential element of the non-moving party's claim, or (2) by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim.” *Farid v. Smith*, 850 F.2d 917, 924 (2d Cir. 1988) (citing *Celotex*, 477 U.S. at 331, 106 S.Ct. 2548 (Brennan, J., dissenting)).

A. Breach of Contract

[5] Garage alleges that Insurer failed to pay sufficient sums to fulfill its contractual policy obligations to cover the reasonable costs necessary to repair the damaged vehicles to their pre-loss condition. To state a claim for breach of contract under New York law, “the complaint must allege: (i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages.” *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 142 (2d Cir. 2011). Insurer does not dispute that prongs (i) and (ii) have been met.

1. Damages

[6] Insurer argues that the First-Party Assignors (whose claims are asserted by Garage as their assignee) suffered no damages because their vehicles were repaired by Garage to their pre-loss condition. Insurer misunderstands the theory of this category of claim. Insurer was obligated to pay its insureds the “loss” on a covered vehicle, *i.e.*, the amount of money sufficient to return the vehicles to their pre-loss condition. Thus, the difference between what Insurer paid to Garage and the amount necessary to return the vehicles to their pre-loss condition constitutes damages suffered by the insureds on which Garage, as assignee, can bring suit.² See *Citibank, N.A. v. Tele/Resources, Inc.*, 724 F.2d 266, 269 (2d Cir. 1983). There is no merit to Insurer's contention that the First-Party Assignors suffered no damages regardless of whether Insurer paid less than the cost of returning the vehicles to pre-accident condition. The District Court properly rejected Insurer's contention on this issue. *Nick's Garage*, 2015 WL 1481683, at *6.

2. Breach

[7] The remaining question then is whether Insurer breached its contractual obligations to its First-Party Assignor insureds. The insured bears the burden at trial of establishing the reasonable cost of the repairs necessary to bring the vehicle to its pre-loss condition. See *Rizzo v. Merchants and Businessmen's Mut. Ins. Co.*, 188 Misc.2d 180, 727 N.Y.S.2d 250, 252 (2d Dep't 2001). However, on a motion for summary judgment, the burden is on the movant to show that it “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Accordingly, upon Insurer's motion for summary judgment, Insurer bears the burden of showing either that Garage lacked

evidence needed to prove any element of its claims, or that the amount paid *115 by Insurer was reasonably sufficient to repair the vehicle to its condition prior to the loss.

[8] Insurer's motion papers were deficient in their attempt to satisfy this burden. In support of its entitlement to judgment, at times Insurer merely asserted—without support or explanation—that Garage had not produced evidence to support its claims. *See, e.g.*, J.A. 136 (“Plaintiffs have not produced any evidence ... as to why the more expensive original manufacture parts were necessary”); Dkt. 103, at 1 n.1³ (“Because Plaintiff failed to submit any admissible evidence relating to labor hour deficiencies, no material issue of fact[] exists with respect to this cost category.”). Statements like these misperceive the allocation of burdens upon a motion for summary judgment. The argument that Garage “has not produced evidence” would have force at trial, or in other circumstances where the plaintiff bears the burden of proving every essential element of its claim. However, on a motion for summary judgment, it is the moving party's burden to show in its motion papers “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)*. Thus, when a defendant moves for summary judgment, it is the *defendant* who must show entitlement to judgment, notwithstanding that, at trial, the plaintiff will have the burden of proving every element of its claim.

[9] The mere assertion by a defendant moving for summary judgment that the plaintiff “has not produced any evidence” to support an essential element of the plaintiff's claim does not satisfy the burden that *Rule 56(a)* imposes. *See 10A Fed. Prac. & Proc. Civ. § 2727.1, at 491–92* (“[T]he party moving for summary judgment cannot sustain its burden ... merely by asserting that the nonmovant lacks evidence to support its claim.”). A plaintiff is under no obligation to “produce” its evidence prior to trial, unless such an obligation arose in response to a discovery demand (or a court order) requiring the plaintiff to set forth the evidence supporting its claim. A moving defendant's mere assertion that a plaintiff “has not produced” evidence that could prove its claim fails to show that the plaintiff lacks the necessary evidence, unless defendant also shows that plaintiff was obligated by discovery demand or court order to produce the evidence or that he voluntarily undertook to make the showing.

There are many ways in which a defendant moving for summary judgment can satisfy the burden of showing entitlement to judgment. Among them, defendant may, prior

to moving for summary judgment, make a discovery demand requiring plaintiff to reveal the evidence that supports an essential element of the plaintiff's case. If, as in *Celotex*, 477 U.S. at 320, 106 S.Ct. 2548, the plaintiff, in response, fails to show evidence capable of sustaining the plaintiff's burden of proof on that element, then the defendant can prevail on its motion, as provided in *Rule 56(c)(1)(A)*, by “citing to [those] particular parts of materials in the record” that demonstrate the insufficiency of plaintiff's evidence. Or, if the plaintiff has made an admission in the record of the limited extent of its evidence, the moving defendant can satisfy the showing required by *Rule 56(a)* by pointing to the plaintiff's admission.

However, unless the moving defendant cites portions of the record that show its entitlement to judgment, an assertion by the defendant that the plaintiff “has not produced any evidence,” without more, *116 does not show that the plaintiff has insufficient evidence. Such a statement fails to show either that there is no genuine dispute as to any material fact or that the defendant is entitled to judgment as a matter of law. A defendant's motion for summary judgment based on such a statement should be subject to a motion to dismiss by reason of its facial deficiency, or to denial.

A plaintiff confronted with such a facially deficient motion sometimes cures defendant's error by undertaking to set forth the totality of its evidence in its opposition papers. Assessing the sufficiency of the evidence thus set forth, a court might conclude that there is no dispute over material fact and that defendant is entitled to judgment as a matter of law. However, absent such an undertaking on the part of a plaintiff, entry of judgment on the basis of a facially deficient summary judgment motion is not warranted. We see no reason why such a motion should not be subject to a motion to dismiss by reason of facial inadequacy, or simply to denial.⁴

[10] What we say here applies the Supreme Court's cornerstone summary judgment ruling in *Celotex*. The Supreme Court made clear that the defendant supported its motion for summary judgment by “not[ing] that [the plaintiff] had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to [defendant's] asbestos products.” *Id.* at 320, 106 S.Ct. 2548. In that circumstance, the moving party was “entitled to a judgment as a matter of law because the nonmoving party [had] failed to make a sufficient showing on an essential element of her case with respect to which she [had] the burden of proof.” *Id.* at 323, 106 S.Ct. 2548 (internal quotation marks omitted). The

Court emphasized that “a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.”⁵ *Id.* The same point was *117 further emphasized by Justice White, who stated in his concurring opinion, “[i]t is not enough to move for summary judgment ... with a conclusory assertion that the plaintiff has no evidence to prove his case.” *Id.* at 328, 106 S.Ct. 2548 (White, J., concurring); see also *id.* at 332, 106 S.Ct. 2548 (Brennan, J., dissenting) (“Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a ‘burden’ of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment.”) (citation omitted).⁶

In this case, Insurer's conclusory assertions that Garage had not produced evidence to support particular elements of its claims did not demonstrate the inadequacy of Garage's evidence or Insurer's entitlement to judgment as a matter of law. In this regard, the motion was facially inadequate.

a. Labor Hours

[11] In its Amended Complaint, Garage claimed that Insurer refused to pay for the labor hours necessary to repair the vehicles to their pre-loss condition. J.A. 256. Insurer's summary judgment motion with respect to this issue was deficient and should have been denied.

Insurer's motion for summary judgment, while demanding judgment on all issues, referred to only four categories of claims made by Garage (labor rates, parts, overhead expenses, and paint and materials charges). See Dkt. 73, at 5. It made no mention whatsoever of Garage's claims for deficiencies in payment for labor hours. In opposition, Garage pointed out Insurer's failure to address in any way its claims for deficiencies as to labor hours, and pointed out that its deficiency bills to Insurer included references to labor hour deficiencies. See Dkt. 88 ¶ 27. Insurer replied by demanding summary judgment as to labor hours “[b]ecause Plaintiff failed to submit any admissible evidence relating to labor hour deficiencies,” Dkt. 103, at 1 n.1, and the District Court granted judgment to the defendant on that basis. With reference to the deficiency notices, the court observed that “Plaintiff has made no attempt to explain these documents or why the alleged [labor hour] deficiencies identified therein were necessary to

return the vehicles to their pre-loss condition.” *Nick's Garage*, 2015 WL 1481683, at *10.

This was error. It reflected a misunderstanding of the respective burdens upon a defendant's motion for summary judgment. Because Insurer's motion failed to show entitlement to judgment with respect to labor hours, Garage was under no obligation to set forth its evidence on this issue. Garage merely pointed out to the court that Insurer's papers claiming entitlement to judgment on all of Garage's claims had completely omitted any mention of Garage's claims for insufficient payment of labor hours, calling the court's attention to the inclusion of this issue in its deficiency notices.

The district court essentially treated the plaintiff, upon the defendant's motion for summary judgment, as obligated, by the mere fact of the motion, to set forth evidence that could support the claim. As noted above, a plaintiff has no such burden on the defendant's motion for summary *118 judgment. It is the defendant's burden to show entitlement to judgment. If the defendant had done so, the plaintiff would need to show that there is a genuine dispute as to a material fact. But if the defendant's papers failed to show the insufficiency of plaintiffs' evidence and entitlement to judgment, the plaintiff is entitled to the dismissal of the motion without having to make any evidentiary showing. The motion for summary judgment, to the extent it covered Garage's claims for labor hours, should have been denied by reason of its obvious facial insufficiency.

b. Parts

[12] The district court also granted summary judgment to Insurer on the portion of Garage's breach of contract claims based on Insurer's payment for non-OEM repair parts rather than OEM repair parts. This, too, was error.

Insurer argued that it was entitled to pay for non-OEM parts because its policies provide: “In determining the amount necessary to repair damaged property to its pre-loss condition, the amount to be paid by [Insurer] ... will be based on the cost of repair or replacement parts and equipment which may be new, reconditioned, remanufactured, or used, including, but not limited to: (a) original manufacturer parts or equipment; and (b) nonoriginal manufacturer parts or equipment.” Confidential App. 32.

Insurer's argument is oversimplified. The fact that the policy permits basing the cost of repair on non-OEM parts does not mean that non-OEM parts will in all instances be sufficient to satisfy Insurer's contractual obligations. Insurer is obligated to pay a sufficient sum to return the vehicle to its "pre-loss condition." This may or may not be possible using non-OEM parts for a particular repair. The provision quoted above on which Insurer relies means that Insurer may limit its payment to the price of non-OEM parts *when the use of such parts will "repair the damaged property to its pre-loss condition."* *Id.* (emphasis added). It does not follow that Insurer may limit its payments to the cost of non-OEM parts regardless of whether the use of such parts will, in the particular circumstance, repair the damaged property to its pre-loss condition.

While New York State law permits insurers to use the cost of non-OEM parts in their estimates, it requires that the part "shall equal or exceed the comparable OEM crash part in terms of fit, form, finish, quality and performance." 11 N.Y.C.R.R. § 216.7(b)(5)(iii). This state-law requirement is "deemed to [be] part of the insurance contract as though written into it." *Salzman v. Prudential Ins. Co. of Am.*, 296 N.Y. 273, 277, 72 N.E.2d 891 (1947). Insurer's evidence failed to satisfy this requirement.⁷

[13] Insurer argues that it satisfied its initial burden of production (on this and other cost categories) by providing evidence that it engaged in good faith settlement negotiations with Garage. The *119 argument fails. Insurers are statutorily required to make a good faith offer of settlement to the insured (or the insured's representative) to return the vehicle to its pre-loss condition. 11 N.Y.C.R.R. § 216.7(b)(7). Good faith refers to the insurance company's (or those acting on its behalf's) honest and fair state of mind. *See Good Faith*, *Black's Law Dictionary* (10th ed. 2014); *cf. Chem. Bank of Rochester v. Haskell*, 51 N.Y.2d 85, 91, 432 N.Y.S.2d 478, 411 N.E.2d 1339 (1980) (noting good faith under the UCC is defined as "honesty in fact in the conduct or transaction concerned"). An Insurer's good faith in making an offer of settlement does not necessarily mean that the amount offered is actually sufficient to cover the cost of repairing the vehicle to its pre-loss condition. The statutory requirement to negotiate in good faith is an additional requirement, over and above the contractual requirement to pay the cost of repairing the vehicle to pre-loss condition, not a substitute for it. Insurer's evidence of good faith negotiation therefore does not negate the claim that the amounts Insurer paid failed to satisfy its contractual obligations.

Insurer makes the further argument that it was entitled to summary judgment as to non-OEM parts because "[Garage] has not put forth evidence demonstrating the necessity of specific OEM parts for the Assignors' repairs." Appellee's Br. 27–28. In its opposition to Insurer's motion for summary judgment, Garage had offered affidavits of Michael Orso, Garage's President, and Rocco Avellini, an expert in the automotive repair industry, explaining that the use of OEM parts was necessary. *See* Dkt. 88 ¶ 44; J.A. 295–332 (Orso Declaration); J.A. 265–73 (Avellini Declaration). Reviewing this evidence, the district court characterized Orso's declaration as amounting to the mere assertion that Garage's customers are "people who care about their cars" who "would only accept a new OEM part." *Nick's Garage*, 2015 WL 1481683, at *9. Accordingly, the court granted summary judgment on the issue of payment for parts. *Id.*

If it were true that those affidavits relied solely on customer preference, the court might have been correct to conclude that summary judgment in favor of Insurer was warranted. But in fact, Orso and Avellini pointed to numerous deficiencies in non-OEM parts needed for the repairs, which would have prevented restoring the vehicles to pre-loss condition. The district court overlooked this evidence. J.A. 309–12. In addition to noting customer preference for OEM parts, Orso noted, for example, that non-OEM fenders are made of lighter gauge sheet metal (which can affect the success of airbag deployment), that the lenses of non-OEM headlamps are often distorted, that non-OEM heaters and puddle lamps are prone to malfunction, and that certain non-OEM parts do not fit correctly and leave gaps. J.A. 310–11. He went on to provide examples of instances in which non-OEM fog lamp bulbs and headlights did not fit. J.A. 312. Avellini explained that non-OEM bumpers have fewer fasteners, making it easier for them to become dislodged in an accident. J.A. 269. He added that non-OEM parts are not crash tested, rendering uncertain their performance in a collision. J.A. 270.

The district court ignored this evidence, and further discredited Orso's testimony by asserting that he had a "clear bias against the use of non-OEM parts." *Nick's Garage*, 2015 WL 1481683, at *9. This was error. The district court was obligated to "draw all factual inferences in favor of the party against whom summary judgment is sought," not the other way around. *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994). With respect to the issue *120 of non-OEM parts, the district court's grant of summary judgment was improper.

c. Labor Rates

[14] The district court ruled that Insurer was entitled to summary judgment on labor rate costs because “[t]he evidence in the record establishes that [Insurer’s] labor rate was reasonably calculated and within the prevailing market rate at all relevant times,” and that Garage did not present sufficient admissible evidence to raise “a material question of fact that [Insurer’s] labor rate paid ... was a breach of contract.” *Nick’s Garage*, 2015 WL 1481683, at *8. We disagree. Insurer did not present evidence sufficient to negate Garage’s claim that Insurer breached its contractual obligations; Insurer demonstrated neither that the rates it paid were no lower than “the prevailing competitive labor rates charged in the area ... as reasonably determined by [it],” Confidential App. 32, nor the absence of a genuine dispute of material fact on that question.

The First-Party Assignors’ insurance policies obligated Insurer to pay the amount necessary to repair the vehicle to its “pre-loss condition,” subject to the proviso that Insurer would not pay more than the “prevailing competitive labor rate charged in the area where the property is to be repaired ..., as reasonably determined by [Insurer].” *Id.*⁸ Garage claims that the rates Insurer paid for various categories of work performed were below the prevailing labor rates.

Insurer argues, as the district court found, that its method for determining the prevailing labor rates is reasonable so as to satisfy its contractual obligations. Insurer presented evidence that it determines the prevailing labor rates using its Labor Rate Reference Guide (“Reference Guide”), which was finalized in January 2008. According to its Reference Guide, Insurer “allow[s] the marketplace to determine what the prevailing rate is as *indicated by [Insurer’s] ability to reach agreed prices for repair with shops in the marketplace.*” Confidential App. 62. Garage counters Insurer’s evidence with evidence of higher labor rates posted by repair shops in the area as constituting the rates they charge, plus evidence of higher rates paid to it by other insurers.⁹

We conclude that Insurer has failed to show that there is no genuine dispute of material fact on the question and that it is entitled to judgment on it as a matter of law. There is a fundamental flaw in Insurer’s approach to demonstrating, for the purpose of summary judgment, that the labor rates it paid to Garage were the prevailing competitive labor rate as reasonably determined by Insurer.

Insurer’s evidence depends on the proposition that evidence of rates that repair shops are willing to accept *from Insurer* shows the prevailing competitive rate. But that is not necessarily so. An insurer such as Progressive may command a very large volume of business. The fact that repair shops may accept a labor rate paid by a particular insurer that may bring the shop *121 a large volume of business does not demonstrate that the shop, or shops generally, would accept the same rate in dealing with another insurer or a customer who has only one car to be repaired. In other words, Insurer’s evidence that it pays labor rates based on its own ability to get repair shops to agree to those rates does not demonstrate that it pays what it is contractually obligated to pay—the rates that actually prevail in the market in the area where the repairs are performed. Indeed, Insurer’s Reference Guide explicitly acknowledges that Insurer does not “conduct a formal market survey of rates in most states.” *Id.*

Garage countered with two types of evidence: first, that higher labor rates than those paid by Insurer were posted by other repair shops; second, that other insurers have agreed to pay Garage higher rates. The evidence of rates posted at repair shops is of debatable persuasive value because it fails to show that the posted rates are actually paid, much less that the posted rates represent the prevailing labor rates. On the other hand, the fact that other insurers—and in some instances, even Insurer itself—paid rates higher than the rate typically paid by Insurer is sufficient to support a genuine dispute as to a relevant fact.

In any event, where the defendant Insurer is moving for summary judgment, plaintiff Garage does not need to demonstrate that the prevailing labor rate is in fact higher than the rate Insurer regularly demands and sets. Garage succeeds in defeating Insurer’s motion for summary judgment if its evidence supports the existence of a genuine dispute as to a material fact on that question. Especially given the illogic of Insurer’s proposition that the rate *it* can regularly command demonstrates the prevailing rate in the market—including rates paid by other insurers and uninsured individuals—Garage’s evidence of higher rates paid to it is sufficient to show a genuine dispute.¹⁰

d. Paint

[15] The district court also granted Insurer summary judgment on Garage’s claims that Insurer failed to pay

sufficient sums for paint and refinishing material costs. On this point, we conclude that the district court properly granted summary judgment to Insurer.

On its motion, Insurer demonstrated that it complied with its contractual obligations with respect to paint and refinishing material costs, and Garage failed to raise a genuine dispute of material fact on that issue. Insurer's policy limits the amount to be paid to the cost of "repair or replacement parts and equipment, as reasonably determined by [Insurer]." Confidential App. 32. In its motion, Insurer provided evidence that it reasonably determines paint and refinishing material costs through the use of estimating software. In response, Garage did not dispute the reasonableness of Insurer's use of estimating software, but rather pointed to its own use of different estimating software.

Garage's reliance on its own assertedly reasonable method for determining the cost of paint and refinishing materials is insufficient to raise a genuine dispute of *122 material fact. The relevant question under the policy is not whether Insurer reached the most accurate estimate but whether its method for determining its costs was reasonable. The mere fact of showing that another reasonable estimating method could produce a higher cost is insufficient, standing alone, to create a genuine dispute of material fact as to the unreasonableness of Insurer's method.

On appeal, Garage argues that the phrase "as reasonably determined by [Insurer]" in the policy language applies only to the prevailing labor rates. That argument misreads the clear contractual language. The district court properly construed the contract to require Insurer to pay the costs of paint and refinishing materials as reasonably determined by Insurer, and properly concluded that Insurer had demonstrated that it complied with that requirement through the use of estimating software.

Therefore, Insurer was entitled to summary judgment on Garage's breach of contract claims based on the costs of paint and refinishing materials.

e. Hazardous Waste Disposal and Database Access

We vacate the district court's grant of summary judgment as to Insurer's treatment of charges related to hazardous waste disposal and accessing the ALLDATA database.¹¹ We

conclude that summary judgment was inappropriate for those two types of charges.

[16] With respect to hazardous waste disposal, Insurer once again failed to satisfy its burden under [Rule 56](#). In its briefs before the district court and statement of material facts below, Insurer did not mention, let alone show that it was entitled to judgment on, Garage's charges for hazardous waste removal.¹² In its opening brief, it made the conclusory assertion that Garage's contract claims are "riddled with charges that are extraneous and unnecessary to repair the First-Party Assignors' vehicles to their pre-loss condition," without specification of the hazardous waste charges specifically or demonstration that it was entitled to judgment on those charges. Dkt. 73, at 7–8. On this issue, Insurer's motion for summary judgment was facially insufficient.

[17] With respect to the ALLDATA charges, there is a genuine dispute of material fact as to whether such charges constituted "overhead" so as to be outside of Insurer's contractual obligations. ALLDATA is an electronic database that contains repair information. In its motion for summary judgment, Insurer argued that Garage's charges for ALLDATA were overhead charges "unrelated to the actual repair of motor vehicles," and therefore were not covered by the policy. *Id.* at 7. The testimony upon which Insurer relied, however, presents a genuine dispute of material fact as to how ALLDATA was used and whether it is properly considered overhead. Larry Zaleppa, who writes estimates for Garage, testified with respect *123 to a particular line-item charge on a single estimate that it signified "[t]he time it takes ... to go get the information off the car, the [vehicle identification number], the year, make and model for the technician to go in and look it up in [ALLDATA] and print it out, [and] read it so he's aware of what's going on." Confidential App. 833. Zaleppa further explained that the information provided by ALLDATA explains "how to repair vehicles" and is "put out by the manufacturers of the vehicle." *Id.* 829.

Drawing all reasonable inferences in favor of Garage, Zaleppa's testimony could establish that, to repair properly a particular vehicle to its pre-loss condition, a technician must review the specifications and procedures provided by the vehicle manufacturer for that specific make and model vehicle. If that is the case, a jury could conclude that a technician needs to expend time to access and familiarize herself with the information provided by the database for a specific vehicle to perform a particular repair. Such efforts

and costs are potentially distinguishable from those that might need to be expended generally for the operation of a business or the performance of technician work, which might properly be considered overhead and not chargeable to a particular client. Resolving the issue of how ALLDATA costs should be treated under the policy thus turns on a factual assessment of how the database operates and is used in practice.

There is, therefore, a genuine dispute of material fact as to whether Insurer's failure to pay Garage's ALLDATA charges breached its contractual obligations to pay the charges necessary to return the vehicles to their pre-loss condition.

* * *

In sum, we conclude that summary judgment should have been denied on Garage's breach of contract claims with respect to the cost categories of labor hour deficiencies, parts, labor rates, hazardous waste removal, and ALLDATA, but that summary judgment was properly granted on the issue of paint material costs. We also affirm the grant of summary judgment on the issues noted in footnote 11, *supra*, which Garage has not challenged on appeal.

B. GBL

The district court also granted Insurer summary judgment on Garage's claims brought under GBL § 349. The district court found that there was no dispute as to a material fact on whether Insurer engaged in materially misleading conduct and that Insurer was entitled to judgment as a matter of law. In the alternative, the court found that Garage's GBL claims were precluded by N.Y. Ins. Law § 2601. On appeal, Garage contends that the district court erred in entering judgment on two of its claims: that Insurer misled customers about (i) its labor rate payments and (ii) customers' ability to take their vehicles to the shop of their choice.¹³ We conclude that the district court erred in granting summary judgment on Garage's claim that Insurer engaged in materially misleading acts with respect to its labor rate payments, and that such claims are not precluded by N.Y. Ins. Law. However, the district court properly granted summary judgment to Insurer on Garage's claim that Insurer misled consumers regarding their ability to use the repair shop of their choice.

*124 1. Labor Rate Practices

[18] [19] General Business Law § 349 makes unlawful “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” N.Y. Gen. Bus. Law § 349(a). To state a claim for a § 349 violation, “a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.” *City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y. 3d 616, 621, 883 N.Y.S.2d 772, 911 N.E.2d 834 (2009); see *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007). “Whether a representation or an omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances.” *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000) (internal quotation marks and citation omitted); see also *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995) (defendant's conduct must be “deceptive or misleading in a material way”). The New York Court of Appeals' adoption of an “objective definition of deceptive acts and practices ... which may be determined as a matter of law or fact (as individual cases require),” was intended to avoid “a tidal wave of litigation against businesses that was not intended by the Legislature.” *Oswego*, 85 N.Y.2d at 26, 623 N.Y.S.2d 529, 647 N.E.2d 741.

[20] There is a genuine issue of fact as to whether Insurer engaged in misleading practices concerning the labor rates it paid repair shops. Insurer's policy provides that it is obligated to pay labor rates up to “the prevailing competitive labor rates charged in the area where the property is to be repaired.” Confidential App. 32. However, as discussed above in section II.A.2.c, Garage has put forth evidence that could establish that Insurer routinely refused to pay the prevailing competitive labor rates, and that the rates Insurer agreed to pay reflected not the prevailing competitive rates in the market but rates that a potentially large volume customer could prevail on repair shops to accept. Garage's evidence is sufficient to raise a genuine issue of fact on Garage's GBL claims that Insurer, as a matter of practice, paid labor rates below those it was obligated to pay pursuant to its insurance policy. *Cf.*, e.g., *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir. 1992) (affirming jury verdict where insurer engaged in deceptive tactics in processing homeowner's claim following fire, including “refus[ing] to estimate, much less pay, the replacement cost value of the [insured's] personal effects as required by the policy”).

Insurer's arguments on appeal are not persuasive. First, Insurer argues that its practice of good faith negotiation with Garage defeats the claim. The argument is inapposite. Insurer's readiness to negotiate with Garage in good faith is not incompatible with its having misled its policyholders about its payment of prevailing labor rates. Moreover, the irrelevance of Insurer's subsequent readiness to negotiate with Garage in good faith is underscored by the fact that New York law defines deceptive practices under § 349 by reference to the capacity of the practice to mislead, regardless of intent to deceive. “[I]t is not necessary under [GBL § 349] that a plaintiff establish the defendant's intent to defraud or mislead,” *Oswego*, 85 N.Y.2d at 26, 623 N.Y.S.2d 529, 647 N.E.2d 741; see also *Stutman*, 95 N.Y.2d at 29, 709 N.Y.S.2d 892, 731 N.E.2d 608.

Second, Insurer argues that its practice cannot be deceptive because its practice is fully disclosed to consumers in the policy *125 stating that the repair costs are limited to the prevailing competitive labor rate, and in Insurer's estimates stating the labor rates to be paid. Once again, the argument is inapposite. These disclosures do not show Insurer's entitlement to judgment on Garage's GBL claims. The essence of Garage's claims is that Insurer *did not do* what its policy said it would do and that the rates listed on Insurer's estimates did not represent the prevailing competitive labor rates, as they purported to do. The cases on which Insurer relies are therefore distinguishable because, while Insurer does not concede the fact that the rates it pays are lower than the prevailing rate it represents it will cover, the defendants in those cases actually disclosed the very practices that were alleged to be deceptive. See *Ludl Elecs. Prods., Ltd. v. Wells Fargo Fin. Leasing, Inc.*, 6 A.D.3d 397, 398, 775 N.Y.S.2d 59 (2d Dep't 2004) (including an automatic renewal provision in lease of equipment not deceptive under GBL § 349 because it was fully disclosed in the lease); *Sands v. Ticketmaster-N.Y., Inc.*, 207 A.D.2d 687, 687, 616 N.Y.S.2d 362 (1st Dep't 1994) (dismissing GBL § 349 claim for excessive fees because record showed Ticketmaster always disclosed the fees charged).

Insurer also argues that there was no dispute as to a material fact concerning the other elements of a GBL § 349 claim. We disagree.

First, Plaintiff's evidence that Insurer, as a matter of practice, misled consumers and paid insufficient sums on claims pursuant to its standard form contract “affects the public generally and, therefore, satisfies the requirements of

‘consumer-oriented’ conduct within the meaning of Section 349.” *Nick's Garage*, 2015 WL 1481683, at *11–12; see *Oswego*, 85 N.Y.2d at 26–27, 623 N.Y.S.2d 529, 647 N.E.2d 741 (“[P]laintiffs have satisfied the threshold test in that the acts they complain of are consumer-oriented in the sense that they potentially affect similarly situated consumers.”); *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 12, 953 N.Y.S.2d 96 (2d Dep't 2012) (describing conduct that is and is not “sufficiently consumer-oriented”).

Second, Garage raised a question of material fact as to a GBL injury. As discussed above in section II.A.1, the vehicle owners were entitled to receive a sufficient amount of money to repair their vehicles to pre-loss condition, and Insurer's alleged failure to pay sufficient sums, if proved, constitutes a sufficient injury.

Third, Insurer argues that the § 349 claims of First-Party Assignors fail because they do not allege an injury independent of their contract damages.¹⁴ The cases on which Insurer relies, however, do not establish such a requirement. Rather, those cases found no GBL injury “where the plaintiffs alleged damages in the amount of the purchase price of their contracts, but failed to allege that defendants had denied them the services for which they contracted.” *Orlander v. Staples, Inc.*, 802 F.3d 289, 302 (2d Cir. 2015) (emphasis omitted) (distinguishing *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009), and *Sokoloff v. Town Sports Int'l, Inc.*, 6 A.D.3d 185, 185, 778 N.Y.S.2d 9 (1st Dep't 2004)).

Therefore, as to Garage's claim under the GBL that Insurer engaged in materially misleading conduct with respect to labor rates, Insurer failed to show entitlement to judgment as a matter of law. Summary judgment should have been denied.

*126 2. Right to Choose Repair Shops

[21] On the other hand, we agree with the district court's grant of summary judgment on Garage's claim that Insurer misled the Assignors as to their right to use the repair shop of their choice. Insurer's motion papers show that it clearly disclosed this right to consumers and that Garage has no evidence that would support a genuine dispute as to that fact.

Garage argues that, notwithstanding Insurer's revelation to consumers that they have the right to use the repair shop of their choice, it misleads them on that question by limiting payment to what Insurer could pay at other repair shops

and refusing to pay Garage's reasonable charges, effectively inducing consumers to use Insurer's favored shops in order to secure full coverage.

Garage's argument fails. Insurer clearly advised consumers of their right to use the shop of their choice. We affirm the grant of summary judgment dismissing Garage's GBL § 349 claim on this theory.¹⁵

* * *

We therefore conclude that summary judgment was properly granted to Insurer on Garage's GBL claims based on customers' ability to choose repair shops, but should be denied on the GBL claims based on Insurer's labor rate practices.

3. Preclusion

[22] The district court also ruled, in the alternative, that Garage's GBL claims were precluded by N.Y. Ins. Law § 2601. *Nick's Garage*, 2015 WL 1481683, at *15. We conclude that Garage's claim of misleading practices as to prevailing labor rates is not precluded.

Section 2601 of the Insurance Law prohibits insurers from “engag[ing] in unfair claim settlement practices,” and specifies various acts that constitute such unfair practices. N.Y. Ins. Law § 2061(a). Although Section 2601 makes the covered acts illegal, it does not allow for a private cause of action based on those acts. *See id.* §§ 2601(a)–(c); *Rocanova v. Equitable Life Assurance Soc’y of the U.S.*, 83 N.Y.2d 603, 614, 612 N.Y.S.2d 339, 634 N.E.2d 940 (1994). By contrast, GBL § 349 generally makes unlawful “deceptive acts or practices in the conduct of any business, trade or commerce ... in this state,” N.Y. Gen. Bus. L. § 349(a), and explicitly provides for a broad private right of action for “any person who has been injured by reason of any violation of this section” to recover “actual damages or fifty dollars, whichever is greater.” *Id.* § 349(h).

Insurer argues that where § 2601 of the Insurance Law prohibits a certain action by insurers, but does not allow for a private right of action, and GBL § 349, which covers deceptive commercial practices generally, prohibits the same action and does provide a private right of action, the Insurance Law takes precedence as to a claim against an insurer, and no private claim may be brought under GBL § 349. This

misunderstands the law of New York. We therefore vacate the district court's ruling.

In *Riordan*, 977 F.2d at 51, an insurer argued to us that § 2601, forming part of a *127 “pervasive statutory scheme regulating unfair and deceptive acts and practice by insurance companies,” precludes a private claim against insurance companies under GBL § 349. We rejected the argument, observing that it “ignores the plain language of GBL § 349(g), which states that ‘[t]his section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state.’ ” *Id.* at 52. The New York courts agree. *See New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 321, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995) (“[R]elief under [GBL § 349] is not necessarily foreclosed by the fact that the transaction involved an insurance policy....” (citing *Riordan*)); *see also Joannou v. Blue Ridge Ins. Co.*, 289 A.D.2d 531, 532, 735 N.Y.S.2d 786 (2d Dep't 2001) (“An insurance carrier's failure to pay benefits allegedly due its insured under the terms of a standard insurance policy can constitute a violation of General Business Law § 349.”).

In subsequent cases, we have recognized a limited preclusion of liability under § 349, which would not apply in the circumstances now before us. In *Conboy v. AT & T Corp.*, 241 F.3d 242 (2d Cir. 2001), the plaintiff argued that the defendant's harassing communications with a debtor (and family members), in violation of GBL § 601, which does not supply a private cause of action, constituted a “deceptive act” within the meaning of GBL § 349, rendering the defendant's conduct actionable under the latter statute. Because the harassing communications were not inherently deceptive and therefore could not qualify as a violation of § 349 (unless on the theory that they constituted violations of § 601), we ruled that a plaintiff “cannot circumvent” § 601's prohibition of a private claim by characterizing the violation of § 601 as a deceptive act in violation of § 349. *Id.* at 258.

Then, in *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187 (2d Cir. 2005), a plaintiff claimed that conduct by the defendant in violation of federal statutes—which did not depend on a deceptive practice and did not allow a private cause of action—was actionable under New York law if the violation of federal law were characterized as a deceptive act that violates GBL § 349. We rejected that argument. Interpreting our earlier *Conboy* ruling, we held that when the challenged acts are not inherently deceptive so as to violate GBL § 349, regardless of whether they violate another statute, such

acts cannot be re-characterized as “deceptive” simply on the grounds that they violate another statute which does not allow for private enforcement; otherwise, GBL § 349 would be permitted to derogate the policy embodied in the other statute precluding private enforcement. We explained that a GBL claim is viable where the plaintiff “make[s] a free-standing claim of deceptiveness under GBL § 349 that happens to overlap with a possible claim” under another statute that is not independently actionable, but fails where the violation of the other statute by conduct that is not inherently deceptive is claimed to constitute a deceptive practice that serves as the basis for the GBL § 349 claim. *Id.* at 200; *see also Schlessinger v. Valspar Corp.*, 21 N.Y.3d 166, 173, 969 N.Y.S.2d 416, 991 N.E.2d 190 (2013) (citing *Broder* with approval).

These precedents do not help Insurer. Garage's plausible evidence that Insurer engaged in inherently deceptive conduct relating to labor rates supports a viable claim of violation of GBL § 349, regardless of whether the conduct also violated §

2601 of the N.Y. Ins. Law. Our rulings in *Riordan*, *Conboy*, and *Broder* all sustain Garage's position on this question.

We conclude that the district court erred in ruling that the GBL § 349 claim relating to labor rates is precluded by N.Y. Ins. Law § 2601.

CONCLUSION

Having considered all of the parties' arguments (whether or not discussed above), we conclude, for the foregoing reasons, and to the extent set forth above, the district court's grant of Insurer's motion for summary judgment is AFFIRMED IN PART, VACATED IN PART, and the matter is REMANDED.

All Citations

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Footnotes

- * Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.
- 1 Defendants are Progressive Casualty Insurance Company, National Continental Insurance Company, Progressive Advanced Insurance Company, Progressive Direct Insurance Company, Progressive Max Insurance Company, Progressive Northern Insurance Company, Progressive Preferred Insurance Company, and Progressive Specialty Insurance Company.
- 2 In any event, the First-Party Assignors remained financially responsible to pay Garage for the difference between Insurer's payment and the full cost of repairs under the terms of the Authorization and Guidelines for Repairs.
- 3 All docket entries refer to the district court docket, No. 12 Civ. 777 (N.D.N.Y.).
- 4 Of course, a district court is not compelled to dismiss or deny an inadequately supported motion for summary judgment. The court has numerous alternative available options. Among them, it may give the moving defendant time to make additional submissions that would cure the deficiency in its papers by citing to evidence that shows its entitlement to judgment (with a reasonable opportunity to the plaintiff to respond). *See Fed. R. Civ. P. 56(e)(1)* (“[T]he court may ... give an opportunity to properly support or address the fact [that has not been properly supported].” Alternatively, if the court is aware of record evidence not cited in the defendant's motion papers that appears to justify grant of summary judgment to the defendant, the court may give notice to the plaintiff citing those portions of the record (with reasonable time to respond) and then grant judgment to the defendant if the plaintiff's response to the court's notice confirms the inadequacy of its evidence or fails to show that there is a genuine dispute as to a material fact. *See Fed. R. Civ. P. 56(f)(3)* (“After giving notice and a reasonable time to respond, the court may ... consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.”). Or the court may dismiss the defendant's motion without prejudice to its subsequent resubmission with proper support. As provided in *Fed. R. Civ. P. 56(e)(4)*, the court may “issue any other appropriate order.”
- 5 This Court has often quoted *Celotex's* holding that “the burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.” *See, e.g., PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) (quoting *Celotex*, 477 U.S. at 325, 106

S.Ct. 2548); *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). These decisions did not absolve the movant of the obligation, articulated in *Celotex*, to “identify[] those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

6 Justice Brennan's analysis of the burdens did “not disagree with the [majority's] legal analysis.” 477 U.S. at 329, 106 S.Ct. 2548. His disagreement was predicated solely on a differing perception of its application to the facts of the case. *Id.* at 334, 106 S.Ct. 2548.

7 The evidence Insurer relied upon—that its MRRs do not always choose the lowest price part—falls far short. The testimony, from one of Insurer's MRRs, Corey Lee, showed only that he might choose to purchase a part from a more expensive supplier if it would reduce the amount of time it would take to do the repair. That testimony addressed neither Insurer's decision to use non-OEM parts for the First-Party Assignors' claims, nor whether those parts were functionally sufficient to return the vehicles to pre-loss condition.

Similarly, Garage's acknowledgment that Insurer paid for OEM parts in certain instances does not establish that Insurer *always* pays for OEM parts when they are necessary for a particular repair, and therefore does not negate breach for the times when Insurer did not pay for OEM parts.

8 Throughout this discussion, unless otherwise specified, our reference to the “prevailing labor rates” is shorthand for the policy language of “prevailing competitive labor rates charged in the geographic area where the property is to be repaired.” Because Insurer was obligated to pay the amount necessary to repair the vehicle to its “pre-loss condition,” paying “not more” than the prevailing rates effectively meant paying the rates exactly.

9 Garage also noted multiple instances in which Insurer paid additional sums as a “labor rate concession,” such that the effective labor rate paid for these particular repairs exceeded the rates Insurer typically paid to Garage.

10 We further find that the district court erred in concluding that Garage's expert report supported Insurer's position that its rates were “within the prevailing market rate.” *Nick's Garage*, 2015 WL 1481683, at *8. Garage's expert report showed that, of the shops surveyed, the average posted or most typical hourly rates for various forms of labor were all higher than the rates Insurer offered to pay the First-Party Assignors. In concluding that this evidence supported the Insurer's position, the district court failed to draw reasonable factual inferences in favor of Garage, the non-moving party.

11 The district court granted summary judgment to Insurer on all of Garage's breach of contract claims. Insofar as these claims included other “overhead expenses” which were raised by Insurer below, including energy surcharges, processing lienholder's checks, or charges for photocopy and fax expenses, Garage has failed to challenge those aspects of the district court's judgment in its briefs on appeal, and therefore has abandoned such claims. See *Hughes v. Bricklayers & Allied Craftworkers Local No. 45*, 386 F.3d 101, 104 n.1 (2d Cir. 2004) (claims advanced below but not raised on appeal were abandoned).

12 It was Garage that, on the summary judgment motion, first identified hazardous waste removal as a category of line-item charges it was owed.

13 Before the district court below, Garage made other claims that Insurer engaged in deceptive practices in its claims processes and other categories of costs, but does not address, and thus has abandoned, those claims on appeal.

14 Because only the First-Party Assignors have asserted contract claims, this argument does not impact the viability of the Third-Party Assignors' GBL claims.

15 Garage offered declarations of consumers averring that they were misled by Insurer as to their right to choose the repair shop. This evidence is insufficient to sustain Garage's claim of deceptive practices under § 349. Insurer's evidence of its statements to consumers shows that, under the objective standard that governs § 349, its conduct was not deceptive, even if individual consumers claim to have been misled. Unlike the labor rate disclosures, Insurer here makes no representations about itself or its own conduct; it simply discloses its customers' rights, without any representations about what it will do with respect to those rights.

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101 A.D.3d 478, 954 N.Y.S.2d 866
(Mem), 2012 N.Y. Slip Op. 08627

****1** The People of the State
of New York, Respondent

v

Malik Bryson, Appellant.

Supreme Court, Appellate Division,
First Department, New York
December 13, 2012

CITE TITLE AS: People v Bryson

HEADNOTES

[Crimes](#)

[Witnesses](#)

Unavailability of Witness—Threats by Defendant—
Admission of Grand Jury Testimony

[Crimes](#)

[Witnesses](#)

Expert Witness—Gangs

[Crimes](#)

[Instructions](#)

Missing Witness Charge

Deron Castro, Forest Hills (Patrick Michael Megaro and John S. Campo of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 16, 2008, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him to a term of seven years, unanimously affirmed.

At a *Sirois* hearing (*Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [1983]), the People established, by clear and convincing evidence, that defendant caused a witness's unavailability by making threats. Accordingly, defendant forfeited his right to confront this witness, whose grand jury testimony was properly received in evidence (*see People v Cotto*, 92 NY2d 68 [1998]; *People v Geraci*, 85 NY2d 359 [1995]). There was ample proof of the identities of the participants in recorded phone conversations. To the extent that defendant's threats to the witness were implied threats, the implication was unmistakable. Furthermore, it can be readily inferred that the witness's failure to testify was caused by the threats.

The court properly exercised its discretion in admitting expert testimony regarding gangs (*see generally People v Lee*, 96 NY2d 157, 162 [2001]). Regardless of whether the underlying charges were gang-related, expert testimony was necessary to explain words and phrases that defendant used in phone conversations (*see e.g. People v Boyd*, 164 AD2d 800, 803 [1st Dept 1990], *lv denied* 77 NY2d 904 [1991]). This testimony was highly probative, and was beyond the knowledge of the typical juror. The expert was sufficiently qualified to give this testimony, based on his practical experience, and he did not convey any hearsay to the jury.

The court properly declined to give missing witness charges as to three uncalled witnesses. Defendant did not establish that these persons were under the People's control for purposes of a missing witness charge, or that they could offer material, noncumulative testimony (*see People v Gonzalez*, 68 NY2d 424 [1986]).

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence. ****2**

We have considered and rejected defendant's remaining claims. Concur—Gonzalez, P.J., Mazzarelli, Acosta and Román, JJ.

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216 A.D.3d 1018, 190 N.Y.S.3d
391, 2023 N.Y. Slip Op. 02691

****1** John Schultheis, Respondent,
v
Ronald J. Arcate, Trustee of the V&C
Brothers Trust, et al., Appellants.

Supreme Court, Appellate Division,
Second Department, New York
2021-06545, 600194/20
May 17, 2023

CITE TITLE AS: Schultheis v Arcate

HEADNOTE

Trusts

Constructive Trust

Summary Judgment Dismissing Complaint—Motion Papers Revealed Issues of Fact and Credibility Regarding Transfer of Deed and Release of All Claims of Ownership in Exchange for Full Satisfaction of Mortgage Loan

George A. Huwel, Hampton Bays, NY, for appellants.

In an action, inter alia, to impose a constructive trust on real property, the defendants appeal from an order of the Supreme Court, Suffolk County (Carmen Victoria St. George, J.), dated August 6, 2021. The order denied the defendants' motion for summary judgment dismissing the complaint and on their counterclaim for sanctions.

Ordered that the order is affirmed, without costs or disbursements.

In January 2020, the plaintiff commenced this action, inter alia, to impose a constructive trust, alleging that the defendants fraudulently induced him to transfer the deed to certain real property located on Westneck Road in Shelter Island (hereinafter the subject property). The plaintiff claimed that the defendants Alberto Figuccio and Erminia Sauro loaned him approximately \$95,000 to satisfy his mortgage loan in order to save the subject property from foreclosure,

and that their daughter, the defendant Patricia Figuccio, a friend of the plaintiff, asked that the deed to the subject property be transferred as “security” for her parents until the loan was paid in full. However, subsequent to the transfer, the plaintiff was served with a notice to quit the subject property and eviction paperwork.

The defendants joined issue by filing an answer, which, among other things, included a counterclaim for sanctions. The ***1019** defendants then moved for summary judgment dismissing the complaint and on their counterclaim. In an affidavit submitted in support of the motion, Patricia Figuccio claimed that the plaintiff transferred the deed to the subject property and released all claims of ownership of the subject property in exchange for, inter alia, full satisfaction of the mortgage loan. In an order dated August 6, 2021, the Supreme Court denied the defendants' motion, determining that issues of credibility precluded an award of summary judgment. The defendants appeal.

“On a motion for summary judgment, the moving party must ‘make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’ ” (*Napoli v Rubin*, 199 AD3d 819, 820 [2021], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “The failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Napoli v Rubin*, 199 AD3d at 820).

“A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Walker v Ryder Truck Rental & Leasing*, 206 AD3d 1036, 1037-1038 [2022] [internal ****2** quotation marks omitted]). “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Spilman v Matyas*, 212 AD3d 859, 860 [2023] [internal quotation marks omitted]).

Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law, as their motion papers revealed issues of fact and credibility that cannot be resolved on a motion for summary judgment (*see Walker v Ryder Truck Rental & Leasing*, 206 AD3d at 1038). Accordingly, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint and on their counterclaim for sanctions, regardless of the sufficiency of the plaintiff's opposition papers (*see*

Napoli v Rubin, 199 AD3d at 820). Brathwaite Nelson, J.P.,
Zayas, Ford and Voutsinas, JJ., concur.

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52 A.D.3d 595, 860 N.Y.S.2d
153, 2008 N.Y. Slip Op. 05496

****1** Miles Turkat, Appellant

v

Lalezarian Developers,
Inc., et al., Respondents.

Supreme Court, Appellate Division,
Second Department, New York
June 10, 2008

CITE TITLE AS: Turkat
v Lalezarian Devs., Inc.

HEADNOTE

Contracts

Breach or Performance of Contract

Garfunkel, Wild & Travis, P.C., Great Neck, N.Y. (Roy W. Breitenbach and Jason Y. Hsi of counsel), for appellant. Nesenoff & Miltenberg LLP, New York, N.Y. (Philip A. Byler, Andrew T. Miltenberg, and Laine A. Armstrong of counsel), for respondents.

In an action, inter alia, in effect, to recover damages for breach of contract, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (McCarty, J.), entered May 17, 2007, as, upon reargument, adhered to its prior determination in an order dated January 10, 2007, granting that branch of the defendants' motion pursuant to [CPLR 3211 \(a\) \(1\) and \(7\)](#) which was to dismiss the first cause of action.

Ordered that the order entered May 17, 2007 is reversed insofar as appealed from, on the law, with costs, and, upon reargument, so much of the order dated January 10, 2007, as granted that branch of the defendants' motion pursuant to

[CPLR 3211 \(a\) \(1\) and \(7\)](#) which was to dismiss the first cause of action is vacated and that branch of the motion is denied.

In considering a motion to dismiss pursuant to [CPLR 3211 \(a\) \(7\)](#), the court should accept the facts alleged in the complaint ***596** as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the alleged facts fit within any cognizable legal theory (*see Town of Riverhead v County of Suffolk*, 39 AD3d 537, 539 [2007]; *Hartman v Morganstern*, 28 AD3d 423, 424 [2006]). A motion to dismiss pursuant to [CPLR 3211 \(a\) \(1\)](#) may be granted only where the documentary evidence that forms the basis of the defense is such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims (*see Saxony Ice Co., Div. of Springfield Ice Co., Inc. v Ultimate Energy Rest. Corp.*, 27 AD3d 445, 446 [2006]), which is not the case here. ****2**

A covenant of good faith and fair dealing is implied in all contracts, encompassing any promises which a reasonable person in the position of the promisee would be justified in understanding were included and which are not inconsistent with the terms of the contract (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *AFBT-II, LLC v Country Vil. on Mooney Pond*, 305 AD2d 340, 342 [2003]; *I-10 Indus. Assoc. v Trim Corp. of Am.*, 297 AD2d 630, 631 [2002]). Accepting the allegations of the complaint as true and giving the plaintiff the benefit of every possible favorable inference, the plaintiff, in his first cause of action, stated a cause of action against Lalezarian Developers, Inc., in effect, to recover damages for breach of contract based on an alleged breach of the implied covenant of good faith and fair dealing inherent in the parties' contract (*see Snitovsky v Forest Hills Orthopedic Group, P.C.*, 44 AD3d 845 [2007]; *Richmond Shop Smart, Inc. v Kenbar Dev. Ctr., LLC*, 32 AD3d 423, 424 [2006]; *I-10 Indus. Assoc. v Trim Corp. of Am.*, 297 AD2d 630, 631 [2002]). Accordingly, the Supreme Court erred in adhering to its prior determination dismissing the plaintiff's first cause of action. Miller, J.P., Dillon, Balkin and Chambers, JJ., concur.

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186 A.D.3d 1447, 128 N.Y.S.3d 848
(Mem), 2020 N.Y. Slip Op. 04987

****1** Twinkle Play Corp., Appellant,
v
Alimar Properties, Ltd., Respondent.

Supreme Court, Appellate Division,
Second Department, New York
2018-10896, 503585/18
September 16, 2020

CITE TITLE AS: Twinkle Play
Corp. v Alimar Props., Ltd.

HEADNOTES

Contracts

Leases

Breach of Implied Covenant of Good Faith and Fair Dealing
Inherent in Parties' Commercial Lease

Evidence

Documentary Evidence

Peluso & Touger, LLP, New York, NY (Carl T. Peluso and Qualia Hendrickson of counsel), for appellant.

Law Offices of Abe George, P.C., New York, NY, for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated July 18, 2018. The order, insofar as appealed from, granted that branch of the defendant's motion which was pursuant to [CPLR 3211 \(a\)](#) to dismiss the third cause of action.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendant's motion which was pursuant to [CPLR 3211 \(a\)](#) to dismiss the third cause of action is denied.

In March 2017, the plaintiff, as tenant, and the defendant, as landlord, entered into a commercial lease, whereby the plaintiff was to open and operate a children's play and

party space on the ground floor of a building owned by the defendant in Brooklyn. In February 2018, the plaintiff commenced this action against the defendant, asserting, inter alia, a cause of action sounding in breach of contract. The plaintiff alleged that ***1448** the defendant had refused to sign certain paperwork required by the New York City Department of Buildings (hereinafter the DOB) in order for the plaintiff to legally operate its business, causing the plaintiff to suffer lost revenues. The defendant moved pursuant to [CPLR 3211 \(a\) \(1\) and \(7\)](#) to dismiss the complaint. In an order dated July 18, 2018, the Supreme Court granted the motion. The plaintiff appeals from so much of the order as granted that branch of the motion which was to dismiss the third cause of action, sounding in breach of contract.

“In considering a motion to dismiss a complaint pursuant to [CPLR 3211 \(a\) \(7\)](#), the complaint must be accorded a liberal construction, the facts as alleged therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference” (*255 Butler Assoc., LLC v 255 Butler, LLC*, 173 AD3d 655, 656 [2019] [internal quotation marks omitted]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “In determining such a motion, the court may freely consider additional facts contained in affidavits submitted by the plaintiff to remedy any defects in the complaint” (*Sheridan v Carter*, 48 AD3d 444, 445 [2008]). “[W]hether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss” (*Lieberman v Green*, 139 AD3d 815, 816 [2016]).

“The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach” (*Neckles Bldrs., Inc. v Turner*, 117 AD3d 923, 924 [2014]). “A covenant of good faith and fair dealing is implied in all contracts, encompassing any promises which a reasonable person in the position of the promisee would be justified in understanding were included and which are not inconsistent with the terms of the contract” (*Turkat v Lalezarian Devs., Inc.*, 52 AD3d 595, 596 [2008]; see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). “The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement” (*Atlas*

El. Corp. v United El. Group, Inc., 77 AD3d 859, 861 [2010] [internal quotation marks omitted]).

Here, accepting as true the allegations of the complaint, *1449 augmented by the plaintiff's submissions in opposition to the defendant's motion to dismiss, and giving the plaintiff the benefit of every possible favorable inference, the plaintiff stated a cause of action, in effect, to recover damages for breach of contract based on an alleged breach of the implied covenant of good faith and fair dealing inherent in the parties' contract (see *255 Butler Assoc., LLC v 255 Butler, LLC*, 173 AD3d at 656; *Turkat v Lalezarian Devs., Inc.*, 52 AD3d at 596). The plaintiff alleged, in effect, that there was an implied understanding that the defendant would cooperate with the plaintiff's efforts to legally change the usage of the rental space, which would require approval by the DOB, and, therefore, the defendant's failure to cooperate in legalizing the premises constitutes a breach of contract.

“A party seeking dismissal pursuant to CPLR 3211 (a) (1) on the ground that its defense is based on documentary evidence

must submit documentary evidence that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim” (*255 Butler Assoc., LLC v 255 Butler, LLC*, 173 AD3d at 656 [internal quotation marks omitted]). “In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable” (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 677-678 [2017]). Here, the evidence submitted by the defendant either was not “documentary” within the meaning of CPLR 3211 (a) (1) or failed to conclusively establish a defense to the third cause of action as a matter of law (see *Neckles Bldrs., Inc. v Turner*, 117 AD3d at 925).

Accordingly, the Supreme Court should have denied that branch of the defendant's motion which was pursuant to CPLR 3211 (a) to dismiss the third cause of action. Scheinkman, P.J., Miller, Maltese and Barros, JJ., concur.

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Compilation of Codes, Rules and Regulations of the State of New York
Title 11. Insurance Department
Chapter IX. Unfair Trade Practices
Part 216. Unfair Claims Settlement Practices and Claim Cost Control Measures
Regulation NO. 64. (Refs & Annos)

11 NYCRR 216.7

Section 216.7. Standards for prompt, fair and equitable
settlement of motor vehicle physical damage claims

Effective: June 9, 2021

[Currentness](#)

This section is applicable to claims arising under motor vehicle collision and comprehensive coverages. The provisions of this Part shall continue to be applicable to these claims, except to the extent that such provisions are inconsistent with the specific provisions of this section. The sections of this Part that do not apply at all to motor vehicle physical damage claims are sections 216.2(b)--(d), 216.6(c), (h), and 216.9 of this Part.

(a) The following shall govern the construction of the terms used in this section:

(1) *Agreed price* shall mean the amount agreed to by the insurer and the insured, or their representatives, as the reasonable cost to repair damages to the motor vehicle resulting from the loss, without considering any deductible or other deductions.

(2) *Designated representative (DR)* shall mean an insured's broker of record or an insured's intended repair shop designated by the insured to represent the insured shop in negotiations with the insurer in an attempt to settle the claim. Such designated representative may legally act on the insured's behalf. If the designated representative is the insured's intended repair shop, such repair shop, if located within New York State, must be registered pursuant to the provisions of the Motor Vehicle Repair Shop Registration Act (article 12-A, Vehicle and Traffic Law), and may only represent the insured in negotiation of the amount necessary to repair the insured's damaged vehicle. The designation form must contain the repairer's registration number.

(3) *Motor vehicle* shall have the meaning ascribed in [section 311 of the Vehicle and Traffic Law](#).

(4) *Substantially similar vehicle* shall mean a vehicle of the same make, model, year and condition, including all major options of the insured vehicle. Mileage must not exceed that of the insured vehicle by more than 4,000 miles or 10 percent of the mileage on the vehicle at the date of loss, whichever is greater.

(5) *Business day* shall mean a day other than Saturday, Sunday or a New York State legal holiday.

(6) *Crash part* means a part of a motor vehicle, which:

(i) is made of sheet metal, plastic, fiberglass or similar material, including a door, fender, panel, bumper, hood, floor or trunk lid, but not including windows or hubcaps; and

(ii) constitutes or provides support for the motor vehicle's exterior.

(7) *Original equipment manufacturer* or *OEM* means a motor vehicle manufacturer or distributor that produces or markets, under its own name, crash parts for use in motor vehicles that it manufactures or distributes under its own name.

(8) *Nonoriginal equipment manufacturer* or *non-OEM* means a manufacturer or distributor (including any entity supplying the required warranty other than a manufacturer), that produces or markets, under its own name, crash parts for use in motor vehicles that it does not manufacture or distribute.

(9) *Waste material* means material defined as a liquid toxic waste or liquid hazardous waste material under Federal or New York State environmental laws or regulations.

(10) *Local market area* shall mean a 100-mile radius, limited to within the United States, of the place of principal garagement of the insured's motor vehicle.

(b) Adjustment of partial losses.

(1) If, upon notification of a loss, the insurer intends to exercise its right to inspect damages prior to repair, it shall have six business days following receipt of notice of claim to inspect the insured's damaged motor vehicle, which is available for inspection, during normal business hours at a place and time reasonably convenient to the insured. In addition, negotiations shall commence and a good faith offer of settlement, sufficient to repair the vehicle to its condition immediately prior to the loss, shall be made within the aforesaid six-day period to the designated representative, and it may also be made to the insured. If there is no designated representative, the offer shall be made to the insured within the six-day period.

(2) Before negotiating a loss with the insured's designated representative, the insurer must receive written proof of such designation, properly executed and signed by the insured. The designated representative form shall be accepted by the insurer or its representative when it is offered by either the designated representative or the insured. Prior to negotiating a loss with a repair shop, the insurer shall ascertain the repair shop registration number and the currency of the registration. The insurer shall not knowingly negotiate a loss with an unregistered repair shop.

(3) The person inspecting the damaged vehicle on behalf of the insurer must be licensed or authorized, under article 21 of the Insurance Law, to negotiate the loss with the insured or the insured's designated representative. At the time of initial inspection, the person chosen by the insurer to inspect damages must attempt to enter into negotiations, involving the extent of damages, manner of repair and number of hours to repair the damaged vehicle, with the designated representative or, if no designated representative, the insured, in accordance with the following procedures:

(i) at the time of inspection, the insurer shall furnish a copy of its estimate, which at a minimum, must indicate the extent of known damages and manner of repair; or

(ii) if the insurer utilizes electronic data processing equipment to generate its repair estimate the insurer shall furnish, at the time of inspection, its estimate or a copy of its worksheet, which at a minimum, must indicate the extent of known damages and manner of repair or, in the alternative, such insurer may hand-deliver to the insured's designated representative or, if no designated representative, the insured, no later than 24 hours following the inspection, a copy of the insurer's detailed written estimate of the cost of repairing the damages resulting from the loss, specifying all appropriate deductions.

Within the aforesaid six-business-day period, the insured's designated representative or, if no designated representative, the insured shall, in all events, receive from the insurer a copy of the insurer's detailed written estimate of the cost of repairing the damages resulting from the loss, specifying all appropriate deductions.

(4) The insurer's repair estimate shall include, as a separate line item, the reasonable cost for proper disposal of waste material generated by painting the motor vehicle or crash part, in the following manner (or using another method that is acceptable to the superintendent as functionally equivalent):

(i) the cost per paint hour shall be calculated by dividing the repair shop's annual disposal fees for such waste material, after adjusting for reclaiming or recycling by the repair shop, by the number of hours expended annually to paint vehicles;

(ii) the reasonable cost for proper disposal of the waste material shall be calculated by multiplying the number of hours estimated to paint the vehicle by the cost per paint hour;

(iii) presentation of the manifest and invoice documenting a repair shop's disposal and disposal cost for hazardous waste may be required by an insurer as a condition for this separate line itemization, and the failure of the repair shop to provide such documentation shall relieve the insurer from any consideration or inclusion of such disposal cost on an itemized basis within the repair estimate;

(iv) the reasonable cost shall not exceed the prevailing cost for such disposal in the geographic area of such repair; and

(v) a new repair shop may use the prevailing cost for disposal of hazardous waste in its geographic area during its first year in business.

(5) If the insurer's repair estimate is based upon the use of any non-OEM crash part:

(i) the estimate shall specify the non-OEM or non-OEM supplier;

(ii) the insurer shall not, without consent of the insured or the insured's designated representative, specify non-OEM crash parts from more than three different suppliers for any one repair;

(iii) the crash part shall equal or exceed the comparable OEM crash part in terms of fit, form, finish, quality and performance;

(iv) the crash part must be warranted by the non-OEM at least to the extent and duration as the comparable OEM crash part;

(v) the insurer shall specify only certified crash parts, in regard to any part that has been duly certified by a qualified certifying entity acceptable to the superintendent;

(vi) if the crash part has not been certified by a qualified certifying entity acceptable to the superintendent, the non-OEM must issue a written warranty, for at least the period of the insured's ownership of the vehicle, that the crash part equals or exceeds the comparable OEM crash part in terms of fit, form, finish, quality and performance; and

(vii) the insurer shall cause the damaged vehicle to be restored to its preloss condition consistent with the non-OEM warranty, at no additional cost to the insured and within a reasonable time, if the non-OEM fails to honor its warranty required in subparagraph (iv) or (vi) of this paragraph.

(6) In determining whether a certifying entity is qualified and acceptable for purposes of paragraph (5) of this subdivision, the superintendent shall consider the extent to which the entity:

(i) has adopted written standards containing conditions to be fulfilled by a manufacturer of crash parts;

(ii) tests, or contracts with an independent testing organization that tests, crash parts, using suitable equipment and techniques;

(iii) administers its certification program in a nondiscriminatory manner regarding any manufacturer or supplier of non-OEM crash parts;

(iv) provides a system to determine that certified non-OEM crash parts continue to conform with standards prescribed in subparagraph (5)(iii) of this subdivision and, failing to so conform, to decertify and advise crash part users of withdrawals of certification for any such part;

(v) provides mechanisms for quickly receiving inquiries and promptly resolving disputes that arise under the program in regard to consumers, insurers or repair shops;

(vi) provides a means of identifying each certified non-OEM crash part and provides a system of security that guards against misuse of the identification;

(vii) provides updated lists of certified non-OEM crash parts on at least a quarterly basis; and

(viii) provides the superintendent with an annual report, and such other reports as the superintendent may require, highlighting any significant developments, problems or changes relating to certification procedures or requirements.

(7) Negotiations must be conducted in good faith, with the basic goal of promptly arriving at an agreed price with the insured or the insured's designated representative. If the insured's intended repair shop is not a designated representative of the insured, the insurer may also reach an agreement with that repair shop on the cost to repair the damaged vehicle, but that agreement shall not be binding upon the insured or the designated representative. Early in negotiations, the insurer must inform the insured's designated representative or, if there is no designated representative, the insured of all deductions that will be made from the agreed price. If an insurer shall require a proof of loss, its offer shall be communicated to the insured via a proof of loss. The insurer shall also communicate the offer to the designated representative.

(8) If the insurer fails to inspect the damaged motor vehicle during the aforementioned six-business-day period, it shall forfeit its right to inspect the damaged vehicle prior to repairs. Unless the insured or designated representative shall permit an inspection after the six-day period, negotiations shall be limited to labor and the price of parts and shall not, unless objective evidence to the contrary is provided by the insurer, involve disputes as to the existence of damage or the chosen manner of repair. For the above forfeiture-of-inspection provision to apply, the damaged vehicle must be available for inspection during normal business hours for the entire aforementioned six-business-day period.

(9) If a second inspection of the vehicle is required by the insurer in order to evaluate open items on the original estimate, or hidden damage discovered upon commencement of repairs, such inspection shall be performed within two business days following the date of notice of additional or hidden damage from either the insured or the DR. When repairs are sublet by the original repairer, thereby necessitating a reinspection at a location other than the original repairer's location, such reinspection must take place within four business days' notice, from either the insured or the DR, of additional or hidden damage. At the time of the subsequent inspection, the insurer shall furnish a copy of the insurer's detailed written estimate of the cost of repairing the damages resulting from the loss, specifying all appropriate deductions.

(10) If upon notification of a loss, the insurer, because of the minor amount of the loss as reported by the insured, requests an estimate of repairs from the insured in lieu of a physical inspection, such a request must be made within three business days of the notice of claim. The insured must receive notification that, upon receipt of the estimate, the insurer may for good reasons (e.g., estimate far exceeded original advice to insurer) elect to inspect the vehicle. Such inspection must be made within four business days following the receipt of the estimate at the claim processing office of the insurer. Such inspection shall be subject to the provisions of this section, except that the six-business-day forfeiture-of-inspection period specified in paragraph (8) of this subdivision shall become applicable after the four business days. A good faith offer of settlement sufficient to repair the vehicle to its condition immediately prior to the loss, must be made to the designated representative and, it may also be made to the insured within three business days of the receipt of the inspection and/or estimate. If there is no designated representative, the offer shall be made to the insured within the three-day period. If the insurer does not perform its own physical inspection, it is nevertheless bound by all the applicable requirements of this Part.

(11) Deductions for betterment and/or depreciation are permitted only for parts normally subject to repair and replacement during the useful life of the insured motor vehicle. Deductions for betterment and/or depreciation shall be limited to the lesser of:

(i) an amount equal to the proportion that the expired life of the part, to be repaired or replaced, bears to the normal useful life of that part; or

(ii) the amount by which the resale value of the motor vehicle is increased by the repair or replacement. Calculations for betterment, depreciation and normal useful life must be included in the insurer's claim file.

(12) Deductions for previous damage or prior condition of the motor vehicle must be measurable, discernible, itemized and specified as to dollar amount, and such deductions must be detailed in the claim file. Such deductions shall be limited to the amount by which the resale value of the motor vehicle is increased by the elimination of the previous damage or the correction of the prior condition.

(13) Estimates of repairs prepared by insurers or their representatives shall contain the following information at a minimum: identity of policyholder and/or owner/claimant; owner/claimant's address and telephone number; identity of insurer, including name, address, license number and telephone number of adjuster; year, make, model, body style, mileage, VIN, license number, color and condition of the damaged vehicle. The estimate must also contain the claim number, the date of accident and the date the vehicle was inspected. Each item of damage must be detailed as to the paint, parts and labor hours it will require to repair that particular item. If the appraisal is made at a repair shop, the registration number of the shop must be included on the estimate form.

(14)(i) If after negotiations an agreed price cannot be reached, the insurer must furnish the insured with a prescribed Notice of Rights letter (NYS APD 1), contained in section 216.12 of this Part. The requirement of this subparagraph shall not be applicable to a claim solely involving window glass.

(ii) The insurer must furnish the insured or the designated representative, at the express request of either, with the name and address of a New York State registered motor vehicle repairer, properly equipped to complete the repairs on the damaged motor vehicle (back-up shop), at a location reasonably convenient to the insured, who will repair the damaged motor vehicle at the insurer's estimated cost of repair. A location reasonably convenient to the insured shall mean: in Nassau, Suffolk and Westchester Counties and cities with 100,000 or more population, 10 miles--and in all other areas of the State, 25 miles--from the place where the motor vehicle is principally garaged; or the location of the insured's repair facility. This mileage limitation shall not apply when a repair facility properly equipped to complete the repairs is not available within the above geographical area. In such a case a properly equipped facility must be selected at a location as close as possible to the above definition of reasonably convenient to the insured. The insurer must furnish the insured, upon request, with a statement from the back-up shop that it will repair the vehicle in a manner consistent with the insurer's estimate for the amount estimated by the insurer to repair the damaged vehicle.

(15) If the insured's motor vehicle is repaired at a repair shop recommended by the insurer, for a sum estimated by the insurer as the reasonable cost to repair the vehicle, the insurer:

(i) shall select a repair shop that issues written guarantees that any work performed in repairing damaged motor vehicles meets generally accepted standards for safe and proper repairs;

(ii) shall cause the damaged vehicle to be restored to its condition prior to the loss, at no additional cost to the insured and within a reasonable time, if the repair shop it recommended does not repair the damaged motor vehicle in accordance with generally accepted standards for safe and proper repair; and

(iii) shall retain in its claim file a signed [section 2610 of the Insurance Law](#) Disclosure Statement (NYS APD 1-a), contained in section 216.12 of this Part, or other written documentation that the insured requested recommendation of a repair facility. If the insured has verbally requested a recommendation of a repair facility prior to the issuance of the prescribed Notice of Rights form, the requirement for written proof of referral shall be satisfied by a notation in the claim files as to the date of such request and the identity of the person to whom such request was made. The requirement of this subparagraph shall not be applicable to a claim solely involving window glass.

(16) Salvage vehicle branding.

(i) This paragraph shall be applicable to claims involving vehicles that are eight model years or newer on the date of the loss.

(ii) If the insurer determines that the cost to repair a damaged vehicle exceeds 75 percent of the vehicle's actual cash value and if the insurer does not take possession of the vehicle for disposition as salvage, the insurer shall require the vehicle owner to provide the title to the insurer. The insurer may withhold the entire claim payment, but must withhold at least 50 percent of its claim payment, after application of any deductible, until receipt of the title. The vehicle owner shall be advised by the insurer that the title is being requested in order to comply with [15 NYCRR 20.20\(c\)](#) and that the title will be branded as "REBUILT SALVAGE" and will be returned to the owner by the Department of Motor Vehicles.

(iii) As soon as reasonably practicable, but no later than 10 business days after the receipt of the title from the vehicle owner, the insurer shall forward the title to the New York State Department of Motor Vehicles, Title Bureau, Empire State Plaza, Albany, NY 12228.

(iv) For the purpose of determining the vehicle's actual cash value pursuant to this paragraph, an insurer shall use the methods prescribed in subparagraph (c)(1)(i) or (iii) of this section; the value of repair parts shall be determined by using the current published retail cost of the original equipment manufacturer parts or the actual retail cost of the repair parts included on the insurer's repair estimate; and the labor cost shall be computed based upon hourly labor rate and time allocations that are consistent with the insurer's repair estimates in the community where the repairs are performed.

(17) The insurer must mail or hand-deliver its payment to the insured or the designated representative within five business days after the insured has accepted the insurer's offer, or three business days after the receipt of a completed proof of loss.

(18) The insured shall have the right to receive the proceeds of any settlement in accordance with policy provisions. However, if the insured agrees and this agreement is documented in the claim file, the insurer may make the check or draft payable to the insured and the lienholder and/or the insured's designated repairer. An insurer may not condition payment of a loss upon repair of the automobile or receipt of a completed Certification of Automobile Repairs.

(19) The following additional standards shall be applicable to the settlement of private passenger automobile physical damage claims:

(i) Subsequent to payment of the claim, the insurer, in accordance with the provisions of [section 3411\(i\) of the Insurance Law](#), may request that the automobile be made available for inspection, whether or not the automobile is repaired. The inspection shall be conducted at a time and place reasonably convenient to the insured. The inspection report shall be retained in the insurer's claim file.

(ii) An insurer shall request submission of a Certification of Automobile Repairs (NYS APD 2), as contained in section 216.12 of this Part, signed and certified by the insured and the automobile repairer, under penalties of perjury, stating whether all items allowed by the insurer have been repaired and, if not, that repairs were made in accordance with the repairer's invoice. This form, together with a postage-paid return envelope, shall be given to the insured or the insured's designated representative by the insurer during the course of negotiation of the settlement amount.

(iii) The provisions of [section 3411\(i\) of the Insurance Law](#), with respect to certification and repair invoices, do not apply where the amount of damage to the insured automobile is less than the deductible applicable to the policy.

(20) Pursuant to the requirements of [section 3411\(1\) of the Insurance Law](#), whenever an insurer discovers any evidence of overcharging, improper repairs or adjustments, or any other wrongdoing by a motor vehicle repair shop, including its failure to permit an inspection of the repaired automobile, to sign the Certification of Automobile Repairs or to provide the insured with an itemized invoice, such evidence shall be forwarded, within 30 days, to:

New York State Department of Motor Vehicles

Division of Vehicle Safety

Governor Nelson A. Rockefeller Empire State Plaza

Albany, NY 12228

The insurer shall thereafter cooperate fully with the Department of Motor Vehicles in its investigation.

(c) Adjustment of total losses.

(1) If the insurer elects to make a cash settlement, its minimum offer, subject to applicable deductions, must be one of the following:

(i) The average of the retail values for a substantially similar vehicle as listed in two valuation manuals current at the date of loss and approved by this department. Manuals approved for use are--The Redbook, published by National Market Reports Inc., and The N.A.D.A. Official Used Car Guide, published by the National Automobile Dealers Used Car Guide Company. The use of other manuals may be approved by this department upon demonstration of need and suitability. If it is evident that an option has not been considered in either or both of the above valuation manuals, the insurer shall consider the value, if any, of such option in arriving at the vehicle's value and shall utilize

the best available method to value such option. The insurer may deduct documented, reasonable dealer preparation charges, up to \$100, from the average of the retail values. The insurer shall provide to the insured, no later than the date of payment of the claim, a detailed copy of its calculation of the insured vehicle's total loss value, including the valuation of options which are not considered in the base price of the vehicle.

(ii) A quotation for a substantially similar vehicle, obtained by the insurer from a qualified dealer located reasonably convenient to the insured. A reasonable location shall be within 25 miles of the place of principal garagement of the motor vehicle. The substantially similar available vehicle must remain available for purchase by the insured for a period of three calendar days subsequent to receipt of notice of its availability by the insured, and the insured must be able to purchase the substantially similar vehicle at the quoted dealer for the insurer's cash offer plus applicable deductions. The insurer must maintain in its claim file the dealer's name and location, the vehicle identification number, the dealer stock number, the mileage and the major options for the substantially similar vehicle which was the basis of its quote. The notice to the insured of the availability of a substantially similar vehicle must be sent by certified mail, return receipt requested, or be a sound-recorded conversation reflecting the date of notice. The three calendar days commence on the date the insured acknowledges receipt of notice. The insured need not purchase the vehicle used as the basis of the insurer's quotation, since the quotation merely serves as a basis for the insurer's offer. The foregoing period is satisfied at the point an insured physically verifies the existence of the substantially similar available vehicle used as the basis of the insurer's quotation. Should the insurer's research of substantially similar vehicles determine that the retail values contained in the valuation manuals, prescribed in subparagraph (i) of this paragraph, are inadequate to purchase a substantially similar vehicle, the insurer's offer should be the amount determined by such research.

(iii) A quotation obtained from a computerized database, approved by the superintendent, that produces statistically valid fair market values for a substantially similar vehicle, within the local market area that meets all the following minimum criteria:

(a) it shall produce values for at least 85 percent of all makes and models of private passenger automobiles, as defined in section 67.1(a) of this Title, for the last 15 model years, and shall take into account the values of all major options for such vehicles:

(b) it shall rely upon values derived from licensed dealers, which have minimum sales of 100 motor vehicles per year in the local market area for all vehicles of seven model years or less of age, and be based upon the physical inventory of vehicles sold within the 90 days prior to the loss and vehicles which are available; and

(c) it shall monitor the average retail price of private passenger automobiles when there is insufficient data or inventory available from licensed dealers to ensure statistically valid local market area values.

(iv) If the method used in subparagraph (i), (ii) or (iii) of this paragraph would result in a settlement offer greater than the purchase price plus the cost of substantiated improvements paid by the insured for a vehicle purchased within the 180 calendar days prior to date of loss, the insurer's offer of settlement may be limited to the purchase price, plus the cost of any substantiated improvements, less the deductible. This method of settlement shall not be applicable to motor vehicles acquired by the insured through a private sale or as a gift. A private sale is one in which the seller does not engage in the sale of motor vehicles as an occupation.

(v) If it is not possible to value the damaged motor vehicle by using an alternative method as described in subparagraph (i), (ii), (iii), or (iv) of this paragraph, the insurer shall determine the retail value by the best available method and shall explain to the insured how its offer was calculated.

(2) If the insurer elects to replace the vehicle, the replacement vehicle must be an immediately available, substantially similar vehicle that is both furnished and paid for by the insurer, subject to the deductible if any.

(3) A private passenger automobile of the current model year means a current model year automobile that has not been superseded in the marketplace by an officially introduced succeeding model, or an automobile of the previous model year purchased new within 90 days prior to the date of loss. If the insured vehicle is a private passenger automobile of the current model year, the insurer shall pay to the insured the reasonable purchase price to the insured on the date of loss of a new identical vehicle, less any applicable deductible and an allowance for depreciation in accordance with the schedule below, except where the utilization of this method of settlement would result in a lower claim payment as compared with the utilization of the methods described in subparagraphs (1)(i), (ii) and (iii) of this subdivision.

DEPRECIATION SCHEDULE

Purchase price	Depreciation per mile
Up to \$10,000	\$.15
\$10,001 to \$15,000	.20
\$15,001 to \$20,000	.25
\$20,001 to \$25,000	.30
\$25,001 to \$30,000	.37
\$30,001 to \$35,000	.45
More than \$35,000	.53

(4) Right of recourse. If, within 35 calendar days after mailing of the claim payment, the insured notifies the insurer in writing that the insured cannot purchase a comparable vehicle for the market value, as determined under the provisions of subparagraph (1)(i), (ii), (iii) or (v) or paragraph (3) of this subdivision, the insurer shall reopen its claim file and shall offer, in its discretion and subject to applicable deductions, one of the following options to the insured:

(i) the insurer shall identify and offer for settlement an amount sufficient to purchase a substantially similar vehicle, as provided in subparagraph (1)(ii) of this subdivision; or

(ii) the insurer shall pay the insured the difference between the amount of its claim payment and the cost of a substantially similar vehicle, as provided in subparagraph (1)(ii) of this subdivision, located by the insured, or the insurer, upon consent of the insured, may purchase that vehicle for the insured.

(5) The insurer shall not be required to take action under paragraph (4) of this subdivision if its documentation to the insured at the time of its final offer included written notification of the availability of a substantially similar vehicle, as provided in subparagraph (1)(ii) of this subdivision, which shall have been available for at least three calendar days subsequent to the insured's receipt of that offer. The documentation shall include the vehicle identification number, the stock number or order number.

(6) If the insurer in the process of adjusting a total loss makes a deduction for the salvage value of the insured vehicle, the insurer must furnish the insured, upon the insured's request, with the name and address of a licensed or certified salvage dealer or dismantler who will purchase the salvage for the amount deducted with no additional charges to the insured by the salvage dealer or dismantler.

(7) All applicable provisions of subdivision (b) of this section ("adjustment of partial losses" also shall apply to the adjustment of total losses, except that the insurer shall be allowed an additional five business days to comply with the requirements of paragraph (1) of subdivision (b) of this section. In the case of an unrecovered theft loss, except as provided in section 216.8 of this Part, the insurer shall make its offer for the total loss no later than the 25th calendar day following the notice of loss, if the insured has provided all information that has been requested by the insurer that is necessary to value the claim. If the insured has not provided such information by the 25th calendar day following the notice of loss, the insurer shall make its offer no later than the 5th business day following receipt of such information.

(8) This subdivision does not prohibit an insurer from issuing a stated value policy insuring against physical damage, where the amount of damages to be paid in the event of a total loss is a specified dollar amount.

(9) The superintendent shall review the operation and efficacy of the total loss provisions of this subdivision at least every five years.

(d) Unreasonable delay.

(1) Unless clear justification exists, no more than 20 percent of a representative sample of the physical damage claims selected by Department of Financial Services examiners at any office or offices of the insurer shall have a payment period in excess of 30 calendar days. A payment period is the period between the date of receipt of notice of loss by the insurer and:

(i) the date the settlement check is mailed; or

(ii) the date on which the damaged motor vehicle is replaced by the insurer.

If an insurer is in violation of this overall standard, then each such claim in excess of 30 calendar days may be treated as a separate violation.

(2) If any element of a physical damage claim remains unresolved more than 30 calendar days from the date of receipt of notice by the insurer, the insurer shall provide the insured with a written explanation of the specific reasons for delay in the claim settlement. Unless the matter is in litigation, an updated letter of explanation shall be sent every 30 calendar days thereafter until all elements of the claim are either honored or rejected.

(3) Any letter of explanation or rejection of any element of a claim shall contain the identity and claims processing address of the insurer, the insured's policy number, the claim number and the following statement, prominently set forth:

“Should you wish to take this matter up with the New York State Department of Financial Services, you may file a complaint with the department either on its website at <http://www.dfs.ny.gov/consumer/fileacomplaint.htm> or by writing to the Consumer Assistance Unit, New York State Department of Financial Services, at: One State Street, New York, NY 10004; One Commerce Plaza, Albany, NY 12257; 1399 Franklin Avenue, Garden City, NY 11530; or 535 Washington Street, Suite 305, Buffalo, NY 14203.”

(e) Repair estimates. If an insurer requires that its insured obtain an estimate or estimates of vehicle damage, the reasonable cost, if any, of such estimates shall be borne by the insurer.

(f) Loss of use. In the event of the theft of the entire vehicle, it shall be the duty of the insurer at the time of notification of loss to advise the insured of his right under the policy to be reimbursed for transportation expenses. Such notification must be confirmed in writing immediately after receipt of notice of theft. All conditions and benefits related to this coverage as stated in the policy must be contained in the notification to the insured.

(g) Subrogation agreements.

(1) Where an insured has received payment under a physical damage coverage that is subject to a deductible, the insured shall share, pro rata, with the insurer any net recovery received by the insurer from third parties. Within 30 calendar days of such recovery, the insurer must mail or hand-deliver to the insured its payment for the insured's pro rata share of the recovery.

(2) Net recovery shall be the total recovery less the insurer's allocated loss adjustment expenses attributable to such recovery. The formula for computing net recovery and the insured's share of recovery of the deductible may be stated as follows:

(i) TOTAL RECOVERY - ALLOCATED LOSS ADJUSTMENT EXPENSES = NET RECOVERY

(ii) DEDUCTIBLE/TOTAL LOSS x NET RECOVERY = INSURED'S SHARE OF NET RECOVERY

Application of Formula: Assume a loss of \$500 subject to a \$100 deductible with \$50 in allocated loss adjustment expenses:

(a) if there is full recovery of \$500:

computation of net recovery: $\$500 - \$50 = \$450$

computation of insured's share of recovery: $\$100/\$500 \times \$450 = \90

(b) If there is a partial recovery of \$300:

computation of net recovery: $\$300 - \$50 = \$250$

computation of insured's share of recovery: $\$100/\$500 \times \$250 = \50

(3) Unless the insurer returns its insured's full deductible, it shall attempt to effect full recovery in clear liability cases and shall not enter into any intercompany agreements that provide for the acceptance of lesser amounts on a formula basis.

(4) If an insurer has paid a physical damage claim that is subject to a deductible and it has elected to pursue its subrogation claim, the insurer shall promptly attempt to effect recovery. If a dispute arises between two or more insurers regarding the subrogation recovery, and the insurers are unable to resolve it, the insurer seeking recovery shall submit the dispute to binding arbitration or a court action shall be commenced no later than 180 calendar days following the payment of the claim to its insured.

(5) If an insurer has paid a physical damage claim that is subject to a deductible and it is pursuing its subrogation claim, the insurer shall notify its insured in writing of the status of its claim 120 calendar days after the date of the claim payment to its insured. An updated status letter shall be sent every 120 calendar days thereafter until the claim is either honored or rejected.

(6) If an insurer has paid a physical damage claim that is subject to a deductible and it elects not to pursue its subrogation claim where the possibility of recovery exists, the insurer shall so notify its insured in writing within 60 calendar days after it has paid the claim, except that the notification shall be given at least 30 days prior to the running of any applicable statute of limitations or period required for notice of claim. If an insurer does not notify its insured within the time periods prescribed above and the statute of limitations or period required for notice of claim has expired, the insurer shall forthwith remit to its insured the full amount of the insured's deductible.

(h) Referral of insured to the "at fault" party. There shall be no attempt to discourage an insured from filing a physical damage claim nor shall an insurer encourage its insured to assert a claim against a third party in lieu of filing a physical damage claim under the insured's policy.

Credits

Sec. filed Jan. 14, 1975; amd. filed Oct. 7, 1977; repealed, new filed May 12, 1982; amds. filed: Sept. 4, 1984; Dec. 31, 1984; March 30, 1993; Oct. 23, 1995; April 7, 1997; Nov. 6, 1997 as emergency measure; Jan. 16, 1998; Aug. 26, 1999 eff. Sept. 15, 1999. Amended (b); amd. filed Feb. 14, 2003, eff. March 5, 2003; amd. filed June 3, 2003, eff. June 18, 2003; amd. filed March 21, 2013 eff. June 1, 2013; amd. filed May 16, 2013 eff. Aug. 1, 2013; amd. filed Jan. 11, 2017 eff. Feb. 1, 2017; amd. filed May 19, 2021 eff. June 9, 2021.

Current with amendments included in the New York State Register, Volume XLVI, Issue 20, dated May 15, 2024. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7, 11 NY ADC 216.7

Compilation of Codes, Rules and Regulations of the State of New York
Title 22. Judiciary
Subtitle B. Courts.
Chapter IV. Supreme Court
Subchapter E. All Departments
Part 1250. Practice Rules of the Appellate Division (Refs & Annos)

22 NYCRR 1250.8

Section 1250.8. Form and content of briefs

Currentness

(a) Cover. The cover shall set forth the title of the action or proceeding. The upper right-hand section shall contain a notation stating: whether the cause is to be argued or submitted; if it is to be argued, the time actually required for the argument; and the name of the attorney who will argue. The lower right-hand section shall contain the name, address, telephone number and email address of the attorney filing the brief and shall indicate whom the attorney represents.

(b) Appellant's Brief. The appellant's brief shall include, in the following order:

(1) a table of contents, which shall include: (i) a list of point headings; and (ii) the contents of the appendix, if it is not bound separately, with references to the initial page of each document included and of the direct, cross and redirect examination of each witness;

(2) a table of cases (alphabetically arranged), statutes and other authorities, indicating the pages of the brief where they are cited;

(3) a concise statement, not exceeding two pages, of the questions involved, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken;

(4) a concise statement of the nature of the case and of the facts which should be known to determine the questions involved, with appropriate citations to the reproduced record, appendix, original record or agreed statement in lieu of record;

(5) the argument for the appellant, which shall be divided into points by appropriate headings distinctively printed;

(6) a statement certifying compliance with printing requirements under this Part, on a form approved by the court, as set forth in subdivision (j) of this section;

(7) in the First and Second Judicial Departments, the appellant's brief shall include as an addendum the statement required by [CPLR 5531](#);

(8) in the First and Second Judicial Departments, in any civil cause permitted to be heard on the original record, the appellant's brief shall include:

(i) a copy of the order or judgment appealed from and the decision, if any;

(ii) a copy of the opinion and findings, if any, of a hearing officer and the determination and decision of any administrative department, board or agency; and

(iii) a copy of the notice of appeal or order transferring the proceeding to this court.

(c) Respondent's Brief. The respondent's brief shall conform to the requirements of subdivision (b) of this section, except that a counterstatement of the questions involved or a counterstatement of the nature and facts of the case shall be included only if the respondent disagrees with the statement of the appellant.

(d) Reply Brief. Any reply brief of the appellant or cross appellant shall conform to the requirements of subdivision (b) of this section, without repetition. An appellant's reply in a cross appeal shall include the points of argument in response to the cross appeal.

(e) Sur-reply Brief. Absent leave of the court, sur-reply briefs shall not be permitted.

(f) Computer-generated briefs.

(1) Briefs prepared on a computer shall be printed in either a serified, proportionally spaced typeface such as Times Roman, or a serified, monospaced typeface such as Courier. Narrow or condensed typefaces and/or condensed font spacing may not be used. Except in headings and in quotations of language that appears in such type in the original source, words may not be in bold type or type consisting of all capital letters.

(i) Briefs set in a proportionally spaced typeface. The body of a brief utilizing a proportionally spaced typeface shall be printed in 14-point type, but footnotes may be printed in type of no less than 12 points.

(ii) Briefs set in a monospaced typeface. The body of a brief utilizing a monospaced typeface shall be printed in 12-point type containing no more than 10¹/₂ characters per inch, but footnotes may be printed in type of no less than 10 points.

(2) Computer-generated appellants' and respondents' briefs shall not exceed 14,000 words, and reply and amicus curiae briefs shall not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k) of this section.

(g) Typewritten briefs.

(1) Typewritten briefs shall be neatly prepared in clear type of no less than elite in size and in a pitch of no more than 12 characters per inch. The original of the brief shall be signed and filed as one of the number of copies required by section 1250.9 of this Part.

(2) Typewritten appellants' and respondents' briefs shall not exceed 50 pages and reply briefs and amicus curiae briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k) of this section.

(h) Margins, line spacing and page numbering of computer-generated and typewritten briefs. Computer-generated and typewritten briefs shall have margins of one inch on all sides of the page. Text shall be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Pages shall be numbered consecutively.

(i) Handwritten briefs.

(1) Self-represented litigants and persons filing pro se supplemental briefs may serve and file handwritten briefs. Such briefs shall be neatly prepared in cursive script or hand printing in black or blue ink.

(2) Handwritten appellants' and respondents' briefs shall not exceed 50 pages and reply briefs and amicus curiae briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance or any addendum authorized pursuant to subdivision (k) of this section. Pages shall be numbered consecutively. The submission of handwritten briefs is not encouraged. If illegible, handwritten briefs may be rejected for filing by the clerk.

(j) Printing Specifications Statement. Every brief, except those that are handwritten, shall have at the end thereof a printing specifications statement, stating that the brief was prepared either on a typewriter, a computer or by some other specified means. If the brief was typewritten, the statement shall further specify the size and pitch of the type and the line spacing used. If the brief was prepared on a computer, the statement shall further specify the name of the typeface, point size, line spacing and word count. A party preparing the statement may rely on the word count of the processing system used to prepare the brief. The signing of the brief in accordance with section 130-1.1-a(a) of this Title shall also be deemed the signer's representation of the accuracy of the statement.

(k) Briefs may include addenda that are composed exclusively of decisions, statutes, ordinances, rules, regulations, local laws, or other similar matter cited therein that were not published or that are not otherwise readily available.

Credits

Approved Dec. 12, 2017 eff. Sept. 17, 2018; amd. through Court Notices in the Oct. 31, 2018 Register eff. Sept. 17, 2018.

Current with amendments included in the New York State Register, Volume XLVI, Issue 20, dated May 15, 2024. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 22, § 1250.8, 22 NY ADC 1250.8

End of Document

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