[Service on Attorney General (Consumer Law Section) and Los Angeles County District Attorney required by Bus. & Prof. Code, § 17209]

2d Civil No. B168079

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LEE EDDINS dba VIDEO EMPIRE, et al.,

Plaintiffs and Appellants,

vs.

SUMNER REDSTONE, et al.,

Defendants and Respondents.

Appeal from Los Angeles Superior Court, No. BC244270
Honorable Victoria G. Chaney

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Substantial evidence below showed that Blockbuster—the world's largest home-video rental retailer—in an effort to reverse a devastating competitive slide, obtained favored deals from the major Hollywood studios and successfully asked them to deny comparable terms to independent video rental retailers. This evidence presented a classic case of a powerful buyer using coercion and enticement to persuade its suppliers to disadvantage a class of that buyer's competitors, in violation of the Cartwright Act, Unfair Practices Act ("UPA") and Unfair Competition Law ("UCL"). In the face of such evidence, the granting of summary judgment for Blockbuster and its studio cohorts was error.

Until late 1997, Blockbuster and the independents operated on a level playing field, because distributors (from whom the independents purchased) and Blockbuster paid studios the same prices for videotapes. Both operated under a "managed dissatisfaction" business model: since there were not enough new-release tapes to meet consumer demand, retailers had to convince consumers to rent another title. At that time, independents were out-competing Blockbuster by charging lower prices and providing better service.

In late 1997, Blockbuster and its parent Viacom, facing a financial crisis, demanded that each studio allow Blockbuster to buy its entire movie output under revenue-sharing terms that, unlike all prior deals, charged a revenue share low enough to permit Blockbuster stores to profitably obtain sufficient copies of every new movie to meet customer demand for new titles ("output revenue-sharing deals"). Using coercion (threatened and actual purchase reductions) and enticement (increased revenues and supracompetitive pricing), Blockbuster got the studios to agree to deny the independents Blockbuster's favored pricing and other terms.

Within a year, Blockbuster obtained output revenue-sharing deals with each major studio. At the same time, each studio refused to provide Blockbuster-comparable terms to the independents' distributors, despite distributors' and independents' myriad requests for them. Pursuing a new, "guaranteed to be there" marketing campaign that the studios subsidized, Blockbuster increased its market share from 24% to 40% within only three years, mostly at the expense of the independents, who still had to operate under the "managed dissatisfaction" model. Over 5000 independents went out of business, depriving customers of the convenience, lower pricing and better service they provided.

In this action, 251 independents sued Blockbuster and the studios for conspiracies to restrain trade, unfair trade practices and unfair competition. The trial court denied class certification. (See pending 2d Civil Appeal No. B157154.) The instant appeal concerns the entry of summary judgment based on findings that (a) the evidence is insufficient to infer a conspiracy; (b) UPA requirements are not met; and (c) the demise of the Cartwright Act and UPA claims precludes the UCL claim.

The summary judgment must be reversed.

The trial court held plaintiffs did not meet the antitrust conspiracy summary judgment standard of presenting "evidence that tends to exclude the possibility that the defendants acted independently rather than collusively . . . ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856 ["*Aguilar*"].) That test prohibits plaintiffs from relying *solely* on evidence of inherently equivocal conduct to prove conspiracy—conduct as consistent with collusion as independent action—such as oligopolists' consciously parallel pricing. Plaintiffs amply met the standard here.

While the substantial evidence summarized above showed the studios engaged in consciously parallel conduct, and that Blockbuster and

the studios had the motive and opportunity to conspire, that was not the sole evidence of conspiracy. Plaintiffs presented much more:

(a) admissions by Fox, and other evidence, that Blockbuster *requested* the studios to deny the independents access to Blockbuster's favored terms;

(b) evidence that each studio refused to grant distributors' and independents' myriad requests for Blockbuster-comparable terms, thus tending to show that the studios *agreed* to Blockbuster's requests;

(c) evidence that, by denying Blockbuster-comparable terms to the independents, each studio *acted contrary to its independent self-interest* because (1) the studios could have increased revenues from independents at little risk by providing distributors with Blockbuster-comparable terms; (2) the studios admitted it was in their self-interest for all retailers to have Blockbuster-comparable terms; (3) a studio would not price-discriminate in Blockbuster's favor without an understanding that the other studios would do the same; and (4) the studios admitted it was against their self-interest to knowingly increase Blockbuster's market share and disadvantage the independents; and

(d) the studios' proffered explanations for failing to provide Blockbuster-comparable terms to distributors—that distributors and independents did not want, or could not do, output revenue sharing deals—were false and *pretextual*.

In short, plaintiffs presented evidence of conspiracies to restrain trade, which, if found by a jury to have existed, would result in the liability of both Blockbuster and the studios under the Cartwright Act.

But even without collusion, any studio's unilateral failure to provide comparable terms violated the UPA and UCL. Courts must broadly construe claims to effectuate the UPA's purpose—to prevent sellers from acquiescing to large chains' demands for favored terms designed to drive independent retailers out of business. (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1258-1261 ["*ABC Internat. Traders*"].) The trial court, however, narrowly construed the UPA and committed a series of other errors that denied plaintiffs their right to present their UPA and UCL claims to a jury.

"[B]oth California and federal decisions urge caution in granting a defendant's motion for summary judgment in an antitrust case." (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 321.) Here, far from showing caution, the trial court narrowly construed both plaintiffs' evidence and the law—precisely opposite to the governing rules—and thereby usurped the jury's role to resolve disputed facts and determine liability. The judgment must be reversed and the case remanded for trial.

STATEMENT OF THE CASE

A. Parties/Claims.

Plaintiffs/appellants are 251 small chain and single store video rental retailers. (AA 13-21.)[1] They sued Blockbuster Inc.; its parent Viacom, Inc.; Sumner Redstone, Viacom's majority stockholder, chief executive officer and board chairman; and the home-video affiliates of the seven major Hollywood movie studios—Paramount Home Video, Inc.; Buena Vista Home Entertainment, Inc. ("Disney"); Columbia Tri-Star Home Video, Inc. ("Columbia"); Universal Studios Home Video, Inc.; Twentieth Century Fox Home Entertainment, Inc.; Time Warner Entertainment Company, L.P. dba Warner Home Video; New Line Home Video, Inc., a Warner affiliate; and Metro-Goldwyn-Mayer Home Entertainment ("MGM"). (AA 22-23.)[2]

Viacom owns and controls Paramount and Blockbuster. (AA 160, 386.) Redstone controls Viacom, Blockbuster and Paramount. (AA 4722-4726.)

The operative complaint alleges that Blockbuster, Viacom and Redstone used coercion and enticement to get the studio defendants to provide Blockbuster highly favorable revenue-sharing deals and to agree "with Blockbuster and among themselves that they would not make the

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[1] "AA" means Appellants' Appendix. Appendix volumes V, VI and VII contain condensed-reporters-transcript pages of a related Texas federal district court case. As those volumes' pages contain multiple condensed-transcript pages, we cite to that reporter's transcript by "AA" page and then the condensed-transcript ("CT") page(s), e.g., AA 1382-1383(CT1073-76) means Appendix pages 1382-1383, condensed-transcript pages 1073-1076.

[2] We refer to the seven major studios as "studio defendants." This appeal does not involve Warner, New Line and MGM because they settled with plaintiffs. We refer to the non-settling studios—Paramount, Disney, Columbia, Universal and Fox—as "respondent studios."

secret revenue sharing agreements available to Plaintiffs and other independent retailers, but instead would maintain higher prices for videocassettes that are sold to independent retailers." (AA 27-28.)

The complaint alleges violations of: (1) the Cartwright Act; (2) the UPA, Business and Professions Code sections 17045-17048; and (3) the UCL, Business and Professions Code sections 17200-17208. (AA 31-34.)

B. Summary Judgment.

Defendants successfully moved for summary judgment, claiming there was insufficient evidence of concerted action and UPA and UCL violations. (AA 43, 7737.) The court sustained defendants' objections to five exhibits concerning distributor Ingram Entertainment. (AA 7755, 7757.)

Judgment was entered April 17, 2003. (AA 7759.)[3]

C. This Appeal.

On June 10, 2003, plaintiffs filed a timely notice of appeal from the April 17, 2003 judgment and all orders made final by it. (AA 7781.) This Court has jurisdiction pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1).

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[3] Defendants unsuccessfully moved for summary judgment on res judicata grounds, relying on a judgment in an antitrust action filed by three retailers (not among plaintiffs here) against Blockbuster and the studio defendants in Texas federal district court. (AA 116, 7749-7755.)

STANDARD OF REVIEW

An appellate court reviews de novo a grant of summary judgment in defendants' favor. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404.) It must construe all evidence in the light most favorable to plaintiffs, with all disputed facts, reasonable inferences and credibility questions resolved against defendants. (*Aguilar*, *supra*, 25 Cal.4th at p. 843.)

"In applying this exacting standard of review, . . . both California and federal decisions urge caution in granting a defendant's motion for summary judgment in an antitrust case." (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court*, *supra*, 114 Cal.App.4th at p. 321 [construing Cartwright Act and UPA claims].)

STATEMENT OF FACTS

A. The Playing Field Was Level Until Late 1997.

The studio defendants sell videos directly to some large chains, including Blockbuster, who then rent them to consumers. (AA 1493(CT1509), 1748(CT2520-21).) They also sell videos to distributors, who resell them to independent retailers, including plaintiffs, who then rent them to consumers. (*Ibid.*) In 1997, Blockbuster was the nation's single largest video rental retailer, with 24% of the national market, four times the next largest retailer's share. (AA 1202(CT358), 1497(CT1525), 2528-2529, 3379.) However, independent rental retailers as a group controlled 55% of the market. (AA 1211(CT392), 1509(CT1576).)

The "life blood of the video business is the new release business." (AA 1418(CT1215).) In 1997, new releases comprised 82% of the demand for video rentals. (AA 1536(CT1676).) That year, the studio defendants controlled almost 90% of the home-video market. (AA 3706, 4876.) The

market is national; the studios do not vary their video prices geographically. (AA 1493(CT1508), 1692(CT2293-94), 4572-4573, 4691-4692, 4708.) The market is oligopolistic at the studio level and "susceptible to the formation of cartels"; the studio defendants "have a history of collusion and price fixing." (AA 4887-4888, 4896.)

Until late 1997, the studio defendants provided only two options for purchasing rental tapes, both equally available to Blockbuster and distributors. (AA 1189(CT305-06), 1311(CT789-91), 1386-1387(CT1089-91), 1494(CT1511-12), 1559-1560(CT1775-77), 1641(CT2095-96), 1748-1749(CT2521-23).)

The first option was traditional sales at a stated price; in 1997, Blockbuster and distributors both paid about $65 per tape. (AA 1189(CT304), 1311(CT788), 1386(CT1089), 1493(CT1508-09), 1559-1560(CT1775-76), 1748(CT2521), 2141.)

The second option was "cherry-pick" revenue sharing offered through distributor Rentrak. (AA 1189(CT305-06), 1252-1253(CT559-60), 1311-1312(CT790-93), 1387(CT1090-91), 1494(CT1511), 1560(CT1776), 1748-1749(CT2522-24), 1761(CT2573).) Under that option, studios sold tapes for a low up-front fee plus a percentage of the retailer's revenues from tape rentals. (AA 1254(CT564).) It was called "cherry-pick" because the retailer selected the specific tapes to purchase. (AA 1302(CT754), 1356(CT962).)

The cherry-pick deals were unprofitable for retailers because the studios charged too high a revenue share. (AA 1191(CT312-315), 1254(CT564-66), 1416(CT1207-08), 1428(CT1255), 1443(CT1308), 1480(CT1455), 1482(CT1463), 1485(CT1478), 1568(CT1808-09), 1603-1604(CT1949-52), 1836(CT2873), 2147, 4716.) Redstone knew that "under the Rentrak arrangement the studios' split was higher than the

retailer could afford." (AA 2147, 4736.) Consequently, retailers used cherry-pick revenue sharing only for short-term promotional purposes. (AA 1387-1388(CT1093-94), 1497-1498(CT1526-27), 1568(CT1808-09), 1603-1604(CT1949-52), 1751-1752(CT2533-36), 2273, 4717-4718, 4836-4838.)

By 1997, these two pricing methods had created an artificial shortage of new-release tapes. (AA 1252(CT556), 1496-1497(CT1520-25), 1536(CT1676), 2187.) The $65 traditional price and the studios' cherry-pick revenue share were too high to permit Blockbuster or the independents to buy sufficient copies ("copy depth") of all new releases ("copy breadth") to meet customer demand. (AA 1189-1191(CT307-15), 1252(CT556), 1312(CT795), 1496(CT1521), 1536(CT1676), 2141, 2147, 2500.) Retailers therefore operated under a "managed dissatisfaction" model: Customers unable to find a new movie they wanted had to be convinced to choose another movie. (AA 1191(CT315), 1231(CT474), 1252(CT556), 1536(CT1677), 2141-2142.)

B. The Independents Beat Blockbuster On The Level Playing Field.

By 1997, Redstone admitted, the independents were out-competing Blockbuster on this level playing field (AA 1186(CT294-95), 1226(CT454), 1561(CT1781), 1734(CT2464), 4733), generally offering lower prices and better service (AA 1186(CT295), 1886-1887(CT3072-75), 4888).

Blockbuster was losing market share to the independents. (AA 1186(CT295), 1203(CT361-62), 1495(CT1515-16), 1561(CT1781), 1753(CT2541), 1889(CT3084), 3162, 4830.) A 1997 study concluded, "[i]ndependents are on the rise, while chains, including Blockbuster, are on the decline." (AA 3162; see also AA 4733 [discussion re document

describing "mom and pop stores" as Blockbuster's "biggest market share enemy" in "virtually every market"].)

As a result, Blockbuster "was failing" and "running out of money." (AA 1186-1187(CT293-96).) In Redstone's words, "Blockbuster had tanked." (AA 1186(CT293), 2135.)

Blockbuster's troubles hurt both Viacom and Redstone, who owned 100 million Viacom shares. (AA 1187(CT296-98).) Blockbuster's failures caused Viacom's stock price to plummet, resulting in a $3.7 billion loss to Redstone personally. (AA 1186-1187(CT293-98), 1548(CT1725), 2135-2140, 4731-4732.) Redstone was "humiliated" and "couldn't sleep at night because of what was happening to Blockbuster." (AA 1188(CT302), 1217(CT417), 2136.)

Blockbuster "was taking Viacom and [Redstone] personally down the tubes with it." (AA 2143, 4728.)

C. In Late 1997, Blockbuster Orchestrated A Scheme To Seize Market Share From The Independents.

1. Blockbuster demanded revenue-sharing deals that permitted profitable copy depth and breadth.

In Summer 1997, Redstone demanded lower pricing from the studios to allow Blockbuster profitable copy depth and breadth. (AA 1192(CT316-17), 1235(CT488-89).) Blockbuster knew that *both* copy depth and breadth were needed to satisfy consumer demand. (AA 1190(CT308-09).) It told the studios that it was "not interested in 'cherry picking' your product." (AA 1752(CT2536-37), 2273, 2648, 4305, 4838.)

Because the existing sale and cherry-pick programs did not permit copy depth or breadth, Blockbuster demanded new, lower revenue-sharing pricing that would allow sufficient copies of *every* new movie, i.e., the studio's entire output. (AA 1194(CT325) [Redstone: "[w]e thought we

could build our business best if we had what we called an output deal"], 1908(CT3160) [Blockbuster's president: Blockbuster wanted to guarantee customers it would have all new releases], 1312(CT794-95) [Universal: "Blockbuster wanted revenue-sharing terms that would allow it to be able to afford to get copy depth on all titles"], 1229(CT467), 1787(CT2670), 1643(CT2104).)

Under these new deals, each studio agreed to provide Blockbuster revenue sharing on its entire movie output for a low up-front fee (usually a few dollars) and a revenue percentage on rentals (and sometimes other fees), which together yielded a revenue share to the studio substantially less than the studio's share under the prior revenue-sharing deals. (AA 1196 (CT332-35), 1314(CT801), 1316(CT808-09), 1371-1372(CT1028-30), 1502-1503(CT1548-52), 1658(CT2163), 1668(CT2204), 1837(CT2874-75), 2147-2148, 2273.) Although the details of Blockbuster's output deals with each studio varied, their ultimate economics were simple and—in Redstone's words—"very similar." (AA 1196(CT333-35).) Under each, the studio's ultimate share of retailer revenue was about 40%. (AA 165, 1893(CT3101), 1899(CT3123), 2148, 2191, 2693, 2764.)[4]

This reduction in the ultimate share owed to the studios enabled Blockbuster to obtain profitable copy depth on all studio titles. (AA 1209 (CT384-85), 1322(CT833-34), 1499(CT1531-32), 1563-1564(CT1790-92), 1837(CT2874-75).) It drastically lowered Blockbuster's marginal and average cost per tape, permitting Blockbuster to "always have enough tapes

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[4] Although revenue-sharing deals include a specific per-transaction revenue split, the studio's *ultimate* revenue share results from factoring in every economic term, including any up-front or back-end fees, any minimum purchase or payment obligations, and revenue splits for sales of previously viewed tapes. (AA 165, 1371(CT1028-29), 2275, 3131, 4307, 4460.)

to meet consumer demand." (AA 4890; see AA 1209 (CT385), 4715-4716.)

Also, each deal allowed Blockbuster to obtain roughly 2 ½ to 3 times more copies than before, while committing Blockbuster to spending only the amount it had previously spent on traditional sales. (AA 1195 (CT331), 1318(CT817-18), 1361-1363(CT989-94), 1377(CT1052-53), 1395(CT1122), 1543(CT1707), 1551(CT1737-39), 1647(CT2119), 1672(CT2219-20), 1683(CT2263), 1829(CT2839), 1851-1852(CT2931-34), 2504, 7318.) If the additional copies generated increased rentals and thus increased revenues, Blockbuster and the studio shared the upside. (*Ibid.*; AA 165, 456, 2191, 2220.) The whole idea of the new model was that Blockbuster would "get more tapes for the same money." (AA 1543 (CT1707).)

Although the deals committed Blockbuster to purchasing a studio's annual output before movies were released, each deal contained a purchasing "matrix" that based Blockbuster's purchasing obligations for any particular new movie on that movie's *actual* box office performance and Blockbuster's historical purchases at that box office level. (AA 1362-1363(CT993-94), 2504, 2611, 7318.) "[T]here was an obligation by Blockbuster to take in the base, which was effectively equivalent to what [Blockbuster] used to buy." (AA 1318(CT817).) This ensured the studio would receive at least the revenues received previously from traditional sales. (AA 4889.)

For movies that performed poorly at the box office, the studios imposed minimal purchasing requirements on Blockbuster and often did not require Blockbuster to guarantee that it would pay a specific per-tape price—in stark contrast to the studios' deals with distributors. (AA 1647-1648(CT2120-22), 1656(CT2155) [no guarantee on Columbia movies with box office revenues below $10 million (80% of titles Blockbuster received),

allowing Blockbuster to obtain most for $4; Columbia imposed $28 guarantee on all titles purchased through distributors], 1378(CT1054-55) [non-theatrical Universal titles available to Blockbuster for 83¢ to $3.33 with no guarantee; same titles $6 under Universal-Rentrak deal], 1376-1377(CT1049-52) [Universal guarantee for movies below $6 million covered only three titles], 1750-1751(CT2530-31) [Blockbuster-Fox deal $2 per-tape up-front fee with no guarantees; Fox-Rentrak deal $3.60 up-front fee, per-tape guarantees ranging from $15 to $31], 5089, 5206, 5208-5209 [Disney-Blockbuster deal $7 per-tape up-front fee with no guarantees; Blockbuster-distributor deals $8 up-front fee, per-tape guarantees ranging from $18-28].)

In addition to the lower pricing, the studios increased Blockbuster's competitive advantage through substantial promotional support to help Blockbuster advertise its newfound copy depth and breadth. (AA 1228(CT462), 1339(CT902-03), 1922(CT3214-15), 3379, 3712.) Blockbuster commenced a "guaranteed to be there" program that guaranteed customers would find a copy of any new movie they wanted to rent. (AA 1210(CT388), 1339(CT902).)

2. The studios knew about each others' deals.

Redstone first met with Paramount—which he controlled (AA 4722-4726)—to determine how to get the other studios to accept Blockbuster's plan (AA 1192-1193(CT318-21), 1811-1813(CT2769-75)). Paramount and Blockbuster began output revenue sharing in late 1997, but for appearance purposes delayed announcing an agreement until Blockbuster signed the largest studios. (AA 1193(CT321-22), 1200(CT350), 1813-1814(CT2777-80), 2150, 4738.)

By late 1997, Blockbuster had obtained output revenue-sharing arrangements with several studios. (AA 1199(CT344-46), 1226(CT452-53), 1884-1885(3064-66), 3973.)

Blockbuster signed a contract with Disney first, in November 1997, because it was "number one in th[e] video business." (AA 1197(CT338-39), 2149, 2593.) Columbia started output revenue sharing with Blockbuster in late 1997 and signed a long-form contract in August 1998. (AA 1226(CT452-53), 1641(CT2095), 1885(CT3066), 2616.) Warner signed a contract in April 1998. (AA 1246(CT535).) Blockbuster knew every studio "had to play" once Disney, Warner and Paramount were on board, because those three studios comprised over 50% of the market. (AA 1200(CT348-49), 1535(CT1675), 2151.) Universal started output revenue sharing with Blockbuster in April 1998 and signed a long-form contract that October. (AA 1312-1313(CT794-97), 3259.) Fox began in September 1998 and signed a contract that November. (AA 523, 2414.)

Blockbuster informed each studio about the deals it had proposed to or already obtained from other studios. (AA 1753-1756(CT2539-51), 1820-1821(CT2804-06), 1899(CT3122-24), 2378, 2380, 3027, 3035, 3037.) After obtaining a commitment from a studio, Blockbuster notified the other studios. (AA 1197-1198(CT339-40), 4735, 4737-4739.)

The studios also knew the general terms of each others' deals with plaintiffs' distributors. (E.g., AA 2205, 2409, 3410.) The studios admitted they routinely obtained, through Blockbuster and distributors, each others' current pricing and contract terms with all wholesale customers, including all large chains and distributors. (AA 1325(CT846-47), 1365(CT1002), 1517(CT1609-10), 1804-1806(CT2740-49), 1821(CT2807-09), 4466-4467, 4485, 4698-4699, 4846.)

Although the studios' contracts with Blockbuster and distributors were supposed to be confidential (AA 1246-1247(CT535-36), 1514(CT1595-97), 1802(CT2731), 1821(CT2808), 4455), their files brim with each others' "confidential" documents and comparisons of "confidential" pricing. For example,

- Fox's files contained the "confidential" Disney-Blockbuster contract and a grid detailing the key terms of Disney's agreements with Blockbuster and Rentrak and other distributors. (AA 1545(CT1712-15), 1802(CT2732), 1809(CT2761), 2409, 3423-3441.) Fox's head lawyer wrote, "Disney Deals," "Confidential" on the pricing grid. (AA 1516(CT1604-05), 1800-1804(CT2725-40), 1809(CT2761), 2409; see also AA 2279-2281 [Fox analysis of Disney deal].) Disney admitted there was "[n]o legitimate reason whatsoever" for its Blockbuster contract to be in Fox's files and it was "highly illegal." (AA 1514 (CT1598), 1516(CT1606), 1546-1547(CT1717-22), 4580-4581.)
- Universal's files contained a Disney document describing Disney's revenue-sharing proposal to distributors. (AA 3410.)
- Disney's files contained data regarding Fox's 1998 pricing to distributors. (AA 4698-4699.)
- Columbia's files contained its president's handwritten notes documenting Disney's pricing to Blockbuster and Rentrak. (AA 2613, 4480-4484.)
- A Warner memo described a proposed Disney distributor deal and recommended following it. (AA 1244-1245(CT527-28), 1517(CT1608-09), 2205.)
- Paramount's files contained a summary of Blockbuster's "Revenue Sharing deals currently in place." (AA 3027.)

3. Defendants knew the deals gave Blockbuster a competitive advantage.

Redstone knew in 1997 that some revenue-sharing deals work for retailers and others do not. (AA 1197(CT336-37), 1921(CT3212), 2147-2148.) If the studio receives too high a revenue share, the retailer cannot make a profit. (*Ibid.*) Redstone demanded the new deals because he knew the existing revenue-sharing deals had a revenue share "higher than the retailer could afford" and only a lower share allowed profitable copy depth/breadth. (AA 2147-2148, 4736.) In Redstone's words, Blockbuster "got the deal that works." (AA 1197(CT337).)

Redstone also knew that, because *both* copy depth and breadth were needed to satisfy consumers, the output deals afforded Blockbuster a tremendous advantage over competitors denied comparable terms. (AA 1190(CT308-10), 1194(CT325), 1209(CT384-85), 1210(CT389-90); see also AA 2712 [Blockbuster acknowledging "copy depth advantage" and "[s]ignificant competitive advantages" from deals], 2739.)

The studios likewise knew that retailers needed both copy depth and breadth to meet consumer demand (AA 1538-1540(CT1686-92) and that too high a studio revenue share precluded retailers from obtaining them (AA 1500(CT1540)). They also knew the output deals would cause Blockbuster to out-compete any retailer denied access to comparable pricing. (AA 2333 [Fox: "The increased copy depth and lower cost to Blockbuster will place Blockbuster at a severe competitive advantage" and give Blockbuster "disproportionate market share"], 2266 [Warner: "Revenue sharing will give Blockbuster copy depth advantage over other retailers allowing it to grow marketshare through low pricing and guaranteed availability programs" and Blockbuster will likely "exercise its marketshare to eliminate competition"], 1406(CT1169) [Universal conceding that if "Blockbuster has a program available to it that would

allow it to get copy depth on all titles, . . . any retailer out there that did not have such a program available to it would be on an unlevel playing field with Blockbuster"].)

4. Blockbuster demanded that the studios deny independents terms comparable to Blockbuster's.

Blockbuster's goal was to exploit the lower pricing and copy depth/breadth from its new deals to seize market share. (AA 1210(CT388-91).) Its 1998 Business Plan projected Blockbuster increasing its market share from 25% to 50% (AA 2235)—an inherently dubious goal if studios were going to provide Blockbuster-comparable terms to distributors, since independents had out-competed Blockbuster when distributors paid the same prices as Blockbuster (see pp. 8-9, above).

When negotiating with the studios, Blockbuster discussed its financial troubles and market-share decline and told them—both orally and by providing its 1998 Business Plan—that it intended to use its new deals to double its market share to 50% by "'owning' new release availability." (AA 2235-2236 [copy of Blockbuster Plan in Columbia's files], 2348-2349 [copy in Fox's files], 1650-1651(CT2131-34), 1754(CT2544-45).)

More specifically, during a break at a May 1998 meeting between Fox and independent retailers, a Fox vice-president confided to a retailer in the hallway "that Blockbuster wanted a special deal" and that Blockbuster "made [it] very clear" that it "*did not want [the special deal] to be offered to independents*." (AA 4434-4435, emphasis added; see also AA 4436.) According to the Fox vice-president, Blockbuster specifically told Fox that Blockbuster did not want the independents "to have access" to the special deal. (AA 3557.) Although the Fox vice-president declined to discuss the deal's details, he said Blockbuster "ha[s] been banging down [Fox's] door and [Fox] ha[s] been resisting . . . ." (AA 4434.) At the time of the May

1998 meeting, Blockbuster had commenced output revenue-sharing arrangements with every studio but Fox. (See chronology, pp. 13-14, above.)

Other Fox personnel made similar statements. Fox's President told the assembled retailers "that Blockbuster had requested exclusivity in terms" and Blockbuster "was insistent that whatever agreement or whatever terms offered to Blockbuster were offered only to Blockbuster." (AA 4428-4431.) Fox's president said that when Fox resisted Blockbuster's exclusivity demand, Blockbuster said that "was not agreeable to Blockbuster." (AA 4430; see also AA 3561.)

In addition, internal memoranda prepared at the highest levels of the studios' home-video divisions documented Blockbuster's demand for favored terms:

- A December 1997 Fox memorandum described Blockbuster as seeking a "favored revenue share relationship" versus Fox's other customers. (AA 4361.)
- A February 1998 Fox memorandum recognized that "[t]he increased copy depth and lower cost to Blockbuster will place Blockbuster at a severe competitive advantage over other rental retailers" (AA 2333)—which would be true only if those other retailers were denied the Blockbuster terms.
- A February 1998 Warner memorandum stated, "It is likely that the trade will know there is a difference in the revenue split with Blockbuster and with everyone else, and give additional support to studios who have not made such a deal with their largest competitor." (AA 2206.)
- A synopsis of Warner's first meeting with Viacom's chairman stated that "[p]rovid[ing] [Blockbuster's] requested concessions" could pose significant risks because Warner must "legally provide requested price

concessions to all retailers in same class of trade" and the concessions "[c]ould spur government inquiry into video industry pricing practices." (AA 2213.) Warner's witnesses offered no explanation for this language other than that Blockbuster was seeking favored pricing. (AA 1237(CT496-98).)

- An October 1997 Disney memorandum seeking CEO approval of Blockbuster deal states that "Blockbuster represents 20-25% of the rental business and we hope to roll this out to a few other key retailers representing another 15-20%." (AA 2500.) A Disney witness confirmed that the omitted 55% were the independent retailers. (AA 1491(CT1501-02), 1509-1510(CT1576-79).)[5]

5. Blockbuster used coercion and enticement.

• ***Coercion***. Blockbuster threatened to reduce its purchases if a studio refused to provide favored terms, and it actually carried out its threats whenever a studio balked. (AA 2216 [Blockbuster will "target[] studios who do not provide concessions"], 2270 [Blockbuster has made it "very apparent" it will reduce purchases absent price concessions], 1736-1737(CT2472-77) [Blockbuster "pressur[ing]" Fox with "decreased purchases" for "special deals" not to be provided independents], 2212, 2331, 4712, 142A-143, 146A, 150.)

Fox, for example, was the last studio to agree to a Blockbuster deal, and it did so only after Blockbuster drastically reduced its purchases in response to Fox's reluctance. (AA 143, 736-744, 1736(CT2472), 1773-

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[5] Disney and some other studios eventually offered comparable output deals to some other large chains which bought from studios directly, including the second largest chain, Hollywood Video, which had 6% of the market compared to Blockbuster's 24% and the independents' 55%. (AA 1211(CT392), 1497(CT1525).) But they never offered comparable terms to the independents' distributors. (Pp. 21-25, below.)

1774(CT2616-21), 1795-1796(CT2705-06), 2411, 4710-4712.) At the time of Fox's May 1998 meeting with independents, where Fox admitted Blockbuster was insisting the studios deny comparable terms to independents, "it was widely known that Fox was a holdout from doing a deal with Blockbuster" and that "Fox was being penalized with decreased purchases on the part of Blockbuster." (AA 1736(CT2472).) Fox called the meeting to tell the independents that it was not "giving into the pressures of Blockbuster" and "we are your friends." (AA 1736(CT2474).) But Fox ultimately acquiesced to Blockbuster's pressure. (AA 2414; pp. 21-25, below.)

• ***Enticement.*** *First*, under every deal but Warner's, Blockbuster agreed to terms that gave the studio a much greater percentage increase in revenues (versus revenues under the prior pricing models) than Blockbuster received. (AA 2762.) Warner and Blockbuster ended up with the same percentage revenue increase, but Warner received special DVD-related concessions. (*Ibid.*; AA 1200-1201(CT351-53), 1243-1244(CT523-24), 4738, 5038.) Although the studios' revenue percentages under Blockbuster's output deals were lower than under the prior cherry-pick deals, the share reduction permitted copy depth on all titles, which significantly increased the retailer's rentals and thus its and the studios' total revenues. (AA 1200(CT350-51), 1224(CT446), 1860(CT2966-67), 3387.)[6] Since the deals committed Blockbuster to spending at least what it spent in prior years and the studios shared any upside with Blockbuster from rental increases, the studios achieved the revenue increase without significant increased risk. (P. 12, above; AA 1395(CT1122), 1487-1488 (CT1485-87),

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[6] See AA 1491(CT1499-1500), 2524 (44% revenue increase to Disney), 3374, 3376 (40% increase to Universal), 1664(CT2187) (59% increase to Columbia), 1775(CT2623-25) (66% increase to Fox), 3016 (81% increase to Paramount).

1543(CT1706), 1550-1551(CT1735-36), 2500.) Plaintiffs' damages expert concluded that the studios' revenue gains from the Blockbuster deals "more than offset the loss in revenue from independent retailers." (AA 752.)

Second, according to plaintiffs' antitrust expert, Dr. James Sweeney, a Stanford economist, the prices Blockbuster agreed to pay the studio defendants under its new deals exceeded the price that would have existed in a non-collusive, competitive market. (AA 4912-4913, 5034-5038, 5081.) Blockbuster, in effect, paid the studios a premium to obtain its favored deals. (*Ibid.*)

D. The Studios Agreed To Deny The Independents Access To Blockbuster's Favored Terms.

1. The studios charged distributors far higher prices than Blockbuster.

a. The studios did not provide Blockbuster-comparable deals to distributors.

Because Redstone knew a studio's revenue share under the Rentrak cherry-pick deals was "higher than the retailer could afford" (AA 2147, 4736), he demanded the studios accept a revenue share low enough to allow copy depth and breadth (AA 1190(CT308-11), 1197(CT337), 1209(CT384-85), 1234-1235(CT487-88)). After agreeing to charge Blockbuster a substantially lower share, the respondent studios never reduced their Rentrak shares or offered distributors any new revenue-sharing deals with a share low enough to permit profitable copy depth and breadth:

- Fox and Universal kept their existing, unaffordable Rentrak cherry-pick deals in place. (AA 1313-1314(CT799-800), 1315(CT805), 1324(CT842), 1749(CT2523-2524), 1761(CT2573).)
- In 1988 and 1989, Disney offered distributors new cherry-pick programs that charged respective revenue shares 17 and 12 percentage points *higher* than what Disney charged Blockbuster; even the lower share

equaled Universal's unaffordable Rentrak share. (AA 5089; see AA 5085-5086.)

- Paramount's only revenue-sharing offer to distributors was a June 1999 Rentrak cherry-pick deal charging a revenue share 15 percentage points higher than Paramount's Blockbuster deal and as high as the worst unaffordable Rentrak deals. (AA 1815(CT2782), 1819(CT2799-2800), 5103.)
- In August 1998, Columbia offered a cherry-pick program to distributors charging a revenue share 20 percentage points higher than its Blockbuster deal and equal to the worst unaffordable Rentrak deal. (AA 1645(CT2111), 5094; see also AA 1645-1650(CT2111-29).)

Dr. Sweeney, analyzing every deal the respondent studios offered, determined their ultimate revenue shares under their distributor deals averaged 11 to 20 percentage points *higher* than their Blockbuster deals:

Studio	**Studio's revenue share under Blockbuster terms**	**Studio's revenue share under distributor terms**	**Difference**
Columbia	37%	57%	20%
Fox	35%	51%	16%
Disney	42%	57%	15%
Paramount	42%	57%	15%
Universal	43%	54%	11%

(AA 5085-5086, 5089, 5094, 5100, 5103, 5106.) The lowest differential—the 11% Universal differential—involved a Rentrak deal with a studio share Redstone admitted was higher than retailers could afford. (AA 1313(CT799), 1315(CT805), 2147, 4736.) Since profit margins in the

video retailing business are "small, often under 10%," the Universal-Rentrak deal was non-viable; the 11% higher cost of goods versus Blockbuster exceeded "the 10% profit typically earned by video retailers." (AA 5021.) The other respondents' deals were non-viable for the same reason. (*Ibid.*)[7]

A 1999 study by video-industry expert Mars & Co. concluded that the studios' revenue-sharing programs to distributors "are non-starters," and that independents needed a "re-negotiation of revenue sharing deals to more 'equitable' terms." (AA 3818, 3826, 3876.) Mars & Co. found that (a) independents complained the studios' "[p]rices are too high" and the available deals not viable because the studios' revenue share "is too high"; and (b) independents "unanimous[ly] suggest[ed] a 60-40 split." (AA 3889.)

In mid-1999, Universal's staff similarly concluded that Blockbuster was rapidly gaining market share at the expense of independent retailers "who are unable to compete," and that independents needed "more competitive" revenue-sharing terms, including output options through distributors. (AA 3369, 3394; see AA 1329-1331(CT863-68).) Universal's staff acknowledged in January 2000 that "[m]ost small retailers still don't have reasonably priced access." (AA 3722; see AA 1337-1338(CT892-98).)[8]

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[7] Warner and MGM—who have settled with plaintiffs—offered distributors revenue-sharing deals in 1998 that, unlike respondents' offers, were output deals and charged a revenue share facially similar to what Blockbuster paid. (AA 5022-5025.) Respondents have characterized these deals as identical to Blockbuster's. (1/23/03 Reporter's Transcript, p. 73.) But Warner's and MGM's distributor deals differed from their Blockbuster deals in other ways that made them non-viable. (AA 5022-5025, 1305(CT764-67).)

[8] The studios' expert admitted that independents seldom used the

(continued...)

Nonetheless, no studio ever offered distributors the same revenue-sharing terms as Blockbuster or anything comparable. (AA 4890-4893, 4908, 4914, 5019-5025, 5027; see also AA 1313-1318(CT797-816), 1371(CT1029), 1379(CT1060), 1503(CT1552-53), 1508-1509(CT1573-77), 1645-1650(CT2111-30), 1656-1658(CT2154-64), 1749-1751(CT2523-31), 1798(CT2714), 1815(CT2782-83), 1819(CT2799-2800), 1849-1851(CT2923-30).)

b. The lack of profitable revenue-sharing deals forced distributors and thus independents to rely on costlier traditional purchases.

Blockbuster admitted repeatedly that it would have paid much higher wholesale prices without its revenue-sharing deals. (AA 1898(CT3119-20) [Blockbuster concluding revenue-sharing deals reduced its average unit cost by 56%], 4216 [Blockbuster acknowledging tapes "not subject to revenue-sharing [are] typically released to video retailers at higher wholesale prices" and therefore "revenue-sharing enables us to substantially increase the quantity and selection of newly released VHS titles" over what "we would otherwise be able to stock"], 318 [Blockbuster acknowledging adverse cost effect if deals discontinued], 4740-4741.)

After the Blockbuster deals commenced, some studios eventually offered so-called "copy-depth" programs, which discounted the $65 price for traditional sales if certain maximum and minimum purchase requirements were met. (AA 4890-4891.) While these programs effectively lowered net per-tape prices to distributors, the resulting prices still greatly exceeded what Blockbuster paid. (AA 4891-4892, 4908, 5027;

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[8] (...continued)
studios' revenue-sharing deals to distributors because the "terms are generally not profitable for an independent retailer . . . ." (AA 4613-4614.)

see AA 3722 [Universal's staff recognizing in January 2000 that independents "still don't have reasonably priced access" to videos].)[9]

Dr. Sweeney's calculations showed that "[t]he net effect of all these differences in programs (traditional, copy-depth, and revenue sharing) means that the prices that independents pay through distributors are substantially higher than the prices Blockbuster typically pays." (AA 4892.) Analyzing all nationwide purchases between August 1998 and November 2000, Dr. Sweeney found that distributors paid on average $40-$49 for tapes while Blockbuster paid on average only $22. (AA 5081, 5027, 5042-5049.)

2. Distributors' and independents' myriad requests for comparable deals were ignored.

a. Ingram.

(1) *Admitted evidence.*

Ingram, the nation's largest distributor, started requesting Blockbuster-comparable output revenue-sharing deals in early 1998 and never stopped. (AA 1609(CT1972) [Ingram: "[w]e had asked the studios to provide us the best possible revenue-sharing terms and the most choices and variety as possible. And clearly, if there were terms being offered to large retailers on a direct basis, we would try to most closely duplicate that for our dealers under our SuperComm method of revenue sharing"],

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[9] For example, a 1999 Universal cost comparison concluded that Blockbuster's average per-tape cost from Universal was $24, while the average per-tape prices to distributors ranged from $37 to $48 under the *best* copy depth programs available from Universal, Warner, Fox, Paramount and Columbia. (AA 3385; see AA 1323-1325(CT838-45), 1378(CT1057).) A 2000 Universal comparison of Disney's, Universal's, Warner's, Fox's, Paramount's and Columbia's copy-depth programs to distributors showed average net prices in the $40-$48 range. (AA 3719; see AA 1761(CT2571-72), 1815(CT2783).)

1607(CT1966) [Ingram: "when Blockbuster started to do revenue sharing with all of the large studios, we went to the studios requesting that they make revenue-sharing deals available to Ingram Entertainment to offer to our customers"], 1609(CT1973) [Ingram sought output deals], 1332(CT875) [Universal: Ingram made "numerous requests" for "copy-depth programs for output"], 1566(CT1800) [Disney: Ingram constantly complained that output deals were unavailable or that the only offers were impractical], 1564(CT1793) [Ingram asked Disney for output deals], 1335(CT887), 1830(CT2843-45).)

In December 1998, Ingram wrote the studio defendants that the output revenue sharing given Blockbuster created unfair advantages because "[o]utput deals have either not been available to all retailers or, if available, have not been practical or profitable." (AA 1389(CT1098-101), 1507(CT1569), 1565(CT1797-99), 1612-1613(CT1984-88), 1621(CT2016), 1659(CT2165), 1763(CT2580), 1817(CT2791), 1826-1827(CT2828-32).) Ingram believed "the playing field was not level" and studios were not making output deals available to distributors or were offering only terms that were not "practical or profitable." (AA 1621(CT2016), 1622(CT2020).)

The letter confirmed what the studios already knew. (AA 1818 (CT2795) [Paramount had already received similar feedback from independents], 1761(CT2573), 1762(CT2578) [Fox already knew some independents wanted output deals].) According to Ingram, *if* a studio responded, it simply said it "had to follow Disney, or Blockbuster encouraged us to do it, or things like that." (AA 1622(CT2017).) No studio disputed Ingram's letter's statements. (AA 1613(CT1988), 1621-1622(CT2015-20), 1639(CT2087).)

Ingram continued complaining about the lack of output and competitive copy-depth programs. (AA 1566(CT1800).) In November 2000, Ingram wrote the studios that the devastation of independents predicted in its December 1998 letter had occurred, that the lack of competitive pricing persisted, and that "something is wrong here." (AA 1624-1625(CT2026-30), 1629(CT2045), 1818(CT2796-97).) Ingram announced it would "continue to request [that the] studios level the playing field" by making Blockbuster-type output deals available through distributors. (AA 1630(CT2051-52).)

(2) *Excluded evidence.*

The trial court excluded five Ingram documents. (AA 7755, 7757.) Two of the excluded documents are Ingram's December 1998 and November 2000 letters to the studios. (See AA 2457, 3551.) Much of their content came in through admissible witness testimony, as discussed above.[10]

The other three documents are Ingram's Strategic Plans for 1999, 2000 and 2001. (See AA 3516, 3526, 3534.) The 1999 Plan stated that "revenue sharing is actually quite profitable for distributors," that Ingram "will continue to enhance its revenue sharing program," and that Ingram "will request studios level the playing field for retailers by making similar direct output deal terms available for retailers being serviced through traditional distribution." (AA 3521-3522.) Ingram's 2000 and 2001 Plans added that Ingram "will continue to request studios level the playing field

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[10] The Texas district court excluded the same Ingram documents on hearsay grounds, but allowed the two letters' content into evidence through testimony of Ingram and the studio addressees. (AA 1388(CT1097), 1505(CT1562), 1594(CT1912-13).) Here, defendants said this was a "correct resolution." (AA 7646, fn. 2.)

for retailers by making similar direct output deal terms available for retailers being serviced through traditional distribution." (AA 3531, 3543.)

We show below (pp. 85-88) that all five Ingram documents are admissible. "In determining whether summary judgment was properly granted, [an appellate court must] review de novo *all of the admissible evidence* set forth in the [parties'] papers to determine whether there are any triable issues of material fact." (*Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 711, emphasis added.) Accordingly, these five exhibits must be considered.

b. Rentrak.

Rentrak was "the largest distributor specializing in the distribution of videocassettes on a revenue-sharing basis." (AA 99.) Like Ingram, it repeatedly requested Blockbuster-comparable deals from 1998 onward. (AA 1331(CT870), 1776-1779(CT2629-41), 4371, 4376, 4387.)

In August 1998, Rentrak proposed an agreement to Fox giving output terms to Rentrak's existing customers. (AA 4376.) Rentrak was pursuing similar output deals with the other studios:

> As you are well aware, we have been working with our studio partners for the past several months to create a set of revenue sharing terms which would both enable and encourage [pay-per-transaction] retailers to commit to acquiring 100% of your rental priced product on a revenue sharing basis.

(*Ibid.*) Rentrak told Fox that Rentrak's output proposal would provide "a strong economic incentive for the retailer to shift his/her purchasing to the output agreement terms – exactly what we expect a majority of our retail customers to do." (AA 4387; see AA 1777(CT2631).)

In April 1999, Rentrak again proposed output terms to Fox that "will generate approximately 70% more margin dollars" for Fox from retailers. (AA 4371; see AA 1779(CT2641).) Rentrak added that "[g]iven this up-lift for Fox, and the need of our smaller retailers for an output option that will enable them to more effectively compete with the biggest retail chains, [Rentrak] suggest[s] we meet as soon as possible to discuss the implementation of such a program." (*Ibid.*, AA 1784(CT2661).)

Despite Rentrak's requests, only two studios—Universal and Fox—ever offered output deals to Rentrak, and they only did so after they were sued and long after Blockbuster's advantages had devastated independents.[11] Even then, Fox and Universal's belated output deals had a higher studio revenue share and other terms inferior to their Blockbuster deals. (AA 1854(CT2944), 1331-1332(CT870-72), 1371-1374(CT1029-39), 1780-1782(CT2642-52); see also AA 5100, 5109.)

c. Independents.

Ingram's and Rentrak's requests reflected what their customers—the independents—wanted. (AA 1572-1573(CT1827-28) [independent "constantly" went to distributors seeking deals "comparable to the deals that were available to Blockbuster"], 1580(CT1857) [independent "contacted Rentrak many times" asking for output revenue-sharing], 1633(CT2062) [independents told Ingram "they wished that they had the option of the same

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[11] Fox did not offer its Rentrak output deal until April 2000—over 1 ½ years after Fox commenced output revenue-sharing with Blockbuster and 9 months after the Texas lawsuit was filed. (AA 1761(CT2574), 1777(CT2633), 1780(CT2642-45), 3591.) Universal did not offer its Rentrak output deal until April 2001—3 years after Universal began its output arrangement with Blockbuster and over 1 ½ years after the Texas lawsuit was filed. (AA 1313(CT797-98), 1331-1332(CT868-72), 1371(CT1026), 3479.)

output deals that are available to Blockbuster"], 4545 [independents asked Ingram for revenue-sharing deals].)

Independents even went directly to the studios to seek the Blockbuster deal. (AA 1736(CT2472), 4285-4301, 4815-4823.) At first the studios denied any new deals existed; they later admitted they existed but claimed independents would not like them. (AA 1278-1279(CT658-61), 1736(CT2471).)

Distributors told plaintiff Bob Webb the studios were frustrating the distributors' efforts to obtain Blockbuster-comparable terms. (AA 4814.) In June 1998, Webb, representing a group of 400 retailers known as the Independent Video Retailers Group ("IVRG"), complained to each studio that Blockbuster appeared to be receiving revenue-sharing terms "that are considerably more favorable than the terms available to independent retailers through Rentrak, currently our only revenue sharing option." (AA 7213, 7215.)

He wrote that the IVRG was "seeking alternative solutions to litigation" and asked the studios to extend to the IVRG "as well as all video retailers, prices, terms, and conditions that will eliminate any discrimination or unfair advantages." (AA 7215-7216.) Warning that "[t]ime is of the essence because many of us are experiencing an alarming loss of market share to Blockbuster," he asked the studios to respond within ten days if "you are unwilling to offer us the same terms as you do for Blockbuster or if you believe you already offer us the same terms . . . ." (AA 7216.) The studios responded by denying discrimination, without promising any new terms to distributors. (AA 7213, 7218-7224.)

Webb tried again in February 1999. He and other IVRG representatives met with several studios and requested they provide the Blockbuster deal to distributors. (AA 4816 [Webb: "We knew we would

have to buy through distribution"], 1304(CT763) [IVRG discussed studios using Rentrak or other distributors to provide the deal], 1298-1299(CT739-40) [IVRG asked studios to "make the deal equal to the one that Blockbuster had"], 1301(CT751) [same], 1661(CT2176) [Columbia: IVRG requested the Blockbuster deal].)

Instead of agreeing to the Blockbuster terms, the studios gave the IVRG the run-around. (AA 1277(CT654) [there was "never a deal offered, never a deal made, never a deal presented, never a deal written down"], 1280(CT664) [same], 1278(CT658) [the studios "refused to deal with us"], 1581(CT1860) ["All we ever got out of the studios was a nice lunch. No deals."].)

3. Independents could have done Blockbuster-comparable deals through distributors.

a. Rentrak acknowledged that all but "teeny, teeny stores"—stores with annual video revenues below $48,000, mostly convenience stores whose primary business was not video rental—can do output revenue sharing. (AA 4488-4490.)

b. Rentrak predicted that "a majority of [its] retail customers" would want output deals. (AA 4387.) Rentrak was "prepared to do [output deals] with any studio that offers us terms that make sense for the retailer." (AA 4493; see also AA 1332(CT873).) Another distributor predicted in October 1997 that Blockbuster's revenue-sharing deals "may result in as many as 5,000 to 10,000 additional [independents] choosing to participate in revenue sharing" through distributors. (AA 4368.)

c. Output deals would not require small retailers to obtain the same number of tapes as Blockbuster, have stores as large as Blockbuster's, or incur the same marketing expenditures as Blockbuster. The basic idea was that a retailer would receive 2½ to 3 times as many tapes as *that*

retailer had purchased in the past, in exchange for that retailer committing itself to paying what it had historically purchased from the studio. (P. 12, above.) A retailer could meet customer demand for new releases by increasing its prior copy depth by 2-3 times. (AA 1672(CT2219), 3944, 3954.) Independent retailers confirmed that it "would be a great deal" to obtain 2-3 times more tapes in exchange for a commitment to spend at least what it previously spent. (AA 1568(CT1811).)

d. In August 1998, Rentrak proposed to Fox a detailed output deal that would provide retailers roughly 2.5 times more tapes in exchange for payments equaling what they previously paid under traditional wholesale terms. (AA 4377, 4387.) The proposal permitted output deals to retailers of all sizes, including the smallest mom-and-pops, and comported with studios' matrices for allocating copies to Blockbuster. (Compare AA 4390-4391 [Rentrak matrix] with AA 3278-3279 [Blockbuster-Universal matrix].)

e. Mars & Co. concluded in March 1999 that "[g]iven copy depth and correct studio pricing, the independents can generate positive revenue and profit momentum" (AA 3949), and that "deployment of copy depth" to independent retailers "could generate an $800 million revenue increase" to the independents and "result in significant gains for both studios and retailers" (AA 3954, 3964).

f. Dr. Sweeney concluded there was no reason a studio could not create output deals for distributors; there were no issues of scale because the distributors were collectively larger than Blockbuster and the same sort of guarantees underlying the Blockbuster deals could have been done through distributors. (AA 1852(CT2935-36).)

g. Studios admitted that revenue sharing with independents could be done through the distributors "who have already invested in that

infrastructure in which to handle the smaller operators." (AA 1533-1534(CT1667-68); see also AA 1341(CT910), 1344(CT922), 1405(CT1163-64), 1409-1410(CT1180-82), 1504(CT1557-58), 1527(CT1647-49), 1552-1553(CT1742-46), 2267, 4368.)

h. The computer and other equipment needed for output revenue sharing did not pose significant barriers for independents; thousands already had it. (AA 1635(CT2071) [Ingram: most retailers "use some point-of-sale [computer] system that in a revenue-sharing context [Ingram] would have . . . the ability to hook into . . . to share data or monitor revenue-sharing type of data"], 1552(CT1741) [4500 locations already set up for Rentrak revenue sharing], 1777(CT2630) [Fox: Rentrak equipment meant a retailer was already set up for output agreements], 1512-1513(CT1589-91), 1526(CT1644-46), 1663(CT2182), 1763(CT2582), 4367.) Retailers starting from scratch could obtain the necessary equipment for only a few thousand dollars. (AA 4508-4509.)

i. Warner, MGM, Universal and Fox ultimately offered output deals to independents through either Ingram or Rentrak, but with terms far worse than Blockbuster received. (Pp. 23 fn. 7, 29, above; AA 1305 (CT764-67), 1331-1332(CT870-72), 1371-1374(CT1029-39), 1780-1782(CT2642-52), 1849-1851(CT2923-30), 1854(CT2944), 5022-5025, 5100, 5109.) Universal and Fox offered their Rentrak output deals only after they were sued and long after Blockbuster's advantages had devastated independents. (P. 29 fn. 11, above; AA 1313(CT797-98), 1331-1332(CT868-72), 1371(CT1026), 1761(CT2574), 1777(CT2633), 1780(CT2642-45), 3591, 3479.)

4. The studios never even tested providing Blockbuster-comparable terms to distributors.

The studios tried to explain away their failure to provide Blockbuster-comparable terms to distributors by claiming distributors and independents did not want, or could not do, output revenue-sharing deals. (AA 66-67, 82-84.) Defendants did not, however, offer a single document from any distributor or independent indicating independents did not want or could not do output deals. (See AA 1393-1394(CT1117-18), 1407(CT1171) [Universal: no document showed Universal even proposed Blockbuster terms to a distributor], 1511(CT1583-85) [Disney: "[n]ot a single piece of paper" showed retailers told Disney they didn't want output deals], 1513(CT1592) [same], 1650(CT2130) ["there is no piece of paper at Columbia that sets forth in writing that we did or did not offer an output deal"].)

The studios never even tested offering Blockbuster-comparable terms to distributors. (E.g., AA 1381(CT1067) [Universal: Universal decided on its own not to offer distributors the Blockbuster terms because it knew "no one would take them"], 1510(CT1579-80) [Disney: same].)[12]

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[12] In their summary judgment motion, defendants asserted that "Universal offered a large number of small retailers the opportunity to do revenue-sharing *on the same terms as Blockbuster*, and while several of them did, many did not." (AA 84, emphasis in original.) But Universal admitted that (a) it tested only *direct* (non-distributor) revenue sharing with a *few* retailers (AA 379-380, 1313(CT798), 1319(CT820), 1341(CT909), 7322-7323); and (b) it could have resolved the problems it found by making the Blockbuster terms available *through distributors* (AA 1343-1344(CT919-922), 1405(CT1163-64), 1409-1410(1180-82), 7322-7323).

E. The Impact.

1. Blockbuster seized independents' market share and drove thousands out of business.

The copy depth/breadth advantages from the favored studio deals allowed Blockbuster to increase its market share dramatically. (AA 1623(CT2023) ["Blockbuster's copy depth gave them an advantage in cases where there was competition in market between independents and Blockbuster"], 4019 [Blockbuster's "dramatic resurgence over the past two years" resulted from "wider and deeper selection of video titles through revenue-sharing agreements with the major studios"], 1209-1210(CT387-90), 1513(CT1593), 1884(CT3064-65), 1889-1890(CT3082-88), 2523, 2712, 2739, 2916.)

After Blockbuster obtained the output deals, its market share grew from 24% in 1997 to 27% in 1998, to 35% in 1999, to 40% by 2001. (AA 1202(CT358-60), 1382(CT1071), 2529, 3387, 3756.) Each percentage point represented an $80 million revenue increase. (AA 1202(CT356), 3011, 4402.) Thus, the rapid 16% increase represented an annual $1.28 billion shift in business from other retailers to Blockbuster.

Blockbuster's market share increases came at independents' expense. (AA 3369 [Blockbuster's gains mostly at "expense of the smaller chains and independents who are unable to compete"], 2181 ["market share shift from independents to Blockbuster"], 3337 [Blockbuster "aggressively captur[ed] market share at the expense of the smaller independent retailers"], 3726 ["Blockbuster has increased its market share to approximately 40% with substantial portions of that gain coming from independent retailers"], 1382(CT1071-72), 1764(CT2583-85), 1796-1797(CT2709-13), 1892(CT 3097), 2552 [Blockbuster projected 18% decline to independents], 1204(CT366) [Blockbuster knew independents "would be hurt the most"], 1212(CT396-97) [same].)

Defendants knew Blockbuster's advantage was causing thousands of independents to close stores or go out of business. (AA 2170 [Warner: "Rentrak estimates that independents were closing at a rate of 300-400 per month as of 11/98"], 3381 [Universal, 1999: "[t]he industry has seen a net loss of more than 4,000 specialty stores in the last 2 years"], 3712 [Universal, 2000: "[t]he industry has seen a net loss of more than 5,000+ specialty stores in the last 2 years"], 1636(CT2076) [studios were told "an unusually large number" of independents going out of business], 1622(CT2019), 1828(CT2835-36).)

2. The independents' devastation hurt consumers.

Blockbuster's dramatic market share increase was bad for consumers. As Disney admitted, "it would have been better . . . for the marketplace to have more copies on the shelves . . . ." (AA 1534 (CT1668).)

The studios' favoritism toward Blockbuster forced consumers to pay higher rental prices. Both before and after the output deals, Blockbuster charged consumers higher rental prices than independents. (AA 2555 [Blockbuster acknowledging 25% price premium over competitors], 1887(CT3074-75) [Blockbuster CEO: "generally speaking, Blockbuster has higher prices than independent competitors"], 2945 [Blockbuster had "[p]remium new release pricing"].) After obtaining the output deals, Blockbuster used its market share gains to increase rental prices further. (AA 1513(CT1593-94) [Blockbuster used increased market share from 1½ years of revenue sharing to raise rental prices], 1919(CT3203-05) [Blockbuster increased rental prices by April 2000 to "an all-time high"], 3369 [rental prices "continuing to trend upward"], 3699 [same, 1997-2000], 752 [same].)

Not only did independents tend to charge lower prices, they also offered better customer service. (AA 1886(CT3072-73), 1186(CT295), 4888.) Thus, Disney conceded, the elimination of independent stores was both "[b]ad for the industry" and "[b]ad for consumers." (AA 1555 (CT1753).) Dr. Sweeney summarized:

> This market share shift [to Blockbuster] and industry consolidation has also harmed consumers, due to a reduction in competition. Consumers have been denied the range of options afforded by competition, such as the option to rent more readily a new-release videocassette at a video store that may be more convenient and have better customer service. All consumers, including those who have switched to Blockbuster or other key retailers, have been harmed because they pay a higher price to rent videocassettes as a result of the reduction in competition. (AA 4915.)

F. The Studios Admittedly Acted Against Independent Self-Interest By Favoring Blockbuster.

First, the studios could have increased their revenues with little risk by providing Blockbuster-comparable deals to distributors. The deals were structured to ensure each studio received at least what Blockbuster historically paid under pre-output purchases, with Blockbuster and the studios sharing the upside from the copy-depth induced increased rentals. (Pp. 11-12, above.) In Disney's words, "in the *remote event* that total rentals do not increase, [the studio] is essentially whole, *with the retailer bearing the risk*." (AA 2500, emphasis added.)

Second, the studios admitted that it was in each studio's self-interest for distributors and independents to have Blockbuster-type deals. (AA 1359(CT976) ["it doesn't make any sense . . . from a business

standpoint" for Universal "to enter into an agreement to deny [Blockbuster] revenue-sharing terms to anybody" because Universal's "goal is to maximize our revenue"], 1403(CT1155) [it would be bad business for Universal "to deny Blockbuster revenue-sharing terms to anyone"], 1534(CT1668) [in Disney's interest for all customers to do output revenue sharing], 1402(CT1152), 1673(CT2222).) The studios' expert likewise conceded that it was in each studio's economic interest to provide Blockbuster-comparable revenue sharing to distributors. (AA 4620-4621.)

Third, studios would not favor Blockbuster without an understanding that the other studios would do the same, because they knew distributors and independents would retaliate against discriminating studios by shifting support to non-discriminating studios. (AA 2206 [Warner noting "the trade" would likely discover any favored "revenue split with Blockbuster" and "give additional support to studios who have not made such a deal with their largest competitor"], 2213 [Warner noting risk of providing Blockbuster's "requested concessions" is that "[t]hose retailers buying through distribution would respond negatively to real or perceived idea that [Blockbuster] was buying product substantially lower than competition"], 1816(CT2786) [Paramount discussed importance of "not going down the official, quote, revenue sharing path, so we still have deniability with the other retailers"], 4626 [studios' expert: "some studios were concerned that if . . . they withheld comparable revenue sharing terms from independents, and they were the only one to do that, that would put [the studios] at a competitive disadvantage"].)

Fourth, defendants' witnesses admitted repeatedly that it was against each studio's self-interest to increase Blockbuster's market power and to disadvantage independents. (AA 2333 ["disproportionate market share" that Blockbuster will gain from copy depth and lower prices "will

significantly reduce the studio's leverage on future transactions"], 2266 [same], 4574 [Disney didn't "want a customer with a dominant market share . . . [b]ecause they'll turn into an 800-pound gorilla on you"], 1246(CT534) [Warner wanted "a nonconcentrated marketplace with no significant buyer"], 5119 [studios' expert: "[i]t is a fundamental tenet of economics that business firms will be harmed by actions that create market power among buyers of their products"], 1216(CT414), 1240-1241(CT511-12), 1400(CT1142-43), 1408(CT1175), 4424-4425, 4621.)[13]

Yet the evidence showed that (a) Blockbuster *told* the studios it intended to use its output-deal advantage to increase its market share rapidly to 50% (p. 17, above); (b) the studios *knew* Blockbuster's output-deal advantages would allow it to take market share from anyone lacking Blockbuster's favored terms (pp. 16-17, above); (c) Blockbuster's market share *did* immediately skyrocket because of the output deals (pp. 35-36, above); and (d) even after the studios knew the independents were being devastated, the studios still failed to provide them "reasonably priced access" to videotapes (AA 3722; pp. 21-31, 35-36, above).

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[13] Indeed, the studios' expert admitted that sellers will purposefully increase a particular buyer's market power *only* when they are colluding with that buyer:

> Expert: Have I ever seen a case where in spite of the fact that business firms are harmed by the creation of market power among the buyers of their products that -- that in spite of that, that they -- that they do create market power?
>
> . . . .
>
> Atty: Have you -- you've seen it happen when a buyer is colluding with its suppliers, haven't you, sir?
>
> Expert: Well, that would be *a necessary condition* . . . .

(AA 4621-4622, emphasis added.)

LEGAL ARGUMENT

I. SUMMARY JUDGMENT WAS ERRONEOUSLY GRANTED: THERE WAS SUBSTANTIAL EVIDENCE OF VERTICAL AND HORIZONTAL CONSPIRACIES.

The federal Sherman Act and California's Cartwright Act prohibit powerful buyers from coercing or enticing suppliers to sell to the buyers' competitors "only at discriminatory prices and [on] highly unfavorable terms." (*Klor's, Inc. v. Broadway-Hale Stores, Inc.* (1959) 359 U.S. 207, 209 [79 S.Ct. 705, 708, 3 L.Ed.2d 741] ["*Klor's*"]; accord, *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 699-700 ["*Redwood Theatres*"].) The resulting agreement is considered a price-fixing agreement because it concerns "a course of conduct affecting prices . . . ." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 666; see also cases cited at pp. 14-18 of appellants' opening brief in the pending class certification appeal, 2nd Civil No. B157154.)

Any such agreement between a buyer and individual seller is a *vertical* restraint of trade. (*Interstate Circuit, Inc. v. United States* (1939) 306 U.S. 208, 220, 232 [59 S.Ct. 467, 471, 477, 83 L.Ed. 610] ["*Interstate Circuit*"]; *Toys "R" Us, Inc. v. F.T.C.* (7th Cir 2000) 221 F.3d 928, 930 ["*Toys "R" Us*"]; *Redwood Theatres*, *supra*, 200 Cal.App.3d at p. 703.)

And any such agreement among sellers is a *horizontal* restraint of trade, with the buyer liable as orchestrator. (*Interstate Circuit*, *supra*, 306 U.S. at pp. 220, 227, 232; *Toys "R" Us*, *supra*, 221 F.3d at p. 935; *Redwood Theatres*, *supra*, 200 Cal.App.3d at pp. 698-700.)

The evidence, viewed in light of applicable legal principles, established triable issues that such vertical and horizontal agreements existed between Blockbuster and the studios.

A. The Law Governing Inferences Of Conspiracies.

1. California law/*Aguilar*.

"[C]onspirators rarely . . . document their illicit agreements." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 48.) "[T]he proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852, citation omitted.) As a result, antitrust law does not require conspiracy plaintiffs to prove defendants reached a formal agreement; plaintiffs need only show that a "unity of purpose or a common design and understanding or a meeting of minds" can be *inferred* from defendants' conduct or other circumstantial evidence. (*American Tobacco Co. v. United States* (1946) 328 U.S. 781, 809-810 [66 S.Ct. 1125, 1139, 90 L.Ed. 1575]; *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.* (1954) 346 U.S. 537, 540 [74 S.Ct. 257, 98 L.Ed. 273] [agreement can be tacit].)

In *Aguilar*, the California Supreme Court held federal Sherman Act standards are the test for inferring conspiracies for Cartwright Act purposes. (25 Cal.4th at pp. 846-852.) Under those standards, "antitrust law limits the range of permissible inferences from ambiguous evidence" in that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." (*Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp.* (1986) 475 U.S. 574, 588 [106 S.Ct. 1348, 1356, 89 L.Ed.2d 538] ["*Matsushita*"].) Thus, "[t]o survive a motion for summary judgment . . ., a plaintiff . . . must present evidence 'that *tends to exclude* the possibility' that the alleged conspirators acted independently." (*Ibid.*, emphasis added.) "[I]n other words, [plaintiff] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action . . . ." (*Ibid.*)

Aguilar requires defendants moving for summary judgment in conspiracy cases to first "make a prima facie showing of the absence of any conspiracy." (*Aguilar*, *supra*, 25 Cal.4th at pp. 854, 861.) If they do, the burden shifts to the plaintiff to "make a prima facie showing of the presence of an unlawful conspiracy." (*Id.* at pp. 845, 862.) Since "[a]t trial, the plaintiff would bear the burden of proof by a preponderance of the evidence," plaintiff "must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful-conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not." (*Id.* at p. 846.)

> Thus, if the court determines that any evidence or inference presented or drawn by the plaintiff indeed shows or implies unlawful conspiracy *more likely than* permissible competition, it must then deny the defendants' motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff . . . . But if the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply unlawful conspiracy *only as likely* as permissible competition *or even less likely*, it must then grant the defendants' motion for summary judgment . . . .

(*Id.* at pp. 856-857, emphasis in original.)

2. *Aguilar*'s "tends to exclude" standard.

a. The standard reflects the basic principle that inherently equivocal conduct, *standing alone*, supports no reasonable inference.

The "tends to exclude" standard arises from recognition that "*conduct as consistent* with permissible competition as with illegal conspiracy does not, *standing alone*, support an inference of antitrust conspiracy." (*Matsushita*, *supra*, 475 U.S. at p. 588, emphasis added.)

There is nothing extraordinary about this principle. No reasonable inference can be drawn solely from conduct as consistent with an event's occurrence as with its non-occurrence because that conduct, standing alone, does not tend to prove or disprove anything. California courts analyzing circumstantial evidence in non-antitrust contexts have "frequently declared"—as *Aguilar* and *Matsushita* did in the antitrust context—"that plaintiffs cannot recover merely on a showing that the circumstances are consistent with their theories; they must show that the inferences favorable to them are more reasonable or probable than those against them." (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation At Trial, § 139, p. 198; see *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

But this principle does not mean a plaintiff's circumstantial evidence must "wholly exclude all unfavorable inferences, i.e., the party is not required to show that, under the circumstances, the inference in his or her favor is the only one that can reasonably be drawn." (Witkin, Cal. Evidence, *supra*, Presentation At Trial, § 139, at p. 198.) Rather, the plaintiff "'need only show that the material fact to be proved may logically and reasonably be inferred from the circumstantial evidence. . . . The mere fact that other inferences adverse to plaintiff might be drawn does not render the inference favorable to plaintiff too conjectural or speculative for

consideration [by the jury].'" (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 121, citations omitted.)

Aguilar and *Matsushita* apply these circumstantial-evidence concepts to the antitrust-conspiracy context. Thus, a plaintiff's conspiracy evidence "need not actually exclude[] the possibility that the alleged conspirators acted independently rather than collusively." (*Aguilar*, *supra*, 26 Cal.4th at p. 852; accord, *De Long Equipment Co. v. Washington Mills Abrasive Co.* (11th Cir. 1989) 887 F.2d 1499, 1509 [plaintiff's "evidence 'need not be such that *only* an inference of conspiracy may be derived from it'"].) "The test states only that there must be *some* evidence which, if believed, would support a finding of concerted behavior." (*Toys "R" Us*, *supra*, 221 F.3d at p. 935.)

> Put more simply, plaintiffs' evidence must reasonably show that defendants engaged in a conspiracy, but is not expected to disprove all other possible inferences. This is why the Supreme Court stated that plaintiff must present evidence that *'tends' to* exclude other possibilities and has not required plaintiff to present evidence which does exclude *all* other possibilities.

(*Alexander v. Phoenix Bond & Indem. Co.* (N.D.Ill. 2001) 149 F.Supp.2d 989, 999 ["*Alexander*"].)[14]

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[14] Defendants erroneously asserted a higher standard below. *First*, they claimed plaintiffs' evidence failed if evidence supported a competing non-conspiracy inference. (E.g, AA 99, 110 ["[e]ven if plaintiffs had evidence that tended to exclude the possibility of independent action (which they do not), it would at most give rise to a competing inference of conspiracy, which is insufficient to allow a trier of fact to draw an inference of a conspiracy"], 7265 [defendants win if "evidence in this case might give rise to competing inferences"].)

Second, they expressly attacked plaintiffs' evidence as not *excluding* the possibility of independent action. (See AA 7271 ["Plaintiffs' Assertion That The Studios Would Have Made More Money If They Had Entered

(continued...)

Aguilar's test reflects the principle that juries may not speculate about unlawful conspiracies and punish legitimate competition by letting them find a conspiracy based *solely* on conduct as consistent with independent action as with conspiracy. (*Aguilar*, *supra*, 25 Cal.4th at pp. 846, 864.) Thus, a plaintiff cannot prevail on a horizontal conspiracy claim based *solely* on defendants' consciously parallel pricing, because that conduct, standing alone, is as consistent with oligopolists' lawful interdependent pricing as with unlawful price-fixing. (*City of Tuscaloosa v. Harcros Chems., Inc.* (11th Cir. 1998) 158 F.3d 548, 570-571 ["*Tuscaloosa*"].) And a plaintiff cannot prevail on a vertical conspiracy claim between a manufacturer and distributors based *solely* on the manufacturer's termination of a distributor after the defendant distributors complained about price-cutting, because that conduct, standing alone, is as consistent with a manufacturer's lawful unilateral termination of a distributor as with an unlawful agreement. (*Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 763-764 [104 S.Ct. 1464, 1470-1471, 79 L.Ed.2d 775] ["*Monsanto*"].)

Such inherently equivocal conduct, standing alone, proves nothing. But it becomes part of proper circumstantial proof where plaintiffs proffer *additional* evidence that tends to exclude the possibility of independent action (i.e., tends to show a conspiracy) in that it "reduces the probability of independent action." (*Alexander*, *supra*, 149 F.Supp.2d at p. 1000; accord,

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[14] (...continued)
Blockbuster-Style Revenue Sharing Agreements With Distributors *Does Not Exclude* The Possibility Of Independent Conduct"; emphasis added], 7274 [same re studios' failure to "test the waters"], 7275 [same re defendants' increasing Blockbuster's market power], 7279 [same re studios' conscious parallelism], 7282 [same re studio memoranda]; see also AA 70 [defendants' stating they proved in Texas "that none of plaintiffs' evidence excluded th[e] possibility" of independent action].)

Tuscaloosa, *supra*, 158 F.3d at pp. 571-572; *Monsanto*, *supra*, 465 U.S. at pp. 764-765, fn. 8 & 768 [distributor complaints become probative of conspiracy where plaintiff proffers additional evidence, such as coercion, "that reasonably tends to prove" a conspiracy].)

This additional evidence is often labeled "plus factor" evidence. (*Alexander*, *supra*, 149 F.Supp.2d at p. 1000.) No exhaustive list exists, as the question is fact-specific and must be resolved on a case-by-case basis. (*Ibid.*) But evidence indicating a defendant acted against independent self-interest—i.e., contrary to what its self-interest and policies would normally dictate were it acting alone instead of colluding—is universally recognized as sufficient. (*Ibid.*; *Re/Max Int'l Inc. v. Realty One, Inc.* (6th Cir. 1999) 173 F.3d 995, 1009 ["*Re/Max*"].)

Courts also recognize as plus factors evidence of : "both an invitation to collude, as well as acceptance of that invitation" (*Alakayak v. British Columbia Packers, Ltd.* (Alaska 2002) 48 P.3d 432, 458 ["*Alakayak*"]); attempts to control the conduct of sellers "who could thwart the conspiracy" (*id.* at p. 452); the timing of meetings and price decisions (*Alexander*, *supra*, 149 F.Supp.2d at p. 1002); high levels of inter-defendant communication (*In re Plywood Antitrust Litigation* (5th Cir. 1981) 655 F.2d 627, 634); evidence a defendant's explanations for its conduct are pretextual (*Rossi v. Standard Roofing, Inc.* (3d Cir. 1998) 156 F.3d 452, 478 ["*Rossi*"]); and expert economic data showing results that would be unlikely absent anti-competitive conduct by defendants (*Tuscaloosa*, *supra*, 158 F.3d at pp. 572-573; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.* (3d Cir. 1993) 998 F.2d 1224, 1241 ["*Petruzzi's*"]).

b. Plaintiffs' evidence must be viewed as a whole.

Plaintiffs in antitrust conspiracy cases must "be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." (*Continental Ore Co. v. Union Carbide & Carbon Corp.* (1962) 370 U.S. 690, 699 [82 S.Ct. 1404, 1410, 8 L.Ed.2d 777].) Courts must "analyze [plaintiffs' evidence] as a whole to see if together it supports an inference of concerted action." (*Petruzzi's*, *supra*, 998 F.2d at p. 1230.) As Judge Posner warns:

> [A] trap to be avoided . . . is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial? The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired . . . than that they had not conspired . . . .

(*In Re High Fructose Corn Syrup Antitrust Litigation* (7th Cir. 2002) 295 F.3d 651, 655-656 ["*High Fructose*"].)

Accordingly, evidence that may be insufficient when viewed alone can, when viewed in light of all the evidence, become proper circumstantial proof of conspiracy. (*Id.* at p. 661 [reversing summary judgment because although "no single piece of the evidence . . . is sufficient in itself to prove a price-fixing conspiracy . . . [t]he question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is

sufficient to defeat summary judgment"]; *In re Medical X-Ray Film Antitrust Litigation* (E.D.N.Y. 1996) 946 F.Supp. 209, 218 [while inter-defendant contacts and dissemination/gathering of price information "taken in isolation [did] not necessarily provide a basis" to infer conspiracy, "these factors, taken together" supported "a reasonable inference that an agreement or conspiracy existed"].)

c. The evidence must be construed in the light most favorable to plaintiffs.

The trial court's order here did not analyze plaintiffs' conspiracy evidence; instead, it stated *defendants'* declarations indicated the studios' deals with Blockbuster and other customers were "business-justified, commercial arrangements that were entered into by parties acting in their own self interest" and "[i]n light of this evidence, plaintiffs' evidence does not show that unlawful conspiracy is *more likely* than permissible competition." (AA 7740.)

But defendants are "not entitled to summary judgment simply because they demonstrated a plausible rationale for their behavior. Rather, the focus must remain on the evidence *proffered by the plaintiff*." (*Petruzzi's*, *supra*, 998 F.2d at p. 1232, emphasis added; accord, *Eastman Kodak Co. v. Image Technical Services, Inc.* (1992) 504 U.S. 451, 468 [112 S.Ct. 2072, 2083, 119 L.Ed.2d 265] ["*Kodak*"].) *Aguilar* instructs that courts must deny summary judgment if "any evidence or inference presented or drawn *by the plaintiff*" shows or implies collusion more likely than unilateral conduct. (*Aguilar*, *supra*, 25 Cal.4th at p. 856, emphasis added.) "[T]he court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact"; all evidence, facts and reasonable inferences must be construed in the light most favorable to plaintiff. (*Ibid.*) As Judge Posner warns, in determining

whether plaintiffs' evidence supports a conspiracy inference, courts "must be careful to avoid th[e] trap[]," set by clever defendants, of "weigh[ing] conflicting evidence." (*High Fructose*, *supra*, 295 F.3d at p. 655.)

The "tends to exclude" standard "does not introduce a special burden on antitrust plaintiffs opposing summary judgment; it 'demands only that the nonmoving party's inferences be reasonable in order to reach the jury. . . ." (*Rossi*, *supra*, 156 F.3d at p. 466, quoting *Kodak*, *supra*, 504 U.S. at p. 468; accord, *Aguilar*, *supra*, 25 Cal.4th at p. 857 [plaintiff's conspiracy "inference need only be reasonable"].) Thus, "[w]hen confronted with evidence that shows a non-conspiracy explanation for defendants' behavior, plaintiffs must come forward with evidence which is reasonably subject to an interpretation which accounts for defendants' arguments." (*Alexander*, *supra*, 149 F.Supp.2d at p. 999.)

If evidence or inferences construed in the light most favorable to plaintiffs support a reasonable inference of conspiracy, the case must go to the jury even if evidence might support a reasonable inference of independent action. "[T]he question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at trial." (*Apex Oil Co. v. DiMauro* (2d Cir. 1987) 822 F.2d 246, 253.) Courts must

> not read *Matsushita* to "give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not." . . . [C]ourts [may not] weigh[] summary judgment evidence. The concern in *Matsushita* is not with the weight of the competing evidence but with the existence of a rational basis for drawing contextually plausible inferences from circumstantial evidence that in theory could go either

way. The case does not permit summary judgment to be granted if the record as a whole, realistically viewed, would allow a reasonable juror to draw rational inferences in favor of each party depending on the juror's view of disputed factual evidence rather than abstract economic theory.

(*Alakayak*, *supra*, 48 P.3d at pp. 451-452.)

d. Where plaintiffs' conspiracy theory is reasonable and defendants' conduct was anti-competitive, more liberal conspiracy inferences are permitted.

Although alone not dispositive, evidence of plausible motive and opportunity to conspire go a long way toward meeting the "tends to exclude" standard. (See *Matsushita*, *supra*, 475 U.S. at p. 596 ["[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence"]; *Re/Max*, *supra*, 173 F.3d at p. 1009 [courts consider motive and opportunity in evaluating whether evidence tends to exclude possibility of independent action]; *Rossi*, *supra*, 156 F.3d at p. 474 [same]; *Alakayak*, *supra*, 48 P.3d at p. 452 [same].)

Under *Matsushita*, "the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the danger associated with such inferences." (*Petruzzi's*, *supra*, 998 F.2d at p. 1232.) More liberal inferences of conspiracy are permissible where plaintiffs proffer a plausible conspiracy theory and defendants' conduct appears anti-competitive. (*Ibid.* [defendants' refusals to bid were "not pro-competitive" and thus "more liberal inferences from the evidence should be permitted than in *Matsushita*"]; *High Fructose*, *supra*, 295 F.3d at

p. 662 [Judge Posner: less evidence required the more plausible the collusion charge].)[15]

Matsushita concerned an alleged 20-year predatory-pricing scheme that indisputably benefitted American consumers by lowering their prices. (465 U.S. at p. 594.) Here, in stark contrast, substantial evidence showed defendants' conduct harmed consumers by allowing Blockbuster to seize 40% market share, *increase* consumer rental prices and drive thousands of competing independents out of business. (Pp. 35-37, above.)

B. Plaintiffs' Evidence Creates Triable Issues That Blockbuster Entered Into Vertical Conspiracies With The Respondent Studios.

Plaintiffs alleged Blockbuster orchestrated vertical *and* horizontal conspiracies with and among the studios. (AA 28, 30, 32.) The trial court's summary judgment order, however, ignores the vertical-conspiracy question.[16] But the law is clear that separate understandings between a

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[15] The Supreme Court announced the "tends to exclude" test in *Monsanto*, finding the plaintiffs' evidence supported a reasonable inference of conspiracy. (465 U.S. at p. 765.) It then applied the test in *Matsushita*, concluding the evidence there was insufficient. (475 U.S. at pp. 595-597.) But the *Matsushita* court also commented that the plaintiffs' conspiracy theory there was "economically senseless" and therefore plaintiffs "must come forward with more persuasive evidence to support their claim *than would otherwise be necessary*." (*Id.* at pp. 587, 597-598, emphasis added.) *Matsushita*'s rule for "economically senseless" conspiracies rarely applies because few conspiracies are so inherently absurd as the conspiracy alleged there—essentially a claim that defendants had charged below-cost prices for 20 years in hopes of driving out competitors and recouping their costs at some speculative time in the future. (*Alakayak*, *supra*, 48 P.3d at p. 451, fn. 71 [canvassing cases]; see *Matsushita*, *supra*, 475 U.S. at pp. 588-590, 596-598.)

[16] The court's order discusses only plaintiffs' contention "that the studio defendants acted in a consciously parallel fashion" (AA 7739), which relates to whether the studios had an understanding *among themselves*, i.e., a horizontal conspiracy.

powerful buyer and one or more of its suppliers are actionable as vertical restraints, regardless of whether the suppliers themselves colluded. (*Redwood Theatres*, *supra*, 200 Cal.App.3d at pp. 700, 703 [film exhibitor allegedly entered into separate unwritten agreements with three different distributors to deny plaintiff-exhibitor reasonable access to first-run films]; *G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267, 269 [*"G.H.I.I."*] [Tower Records allegedly used "threats, coercion, intimidation and boycott" to obtain favored treatment from distributors "in a vertical price-fixing arrangement"]; *Beech Cinema, Inc. v. Twentieth Century Fox Film Corp.* (2d Cir. 1980) 622 F.2d 1106, 1108 [Fox conspired with large theater chain to deprive chain's competitor of ability to obtain Fox films].)

Here, the vertical-conspiracy issue is whether plaintiffs' evidence supports a reasonable inference that any of the respondent studios had an understanding *with Blockbuster* to deny independents access to Blockbuster's favored terms.

1. Plaintiffs' vertical-conspiracy theory is reasonable.

Abundant evidence showed *Blockbuster* had a plausible motive and the opportunity to orchestrate vertical conspiracies to disadvantage the independent retailers—it needed to reverse a devastating competitive slide by seizing their market share. (Pp. 9-10, above.)

Abundant evidence likewise showed *the studios* had a plausible motive and opportunity to conspire—Blockbuster employed coercion (threatened and actual purchase reductions) and enticement (increased revenues and supra-competitive pricing) to enlist their cooperation. (Pp. 19-21, above.) "[T]here can be sufficient evidence of a combination or conspiracy when one conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition

by another conspirator who has an anticompetitive motive." (*Spectators' Commun. Network, Inc. v. Colonial Country Club* (5th Cir. 2001) 253 F.3d 215, 222; accord, *United States v. Paramount Pictures, Inc.* (1948) 334 U.S. 131, 161 [68 S.Ct. 915, 931, 92 L.Ed. 1260] ["*Paramount*"]; *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.* (7th Cir. 1995) 62 F.3d 967, 973 ["*MCM Partners*"].)

The pattern here is a familiar one. Powerful buyers frequently use their massive leverage to coerce or entice sellers into conspiracies to disadvantage some of that buyer's competitors. (E.g., *Klor's, supra*, 359 U.S. at p. 209 [powerful chain store induced appliance suppliers to sell to its competitor "only at discriminatory prices and highly unfavorable terms"]; *Toys "R" Us, supra*, 221 F.3d at pp. 930, 936 [Toys "R" Us, "a critical outlet for toy manufacturers," coerced toy manufacturers into disadvantaging warehouse clubs]; *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.* (7th Cir. 1999) 190 F.3d 775, 778-779 ["*JTC*"] [triable issue whether powerful asphalt buyers paid supracompetitive prices to entice asphalt producers to conspire against buyers' competitors or coerced producers "by threatening to buy less product"].)[17]

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[17] Indeed, a legion of such cases have involved the same Hollywood studios alleged to have conspired with Blockbuster here. (E.g., *Paramount, supra*, 334 U.S. at pp. 160-161 [studios acquiesced to chain theaters' demands for favored terms at expense of small independent exhibitors]; *Interstate Circuit, supra*, 306 U.S. at pp. 214-215, 228 [two movie-theater chains induced studios' movie-distributor affiliates to discriminate against chains' competitors]; *Harkins Amusement Enterprises, Inc. v. General Cinema* (9th Cir. 1987) 850 F.2d 477, 484-485 ["*Harkins*"] [triable vertical conspiracy issue that studios' movie-distributor affiliates acquiesced to large regional exhibitors' demands to disadvantage smaller theaters]; *Southway Theatres, Inc. v. Georgia Theatre, Co.* (5th Cir. 1982) 672 F.2d 485, 492 ["*Southway Theatres*"] ["alleged boycott could have been the result of coerced acquiescence on the part of each [film] distributor; conspiring [large chain] exhibitors could have somehow induced each distributor to cut off its supply of first run films from independent

(continued...)

2. The evidence that Blockbuster asked the studios to deny independents comparable terms and the studios refused to provide them to distributors meets the "tends to exclude" standard.

"[E]vidence of both an invitation to collude, as well as acceptance of that invitation" satisfies the "tends to exclude" standard. (*Alakayak*, *supra*, 48 P.3d at p. 458.) Plaintiffs met that standard as to vertical conspiracies between Blockbuster and the studios by presenting evidence that (a) Blockbuster asked each studio not to make Blockbuster's favored terms available to independents (pp. 17-19, above); and (b) each studio subsequently refused to provide Blockbuster-comparable terms to distributors in the face of distributors' and independents' requests for them (pp. 21-34, above). That evidence, coupled with plaintiffs' motive and opportunity evidence, creates a triable issue that Blockbuster and the studios reached vertical agreements to restrain trade. (*Alakayak*, *supra*, 48 P.3d at p. 458 [reversing summary judgment because plaintiffs proffered (a) some evidence tending to show an invitation to collude, and (b) pricing evidence from which "[a]cceptance can be reasonably inferred"].)

Here, Fox's admissions that Blockbuster asked Fox to deny independents access to Blockbuster's terms (pp. 17-18, above), coupled with the evidence that Fox refused to provide distributors Blockbuster-comparable terms (pp. 21-31, above), support a reasonable inference that Blockbuster induced Fox into agreeing to deny the independents access.

Moreover, it is undisputed that Blockbuster approached and negotiated with each studio as part of a common plan to obtain new revenue-sharing arrangements to reverse its competitive slide and increase

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[17] (...continued)
exhibitors"]; *Redwood Theatres*, *supra*, 200 Cal.App.3d at pp. 698-700 [discussing studio conspiracy cases]; *Milgram v. Loew's, Inc.* (3d Cir. 1951) 192 F.2d 579, 583 [same].)

its market share. A jury could reasonably infer from the circumstances that Blockbuster sought the same commitment from each studio vis-à-vis the independents. (*Firlotte v. Jessee* (1946) 76 Cal.App.2d 207, 211 [evidence defendant reached agreement with A is evidence of a similar agreement with B "where the circumstances indicate a strong probability that the course followed in one instance would be followed in others"]; *Southway Theatres*, *supra*, 672 F.2d at p. 493, fn. 8 [letter from one movie exhibitor to one distributor supported conspiracy inference as to other alleged distributors].) Indeed, at the time of Fox's May 1998 admissions, Blockbuster had commenced output revenue sharing with every studio *except* Fox. (See chronology, p. 14, above.) It would be unreasonable to assume Blockbuster sought a different commitment from Fox.

Further support for the inference of a series of vertical conspiracies between Blockbuster and each studio comes from the Fox, Warner and Disney memoranda indicating that Blockbuster sought a "favored" cost and revenue-share relationship, that Blockbuster's requested concessions could "spur government inquiry into video industry pricing practices," and that the ultimate plan was to make the new pricing potentially available to all but independents (pp. 18-19, above).

This evidence, viewed as required in the light most favorable to plaintiffs and coupled with the studios' refusals to provide Blockbuster-comparable terms to distributors, plainly supports a reasonable inference of a series of vertical agreements to restrain trade.

3. The evidence that the studios acted against independent self-interest meets the "tends to exclude" standard.

Additional evidence supports the vertical-conspiracy inference. Courts consistently recognize that evidence a defendant acted contrary to

what its policies and self-interest would normally dictate if acting alone is evidence tending to exclude the possibility of independent conduct. (*Re/Max, supra*, 173 F.3d at p. 1009; *Tuscaloosa*, *supra*, 158 F.3d at pp. 570-572 & fn. 33.) There was plenty of such evidence here.

First, the studios admitted it was against each studio's self-interest and standard policy to knowingly increase Blockbuster's market share and knowingly disadvantage smaller retailers. (Pp. 38-39, above.) (See *Toys "R" Us*, *supra*, 221 F.3d at p. 932 [toy manufacturers' sudden adoption of measures that increased "their dependence on [Toys "R" Us]" and "decreased sales to [warehouse] clubs ran against their independent economic self-interest"].)

Second, the evidence showed the studios could have potentially increased revenues with little risk by providing Blockbuster-comparable terms to distributors, and the studios admitted it was in their interest to make such terms available to everyone. (Pp. 37-38, above.) (See *Harkins*, *supra*, 850 F.2d at p. 484 [triable vertical conspiracy issues because distributors' rejection of smaller exhibitors' bids was suspicious if bids were lucrative]; *Milgram*, *supra*, 192 F.2d at p. 583 [sufficient conspiracy evidence where defendants consistently refused to license first-run features to smaller theaters even though licensing might have increased profits].)

In *Harkins*, the Ninth Circuit held that evidence indicating the sellers passed up potentially lucrative sales to smaller customers satisfied the "tends to exclude" standard. (850 F.2d at p. 484.) It recognized that if the smaller customers' bids would have been lucrative, "'their rejection by the distributors can be explained only as extraordinary exercises of bad judgment or as accommodation to a request by the [larger customers] for preferential treatment.'" (*Ibid.*) The same is true here.

4. The evidence of pretext meets the "tends to exclude" standard.

"Pretextual excuses are circumstantial evidence that can disprove the likelihood of independent action." (*Rossi*, *supra*, 156 F.3d at p. 478; accord, *Fragale & Sons Beverage Co. v. Dill* (3d Cir. 1985) 760 F.2d 469, 474 ["evidence of pretext," if believed by a jury, "would tend to discount the likelihood of independent activity"]; *JTC*, *supra*, 190 F.3d at p. 779; *Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1480 ["*Dimidowich*"]; *Ezzo's Investments, Inc. v. Royal Beauty Supply, Inc.* (6th Cir. 1996) 94 F.3d 1032, 1036; see also *Milgram*, *supra*, 192 F.2d at pp. 583-585 [appellate court held fact studios claimed they would not have increased profits by licensing first-run movies to plaintiffs and yet "none had ever experimented" in doing so was evidence they conspired to deny plaintiffs first-run movies].)

Here, a mountain of evidence indicated the studios' excuse for not making Blockbuster-comparable terms available to independents—that distributors and independents did not want or could not do Blockbuster-type output arrangements—was entirely pretextual. (Pp. 21-34, above.)

Courts have repeatedly reversed defense summary judgments in antitrust conspiracy cases where evidence indicates defendants' explanations were pretextual, particularly where, as here, evidence also indicates that an alleged co-conspirator made a "proposal for a concerted refusal to deal" (*Dimidowich*, *supra*, 803 F.2d at p. 1479), or defendants acted against independent self-interest or standard corporate policy (*Rossi*, *supra*, 156 F.3d at p. 475; *Re/Max*, *supra*, 173 F.3d at p. 1001), or a buyer allegedly orchestrating a conspiracy with suppliers paid a supracompetitive price and used coercion (*JTC*, *supra*, 190 F.3d at pp. 778-779).

Defendants' proffered explanations for their conduct were disputed by evidence that distributors and independents were capable of, and actively

sought, Blockbuster-comparable deals. Only a jury can resolve this factual dispute. (*Kodak*, *supra*, 504 U.S. at p. 483 ["[f]actual questions" regarding "validity and sufficiency" of defendant's proffered business justifications for its conduct "ma[de] summary judgment inappropriate"].)

C. Plaintiffs' Evidence Creates Triable Issues That Blockbuster Orchestrated A Horizontal Conspiracy Among The Studios.

1. Plaintiffs' horizontal-conspiracy theory is reasonable.

The motive and opportunity evidence demonstrating the reasonableness of plaintiffs' vertical-conspiracy claim also confirms the reasonableness of plaintiffs' horizontal-conspiracy claim. Powerful buyers typically orchestrate both vertical *and* horizontal conspiracies in inducing sellers to disadvantage some of the buyers' competitors. (E.g., *Paramount*, *supra*, 334 U.S. at p. 142; *Interstate Circuit*, *supra*, 306 U.S. at pp. 226-227; *Klors*, *supra*, 359 U.S. at p. 213; *Toys "R" Us*, *supra*, 221 F.3d at pp. 934-936; *JTC*, *supra*, 190 F.3d at p. 779.)

Moreover, "the possibility of anticompetitive collusive practices is most realistic in concentrated industries." (*Todd v. Exxon Corp.* (2d Cir. 2001) 275 F.3d 191, 208). The studio defendants comprised 90% of the home-video market in 1997 (AA 3706, 4876); they have a history of collusive conduct (AA 4887-4888, 4896; cases at pp. 53-54 fn. 17, above.)[18]

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[18] One can reasonably infer from the confidential competitor contracts and pricing data found in the studios' files that the studios exchanged pricing information either directly or through Blockbuster and other conduits. While alone not dispositive, "[i]nformation exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement." (*Todd*, *supra*, 275 F.3d at p. 198.)

2. Plus factors and the studios' conscious parallelism create a reasonable inference of horizontal conspiracy.

Evidence that "tends to show consciously parallel behavior in addition to plus factors" creates a triable horizontal-conspiracy claim. (*Alakayak*, *supra*, 48 P.3d at p. 455.)

a. Conscious parallelism.

"Evidence of conscious parallelism is evidence: '(1) that the defendants' behavior was parallel [and] (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making processes.'" (*Ibid.*)

The trial court correctly acknowledged that plaintiffs presented "evidence that each studio was aware of the terms of the other studios' deals with Blockbuster and the distributors." (AA 7739.) But it held "[p]laintiffs have not offered any evidence tending to show that any defendant actually *relied* upon its awareness of the other defendants' conduct in making its revenue-sharing decisions." (AA 7740.) The record amply shows otherwise.

The studios' files for the relevant period overflow with price verifications and copies of each others' confidential contracts and pricing data. (Pp. 14-15, above.) "[E]vidence of price verifications tends to show that the defendants were conscious of each other's conduct and *that this awareness was an element in their decision-making processes*." (*Alakayak*, *supra*, 48 P.3d at p. 456, emphasis added.)

Additional evidence shows that the studios' conduct was interdependent. Each studio offered identical terms to Blockbuster and distributors before 1997 but then abruptly changed course after meeting with Blockbuster. (Pp. 8, 10-14, 21-25, above.) Redstone admitted that

Blockbuster structured its negotiations to wield the most leverage over the studios and that it knew every studio "had to play" once Blockbuster had commitments from Disney, Warner and Paramount. (AA 2149-2151). He further admitted that Blockbuster told the studios it was seeking the same basic commitments from each studio and that whenever it obtained a commitment from a studio it notified the others. (See p. 14, above; AA 1197-1198(CT339-40), 4735, 4737-4739.) Columbia, Fox and Universal confirmed the interdependent nature of studio conduct by characterizing their acts as "meeting competition." (AA 97.) And studio memoranda and other evidence showed studios were concerned about customers retaliating if they did not adopt similar pricing. (P. 38, above.)

Accordingly, ample evidence tended to show that the studios' awareness of each others' conduct "'was an element in their decision-making processes.'" (*Alakayak*, *supra*, 48 P.3d at p. 455.)

The trial court also held that "[t]he conduct of the studios was parallel only in a broad sense" because the studios negotiated different pricing with Blockbuster and distributors and at different times. (AA 7741.) But the law does not require identical or simultaneous conduct: "If it were otherwise, a charge of conspiracy could always be avoided by agreeing to go home by different roads." (*Delaware Valley Marine Supply Co. v. American Tobacco Co.* (3d Cir. 1961) 297 F.2d 199, 204 ["*Delaware Valley*"].)

Here, plaintiffs' evidence showed (a) each studio, at Blockbuster's insistence, abruptly abandoned its prior practice of selling videos on identical terms to Blockbuster and distributors (pp. 8, 10-14, 21-25, above); (b) each studio negotiated new revenue-sharing deals with Blockbuster that Redstone conceded were "very similar" and designed to yield a 40% ultimate revenue share to the studio (AA 165, 1196(CT333-35),

1893(CT3101), 1899(CT3123), 2148, 2191, 2693, 2764); (c) each studio refused to provide comparable deals to distributors (pp. 21-25, above); and (d) each studio left distributors with wholesale pricing roughly double what Blockbuster paid, which precluded independents from obtaining the copy depth/breadth needed to compete with Blockbuster (pp. 24-25, above).

These shared elements show sufficient parallelism. (*Petruzzi's*, *supra*, 998 F.2d at p. 1243 [sufficient parallelism even though "it may be true that the defendants did not use the same prices or run their internal business operations identically" because "evidence shows that they acted similarly by refraining from competing on existing accounts, while at the same time competing actively for new accounts"]; *Delaware Valley*, *supra*, 297 F.2d at p. 204 [sufficient parallelism even though defendants rejected plaintiff's applications in different ways and for different reasons, because "there was uniformity of action on a crucial point: all the corporate defendants denied the plaintiff's applications"].)

b. Plus factors.

In addition to substantial evidence of motive, opportunity and conscious parallelism, plaintiffs presented additional evidence of a horizontal conspiracy among the studios.

First, evidence that each horizontal competitor acted against economic self-interest creates a reasonable inference of horizontal conspiracy when coupled with "conscious parallelism" evidence. (*Alakayak*, *supra*, 48 P.3d at p. 452; *Petruzzi's*, *supra*, 998 F.2d at p. 1242; *Toys "R" Us*, *supra*, 221 F.3d at p. 932 [evidence each toy manufacturer knowingly increased dependence on Toys "R" Us supported reasonable inference that Toys "R" Us orchestrated horizontal conspiracy among manufacturers, in addition to vertical conspiracies].) Here, ample evidence

showed *each* studio acted against self-interest by refusing to provide Blockbuster-comparable terms to distributors. (Pp. 21-25, 37-39, above.)

Second, evidence that a defendant engaged in conduct that would be unlikely absent an understanding with its competitors is a horizontal-conspiracy plus factor. (*Tuscaloosa*, *supra*, 158 F.3d at p. 570, fn. 34 ["the implausibility that the defendants would have acted as they did had they not been unlawfully conspiring" is a plus factor]; *Toys "R" Us*, *supra*, 221 F.3d at p. 936 [evidence indicating "each manufacturer was afraid to curb its sales to the warehouse clubs alone" supported reasonable horizontal-conspiracy inference].) Here, evidence indicated a studio would not price discriminate in Blockbuster's favor without an understanding that the others would do so, because otherwise independents would retaliate by shifting support to non-discriminating studios. (P. 38, above.)

Third, the U.S. Supreme Court has recognized evidence of a horizontal conspiracy exists where a powerful defendant orchestrated a series of vertical conspiracies with a group of horizontal competitors and those competitors knew the orchestrator was seeking similar agreements from the others and that their "cooperation was essential to successful operation of the [orchestrator's] plan." (*Interstate Circuit*, *supra*, 306 U.S. at pp. 222, 226-227 [two theater chains used vertical agreements to induce Hollywood studios into horizontal conspiracy to restrict supply of first-run films to smaller theaters; each studio knew the two chains had solicited the other studios for similar terms and that "without substantially unanimous action" by the studios "there was risk of a substantial loss of the business and goodwill of the [smaller theaters], but that with it there was the prospect of increased profits"].)[19] The competitors need not act

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[19] See also *United States v. Masonite Corp.* (1942) 316 U.S. 265, (continued...)

simultaneously nor communicate with each other. (*Interstate Circuit*, *supra*, 306 U.S. at pp. 226-227; *Masonite*, *supra*, 316 U.S. at pp. 275-276; *Toys "R" Us*, *supra*, 221 F.3d at pp. 932-933, 936 [manufacturers liable for horizontal conspiracy even though orchestrated by Toys "R" Us through vertical agreements].)

Here, a reasonable juror could find: (a) each studio knew Blockbuster was seeking the same basic commitments from all studios and using coercion and enticement to get what it wanted (pp. 13-15, 19-21, above); (b) the studios knew Blockbuster's plan was to use its favored deals to double its market share to 50%—a dubious goal without every studio's agreement to favor Blockbuster at independents' expense (p. 17, above); (c) the studios could and did confirm through their contacts with Blockbuster and knowledge of each others' pricing that the other studios were acquiescing to Blockbuster's requests (pp. 14-15, above); and (d) the studios refused to provide independents reasonably priced access to videos even after it became readily apparent—and Ingram told them—that their parallel conduct was devastating independents (pp. 21-27, 35-36, above).

Moreover, timing of decisions can be a plus factor giving rise to an inference of conspiracy. (*Alexander*, *supra*, 149 F. Supp.2d at p. 1002.)

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[19] (...continued)
269, 275-276 [62 S.Ct. 1070, 1076-1077, 86 L.Ed. 1461] ("*Masonite*") (sufficient evidence manufacturer orchestrated horizontal price-fixing conspiracy among buyers even though each buyer "acted independently of the others" in negotiating vertical agreement with manufacturer, because manufacturer told each buyer about "the existence and terms" of its agreements with the other buyers and each buyer eventually "became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement"); *United States v. Parke, Davis and Company* (1960) 362 U.S. 29, 33-34, 46-47 [80 S.Ct. 503, 506-507, 513-514, 4 L.Ed.2d 505] (sufficient evidence manufacturer used vertical agreements to orchestrate horizontal price-fixing conspiracy among buyers, because manufacturer told each buyer it was providing the other buyers the same message and used each buyer's acquiescence to obtain the others' compliance).

Here, each studio abruptly and suspiciously abandoned its policy of providing identical prices to Blockbuster and distributors *after* Blockbuster demanded price favoritism. (*Interstate Circuit*, *supra*, 306 U.S. at pp. 222-223 [fact that movie exhibitors' proposals "involved a radical departure from the previous business practices of the industry" and that movie distributors adopted the "far-reaching changes" with "substantial unanimity" reasonably indicated distributors had "some understanding that all were to join"]; *Toys "R" Us*, *supra*, 221 F.3d at p. 935 [horizontal-conspiracy inference reasonable because toy manufacturers' new approach to wholesale clubs was "abrupt shift from the past" and it was "suspicious for a manufacturer to deprive itself of a profitable sales outlet"].)

Plaintiffs proffered sufficient evidence of horizontal conspiracy. The summary judgment must be reversed for this reason as well.

3. "Meeting competition" evidence does not foreclose an inference of conspiracy.

The trial court, relying on *Zoslaw v. MCA Distributing Corp.* (9th Cir. 1982) 693 F.2d 870 ("*Zoslaw*"), erroneously held that evidence that Fox and Columbia entered into their revenue-sharing deals with Blockbuster to meet deals the other studios had already reached with Blockbuster "exclud[es] an inference of conspiracy." (AA 7741.) Defendants had claimed, based primarily on *Zoslaw*, that "meeting competition" evidence precludes a conspiracy inference even where a plaintiff "had evidence that tended to exclude the possibility of independent action." (AA 110-111.) *Zoslaw* says no such thing.

Zoslaw pre-dates *Monsanto* and *Matsushita*; it does not mention the "tends to exclude" test. The court merely commented that plaintiffs' evidence showed certain defendants gave discounts to chain-store retailers to match other sellers' prices and "[s]uch evidence does not indicate a

conspiracy to favor large record stores." (693 F.2d at p. 885.) *Zoslaw* did not hold that "meeting competition" evidence trumps evidence that tends to exclude the possibility of independent action; it simply recognized that consciously parallel pricing does not, standing alone, prove a conspiracy. Under the "meeting competition" rationale the trial court adopted here, oligopolists could immunize themselves from price-fixing liability simply by claiming they followed a competitor's lead. But co-conspirators are liable even when they join at different times (*Interstate Circuit*, *supra*, 306 U.S. at pp. 226-227) and reluctantly (*Paramount*, *supra*, 334 U.S. at p. 161; *MCM Partners*, *supra*, 62 F.3d at pp. 973-974).

Moreover, the *Zoslaw* record contained no evidence of motive or acts against self-interest. (693 F.2d. at p. 885.) Unlike here, the plaintiffs did not claim or demonstrate that a powerful chain store induced new pricing to reverse a competitive slide. Nor did they claim or demonstrate that sellers knowingly increased a large chain's market share and drove smaller retailers out of business; indeed, in *Zoslaw* the number of stores and retailers *increased* during the relevant period. (*Id.* at p. 874.) Moreover, the *Zoslaw* sellers indisputably had independent reasons to maintain higher prices to smaller retailers, because price reductions would reduce seller revenues. Here, in contrast, the studios refused to make a *new pricing model* available that was designed to *increase* seller revenues by allowing the product depth/breadth needed to meet consumer demand. (E.g., AA 3387 [studios embraced revenue sharing because "copy depth increased consumer satisfaction while increasing their revenues as well"].) *Zoslaw* is utterly inapposite.

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In sum, ample evidence established triable issues that Blockbuster and the studios conspired to restrain trade, both vertically and horizontally. The summary judgment on plaintiffs' Cartwright Act claim must be reversed and the matter remanded for jury trial.

II. THE JUDGMENT MUST BE REVERSED AS TO PLAINTIFFS' UNFAIR PRACTICES ACT CLAIM.

Under Business and Professions Code section 17045, part of California's Unfair Practices Act ("UPA"),

> The secret payment or allowance of rebates, refunds, commissions, or *unearned discounts*, whether in form of money or otherwise, or secretly extending to certain purchasers *special services or privileges not extended to all purchasers purchasing upon like terms and conditions*, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

(Bus. & Prof. Code, § 17045, emphasis added.) Sections 17046 and 17047 prohibit parties from soliciting, or using "threat[s], intimidation or boycott[s]" to effectuate section 17045 violations; section 17048 prohibits parties from jointly violating section 17045. (*Id.*, §§ 17046-17048.)

Plaintiffs contend the studios, by refusing to offer Blockbuster-comparable terms to distributors, (1) secretly allowed Blockbuster unearned discounts (e.g., non-cost-justified lower pricing);[20] and (2) secretly extended

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[20] An "earned" discount reflects special services the buyer performs for the seller. (*Jauquet Lumber Company, Inc. v. Kolbe & Kolbe Millwork Company, Inc.* (1991) 164 Wis.2d 689, 701-702 [476 N.W.2d 305, 309-310] ["*Jauquet-Lumber*"].) Both the UPA and the federal Robinson-Patman Act prohibit sellers from giving discounts to large chains simply

(continued...)

to Blockbuster special privileges not extended to all purchasers purchasing upon like terms and conditions (e.g., special promotional support).

The trial court granted summary judgment on the section 17045 claim (and, thus, the dependent section 17046-17048 claims) on the following grounds: (1) plaintiffs' distributors and Blockbuster did not purchase upon "like terms and conditions"; (2) distributors and Blockbuster are in different functional classes; (3) the Blockbuster terms were not "secret"; and (4) Fox and Columbia established "meeting competition" defenses as a matter of law. (AA 7742-7747.) As shown below, those rulings are wrong.

A. Section 17045 Must Be Broadly Construed.

The California legislature mandated that courts "construe section 17045 'liberally . . . that its beneficial purposes may be subserved.'" (*ABC Internat. Traders*, *supra*, 14 Cal.4th at p. 1257, quoting Bus. & Prof. Code, § 17002; accord, *Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 212 ["*Diesel Electric*"].) The "primary concern in the enactment of the UPA was the protection of smaller, independent retailers . . . against unfair competitive practices of the large chain stores." (*ABC Internat. Traders*, *supra*, 14 Cal.4th at p. 1261.)

The UPA was enacted because "price discrimination in favor of chains added to their cost advantage over competing retailers, helping them

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[20] (...continued)
because they buy more product. (*ABC Internat. Traders*, *supra*, 14 Cal.4th at pp. 1256-1257; *Federal Trade Commission v. Morton Salt Co.* (1948) 334 U.S. 37, 43 [68 S.Ct. 822, 826, 92 L.Ed. 1196] ["*Morton Salt*"].) Defendants have never claimed, let alone shown as a matter of law, that Blockbuster's favored terms reflected actual cost savings to the studios or functional services Blockbuster actually performed for the studios. "[W]hether a particular discount is unearned requires findings of fact." (*Jauquet Lumber*, *supra*, 164 Wis.2d at p. 702.)

to undersell the independents and ultimately drive them from the field, thereby tending to create monopoly conditions." (*Id.* at p. 1260.) The UPA "'protect[s] the retailer whose more powerful neighbor is attempting to drive him out of business.'" (*Id.* at p. 1261.)[21]

B. Section 17045's "Like Terms And Conditions" Requirement Does Not Apply To Unearned Discounts.

The trial court held that section 17045's "like terms and conditions" requirement applies to unearned discounts. (AA 7743.) That was wrong, as the plain meaning of the statute makes clear.

As *Diesel Electric* expressly recognized, "the phrase 'purchasing upon like terms and conditions' *does not* apply to or otherwise qualify secret allowances of unearned discounts." (*Diesel Electric*, *supra*, 16 Cal.App.4th at p. 216, fn. 5, emphasis added.) "Rather, the proper reading of that phrase and the entirety of section 17045 results in its application only to secret extensions of 'special services or privileges not extended to all purchasers' who are 'purchasing upon like terms and conditions.' (§ 17045.)" (*Ibid.*) Thus, any unearned discount that "tends to destroy competition" violates section 17045. (Bus. & Prof. Code, § 17045; State Bar of California, California Antitrust Law Jury Instructions (1998) § 1.10 & Com., pp. 19-20 ["like terms and conditions" applies only to "'special services or privileges'"].)

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[21] The UPA "closely parallels the federal Robinson-Patman Antidiscrimination Act" (*Diesel Electric*, *supra*, 16 Cal.App.4th at p. 212), which was designed to combat "discriminatory prices granted chain stores by virtue of their size" that "put the more normal 'mom and pop' merchants of the day at a competitive disadvantage" (*Alan's of Atlanta, Inc. v. Minolta Corp.* (11th Cir. 1990) 903 F.2d 1414, 1422). Congress' goal was "'to curb and prohibit *all devices* by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.'" (*F.T.C v. Fred Meyer, Inc.* (1968) 390 U.S. 341, 349-350 [88 S.Ct. 904, 908-909, 19 L.Ed.2d 1222], emphasis added.)

The trial court, nonetheless, concluded "[t]here appears to be a split in authority as to whether section 17045's 'upon like terms and conditions' applies to unearned discounts." (AA 7742.) It cast aside *Diesel Electric*'s holding as "dicta," choosing to follow a purported contrary "weight of authority on this issue." (AA 7742-7743.) The trial court erred for three reasons.

First, unlike the trial court's construction, *Diesel Electric*'s holding comports with section 17045's plain language. The "like terms and conditions" phrase appears in a clause fully set off by commas that modifies only the phrase "secretly extending to certain purchasers special services or privileges not extended to all purchasers." (Bus. & Prof. Code, § 17045.) "An accepted rule of statutory construction is that qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." (*Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460, 472.) Other jurisdictions construing statutes with section 17045's language agree. (E.g., *Jauquet Lumber*, *supra*, 164 Wis.2d at pp. 699-700 [finding "like terms and conditions" does not qualify first clause in Wisconsin unfair trade statute].)

Second, the *Diesel Electric* court's conclusion was not dicta. It was a *holding* in response to the trial court's conclusion that the statute did not apply because the parties "'were not purchasing on like terms and conditions.'" (16 Cal.App.4th at pp. 210, 216 & fn. 5.)

Third, the purported "split in authority" is fictional. Only *Diesel Electric* addressed the issue. The trial court's purported "weight of authority" consisted of three cases—*Harris v. Capital Records Distrib. Corp.* (1966) 64 Cal.2d 454, 463 ("*Harris*"); *ABC Internat. Traders*, *supra*, 14 Cal.4th at p. 1264; and *G.H.I.I.*, *supra*, 147 Cal.App.3d at p. 272.

(AA 7743.) None addressed—either directly or in dicta—whether "like terms and conditions" modifies unearned discounts:

- *Harris* discussed special advertising allowances, not rebates or unearned discounts, and it did not involve a section 17045 claim. (See 64 Cal.2d at pp. 457, 463; *Diesel Electric*, *supra*, 16 Cal.App.4th at p. 216.) The Supreme Court merely stated in dicta that section 17045 was inapplicable because the advertising allowances were "not secret" and "not discriminatory but were 'extended to all purchasers purchasing upon like terms and conditions,' as permitted by section 17045." (*Harris*, *supra*, 64 Cal.2d at p. 463.)
- *ABC Internat. Traders* merely describes *Harris* as deciding "section 17045 did not apply to advertising allowances allegedly granted to the competing retailer, because the allowances were neither secret nor discriminatory, being available to all purchasers buying on like terms and conditions." (14 Cal.4th at p. 1264.)
- *G.H.I.I.* involved a demurrer-based judgment that defendants sought to affirm by arguing plaintiffs "failed to plead that the 'secret rebates' were 'not extended to all purchasers *purchasing upon like terms and conditions* (italics added) as section 17045 requires." (147 Cal.App.3d at p. 272.) The Court of Appeal held the argument "specious, for the complaint specifically alleges that the 'rebates were not extended to all purchasers purchasing on like terms and conditions'" and the lawsuit's gravamen was that plaintiffs purchased "on like terms and conditions, but for anticompetitive reasons were treated differently by distributors." (*Ibid.*) *G.H.I.I.*, thus, never addressed whether "like terms and conditions" actually modifies the rebate clause.

Cases are "'only authority for those issues actually considered or decided.'" (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1076.) Only

Diesel Electric addressed whether "like terms and conditions" actually modifies unearned discounts. Its holding comports with section 17045's plain meaning.

C. In Any Event, Blockbuster And Plaintiffs' Distributors Purchased Upon "Like Terms And Conditions".

Even accepting the trial court's re-writing of section 17045, overwhelming evidence demonstrates that plaintiffs' distributors and Blockbuster purchased upon like terms and conditions. Both purchased identical products—videotapes—at the same wholesale level. Like Blockbuster, distributors could and did execute long-term multi-year contracts with studios. (E.g., AA 4341 [5-year Ingram deal], 3566 [5-year Rentrak deal], 4316 [same], 4379 [proposed 5-year Rentrak deal], 3310 [2-year Rentrak deal].)[22] Like Blockbuster, distributors could and did obtain and offer videos through revenue-sharing programs. (E.g., AA 3287, 3443, 3563, 4316, 4329, 4341.)

Moreover, the studios conceded that the distributors "provided the same services [for independents] as Blockbuster did for itself." (AA 1314(CT801); see also AA 1507(CT1568) [Disney witness describing Blockbuster as "probably my largest distributor"], 1913-1914(CT3178-82) [Blockbuster's CEO describing Blockbuster's distribution center and distributor functions], 388, 4834-4835.)

Nonetheless, the trial court ruled that the studios' transactions with Blockbuster and distributors "are essentially so different [that] Blockbuster and the distributors are purchasing upon fundamentally different terms and conditions." (AA 7743.) It relied solely on the purported distinction that "Blockbuster agreed to purchase the full output of the studios under multi-

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[22] The studios' contracts with Blockbuster spanned one to five years. (AA 166, 5206.)

year contracts, before Blockbuster knew what titles the studios would release, and before it knew how those titles would perform at the box office," while "[p]laintiffs' distributors purchase videos title by title, after they and their customers know how that title had performed at the theaters." (*Ibid.*)

The trial court's analysis begs the question; it ignores the evidence that distributors and independents *had no choice* but to obtain videos on a title-by-title basis, because the respondent studios refused to offer distributors the Blockbuster deal or any viable output deal. (Pp. 21-24, above.) And in stating Blockbuster agreed to purchase a studio's output before it "knew how those titles would perform at the box office," the court ignored that (a) Blockbuster's purchasing commitments for any particular movie rested on its *actual* box office performance and reflected Blockbuster's prior purchases at those levels (p. 12, above); (b) Blockbuster's requirements for poor-performing movies were minimal (pp. 12-13, above); (c) Blockbuster specifically sought the output commitment as it gave Blockbuster an astronomical advantage (pp. 10-11, above); and (d) multi-year contracts benefitted retailers, as they precluded studios from changing terms after rental consumers became used to a studio's entire output being available.

By definition, disfavored purchasers always purchase on terms different from favored purchasers. Obviously, a defendant cannot use the result of its own discrimination to claim "unlike terms and conditions." But that is what the ruling below effectively permitted.

D. Blockbuster And Plaintiffs' Distributors Had The Same Functional Role In Terms Of Purchases From Studios.

Section 17042 of the UPA allows price differentials between "customers in different functional classifications" and allows functional

classifications of "broker, jobber, wholesaler or retailer." (Bus. & Prof. Code, § 17042, subds. (b), (c).) The trial court held that "Section 17042 exempts any alleged discrimination between Blockbuster and the distributors" because "Blockbuster is a retailer and the distributors are wholesalers." (AA 7745.) That was error.

With respect to their purchases from studios, Blockbuster and plaintiffs' distributors occupy precisely the *same* functional role—they are both distributors that incur distribution costs in packaging and disseminating the tapes to retail stores (Blockbuster to its own stores, the distributors to the independents). There was no functional difference in Blockbuster's purchase of tapes from the studios versus distributors' purchases—Blockbuster performed the same distribution services as plaintiffs' distributors. (AA 388, 1314(CT801), 1507(CT1568), 1913-1914(CT3178-82), 4834-4835.) Indeed, Blockbuster and the distributors always paid identical prices before Blockbuster demanded its special deals in late 1997. (P. 8, above.)

Section 17042 permits discounts only for functional services that a buyer *actually* performs for a seller; and the discount must reasonably relate to the value of those services. (*Diesel Electric*, *supra*, 16 Cal.App.4th at p. 217; State Bar of California, California Antitrust Law Jury Instructions, *supra*, § 1.12, p. 23.) Thus, a retailer who serves as its own distributor is entitled to the seller's distributor price. (*Diesel Electric*, *supra*, 16 Cal.App.4th at p. 217 ["'where a wholesaler-retailer *buys* only part of his goods as a wholesaler, he must not claim a functional discount on all"].)

The trial court, however, turned the UPA on its head by holding that Blockbuster could use its dual distributor-retailer role to claim entitlement to *lower prices* than plaintiffs' distributors. Not only is that conclusion unsupported by case law, it destroys section 17045's purpose. The UPA

was enacted to "restrain the quickly growing chain stores" from "abuses of their buying power" that arose after "chains grew in size, *integrated wholesale and retail functions*, and gained extraordinary purchasing power." (*ABC Internat. Traders*, *supra*, 14 Cal.4th at p. 1258, emphasis added.) The UPA combats suppliers' succumbing to large chains' bargaining power by providing special discounts/privileges not made available to their other customers, which hurt "the chains' competitors—the independent retailers and [distributor] wholesalers." (*Id.* at pp. 1259-1260.)

Analogous Robinson-Patman Act authority makes the same point. That Act prohibits sellers from giving lower non-cost-justified prices to large chains that buy direct than to wholesale distributors that supply independent retailers. (*Morton Salt*, *supra*, 334 U.S. at pp. 41-43; *Texaco, Inc. v. Hasbrouck* (1990) 496 U.S. 543, 577 [110 S.Ct. 2535, 2553-2554, 110 L.Ed.2d 492] (Scalia, J., concurring); *Guyott Company v. Texaco, Inc.* (D.Conn. 1966) 261 F. Supp. 942, 950 ["supplier's sale to its retailer at a price lower than that charged wholesalers whose customers compete with the favored retailer may violate Section 2(a)"; citing cases].) Congress "focused on the buying practices of large retailers, particularly the chain stores, because it was felt that they were threatening the continued existence of the independent merchant." (*F.T.C. v. Meyer*, *supra*, 390 U.S. at p. 350.)

E. Whether The Studios' Blockbuster Terms Were "Secret" Is A Triable Issue.

The trial court erroneously held that the studios' Blockbuster terms were, as a matter of law, not "secret" for section 17045 purposes. (AA 7744.) Whether an unearned discount or special privilege was "secret" is a fact question; the secrecy element requires only that sellers fail to disclose any material term to the disfavored purchaser. (*Diesel Electric*, *supra*, 16 Cal.App.4th at p. 212 [finding triable secrecy issue even though

defendant told plaintiff it received a favored "large volume discount," since defendant did not disclose the discount was unearned]; 2 State Bar of California (3d ed 2003) California Antitrust & Unfair Competition Law, p. 133 ["any undisclosed negotiated preferential terms with any customer may be deemed 'secret' for the purposes of the statute"]; State Bar of California, California Antitrust Law Jury Instructions, *supra*, § 1.11, p. 21 [plaintiff must show disfavored purchasers "did not know" about the discounts or "at least that they were not aware of their material terms"].)

The evidence here amply demonstrates a triable issue that the studios' Blockbuster terms were secret:

- Respondents' contracts and term sheets specified the Blockbuster terms were confidential. (AA 2428, 2601, 2632, 3112, 3275, 3509, 3254 ["All terms confidential, including existence of this deal"].)
- Respondents' witnesses admitted the Blockbuster terms were confidential and not to be publicly disclosed, even to distributors and independents. (AA 1514(CT1595-97), 1802(CT2731), 4455, 4479, 4632-4633, 6323 ["We do not share this information with any studio or entity outside of the Disney family"].)
- Respondents' witnesses testified their Blockbuster terms were "secret." (AA 1514(CT1595), 4479, 4579, 4709.)
- Distributors confirmed the studios never disclosed the Blockbuster terms to them, which precluded distributors from knowing whether the studios actually offered them Blockbuster-comparable terms. (AA 1605(CT1956), 1621(CT2014-15), 1633(CT2062), 4494, 7470-7471(CT199-203), 7530-7532(CT91-97), 7557(CT233).)
- There is no evidence that any studio ever disclosed or offered its Blockbuster terms to *any* distributor or independent, let alone any of the 251 plaintiffs. In fact, after the studios were sued in Texas they

obtained protective orders limiting disclosure of their Blockbuster contracts to plaintiffs' attorneys to preclude plaintiffs and other independents from seeing them. (AA 2383-2384, 6234-6235, 6287-6288.)

- Studio witnesses admitted "there was no way" the independent retailers would have known the Blockbuster terms. (AA 1663(CT2183).)

The trial court held the studios' Blockbuster terms were, as a matter of law, not "secret" because media articles and industry rumors indicated Blockbuster was obtaining new, favorable revenue-sharing deals from the studios. (AA 7744.) But for the most part those media reports omitted any detailed discussion of actual terms (see AA 465, 672-679, 689-705) and the articles (both singly and together) did not disclose every essential term needed to evaluate the economics of every new deal. (See *ibid.*, AA 4460 ["one of the fundamental pieces of evaluating the economics of a revenue sharing deal would be that you cannot pick individual elements and look at them apart from the entire package"; the deals "have a variety of components and as you move any one of the components, the entire financial structure of the deal can be very different"], 790-796, 2644, 3131, 4307, 4463-4465.)

Moreover, no authority supports the trial court's view that media reports and industry rumors can preclude a section 17045 claim where, as here, the sellers refused to disclose and offer the actual terms to the disfavored purchasers. If such indirect, unconfirmed knowledge that price discrimination may have occurred sufficed to defeat the secrecy element, disfavored purchasers could never assert section 17045 violations.

The trial court held, in effect, that the only germane secrecy issue is whether articles and industry rumors indicated new favorable deals might exist. Indeed, defendants asserted plaintiffs' claim failed if "*the fact* of the

agreements was reported." (AA 7290, emphasis added.) Relying on a statement in *ABC Internat. Traders* that the Legislature recognized that unearned discounts "'were frequently kept secret so that the buyer's competitors would not demand the same treatment," the trial court apparently concluded no section 17045 claim exists if distributors and independents learned that new revenue-sharing deals might exist in some form so they could "demand the same treatment." (AA 7744.)

The trial court's view would leave disfavored buyers no UPA recourse whenever industry rumors or media articles prompt them to "demand the same treatment" but—as substantial evidence showed here—the sellers refuse to disclose and even go so far as to assert falsely (as the studios did here (AA 82)) that the terms they did offer were comparable. It would undermine section 17045's purpose of "address[ing] the problem of a manufacturer or other producer who is forced or induced to give preferential prices to one or more individual purchasers, typically retailers." (*ABC Internat. Traders*, *supra*, 14 Cal.4th at p. 1267.) As this Court recently recognized, the Supreme Court "uniformly agreed" in *ABC Internat. Traders* that "the purpose of section 17045 [is] to prevent a manufacturer or other supplier from discriminating among its customers." (*Kunert v. Mission Financial Services Corp.* (2003) 110 Cal.App.4th 242, 260; accord, *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 323.)

The studios' refusal to disclose their Blockbuster terms precluded distributors and independents from definitively comparing Blockbuster and distributor deals and from conclusively establishing whether Blockbuster actually received unearned discounts or discriminatory privileges. As distributors Ingram explained, (a) the studios told Ingram their revenue-sharing offers to Ingram were "similar to the ones offered to Blockbuster"

(AA 4541); and (b) Ingram was not in a position to know otherwise since the studios never disclosed their Blockbuster terms (AA 1605(CT1956), 1621(CT2014-15), 1633(CT2062), 7530-7532(CT91-97), 7557(CT233)). Independents had to sue the studios to obtain the terms. The secrecy requirement was satisfied.

F. The Trial Court Erred In Ruling Fox And Columbia Established "Meeting Competition" Defenses.

Applying a Robinson-Patman Act standard, the trial court held Fox and Columbia "have established a meeting competition defense to plaintiffs' UPA claims" because evidence indicated (1) Blockbuster told them it "was entering into [output revenue-sharing] deals with their competitors"; (2) "Blockbuster reduced or threatened to reduce purchases if Fox and [Columbia] did not enter into revenue-sharing agreements"; and (3) Fox and Columbia "undertook efforts to corroborate the terms of their competitors' deals" and "to assess the reasonableness of their competitors' agreements using available market data." (AA 7746-7747.)

That ruling fails on multiple levels.

1. There is no section 17045 "meeting competition" defense; ample evidence indicated the Blockbuster deals destroyed competition.

The trial court erred in applying Robinson-Patman's "meeting competition" defense. There is no such defense to section 17045. (*Diesel Electric*, *supra*, 16 Cal.App.4th at pp. 217-218; State Bar of California, California Antitrust Law Jury Instructions, *supra*, § 1.13 & Com., pp. 25-26.)

In *Diesel Electric*, the defendant claimed (as Fox and Columbia did here) that "there can be no violation of section 17045 because [it] was merely 'meeting the competition' when it gave [the favored buyer] its

favorable pricing and that this is a complete defense to a section 17045 violation." (16 Cal.App.4th at p. 217.) The court rejected the argument. It noted that while the Legislature included a "meeting competition" defense in other UPA sections, it omitted the defense in section 17045 so one must "infer the Legislature intended not to provide a 'meeting competition' defense to a section 17045 violation." (*Id.* at p. 218.)

Contrary to the trial court's holding, *Diesel Electric* did not hold that meeting-competition evidence defeats the "tends to destroy competition" element as a matter of law. Instead, the appellate court recognized that the element is a fact question for the jury, and it found a *triable issue* based upon the same type of evidence that abounds here. (*Id.* at pp. 213-214.)

It concluded that evidence that the plaintiff's "gross sales and profits declined and [plaintiff] eventually was forced out of the market and closed down its operations provides evidence not only that the allowances to [defendant] *'tended'* to destroy competition, but actually *did* destroy competition." (*Id.* at p. 213, emphasis added; accord, *Falls City Industries, Inc. v. Vanco Beverage, Inc.* (1982) 460 U.S. 428, 437-438 [103 S.Ct. 1282, 1290, 75 L.Ed.2d 174] ["diverted sales . . . more than establish[es] [actual] competitive injury"].) Here, there is overwhelming evidence that Blockbuster's output-deal advantages permitted Blockbuster to seize market share from independents, caused independents to lose profits and sales, and drove thousands out of business. (Pp. 35-36, above.)

Indeed, the *Diesel Electric* court recognized that "where one competitor is given a major pricing advantage over another competitor, such pricing discrimination has an inherent tendency to destroy competition." (16 Cal.App.4th at pp. 213-214; see also *Falls City Industries*, *supra*, 460 U.S. at p. 435 ["injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over

time"]; *Texaco, Inc. v. Hasbrouck*, *supra*, 496 U.S. at p. 559 ["injury to competition may be inferred from evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay'"]; *Morton Salt*, *supra*, 334 U.S. at p. 50 [same].)[23]

2. A triable issue would exist even under the erroneously imported Robinson-Patman defense.

The trial court's "meeting competition" holding fares no better under the Robinson-Patman standard.

First, "a legal conclusion that the [Robinson-Patman] meeting competition defense has been established is *rarely, if ever*, reachable," because (a) the "test for establishing the defense is particularly fact-bound"; (b) it requires findings that the defendant acted in good faith, which are inherently bound up with "issues of credibility"; and (c) the defendant has the burden of proof. (*Alan's of Atlanta*, *supra*, 903 F.2d at pp. 1425-1426, emphasis added; *accord*, *Hoover Color Corp. v. Bayer Corp.* (4th Cir.

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[23] The trial court also cited *E&H Wholesale, Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728, as indicating that "[m]eeting competition is a complete defense recognized as defeating the prima facie element of 'harm to competition.'" (AA 7745.) But *E&H Wholesale* merely recognized, like *Diesel Electric*, that the element is a fact question for the trier of fact. The court assessed whether substantial evidence supported a factual finding that a particular discount did not tend to destroy competition. (158 Cal.App.3d at p. 739.) It affirmed the finding because it found no evidence on the harm-to-competition element other than that the defendant granted the discount "to meet offers made by competitors." (*Ibid.*)

Moreover, *E&H Wholesale* was a "primary line-of-commerce" case, i.e, sellers claimed they were harmed by another seller's discounts. (*Id.* at pp. 730-731.) In that context, evidence that the defendant seller offered a discount to meet another seller's price indicates the discount tended to further, not destroy, competition among sellers. (*Id.* at p. 739.) But here the question is whether the lower pricing tended to destroy competition *in the favored buyer's* market—i.e., among the distributors and independents competing with Blockbuster. (*ABC Internat. Traders*, *supra*, 14 Cal.4th at pp. 1258-1262.) Ample evidence indicates it did.

1999) 199 F.3d 160, 164 ["courts have rarely granted a seller judgment as a matter of law on the basis of the defense"].)

Second, the trial court's "meeting competition" analysis begs the question. A seller cannot assert Robinson-Patman's "meeting competition" defense "when it chooses to adopt . . . a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system . . . ." (*FTC v. A.E. Staley Mfg.* (1945) 324 U.S. 746, 757 [65 S.Ct. 971, 977, 89 L.Ed. 1338].) The defense does not allow "the excuse that the person charged with a violation of the [Act] was merely adopting a similarly unlawful practice of another." (*Id.* at p. 754.) It "'cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first . . . .'" (*Id.* at p. 754, fn. 2.) Thus, the proper question is whether Fox and Columbia adopted a discriminatory pricing system by failing to offer their Blockbuster terms to distributors; it is not enough to show they adopted other studios' pricing.

Third, the defense's purpose is to prevent sellers from having to "ruinously cut[] prices to all its customers to match the price offered to one." (*Standard Oil v. F.T.C.* (1951) 340 U.S. 231, 250 [71 S.Ct. 240, 250, 95 L.Ed. 239].) Defendants presented no evidence they would have lost revenues by offering the Blockbuster terms to distributors. To the contrary, evidence indicated they would have increased revenues. (P. 20 & fn. 6, above.) The fact other studios did Blockbuster deals does not justify Fox and Columbia's failure to offer Blockbuster-comparable terms to distributors.

The trial court therefore erred, even under the Robinson-Patman standard, in finding that Fox and Columbia established "meeting competition" defenses as a matter of law.

III. THE JUDGMENT MUST BE REVERSED AS TO PLAINTIFFS' UNFAIR COMPETITION LAW CLAIM.

California's Unfair Competition Law ("UCL") defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) The trial court concluded that because "[p]laintiffs have brought the same claims under the Cartwright Act and the UPA[,] a separate inquiry under the UCL is not permitted." (AA 7748.) That was wrong for two reasons.

First, even assuming the Blockbuster terms were not "secret" for section 17045 purposes, a triable issue exists whether the studios' price discrimination violated the Robinson-Patman Act. That Act contains no "secrecy" limitation. (*Morton Salt*, *supra*, 334 U.S. at pp. 42-43.) A triable Robinson-Patman issue creates a triable UCL issue, because any practice violating existing law is "unlawful" for UCL purposes. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 ["*Cel-Tech*"].)

Second, even assuming defendants did not violate existing law, triable issues exist that defendants' practices were "unfair." "Business practices that do not violate technically antitrust laws can still be found to constitute unfair business practices under [the UCL]." (Cranston, The Tension Between Federal Antitrust And State Unfair Competition Laws (1996) 915 PLI/Corp. 71, 79.) The UCL's "unfair" practices prohibition sweeps beyond statutory violations to encompass *any* conduct that "threatens an incipient violation of an antitrust law, *or violates the policy or spirit of one of those laws* because its effects are comparable to or the same as a violation of the law, *or* otherwise *significantly threatens or harms competition*." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 187, emphasis added.)

Even if no UPA or Robinson-Patman violation technically occurred, the studios violated those statutes' "policy or spirit" by succumbing to a

large chain's demands for favored terms designed to drive independent retailers out of business. (See legislative history discussion, pp. 67-68 & fn. 21, above.) A triable UCL issue further arises from the evidence that the studios' favoritism of Blockbuster "significantly threaten[ed] or harm[ed] competition" by destroying independents' ability to compete, harming both independents and consumers. (Pp. 16-17, 35-36, above.)

The trial court's rejection of plaintiffs' UCL claim rested on a misreading of *Cel-Tech* and *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363 ("*Chavez*"). (AA 7747-7748.) Neither case holds that the demise of a Cartwright Act or UPA claim precludes a UCL claim predicated on the same conduct. In *Cel-Tech*, the Supreme Court reversed a trial court's order to that effect and remanded the case for a trial on whether the defendant's pricing practices were "unfair" for UCL purposes even though there was no UPA violation. (20 Cal.4th at p. 189.) The Supreme Court announced only one limitation—plaintiffs cannot use a UCL claim to circumvent a legislative "safe harbor," i.e., to attack business practices the Legislature has expressly declared lawful. (*Id.* at pp. 182, 184.)

Chavez merely extended *Cel-Tech*'s "safe harbor" analysis to settled common-law decrees of lawfulness. (*Chavez*, *supra*, 93 Cal.App.4th at pp. 375-376 [holding plaintiff could not use UCL to challenge conduct authorized by *Colgate* doctrine].) The court expressly acknowledged its holding's limited reach: "We do not hold that in all circumstances an 'unfair' business act or practice must violate an antitrust law to be actionable under the [UCL]." (*Id.* at p. 375.)

Cel-Tech's and *Chavez*'s "safe harbor" rulings are irrelevant here. Even assuming no statute or settled judicial doctrine prohibited respondents' pricing practices, none specifically authorized them. The

"mere failure to prohibit an activity does not prevent a court from finding it unfair." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 184.)

IV. THE TRIAL COURT ERRED IN EXEMPTING PARAMOUNT'S SALES TO BLOCKBUSTER FROM SECTION 17045 LIABILITY.

Relying exclusively on Robinson-Patman cases, the trial court held "there can be no liability for price discrimination claims [under section 17045] for transactions among Viacom, Blockbuster and Paramount" because Paramount's provision of tapes to Blockbuster were intra-enterprise transactions. (AA 7748.)

That was error. *Diesel Electric* holds that where sister companies operate "[a]s separate entities who placed orders separately and received shipments at their geographically separate locations," they "should be treated as separate entities for purposes of pricing and section 17045 violations." (16 Cal.App.4th at p. 216.)

Here, substantial evidence showed Blockbuster and Paramount operated as separate companies and treated Blockbuster's video purchases from Paramount as sales, not transfers. Blockbuster and Paramount had a revenue-sharing contract detailing Blockbuster's purchasing terms, including amounts Blockbuster "shall pay to [Paramount]." (AA 3054.) Paramount maintained records of Blockbuster's payments per title. (AA 3091-3129.) Blockbuster's SEC filings acknowledged that Blockbuster "purchase[d]" videos from Paramount. (AA 3074, 4245.) Blockbuster's president testified Blockbuster and Viacom never had a "complete unity of interest." (AA 4400.) And Paramount's president claimed that after Blockbuster and Paramount joined the Viacom group, "Paramount continued to deal generally with our sister company Blockbuster as we would with any other customer" and the "commercial

relationship between Paramount and Blockbuster is typical of a relationship between a large customer and one of its suppliers." (AA 386-387.)

V. THE TRIAL COURT ERRED IN EXCLUDING FIVE INGRAM DOCUMENTS.

As shown above, the judgment must be reversed and the case remanded for a jury trial on plaintiffs' Cartwright Act, UPA and UCL claims. At the trial, plaintiffs should be allowed to present to the jury five documents prepared by distributor Ingram that the trial court erroneously ruled were inadmissible. (AA 7755, 7757.) The five documents are (a) two letters Ingram wrote to the studios complaining about the impact of Blockbuster's new output deals and the lack of output deals for retailers who buy through distributors; and (b) Ingram's Strategic Plans for 1999, 2000 and 2001. (See pp. 27-28 above.) Defendants objected to each on grounds of "no authentication, no foundation, hearsay, improper opinion, irrelevant [and] speculative." (AA 7379-7380, capitalization normalized.) The court globally sustained "[d]efendants' objection" to the exhibits. (AA 7755.) The exhibits are admissible, and their erroneous exclusion was extremely prejudicial as the exhibits contravene the studios' assertions that distributor Ingram did not want, request or promote output deals or revenue sharing.

A. Ingram's Letters.

Ingram Entertainment's president and owner, David Ingram, testified that he prepared, signed and sent both letters, that he wrote them in the ordinary course of business with assistance of top Ingram executives assigned to obtain the data referenced therein, and that they believed the information was accurate. (AA 1612(CT1984-87), 1620-1622(CT2010-19), 1624-1625(CT2026-30), 1628-1629(CT2043-45), 7523(CT11),

7524(CT19), 7540-7543(CT162-73), 7545-7546(CT183-85), 7548-7549(CT198-204), 7568(CT317-19).) The studios acknowledged receiving the letters. (AA 1388-1389(CT1097-100), 1333-1334(CT877-81), 1505-1508(CT1560-71), 1565(CT1797-99), 1659(CT2165-67), 1760-1763(CT2569-80), 1817-1818(CT2790-96), 1826(CT2827).) The letters, thus, were properly authenticated. (Evid. Code, § 1400 [writings are authenticated by evidence "sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is"].)

The hearsay rule is inapplicable for four reasons. First, out-of-court statements are admissible to prove the declarant's state of mind. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 591-592.) The studios placed Ingram's state of mind at issue by claiming Ingram did not want output deals and failed to promote available revenue-sharing options to independents. Ingram's joint letters to the studios are evidence of what Ingram truly wanted, believed or intended.

Second, David Ingram characterized his December 1998 letter as a request for the studios to provide Blockbuster-type output terms to distributors. (AA 7555(CT225).) Thus, besides constituting state-of-mind evidence, Ingram's statements are operative facts, as they contradict defendants' claims that Ingram did not want or request output or other revenue-sharing deals. The hearsay rule does not apply to operative facts. (1 Witkin, Cal. Evidence, *supra*, Hearsay, § 31, p. 714.)

Third, out-of-court statements are admissible to show notice. (*Taylor v. Centennial Bank, Inc.* (1966) 65 Cal.2d 114, 125.) The letters show each studio received joint notification that their largest distributor believed each was unfairly favoring Blockbuster, each was not making output terms available to independents or offering only impractical terms, and each was failing to provide independents a level playing field. (See

AA 2457-2458, 3551-3554.) The evidence is relevant to plaintiffs' charge of conscious parallelism against independent self-interest.

Fourth, out-of-court statements are admissible against a party as adoptive admissions under circumstances where that party would be expected to have denied the statements were they untrue. (Evid. Code, § 1221; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 88; *Simpson v. Bergmann* (1932) 125 Cal.App. 1, 9 [failure to respond to letter supported inference statements were true].) Despite the strong accusations in Ingram's letters, the studios either gave no response or claimed they "had to follow Disney, or Blockbuster encouraged us to do it." (AA 1622(CT2017); see also AA 1613(CT1988), 1621-1622(CT2015-20), 7545(CT181), 7549(CT202).)

B. Ingram's Strategic Plans.

Ingram's strategic plans are admissible under the "business records" hearsay exception. (Evid. Code, § 1271.) Ingram's top executives prepared the plans, with Ingram's president/owner having final edit; they intended that the information be as accurate as possible and be used to run the company's business; and each plan was prepared "in the normal course of [Ingram's] business" at or near the time of the events described. (AA 1600-1602(CT1939-46), 7528-7529(CT61-68), 7542(CT172), 7551-7554(CT211-21), 7556(CT230-31), 7759-7760(CT244-45), 7561-7562(CT252-56).)

The plans also are admissible to prove Ingram's state of mind as they show the company's views about industry conditions and revenue sharing. (See AA 3516-3545.) Further, the plans state "revenue sharing is actually quite profitable for distributors," Ingram "will continue to enhance its revenue sharing program," and Ingram "will request" or "continue to

request" that the studios level the playing field by making Blockbuster-comparable output terms available to distributors. (AA 3521-3522, 3530-3531, 3542-3543.) These statements are both state-of-mind evidence and operative facts, as they contradict defendants' assertions that Ingram did not want or request output or other revenue-sharing deals.

C. Foundation/Speculation Objections.

Defendants premised their foundation/speculation objections on assertions that David Ingram testified that certain statements in his letters and company plans may have been "speculative or best guess" or proven to be exaggerations. (AA 7370-7371, 7647-7648.) As discussed in detail at AA 7495-7497, 7503-7507 and 7717-7723, these claims distort Mr. Ingram's testimony; he never claimed that the letters or strategic plans were speculative or inaccurately stated his or his company's views. (See, e.g., AA 7529(CT66-68).)

Moreover, Mr. Ingram conceded that he could not risk inflaming the studios, as they control his company's existence. (AA 1609(CT1974), 7541(CT165-66). A reasonable juror could find that Mr. Ingram's statements in strategic plans and confidential letters to the studios more credibly reflect his true views than testimony in a lawsuit against the studios.

In any event, speculative statements may be redacted. They do not justify excluding statements based on personal knowledge, such as Ingram's stated goals to enhance its revenue-sharing program and to continue asking the studios to provide Blockbuster-comparable output deals.

CONCLUSION

Within three years of obtaining its favored revenue-sharing deals, Blockbuster increased its market share from 24% to 40% at independents' expense and drove over 5000 independents out of business. The studios admit Blockbuster's rapid rise to dominance was against their self-interest, thereby suggesting it was accidental and they were powerless to stop it. But ample evidence shows it was no accident: The studios knew Blockbuster's plan was to achieve industry dominance and they willingly permitted it by denying independents the Blockbuster-comparable pricing and copy depth and breadth needed to compete. The independents' devastation and Blockbuster's resulting increase of video rental prices irrefutably hurt consumers.

The evidence amply shows triable issues under the Cartwright Act, UPA and UCL. The judgment therefore must be reversed and the case remanded for jury trial. In addition, the exclusion of Exhibits 65, 374, 375, 376 and 388 should be reversed.

Dated: April 16, 2004

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CERTIFICATION

Pursuant to California Rules of Court, Rule 14(c), I certify that this **APPELLANTS' OPENING BRIEF** contains **23,360** words, not including the tables of contents and authorities, the caption page, and this Certification page.

Dated: April 16, 2004

Edward L. Xanders