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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' REPLY BRIEF AND RESPONSE TO ATTORNEY GENERAL'S AMICUS CURIAE BRIEF

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INTRODUCTION

This brief collectively responds to the separate respondents' briefs filed by Blockbuster and the studio defendants, and the amicus curiae brief filed by the California Attorney General in support of plaintiffs.

We first explain that this Court should ignore the defendants' repeated emphasis on the Fifth Circuit's opinion from the Texas lawsuit against defendants. Not only does that unpublished opinion have no precedential value, it was based upon a narrower record. (§ I, *infra*.)

We next demonstrate that defendants' argument that there is insufficient evidence of conspiracy rests on an erroneous interpretation of *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 ("*Aguilar*"), which, if accepted, would create a fundamentally different—and significantly more defendant-friendly—summary judgment standard for antitrust suits than for all other California claims, effectively requiring direct evidence to prove antitrust conspiracy. (§ II.A, *infra*.) When the Legislature's announced standards are properly applied, and the evidence is construed in the light most favorable to plaintiffs, plaintiffs' evidence indisputably creates triable issues that Blockbuster entered into a series of vertical conspiracies with the studios (§ II.B, *infra*), and orchestrated a horizontal conspiracy among them (§ II.C, *infra*).

We then demonstrate that the judgment must be reversed as to plaintiffs' Unfair Practices Act claims, because defendants' interpretations of Business and Professions Code section 17045 necessarily fail as they contravene the statute's very purpose, as well as its plain language. (§ III.A-F, *infra*.) We also show that the evidence Paramount and Blockbuster operated at arm's length creates a triable issue that Paramount's sales to Blockbuster violated the Unfair Practices Act. (§ III.G, *infra*.)

We next show that the substantial evidence the studios harmed consumers by refusing to provide Blockbuster-comparable deals to distributors creates a triable Unfair Competition Law claim, even if the evidence were insufficient to establish conspiracy or the conduct did not technically violate the Unfair Practices Act. (§ IV, *infra*.)

Finally, we explain that the trial court erred in excluding five exhibits from Ingram, the nation's largest distributor, that undermine one of defendants' key assertions—that Ingram did not want or could not do Blockbuster-comparable deals. (§ V, *infra*.)

LEGAL ARGUMENT

I. THE FIFTH CIRCUIT OPINION IS A RED HERRING.

A. Res Judicata And Collateral Estoppel Are Inapplicable.

The trial court concluded that the antitrust lawsuit that three other independent retailers filed in Texas has no res judicata or collateral estoppel impact here. (AA 7749-7755.) Defendants have not appealed that ruling. (Blockbuster's Respondent's Brief ["BRB"] 8.) The Fifth Circuit's unpublished opinion from that lawsuit, which is not precedent, is therefore irrelevant here. (U.S. Cir. Ct. Rules (5th Cir.), rule 47.5.4 ["Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case . . ."]; accord, Cal. Rules of Court, rule 977(a).)

Defendants, nonetheless, trumpet the Fifth Circuit and Texas court rulings throughout their briefs. (BRB 4-7, 24, 26; Studios' Respondents' Brief ["SRB"] 1, 6, 16, 18, 28, 43.) They proclaim that those courts rejected the claims of the plaintiffs there "on the exact same" evidence at issue here and that because "the parties have already tried the issue of conspiracy" in Texas, "[a]nother trial is not only unnecessary but would

entail a gross waste of judicial resources." (BRB 8, 24.) As we explain below, defendants have wildly overplayed their hand.

B. The Record Here Contains Substantial Additional Evidence.

This appeal does not involve the "exact same evidence" as was before the federal courts. (BRB 8; SRB 28.) Although the record here does contain the entire Texas trial transcript, it also contains numerous declarations, deposition excerpts, and documents that were not part of the Texas trial. (See testimony and exhibits at Appellants' Appendix, Tabs 6, 17, and 26 and also exhibits at AA 2185-2199, 2219-2226, 2375-2376, 2378, 2380, 2382-2407, 2512-2525, 2569-2591, 2613, 2647-2655, 2658-2665, 2709-2732, 3027-3033, 3035-3051, 3053-3060, 3063-3066, 3068-3089, 3091-3110, 3112-3129, 3131-3137, 3139-3232, 3234-3250, 3477, 3735-3776, 3778-3893, 3895-3951, 3953-3964, 4867-5079, 5081, 5083-5112, 5114-5210.)

That additional evidence directly contradicts many of defendants' factual assertions. For example, the following evidence was not in the Fifth Circuit record:[1]

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[1] The evidence discussed in this section shows that even without the evidence recounted in the AOB, Blockbuster's "Factual Background"—which Blockbuster claims is "undisputed" or "viewed in the light most favorable to the plaintiffs-appellants" (BRB 8)—actually presents *disputed* facts in the light most favorable to *defendants*. Moreover, most of defendants' purported "undisputed" facts never appeared in their Separate Statement Of Undisputed Facts. (See AA 135-152.)

A prime example is defendants' assertion that, "In truth, the studios provided roughly the same portion of Blockbuster's marketing expenditures before as they did after revenue sharing." (BRB 16, fn. 5.) Not only is this "fact" not in defendants' Separate Statement, but their only citation is to a Blockbuster witness who merely said that the studios also provided significant marketing support before the output deals. (See AA 1922 (CT3214).) Defendants ignore plaintiffs' evidence that Blockbuster's marketing after the output deals "increased dramatically due to *additional*

(continued...)

Additional evidence contradicting defendants' assertions (BRB 16, fn. 4, 41; SRB 5-6, 23-26) that independents and distributors did not want or could not do output deals or that they received viable alternatives:

- According to Rentrak, the distributor most experienced with revenue sharing, all but "teeny, teeny stores"—stores with annual video revenues below $48,000, mostly convenience stores whose primary business was not video rental—could do output deals. (AA 4488-4490.)
- Rentrak was "prepared to do [output deals] with any studio that offers us terms that make sense for the retailer." (AA 4493.)
- Distributors, including Major Video Concepts, told plaintiff Bob Webb that the studios were frustrating their efforts to obtain Blockbuster-comparable terms for independents. (AA 4814.)
- Webb wrote the studios to request that they address the price-discrimination, but the studios' responding letters did not offer Blockbuster's terms. (AA 7213-7224.)
- The IVRG retailers knew they "would have to buy through distribution" and therefore asked the studios *to give distributors* "the same terms as Blockbuster" to allow independents to "be competitive." (AA 4816.)
- Studies conducted in 1999 by video-industry expert Mars & Co. found (a) independents complained the studios' "[p]rices are too high" and the available Rentrak deals not viable because the studios' revenue share "is too high" (AA 3889); (b) independents "unanimous[ly] suggest[ed] a 60-40 split." (*ibid.*); (c) the studios' revenue-sharing programs to distributors were "non-starters" and

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[1] (...continued)
funding" from the studios and that studio support "had *grown.*" (AA 1339 (CT903), 3379, 3712, emphasis added.)

The AOB presents the facts according to the correct standard.

independents needed a "re-negotiation of revenue sharing deals to more 'equitable' terms" (AA 3818, 3826, 3876); and (d) deploying copy depth to independents would have "result[ed] in significant gains for both studios and retailers" (AA 3954, 3964).

- Independents starting from scratch could obtain the equipment to do revenue sharing for only a few thousand dollars. (AA 4508-4509.)
- The Fifth Circuit record did not include Dr. Sweeney's comprehensive reports. (AA 4867-5112.)

Additional evidence contradicting defendants' assertions (BRB 11-12) that Hollywood Video and other large chains were Blockbuster's principal concern:

- A study concerning pre-1997 market conditions recognized that independents were "on the rise" and increasing market share "while chains, including Blockbuster, are on the decline." (AA 3162.)
- A document discussed in Redstone's deposition described "mom and pop stores" as Blockbuster's "biggest market share enemy" in "virtually every market." (AA 4733.)

Additional evidence contradicting defendants' assertions (BRB 14-15; SRB 4-5) that the output deals increased Blockbuster's risk:

- Blockbuster admitted that its output revenue-sharing deals *reduced its risk* compared to all "previous economic [purchasing] models," because while the prior methods required Blockbuster to decide how many units to purchase and then alone bear the risk of titles underperforming, its output deals were "based off the performance of the title." (AA 4841-4842.) This meant the studio and Blockbuster shared the performance risks and the

studio became a partner with "a vested interest" in increasing Blockbuster's rentals. (AA 2713, 4842.)

- Blockbuster admitted that having a studio's entire output was advantageous because it allowed Blockbuster to give consumers "what they're looking for." (AA 4839.)
- Warner admitted that revenue sharing's principal benefit was to allow "retailers to obtain greater copy depth by *lowering* the retailer's average price per unit cost of acquiring video cassettes." (AA 4715, emphasis added.)

Additional evidence contradicting defendants' assertions (BRB 13) that Blockbuster rejected Rentrak as a viable option only because Blockbuster developed its own distribution center, as opposed to Redstone's admission that no retailer could afford the revenue share the studios charged Rentrak (AA 1197(CT336-37)):

- Blockbuster did not assume the distribution role until late 1996. (AA 4833-4834, 4878.) Yet Blockbuster's expert admitted that "Blockbuster had not considered Rentrak a viable option *for a number of years*." (AA 4421, emphasis added.)[2]
- Warner admitted that the Rentrak deals in place in 1997-1998 were "worse for retailers than the traditional $65 purchase." (AA 4716; see also AA 4496-4497 [others believed the studios' deals to Rentrak were worse than traditional purchases].)

Evidence contradicting defendants' assertions (BRB 30, fn. 14) that a single witness, John Caesar, provided the only evidence that Blockbuster expressly asked that independents be denied access to their deal:

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[2] Defendants' experts never testified at the Texas trial because the district court granted judgment as a matter of law immediately after plaintiffs' case-in-chief. (AA 1923-1930(CT3218-49).)

- Two other individuals recall similar admissions. (AA 4428-4431 [Blanken testimony: Fox told Blockbuster that "any terms or any methodology that was created for Blockbuster should be generally available to anybody else," but this "was *not* agreeable to Blockbuster" because Blockbuster "was insistent" about exclusivity]; AA 3561, 5651-5652 [Spark notes: Fox admitted Blockbuster "wants a deal that is not available to independents"].)

Testimony by the studios' expert confirming that plaintiffs' evidence shows studios acted against independent self-interest:

- The studios' expert admitted that (1) sellers will purposefully increase a particular buyer's market power *only* when they *are colluding* with that buyer (AA 4621-4622); (2) it was in each studio's independent economic interest to provide Blockbuster-comparable revenue sharing to distributors (AA 4620-4621); (3) if Dr. Sweeney's calculations regarding the differences between the Blockbuster and distributor deals are accurate, they are "huge differences" (AA 4628); (4) independents seldom used the studios' revenue-sharing deals to distributors because the "terms [we]re generally not profitable for an independent retailer" (AA 4613-4614); (5) 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 studio] at a competitive disadvantage" (AA 4626).[3]

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[3] The expert sought to explain away his admissions by opining that these considerations led each studio to actually make Blockbuster-comparable terms "available to independents." (AA 4627; accord, AA 4614 [opining the studios' terms to distributors "are comparable to the terms to Blockbuster"].) For summary judgment purposes, however, this Court must accept the overwhelming evidence (AOB 21-24) that the

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C. Defendants Ignore The Context Of The Fifth Circuit Decision.

In addition to ignoring the additional evidence, defendants ignore the procedural backdrop to the Fifth Circuit decision. They omit the following:

- When Blockbuster and the studios moved for summary judgment in Texas—the same motion at issue here—the district court *denied* the motion. (AA 1099-1121.) In a 23–page opinion, it found sufficient evidence of both vertical and horizontal conspiracies. (AA 1101, 1106.)[4]
- When the district court granted defendants' motions for judgment as a matter of law ("JMOL"), the only analysis it gave was in a subsequent sua sponte order denying injunctive relief; that order improperly heightened the conspiracy standard by stating "no evidence *excluded the possibility* that the defendants acted independently in their quests to maximize their own profits." (AA 1095-1097, 1123, emphasis added.)[5]

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[3] (...continued)
studios' terms to distributors were *not* comparable to Blockbuster's terms. The studio experts' admissions *by themselves* therefore create a triable issue.

[4] It found plaintiffs presented "evidence that tends to exclude the possibility that the studios acted independently," including: (1) Ingram's complaints to studios that independents wanted and needed Blockbuster-comparable deals; (2) evidence the Blockbuster and distributor deals were not comparable; (3) the studios' expert's admission "that acting in a way that creates significant market power in a single customer is a classic indicator of conspiracy"; and (4) evidence the studios acted against independent self-interest, including evidence they ordinarily would not want Blockbuster "to gain a disproportionate amount of market share." (AA 1101, 1105-1106, 1109.) "Certainly, plaintiffs' evidence suggests that significant market power is what Blockbuster sought. Whether the studios conspired in achieving that goal is a question of fact." (AA 1106.)

[5] The district court granted JMOL before defendants introduced their experts' testimony—even though it previously had relied on their
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- The appeal was assigned to a panel that epitomizes the Fifth Circuit's reputation as "one of the most conservative federal appeals courts in the country." (Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean The Sixth Amendment And Should Be Deemed Per Se Prejudicial* (2002) 26 J. Legal Prof. 67, 71, fn. 33; see http://www.lb5.uscourts.gov/judgebio/FifthCircuit [*Smith*, *Davis* and *Duhe*].)[6]

The Fifth Circuit affirmed the JMOL in an extremely short, unpublished opinion. (See Respondent Studios' Motion To Take Judicial Notice, Exh. A.) The plaintiffs petitioned for panel rehearing, identifying key areas where the opinion ignored their evidence and improperly compartmentalized and weighed evidence in defendants' favor. (Appellants' Motion For Judicial Notice ["AMJN"], Exh. A, pp. 1-12.) The petition was summarily denied. (*Id.*, Exh. B.)

Accordingly, not only are the Texas and Fifth Circuit proceedings irrelevant, they confirm the pressing need for this Court to independently and carefully resolve this appeal.

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[5] (...continued)
admissions in denying summary judgment. (AA 1106, 1923-1930(CT3218-49).)

[6] To make matters worse, plaintiffs had to ask the panel to reverse the decision of one of their fellow Fifth Circuit justices—shortly after he granted the JMOL, the Honorable Edward C. Prado was elevated to the Fifth Circuit. (See http://www.lb5.uscourts.gov/judgebio/FifthCircuit [*Prado*].)

II. THERE WAS SUBSTANTIAL EVIDENCE OF VERTICAL AND HORIZONTAL CONSPIRACIES.

A. Defendants' Argument Is Founded On An Erroneously Heightened Interpretation Of *Aguilar*'s Standard For Creating A Triable Issue Of Conspiracy.

Our opening brief demonstrated that *Aguilar* and the federal cases it discusses merely require a plaintiff opposing summary judgment in an antitrust conspiracy case to produce some evidence that, when construed in the light most favorable to plaintiffs, would support a reasonable inference of antitrust conspiracy, i.e., a prima facie case for the plaintiff. (AOB 43-50.)

Defendants, however, argue that *Aguilar* establishes a fundamentally different summary judgment standard for antitrust conspiracy claims than for all other California claims. They contend that even if a plaintiff produces substantial evidence from which a reasonable juror could infer a conspiracy, the court must grant summary judgment if it concludes there is equally probative evidence implying no conspiracy. They also argue that plaintiffs' circumstantial evidence of conspiracy here is "ambiguous," and therefore insufficient under *Aguilar*, because that evidence might be susceptible to differing interpretations and no single item of evidence by itself inexorably points to the existence of an agreement.

We show below that defendants misread *Aguilar* and that their interpretation, if applied, would violate an antitrust conspiracy plaintiff's constitutional right to a jury trial. Where the record contains substantial evidence that would support either a finding of conspiracy or of no conspiracy, only a jury can weigh the evidence and any conflicting inferences therefrom. Of course, if a plaintiff relies solely on evidence of purely equivocal conduct—like parallel pricing—there is no basis for a reasonable juror to infer a conspiracy and summary judgment must be granted. But if a plaintiff produces substantial evidence that, when viewed

in the light most favorable to him, makes a conspiracy likely, the case must go to the jury even if the circumstantial evidence would permit the jury to go either way.

We also explain that defendants' approach would mean that no antitrust conspiracy claim would ever go to the jury unless based on direct, rather than circumstantial, evidence. All circumstantial evidence is ambiguous and susceptible to multiple interpretations, particularly when viewed in bits and pieces as defendants do here. When *Aguilar* is correctly construed, summary judgment for defendants is permissible in antitrust conspiracy cases only where, as is true in any California case, the plaintiff's evidence is so utterly ambiguous that no reasonable juror could find for plaintiff.

We further show that, contrary to defendants' assertions, (a) the rule in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986) 467 U.S. 574 [106 S.Ct 1348, 89 L.Ed.2d 538] ("*Matsushita*") regarding implausible conspiracies is inapplicable here; and (b) more liberal inferences of conspiracy are permissible where, as here, the conspiracy claim is plausible and defendants' conduct had anti-competitive results.

1. Defendants err in claiming *Aguilar* imposes a different summary judgment standard for antitrust claims than for all other California claims.

Defendants assert *Aguilar* establishes a dramatically different summary judgment standard for antitrust conspiracy claims: They argue plaintiffs "simply misstate the law when they claim that a case must go to the jury '[i]f evidence or inferences construed in the light most favorable to plaintiffs support a reasonable inference of conspiracy, . . . even if evidence might support a reasonable inference of independent action." (BRB 20; accord SRB 12.)

In defendants' view, *Aguilar* requires summary judgment for defendants even where evidence supports a "reasonable" or "plausible"

inference of conspiracy if the evidence might equally support a "reasonable" or "plausible" inference of non-conspiracy. (BRB 20; SRB 3, 11.) Under their view, the court must "review ***all*** of the evidence, including defendants' evidence of independent business conduct," and weigh "whether plaintiffs' proposed inference of conspiracy is ***more likely than*** an inference of permissible competition." (BRB 21-22, emphasis in original; see also SRB 36 [studios claiming "'[t]he court must necessarily weigh the . . . summary judgment evidence of both parties'"].)[7]

Defendants base their interpretation primarily on *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870 ("*Kids' Universe*"), which they describe as "an antitrust conspiracy case" from "this Court." (BRB 19.) *Kids' Universe* actually was a Division Five tort case. (95 Cal.App.4th at p. 874.) More important, in suggesting *Kids' Universe* adopted their interpretation of *Aguilar* (BRB 19-20), defendants ignore what Justice Turner actually said in the majority opinion.

After noting that *Aguilar* generally proscribes courts from weighing plaintiffs' and defendants' inferences like a trier of fact, Justice Turner stated that "[n]onetheless, at another place in *Aguilar*, there is language *some may argue* would permit summary judgment to be granted in the face

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[7] The studios claim *Aguilar* holds "[e]qually plausible inferences are insufficient to raise a triable issue." (SRB 3; see also SRB 11 ["equally plausible competing inferences from the evidence are insufficient"].) *Aguilar* does not say that. The opinion does not even contain the word "plausible," nor the phrases "equal inferences," "equally competing inferences" or "equally reasonable inferences." Indeed, *Aguilar* proclaims that summary judgment may *not* be granted where an inference reasonably deducible from the evidence is contradicted by other reasonable inferences or evidence. (*Aguilar*, *supra*, 25 Cal.4th at p. 856.) It further dictates that plaintiffs' inference of conspiracy "need only be reasonable" to prevent summary judgment. (*Id.* at p. 857.) *Aguilar* does not allow a court to weigh competing inferences as defendants' suggest; the Supreme Court's point was that no reasonable juror could infer the existence of a fact (here a conspiracy) from evidence that only makes that fact's existence equally or less likely than its nonexistence. (*Ibid.*)

of equally probative evidence on each side." (95 Cal.App.4th at p. 880, emphasis added.) Addressing the "'equipose' analysis" in *Aguilar*'s antitrust discussion, Justice Turner stated:

> This language *can be read to infer that*, at the summary judgment stage, if there are equally conflicting inferences to be drawn from the evidence, the moving defendant is entitled to the benefit of that conflict and the motion must be granted. *If so*, this language *would conflict with that recited elsewhere in Aguilar* where the Supreme Court held that if there is a conflict in the inferences such that a triable issue exists, the summary judgment motion must be denied. [Citation.] *Typically, in summary judgment litigation, equally conflicting evidence requires a trial to resolve the dispute.*

(*Id.* at p. 881, emphasis added.)

Justice Turner recognized that such an interpretation of *Aguilar*'s "equipoise" discussion would represent "a dramatic change in [California] summary judgment law." (*Id.* at p. 882.) He resolved his concern by suggesting that if this interpretation were correct it must be limited to antitrust claims and not applied to any other claims, including the tort claims at issue in *Kids' Universe.* (*Ibid.*)

Thus, far from adopting defendants' interpretation of *Aguilar*, Justice Turner merely characterized in dicta the "dramatic change in summary judgment law" that defendants are arguing for here. As Justice Turner recognized, a cornerstone of California summary judgment law—both before and after *Aguilar*—is that "equally conflicting evidence requires a trial to resolve the dispute." (*Kids' Universe*, *supra*, 95 Cal.App.4th at p. 881; *McIntosh v. Mills* (2004) 121 Cal.App.4th 333, 338 ["equally conflicting evidence requires denial of a summary judgment motion"]; *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 361 [only jury can

resolve "two plausible interpretations" of evidence]; *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 718 [summary judgment improper because evidence supported two contrary inferences]; see also *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 58 [JNOV and nonsuit motions also must be denied where facts supporting verdict for plaintiff "may logically and reasonably be inferred from the evidence," even if that "evidence is also susceptible to conflicting inferences"].) Another settled rule is that "'[a]ll doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment.'" (*McIntosh*, *supra*, 121 Cal.App.4th at p. 338.)

Under defendants' view, however, the opposite is true for antitrust conspiracy claims. (BRB 19-20.) Although Justice Turner never reached that issue, a careful reading of *Aguilar* and California's summary judgment statute defeats the argument.

First, under defendants' interpretation, the California Supreme Court endeavored in *Aguilar* to clarify the general rules for summary judgment in California but then embraced a radically *different* standard for antitrust claims, *without ever explicitly saying it was doing so*. That's unlikely.

Second, defendants' argument is statutorily precluded. Unlike its federal counterpart, California's summary judgment statute specifies that summary judgment "may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c); compare Fed. Rules Civ. Proc., rule 56(e).) Under this prohibition, "[s]ummary judgment cannot be granted on the basis of an inference which is contradicted by another reasonable inference derivable from the same underlying evidence." (*Chevron USA, Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 552, fn. 6, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245.) Antitrust case or

not, the Legislature has determined that summary judgment must be denied in California where probative evidence supports conflicting inferences, because only a jury can resolve the dispute. (*McIntosh*, *supra*, 121 Cal.App.4th at p. 338.)

Third, defendants' interpretation of *Aguilar* would violate an antitrust plaintiff's constitutional right to a jury trial:

> [T]he fact that a judge thinks that the inferences are equally plausible must mean that a jury could find one inference to be more plausible than the other. It is important to keep in mind that we do not and cannot know which claim is in fact more plausible than the other. All we have is the judge's possibly erroneous estimate of the relative plausibility. . . . [J]udges do not in fact possess such accuracy in estimating probabilities —indeed, the very idea of a 'true' probability is itself of questionable validity. Since the judge cannot presume the accuracy of his own estimate, any standard he applies in deciding a motion for summary judgment must take account of the fact that a jury may reasonably come up with a somewhat different estimate. That is, the judge must permit some cases to go to the jury in which he does not in fact think that the non-movant's inference is the more plausible one.

(Collins, *Summary Judgment And Circumstantial Evidence* (1988) 40 Stan. L. Rev. 491, 504.) A trial court violates a plaintiff's constitutional right to jury trial if it weighs conflicting evidence and inferences, instead of merely determining whether the plaintiff produced facts sufficient to demonstrate a prima facie case if all of plaintiff's evidence is credited. (*Hung v. Wang* (1992) 8 Cal.App.4th 908, 931; *Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 538-539.)

Fourth, as Justice Mosk explains in his concurrence in *Kids' Universe*, "[o]ne cannot infer [defendants' interpretation] from *Aguilar*." (95 Cal.App.4th at p. 888 (conc. opn. of Mosk, J.).) Justice Mosk correctly recognized that defendants' argument "appears to confuse *Aguilar*'s discussion of the plaintiff's burden of production in opposing summary judgment with *Aguilar*'s standard for granting summary judgment." (*Ibid.*) Where a defendant moving for summary judgment presents evidence that would require a reasonable juror "'*not* to find any underlying material fact more likely than not,'" the burden shifts to plaintiff to "'make a prima facie showing'" that there is a triable issue. (*Id.* at p. 889.) A plaintiff who must prove his case by a preponderance of evidence cannot meet that burden "by the production of evidence that merely demonstrates that the matter sought to be established is as likely as it is unlikely." (*Ibid.*)

This merely means that the plaintiff "to defeat a motion for summary judgment, needs to meet its burden to make a prima facie showing of a triable issue of fact by submitting evidence from which a reasonable fact finder could decide in favor of that plaintiff." (*Ibid.*) It does not mean that in an antitrust case "equally conflicting evidence entitles defendant to summary judgment." (*Ibid.*)

Aguilar, thus, does not establish a special or heightened summary judgment standard for antitrust conspiracy suits—it establishes the same standard for all California claims. Even in antitrust conspiracy cases, "summary judgment cannot be granted on the basis of a weighing of evidence or resolution of conflicting, material facts" and "if the credibility of witnesses was determinative, summary judgment would be inappropriate." (*Id.* at p. 890.)

Citing a federal case, defendants nonetheless claim that summary judgments for defendants are now "'particularly favored'" in antitrust cases. (BRB 24-25, fn. 10.) *Aguilar* does *not* so decree. It merely recognizes that

although some antitrust decisions say courts should "grant motions for summary judgments by defendants 'sparingly[,] . . .'sparingly' does *not* mean 'seldom if ever.' Hence, although such motions should be denied when they should, they must be granted when they must." (25 Cal.4th at p. 852.)

Summary judgment therefore remains disfavored in antitrust cases like this one, where the key issues rest on complex disputed facts and witness credibility. (*Kids' Universe*, *supra*, 95 Cal.App.4th at p. 890 (conc. opn. of Mosk, J.); *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 321 ["*Fisherman's Wharf*"]; see *Toscano v. Professional Golfers Assn.* (9th Cir. 2001) 258 F.3d 978, 982-983 ["[s]ummary judgment is disfavored in complex antitrust litigation . . . [and] 'is appropriate only in the clear absence of any significant probative evidence tending to support the complaint'"].)

2. *Aguilar* permits summary judgment for conspiracy defendants only if—after all evidence and reasonable inferences are collectively construed in the light most favorable to plaintiffs—*no* reasonable juror could find for plaintiffs.

In *Block v. Golden Eagle Ins. Corp.* (2004) 121 Cal.App.4th 186, this Court essentially adopted the same interpretation of *Aguilar* as was articulated in Justice Mosk's concurrence in *Kids' Universe*. Construing the same language from *Aguilar* that spurred Justice Turner's dicta, this Court recognized that the language governs all claims based on circumstantial evidence, not just antitrust conspiracy claims:

> Where all of the evidence *presented by the plaintiff* shows the existence of an element of the offense only as likely or even less likely than the nonexistence of that element, the court must grant the defendant's motion for summary judgment because a reasonable trier of fact could not find for the plaintiff in such a case. [Citation.] Even where the element

> at issue can be proved by inferences, the inference of the existence of the element must be more likely than the inference of its nonexistence. An inference is reasonable if and only if it implies the existence of an element more likely than the nonexistence of that element. . . . [The court] view[s] the evidence in the light most favorable to the party opposing the motion.

(*Id.* at p. 191, emphasis added.)

As in all cases, a court must "determine what any evidence or inference could show or imply to a reasonable trier of fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 856, emphasis omitted.) But in determining whether there is a triable issue of conspiracy, *Aguilar* clearly instructs that (1) the court must construe *all* evidence and reasonable inferences in the light most favorable to plaintiff and cannot weigh the parties' evidence or inferences (*id.* at pp. 844-845, 856); (2) plaintiff's only burden in opposing summary judgment is to *make a prima facie showing* of conspiracy (*id.* at pp. 845-846, 850-851); and (3) the defendant retains at all times the ultimate burden of showing that there is no disputed issue of material fact and that a reasonable juror would *have to* rule in its favor (*id.* at pp. 845, 851).

That is why *Aguilar* refers to "all of the evidence presented *by the plaintiff*, and all of the inferences drawn therefrom" when it describes the test for a triable conspiracy issue (*id.* at p. 857, emphasis added)—and does *not* say, contrary to defendants' assertions, that the court must weigh defendants' and plaintiffs' evidence and determine whether the conspiracy inference is more likely than the non-conspiracy inference.[8] The court must

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[8] Defendants miss the point when they discuss the principle that courts assessing summary judgment motions must consider the entire record, including defendants' evidence. (E.g., BRB 23-24.) True enough, courts must always review the entire record. But because summary

(continued...)

ensure that plaintiff's evidence, when viewed in the light most favorable to plaintiff, would allow a reasonable juror to conclude by a preponderance of evidence that there was a conspiracy. Defendants are entitled to summary judgment only if the plaintiff's "evidence and inferences are *so ambiguous* that *no reasonable trier of fact* could find in plaintiffs' favor." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (2004) ¶ 10:272.2, p. 10-109, emphasis in original.)

In arguing for a special, heightened standard for antitrust conspiracy cases, defendants place great reliance on *Aguilar*'s statements that (a) evidence "showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones" would not allow a juror to find a conspiracy more likely than not; and (b) antitrust law "compels the result" because "[o]therwise it might effectively chill procompetitive conduct in the world at large, the very thing it was designed to protect." (*Aguilar*, *supra*, 25 Cal.4th at p. 852.)

But *Aguilar* acknowledges that these rules merely mean that to withstand summary judgment a plaintiff must produce evidence supporting a reasonable inference of conspiracy. (*Id.* at p. 857.) There is nothing remarkable about the principle that a reasonable inference of conspiracy cannot be drawn from conduct that is as consistent with permissible competition as with conspiracy. In *all* circumstantial evidence contexts, a juror could never legitimately infer that an event occurred based upon conduct that was as consistent with the event's existence as with its

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[8] (...continued)
judgment evidence must be construed in the light most favorable to the non-moving party, defendants' evidence is pertinent to summary judgment analysis only if it is uncontradicted. Defendants' evidence has no significance where, as here, plaintiff produces evidence contradicting defendants' "facts."

nonexistence. Such purely equivocal evidence merely makes the event a possibility—it does not tend to show that it occurred or didn't occur.

Thus, the requirement that conspiracy plaintiffs proffer some evidence that tends to exclude the possibility of independent action merely applies to the antitrust context the rule that California courts have long applied to circumstantial evidence cases—a plaintiff must rely on a reasonable inference, not sheer conjecture, to withstand summary judgment. (See AOB 43-44, citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112 and 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation At Trial § 139, p. 198.)

If the fact to be proved can logically and reasonably be inferred from plaintiff's evidence when that evidence is viewed in the light most favorable to plaintiff, the case must go to the jury even if adverse inferences could also be drawn. (*Ibid.*) The court's role is to ensure that plaintiffs' evidence surpasses the line between impermissible speculation and permissible inference. (See *Leslie G.*, *supra,* 43 Cal.App.4th at pp. 483-484 [held: no reasonable juror could infer rapist entered garage through broken security gate, because undisputed evidence showed alternative methods of entry and plaintiff produced no evidence tending to show the rapist used the gate]; *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 767-768 & fn. 12 [104 S.Ct. 1464, 79 L.Ed.2d 775] ["*Monsanto*"] [U.S. Supreme Court recognized, after proclaiming the "tends to exclude" requirement that *Matsushita* and *Aguilar* later applied, that the "choice between two reasonable interpretations of the testimony properly was left for the jury"].)

Aguilar recognizes that in the antitrust context, conduct as consistent with conspiracy as with permissible competition can never, standing alone, support a reasonable inference of conspiracy. (25 Cal.4th at pp. 852, 857.)

Parallel pricing is the classic example. (*Blomkest Fertilizer, Inc. v. Potash Corp.* (8th Cir. 2000) 203 F.3d 1028, 1043 ["*Blomkest*"] (dis. opn. of Gibson, J.) ["Although parallel pricing evidence is *consistent* with illegal conduct, it is *equally consistent* with lawful conduct, and thus does not tend to exclude the possibility of independent action"].)

Parallel pricing evidence in an antitrust case is like a dead body lying in a backyard in a wrongful death case. Standing alone, the body's existence does not tend to show a tortious cause or a natural one—it equally comports with both possibilities. Even when viewed "in the light most favorable" to a party, the body's mere existence—just like the presence of parallel pricing—remains purely equivocal and is not probative alone. To create a triable issue of tortious conduct, a plaintiff would have to proffer some evidence that tends to show the death was not from natural causes.

Thus, while parallel pricing, like the dead body, "may set the groundwork" for a proper circumstantial case, the plaintiff—to establish a prima facie case—must produce some evidence "that increase[s] the likelihood that the parallel prices resulted from conspiracy." (*Ibid.*) Properly construed, the "tends to exclude" standard does not require plaintiff to prove a negative; it simply requires plaintiffs to present some evidence that, when viewed in the light most favorable to them, would tend to show a conspiracy. (*Williamson Oil Co. v. Philip Morris USA* (11th Cir. 2003) 346 F.3d 1287, 1303 ["'tend[s] to exclude' independent action" is the same as "'tend[s] to establish' a conspiracy"]; *Monsanto*, *supra*, 465 U.S. at p. 768 [plaintiff needs evidence "that reasonably tends to prove . . . a conscious commitment to a common scheme"].)

Here, plaintiffs did not rely on mere parallel pricing, nor just motive and opportunity evidence. They also offered substantial evidence that Blockbuster requested the studios to conspire against the independents by providing Blockbuster with favored pricing to be denied distributors; that

the studios did in fact provide Blockbuster its requested favored treatment; that in doing so each studio engaged in conduct that ordinarily would be rational only if a conspiracy existed (i.e., conduct against independent self-interest); and that the studios' explanations for their actions were pretextual. None of that evidence is mere "conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy."

3. The United States Supreme Court has confirmed that there is no special summary judgment rule for antitrust conspiracy cases.

As explained in our opening brief (AOB 49-50), the Alaska Supreme Court correctly recognized in *Alakayak v. British Columbia Packers, Ltd.* (Alaska 2002) 48 P.3d 432 ("*Alakayak*") that *Matsushita* does not authorize a trial court to weigh the parties' competing evidence and determine for itself whether "'the evidence makes the inference of conspiracy more probable than not'"—*Matsushita*'s concern was that a rational basis exist for jurors to draw a reasonable inference of conspiracy, even if the evidence "in theory could go either way." (48 P.3d at pp. 451-452.) Thus, *Matsushita* "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." (*Id.* at p. 452.)

As shown above, that analysis comports 100% with a correct reading of *Aguilar*. Defendants try to nullify the force of *Alakayak* by claiming it followed the dissent in *Matsushita*, while *Aguilar* "adopted the majority's position in *Matsushita*." (BRB 23, fn. 9.) *Alakayak*, however, interpreted and followed the majority's position, just like *Aguilar*. (See 48 P.3d at pp. 449-452.)

Defendants' claim is based on the fact that the *Alakayak* court cited the portion of the *Matsushita* dissent where Justice White criticized the majority for using "confusing and inconsistent statements about the appropriate standard for granting summary judgment," which he worried suggested that a judge "in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors plaintiff." (*Matsushita*, *supra*, 475 U.S. at pp. 599-600 (dis. opn. of White, J.).) Since that approach would be irreconcilable with *Monsanto* and the "doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment," Justice White warned:

> If the Court intends 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, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

(*Id.* at pp. 600-601.)

Since some courts *did* misconstrue the majority's language in *Matsushita*, the Supreme Court set the record straight in *Eastman Kodak Co. v. Image Technical Services, Inc.* (1992) 504 U.S. 451 [112 S.Ct 2072, 119 L.Ed.2d 265]. In *Kodak*, the Court explained that *Matsushita* "did *not* introduce a special burden on plaintiffs facing summary judgment in antitrust cases"; it merely applied the settled rule that "the nonmoving party's inferences be reasonable in order to reach the jury." (*Id.* at p. 468, emphasis added.)

Kodak confirmed—as *Aguilar* and *Alakayak* also recognize—that a "non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case." (*Big Apple BMW v.*

BMW of North America (3d Cir. 1992) 974 F.2d 1358, 1363; see also Zwisler, *The Susceptibility Of Vertical Restraints To Summary Adjudication: Procedural Avenues To Substantive Objectives* (1999) 67 Antitrust L.J. 327, 330 ["Some lower courts interpreted [*Monsanto* and *Matsushita*] as dictating a special rule in antitrust cases that actually favored summary judgment where the evidence of conspiracy or plausibility was in equipose. However, the Supreme Court subsequently emphasized, in [*Kodak*], that . . . *Matsushita* merely means that the inferences that the plaintiff seeks to draw must be reasonable, as they must be in all summary judgment cases."].)

4. Defendants misleadingly interpret the evidence in their favor and dismiss plaintiffs' evidence as "ambiguous" if it does not inexorably lead to the conclusion that there was an agreement.

As our opening brief showed, in *In re High Fructose Corn Syrup Antitrust Litig.* (7th Cir. 2002) 295 F.3d 651 ("*High Fructose*"), Judge Posner enumerated traps clever defendants set to erroneously heighten the proper standard for inferring conspiracies. (AOB 47, 49.)[9] Tellingly,

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[9] Trial courts repeatedly fall victim to these traps, as shown by the numerous antitrust conspiracy decisions reversing summary judgments for defendants. (E.g., *In re Flat Glass Antitrust Litigation* (3d Cir. 2004) 385 F.3d 350, 368-369 ["*Flat Glass*"]; *High Fructose*, *supra*, 295 F.3d at pp. 655-656; *Alakayak*, *supra*, 48 P.3d at pp. 452-453; *Re/Max Int'l Inc. v. Realty One, Inc.* (6th Cir. 1999) 173 F.3d 995, 1009; *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.* (7th Cir. 1999) 190 F.3d 775, 778-779 ["*JTC Petroleum*"]; *Rossi v. Standard Roofing, Inc.* (3d Cir. 1998) 156 F.3d 452, 472, 478-479; *City of Tuscaloosa v. Harcros Chems., Inc.* (11th Cir. 1998) 158 F.3d 548, 572-573; *Ezzo's Investments, Inc. v. Royal Beauty Supply, Inc.* (6th Cir. 1996) 94 F.3d 1032, 1035; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.* (3d Cir. 1993) 998 F.2d 1224, 1232-1246 ["*Petruzzi's*"]; *Boczar v. Manatee Hospitals & Health Systems, Inc.* (11th Cir. 1993) 993 F.2d 1514, 1517-1519; *Movie 1 & 2 v. United Artists Communications* (9th Cir. 1990) 909 F.2d 1245, 1251-1252 ["*Movie 1 & 2*"]; *Apex Oil Co. v. DiMauro* (2d Cir. 1987) 822 F.2d 246, 257; *Harkins Amusement Enterprises, Inc. v. General Cinema* (9th Cir. 1988) 850 F.2d 477, 485 ["*Harkins*"]; *Dimidowich v. Bell & Howell* (9th Cir. 1986) 803

(continued...)

defendants do not discuss Judge Posner's views or *High Fructose*. Instead, they set two of the traps he warns against: (1) they repeatedly "weigh conflicting evidence" by failing to present the facts and inferences in the light most favorable to plaintiffs; and (2) they claim that "the evidence as a whole cannot defeat summary judgment" because "no single item of evidence presented by the plaintiff points unequivocally to conspiracy." (*High Fructose*, *supra*, 295 F.3d at p. 655.)

Defendants discuss each piece of plaintiffs' evidence in isolation from the others and then claim each fails either because (a) it does not, standing alone, support an inference of conspiracy; or (b) it might be susceptible to, or might not negate, an alternative interpretation supporting defendants' version of events. (See, e.g., BRB 29, SRB 37 [motive not enough by itself to infer a conspiracy]; BRB 42, SRB 37 [same re opportunity]; BRB 31, SRB 43 [same re request for conspiracy]; BRB 41, SRB 29-30 [same re price discrimination]; SRB 20-21, 40-41 [same re gathering and possession of market information]; SRB 14 [same re pretext evidence]; BRB 44-45, SRB 30 [arguing coercion and enticement evidence could be construed to support defendants]; BRB 34-40 [arguing studio memoranda could be construed to support defendants].)

And when it comes to discussing key factual issues, such as whether distributors and independents wanted or could do Blockbuster-comparable deals and the comparability of what the studios offered, defendants present jury arguments—they disregard plaintiffs' evidence and instead recite disputed facts in the light most favorable to themselves. (See, e.g., BRB 32 [discussing Fox's deals to distributors]; SRB 4-6 [discussing defendants' purported business strategies]; SRB 17, fn. 7 [discussing output deals offered to distributors]; SRB 17, 26 [discussing studios' dealings with the

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[9] (...continued)
F.2d 1473, 1479-1480.)

IVRG]; SRB 19 [discussing Dr. Sweeney's testimony]; SRB 23-27 [discussing whether distributors and independents could do Blockbuster-comparable deals]; SRB 27 [claiming defendants presented "uncontroverted testimony that they ultimately negotiated deals with wholesalers and retailers that were business justified"]; SRB 24-25, 31-36 [discussing Ingram and Rentrak evidence]; SRB 39 [discussing "testing"]; see also § I.B, *supra* [showing pro-defendant spin in Blockbuster's "Factual Background"].)

In *Flat Glass*, *supra*, 385 F.3d 350, the Third Circuit recently reversed a summary judgment for defendant in a price-fixing case where the defendant took exactly the same approach to the evidence. The defendant "appear[ed] to propose that [the court] consider each individual piece of evidence and disregard it if we could feasibly interpret it as consistent with the absence of an agreement to fix prices." (*Id.* at p. 368.) It weighed evidence in its own favor, presenting arguments "well-suited for an argument before a jury" but improper for summary judgment purposes. (*Ibid.*) In addition, it contended that the court "should disregard certain categories of evidence . . . because such evidence does not in isolation lead inexorably to the conclusion that [defendant] entered into an agreement." (*Ibid.*) The court rejected defendant's approach, as this Court should here.

> As Judge Posner puts it:
>
> 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?

(*High Fructose*, *supra*, 295 F.3d at p. 655; accord, *In re Vitamins Antitrust Litigation* (D.D.C. 2004) 320 F.Supp.2d 1, 14 ["*Vitamins Litigation*"].)

High Fructose and *Flat Glass* demonstrate that Blockbuster and the studios misapply *Aguilar*, as well as the federal standard, when they discard each piece of plaintiffs' circumstantial proof as "ambiguous" and claim it is insufficient because it "might support competing inferences" (SRB 14):

> A notion has sprung up that *Matsushita* created a new rule in antitrust cases preventing any reliance on "ambiguous" evidence. . . . This is a misreading of *Matsushita*—a misreading that [*High Fructose*] nicely exposes. . . . A blanket rule against ambiguous evidence would go too far. After all, "ambiguous" simply means subject to differing interpretations. Virtually everything is ambiguous, even extremely strong evidence. There is always another possible interpretation of any piece of evidence. If we never let a conspiracy be inferred from "ambiguous" evidence, then as a practical matter we are disallowing any conspiracy from circumstantial evidence. But some of this evidence is precisely what a jury should be reviewing in reaching its decision.

(Glazer, *Easy Facts Make Good Law: A Response To David Meyer's Article On The High Fructose Corn Syrup Decision* (2003) 17 Antitrust ABA 90, 92 ["*Easy Facts*"].)[10]

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[10] See also *City of Long Beach v. Standard Oil Co.* (9th Cir. 1995) 46 F.3d 929, 933-934 ("*Matsushita* and *Monsanto* can[not] be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. . . . *After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences.*"); Baker, *Proof of Conspiracy In Vertical And Horizontal Price-Fixing Cases: The Intersection Of Law, Economics And Policy* (2004) 5 Sedona Conf. J. 93, 95 ("The problem is that circumstantial evidence is inherently ambiguous. If only unambiguous evidence were allowed, horizontal price-fixing could only be proved through direct

(continued...)

Not surprisingly, Blockbuster and the studios rely on federal cases that have misinterpreted the "tends to exclude" standard. For example, they quote *Blomkest*, *supra*, 203 F.3d 1028, for the proposition that "'where there is an independent business justification for the defendant's behavior, no inference of conspiracy can be drawn.'" (SRB 31; accord, SRB 41.) But the Eighth Circuit split six-to-five en banc in *Blomkest*, with the dissent remarking that "[t]he Court today rejects circumstantial evidence of conspiracy and requires direct evidence to withstand summary judgment in an antitrust case." (203 F.3d at p. 1039 (dis. opn. of Gibson, J.).)

Blomkest exemplifies the cases in which courts have usurped the jury's role by failing to construe conspiracy evidence in the light most favorable to plaintiffs. (Shulman, *Proof Of Conspiracy In Antitrust Cases & The Oligopoly Problem* (2003) 4 Sedona Conf. J. 1, 12 ["One might fairly conclude from reading the two [*Blomkest*] opinions that the majority and the dissent were looking at different records, or that the plaintiffs were not truly given the benefit of all inferences and the full force of their proof. One might also conclude that the majority assumed an activist role in reviewing evidence that properly should have been left for the jury."]; Posner, Antitrust Law (2d ed. 2001) p. 93 & fn. 61 [*Blomkest* majority improperly handled the economic evidence; the dissent was "cogent"]; *id.* at pp. 100 & fn. 72, 171 [Posner further criticizing *Blomkest*].)

Thus, a leading antitrust scholar has recognized that *Blomkest* and other cases defendants cite here have misinterpreted *Matsushita* "as requiring a certain quantum of evidence of verbal agreement before summary judgment can be avoided," when in fact "*Matsushita* never insisted that any particular kind of evidence of collusion was necessary, but

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[10] (...continued)
evidence. . . . [W]here there is substantial evidence of explicit agreement—*albeit capable of being interpreted either way*—the case should be given to the jury." (Emphasis added.).)

only that the evidence be of such quality that it makes collusion a likely explanation of the activity before the court." (Hovenkamp, *The Rationalization Of Antitrust* (2003) 116 Harv. L.Rev 917, 925.)

Judge Posner similarly criticizes these cases for mistakenly applying the "tends to exclude" standard in a manner that effectively requires the plaintiff to "negate the possibility that supracompetitive pricing was achieved without explicit agreement." (Posner, Antitrust Law, *supra*, at p. 100 & fn. 72; see Shulman, *Williamson Oil v. Philip Morris: Whatever Happened To Jury Trials?* (2004) 5 Sedona Conf. J. 81, 90 [concluding *Williamson Oil* falls into Judge Posner's enumerated traps].)

In sum, defendants' approach to the evidence misapplies *Aguilar*, as well as *Monsanto* and *Matsushita*.

5. Defendants' approach would require direct evidence for California plaintiffs to prove conspiracy.

"In cases where the existence of a conspiracy is alleged, the law recognizes that the persons engaged in such an undertaking do not generally leave a recognizable trail of their activities and that direct evidence of a conspiracy can usually be secured only if one of the conspirators confessed." (*Balistreri v. Turner* (1964) 227 Cal.App.2d 236, 241.) Thus, "courts should be cautious not to require the impossible from a [conspiracy] plaintiff at the summary judgment stage . . . ." (Barlow, *Avoiding Summary Judgment In Antitrust Conspiracy Cases: Is The Seventh Circuit Pro-Enforcement?* (2004) SJ054 ALI-ABA 581, 593 ["*Avoiding Summary Judgment*"].)

Blockbuster and the studios urge this Court to require the impossible. Under their approach, *no* California plaintiff could ever reach a jury without the direct evidence of conspiracy that rarely exists. They discuss each category of the plaintiffs' evidence *seriatim*, rejecting each as inadequate by itself.

They begin by dismissing the motive and opportunity evidence as irrelevant. (SRB 12, 37; BRB 29, 42.)

They then dismiss the evidence that Blockbuster *demanded* a conspiracy (including direct evidence in the form of the Fox admissions), by asserting a request alone is not enough to infer a conspiracy. (BRB 31; SRB 43.)

In response to plaintiffs' showing that pricing evidence indicated the studios *accepted* the demand, defendants claim "price discrimination does not give rise to an inference of conspiracy as a matter of law" (BRB 41) and even if "'Blockbuster wrongfully requested preferential treatment,'" a studio's "'decision to take actions that are in its own interest cannot support an inference of conspiracy'" (SRB 43).

To plaintiffs' demonstration that the price discrimination here ordinarily would be irrational unless a conspiracy existed, defendants respond that "'evidence that defendants have merely foregone profitable business opportunities'" and "'failed to continue to increase [their] market share'" are not enough to infer a conspiracy (SRB 27, 32) and "'business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute'" (SRB 31).

When plaintiffs show that independents and distributors requested the Blockbuster deals, defendants claim that such "evidence *does not exclude* the possibility that after discovering the various onerous terms of those deals, those same retailers and wholesalers chose to negotiate different deals." (SRB 24, emphasis added.)

When plaintiffs demonstrate that independents and distributors *did* want and *could* do Blockbuster-comparable deals, and therefore defendants' explanations are pretextual, defendants claim "that is not enough" because "at most" that evidence "calls into question whether Defendants made good

business decisions" and "does not tend to exclude the possibility that they made those decision independently" (SRB 14) and also "'[e]vidence of business justification for a defendant's behavior precludes an inference of conspiracy . . . .'" (SRB 41).

When plaintiffs show that the evidence also supports an inference that Blockbuster orchestrated a horizontal conspiracy among the studios, not just vertical conspiracies, defendants claim that only *direct* evidence of a vertical conspiracy will do (BRB 49-53), and they argue there must be *direct* evidence of Blockbuster discussing with each studio the other studios' distributor pricing or of studios directly communicating with each other (BRB 43, 51).

On and on defendants go. Utterly missing from their exegesis on the purported "ambiguity" of plaintiffs' evidence is any offer as to how *any* plaintiff could ever satisfy their interpretation of *Aguilar* with circumstantial evidence. Defendants' approach must be rejected as it would preclude all California conspiracy plaintiffs from reaching a jury without direct evidence.

6. *Matsushita*'s "implausible conspiracy" rule is inapplicable here.

Addressing an alleged 20-year conspiracy to sell products to consumers at below cost, the U.S. Supreme Court announced in *Matsushita* that "if the factual context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claims than would otherwise be necessary [to survive a summary judgment motion]." (*Matsushita*, *supra*, 467 U.S. at p. 587.)

Summary judgments are "rarely granted on th[e] basis" of this rule, because few conspiracies are so implausible as the conspiracy alleged in *Matsushita*. (*Alakayak*, *supra*, 48 P.3d at p. 451, fn. 71; *Kodak*, *supra*, 504

U.S. at p. 468 [the *Matsushita* defendants "had every incentive not to engage in the alleged conduct which required them to sustain losses for decades with no foreseeable profits"].)

Defendants, nonetheless, claim this standard applies here. (BRB 17, fn. 17; SRB 12-13.) It doesn't. As the Texas district court explained, "[t]he difference in this case," compared to *Matsushita*, "is that the plaintiffs' claims make economic sense." (AA 1102.)

Further, in the California lawsuit, neither defendants nor the trial court mentioned or relied upon *Matsushita*'s "implausible conspiracy" rule. (See AA 62-88, 136, 7263-7285, 7738-7741; 1/23/03 RT 1-262.) They focused exclusively on *Aguilar* (see *ibid.*), and *Aguilar* does not address that rule. Because the conspiracy claim in *Aguilar* was "far from implausible," the Supreme Court declared that it need not, and would not, "consider whether summary judgment law in this state now conforms to" *Matsushita*'s "implausible conspiracy" rule. (*Aguilar*, *supra*, 25 Cal.4th at p. 855, fn. 25; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 10:260.12, p. 10-100 [this "is an open question" in California].)

The studios now belatedly claim that *Matsushita*'s "implausible conspiracy" rule applies, because "[W]hy would the studios seek to eliminate independent retailers who collectively comprise the largest sector of the market?" (SRB 12.)

Why? Because of Blockbuster!

Such conduct *would* be irrational—absent a conspiracy orchestrated by Blockbuster. As our opening brief documented, sellers frequently succumb to powerful buyers' demands for conspiracies against smaller buyers because those powerful buyers, unlike scattered, smaller independent stores, have the economic power to coerce and/or entice sellers. (See cases at AOB 52-53 & fn. 17; Areeda & Hovenkamp, Fundamentals Of Antitrust

Law (3d ed. 2004) § 16.01c, p. 16-11 [a manufacturer "may restrict intrabrand competition not to serve its own interests in effective distribution but to accommodate powerful dealers"]; *id.* at § 16.03a, p. 16-26 ["manufacturers have often restrained intrabrand competition . . . to appease dealer interests in excess profits"].)

Indeed, the recurring problem of sellers favoring large chains at independents' expense is precisely what spurred enactment of the Robinson-Patman Act and California's Unfair Practices Act. (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1258-1261 ["*ABC Internat. Traders*"]; *Alan's of Atlanta, Inc. v. Minolta Corp.* (11th Cir. 1990) 903 F.2d 1414, 1422 ["*Alan's of Atlanta*"].)

The studios likewise ignore the evidence that they substantially *increased* their revenues under Blockbuster's output deals (e.g., AA 1200 (CT350-51), 1491(CT1499-500), 1664(CT2187), 1775(CT2623-25), 2524, 2762, 3016, 3374, 3376, 3387), that their revenue increases more than offset any losses attributable to independents' inability to compete with Blockbuster (AA 752), that Blockbuster threatened to and did reduce purchases if it didn't get what it wanted (e.g., AA 1736-1737(CT2472-77), 2212, 2216, 2270, 2331, 4712), and that Blockbuster paid the studios a supracompetitive price (AA 1860 (CT2966-67), 4912-4913, 5034-5038, 5081). (See *Spectators' Commun. Network, Inc. v. Colonial Country Club* (5th Cir. 2001) 253 F.3d 215, 220-222 [coercion and enticement evidence created triable issue of conspiracy despite defendant's contention proposed conspiracy was irrational].)

The studios' *own history* of illegally favoring large chains at the expense of smaller, independent buyers—which defendants ignore—further shows plaintiffs' claims are plausible. (See cases at AOB 53, fn. 17 [studios conspiring with large chain theaters at expense of independent theaters]; *American Tobacco Co. v. United States* (1946) 328 U.S. 781, 796

[66 S.Ct. 1125, 90 L.Ed. 1575] ["an opportunity for abuse" should not "be ignored when the opportunity is proved to have been utilized in the past"].)

Blockbuster, in turn, claims the alleged conspiracy is implausible because it wouldn't make sense for Blockbuster to demand that the studios deny its favored terms to independents but not to the other large chains. (BRB 17, fn. 7.)[11] Ample evidence shows it made perfect sense.

Although Blockbuster faced competition in 1997 from other large chains, the next largest chain—Hollywood Video—had a market share of only 6%, which paled in comparison to Blockbuster's 24% share and the independents 55% share. (AA 1211 (CT392), 1497(CT1525), 2550.) The independents, not chains, were Blockbuster's biggest problem. By 1997, independents "[we]re on the rise, while chains, including Blockbuster, [we]re on the decline." (AA 3162; see AA 4733 ["mom and pop stores" Blockbuster's "biggest market share enemy" in "virtually every market"].)

By charging lower prices and providing better service (AA 1186(CT295), 1886-1887(CT3072-75), 4888), independents steadily had increased their market share from 1993 to 1997 at the expense of Blockbuster and the other chains (AA 3162; see also AA 1186(CT295), 1203(CT361-62), 1495(CT1515-16), 1561(CT1781), 1753(CT2541), 1889(CT3084), 4830). Redstone admitted that the "independents were clearly outcompeting Blockbuster." (AA1226 (CT454)).

Blockbuster also correctly anticipated that if the independents lacked access to Blockbuster's terms, Blockbuster's market share would skyrocket

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[11] Defendants erroneously assert that the studios gave other large chains "revenue sharing deals identical to or better than Blockbuster's deals." (BRB 17.) There was no evidence a studio ever gave anyone a "better" deal than Blockbuster's. Nor did every studio give the other chains deals "identical to" Blockbuster's. Paramount, for example, admitted that it only gave them *cherry-pick* deals charging a *higher* revenue share than Blockbuster's deal; Paramount contended the other chains did not want output deals. (AA 393-395.)

and Blockbuster's share increase would far exceed any gains other chains might make at independents' expense. (See AA 1204 (CT364-66) [Blockbuster knew independents "would be hurt the most" and Blockbuster and other chains would seize their market share], 2235 [Blockbuster planned to increase its share to 50%], 2541 [Blockbuster wanted to "[l]ead consolidation of industry"], 2551-2552 [Blockbuster projected it would increase its market share at independents' expense by 13% from 1998 to 2001 (27% to 40%), while the other large chains would increase their combined share by only 5% (15% to 20%)], 2739 [Viacom in 1999: "[t]he gap between Blockbuster and the rest of the market is widening"], 3756 [Blockbuster's market share increased to 40%, while Hollywood Video's increased to only 10%].)

In short, Blockbuster irrefutably had a rational economic motive to target the independents—it intended to, and did, increase its market share to 40-50% by seizing their market share, driving out of business competitors who typically offered lower prices and better service.[12]

7. Where, as here, the conspiracy claim is plausible and the challenged conduct had anti-competitive results, more liberal inferences of conspiracy are permissible.

Our opening brief explained that "'the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' [conspiracy] theory and the danger associated with such inferences.'" (AOB 50, quoting *Petruzzi's*, *supra*, 998 F.2d at p. 1232.) Thus, "'more liberal inferences from the evidence should be permitted'"

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[12] A conspiracy against the other large chains would have been impossible to accomplish. Unlike the independents, Hollywood Video and the other large chains had the economic power to immediately sue or demand concessions from the studios. And the various obstacles defendants mount against plaintiffs' claims here—e.g., their assertions that distributors and independents could not do Blockbuster-comparable deals—could never fly against the other large chains.

where, as here, plaintiffs' conspiracy theory is plausible and the conduct was "'not pro-competitive.'" (*Ibid.*, quoting *Petruzzi's*.)

Defendants accuse plaintiffs of "a deliberate mischaracterization of the law," but they then relegate their discussion of *Petruzzi's* to a footnote. (BRB 48-49 & fn. 24.) They instead claim plaintiffs erred in stating that Judge Posner recognized in *High Fructose*, *supra*, 295 F.3d 651, that "'less evidence [is] required the more plausible the collusion charge.'" (BRB 48.) Defendants miss the mark for two reasons.

First, that *is* Judge Posner's view. (See Barlow, *Avoiding Summary Judgment, supra*, SJ054 ALI-ABA at p. 587 ["as the Seventh Circuit explained [in *High Fructose*], more evidence is required the less plausible the charge of collusive conduct, *and vice versa*"; emphasis added]; *Vitamins Litigation*, *supra*, 320 F.Supp.2d at p. 13 [*High Fructose* suggests "*Matsushita* permitted a sliding scale approach in antitrust cases"].) "Under Posner's approach, once one determines that the market is conducive to collusion and has some of the suspicious practices that suggest collusion, little or nothing in the way of additional 'explicit' evidence of collusion is required." (Hovenkamp, *The Rationalization Of Antitrust*, *supra*, 116 Harv. L.Rev at p. 926.)

Thus, "given the Seventh Circuit's decision [in *High Fructose*] and the significance of the post-Enron era, courts confronted with a plausible theory can opt to permit more liberal inferences of conspiracy, if they so choose." (Barlow, *supra*, SJ054 ALI-ABA at p. 589.)

Second, defendants ignore *Petruzzi's* other prong—that more liberal inferences are permissible where the conspiracy is plausible *and the conduct was not procompetitive*. Defendants claim the *Petruzzi's* quote is "out-of-context" and "the 3rd Circuit held nothing of the sort." (BRB 49, fn. 24.) But the Third Circuit recently confirmed in *Flat Glass* that

Petruzzi's does so hold and that it accurately states the proper rule. (See 385 F.3d at p. 358.)

As *Flat Glass* explains, *Matsushita* was premised on two concerns: (1) "plaintiffs' theory of conspiracy was implausible"; and (2) "permitting an inference of antitrust conspiracy in the circumstances would have the effect of deterring *significant* procompetitive conduct," because plaintiffs contended the defendants' low pricing to consumers reflected a predatory-pricing conspiracy. (*Id.* at pp. 357-358, emphasis in original, internal quotation marks omitted.) Thus, the "'meaning [courts] ascribe to circumstantial [conspiracy] evidence will vary depending on the challenged conduct.'" (*Id.* at p. 358.)

As our opening brief explained, the challenged conduct here was not procompetitive. (AOB 51.) Defendants, however, claim plaintiffs put "the cart before the horse" because defendants' conduct would be "'anti-competitive' only if they conspired in violation of the Cartwright Act." (BRB 48, fn. 23.) That is sophistry.

The "rationale behind the Supreme Court's decision in *Matsushita*" was to protect conduct "that leads to consumer-friendly *results* in the overall marketplace." (*Vitamins Litigation*, *supra*, 320 F.Supp.2d at p. 14, emphasis added.) Thus, where the result of the challenged conduct benefitted consumers—such as the lower prices to consumers in *Matsushita*—courts should be cautious in permitting conspiracy inferences because it could chill the very conduct antitrust laws are designed to protect. (*Kodak*, *supra*, 504 U.S. at p. 478.) But where the alleged conduct is "facially anticompetitive"—for example, where it caused "higher service prices and market foreclosure"—"*Matsushita* does not create any presumption in favor of summary judgment for the defendant." (*Ibid.*)

The challenged conduct here—the studios' admitted failure to provide independents with "reasonably priced access" to videos

(AA 3722)—foreclosed independents from offering the copy depth and lower prices needed to meet consumer demand and to compete with Blockbuster. Blockbuster proclaims that it needed "a feasible way to increase the number of copies of movies offered in its stores." (BRB 13.) But independents needed the same thing and they, unlike Blockbuster, never got it.

The independents' resulting devastation was "[b]ad for consumers" and "bad for the industry." (AA 1555(CT1753).) Within only a few years, Blockbuster's market share skyrocketed to 40% (AA 3756); over five thousand independents went out of business, depriving consumers of the lower prices, convenience and better service they provided (AA 1186(CT295), 1886-1887(CT3072-75), 3712, 4888, 4915); and the devastation of the independents and Blockbuster's increased dominance resulted in an *increase* in consumer rental prices (AA 1513(CT1593-94), 1919(CT3203-05), 3369, 3699, 752).

The result here is the polar opposite of the low consumer pricing in *Matsushita*—it is what antitrust laws are designed to prevent, not promote. The balance therefore tips *against* summary judgment. "[I]f the reasons for prohibiting or controlling certain conduct are very strong, it makes sense to err on the side of over-inclusiveness in determining the presence of an agreement." (Areeda & Hovenkamp, Fundamentals Of Antitrust Law, *supra*, at § 14.11a, p. 14-82; see *Kodak*, *supra*, 504 U.S. at p. 479 [held: since the pro-competitive effects of defendants' conduct were disputed, "when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment"]; *Vitamins Litigation*, *supra*, 320 F.Supp.2d at p. 23 [plaintiffs entitled to "jury determining inferences rather than the Court doing so at the summary judgment stage" because

defendants' actions "do not indicate a reasonable presumption of procompetitive conduct"].)

B. Plaintiffs' Evidence Created Triable Issues That, At A Minimum, Blockbuster Entered Into A Series Of Vertical Conspiracies With The Studios.

The studios acknowledge that plaintiffs have always accused Blockbuster of orchestrating vertical *and* horizontal conspiracies with the studios. (SRB 15, fn. 5, 44, fn. 18.) Blockbuster, however, tries to obfuscate the issue by characterizing the vertical-conspiracy issue as "secondary" to plaintiffs' horizontal-conspiracy claim. (BRB 25.) Wrong. The complaint alleged that Blockbuster orchestrated vertical and horizontal conspiracies (AA 28, 30, 32) and plaintiffs argued in their summary judgment opposition that the circumstances mirrored *Toys "R" Us, Inc. v. F.T.C.* (7th Cir. 2000) 221 F.3d 928 ("*Toys "R" Us*") and *Interstate Circuit, Inc. v. United States* (1939) 306 U.S. 208 [59 S.Ct. 467, 83 L.Ed. 610] ("*Interstate Circuit*")—i.e., a powerful buyer using a series of vertical agreements with its suppliers to orchestrate a horizontal conspiracy among them (AA 1940).

As our opening brief demonstrated and we further explain below, quite apart from the evidence of a horizontal conspiracy, the evidence construed in the light most favorable to plaintiffs supports a reasonable inference that each studio reached a vertical agreement with Blockbuster to deny the independents' access to Blockbuster's favored terms.

1. Plaintiffs' evidence shows plausible motive and opportunity.

Our opening brief showed that Blockbuster and the studios had a plausible motive and opportunity to reach the vertical conspiracies. (AOB 52-53.) Defendants present two arguments in response.

First, they argue evidence of plausible motive and opportunity are insufficient alone to infer a conspiracy. (SRB 12, 37; BRB 29, 42.) True, but as we demonstrated in section II.A.7 above, such evidence contributes to a plaintiff's carrying of its evidentiary burden, particularly where, as here, defendants' conduct had anti-competitive results.

Second, defendants argue that the coercion and enticement evidence should be construed as Blockbuster merely enlisting studios to do output deals, not enlisting them to deny independents access to Blockbuster's terms. (BRB 44-45; SRB 30.) But that argument reverses the summary judgment standard by construing the evidence in the light most favorable *to defendants*. Even if the evidence is "susceptible to an innocent interpretation" as defendants claim, summary judgment is impermissible because while "defendants' interpretations may be correct[,] they are not inevitable." (*In re Brand Name Prescription Drugs Antitrust Litigation* (7th Cir. 1997) 123 F.3d 599, 614 ["*Brand Name*"].)

When the evidence is properly construed in plaintiffs' favor, it supports a reasonable inference that Blockbuster pressured and enticed the studios to deny comparable terms to independents. Blockbuster labels the coercion evidence as "evidence that Blockbuster will cut orders on product not available on revenue sharing." (BRB 45.) But the cited evidence also showed the studios admitted Blockbuster threatened to cut purchases if it didn't get "price concessions" (AA 2212-2213, 2216) and showed Blockbuster was "pressur[ing]" Fox for a special deal not "to be given to independents" (AA 1736-1737(CT2472-77).

Also, the studios acknowledged long after entering into the output deals that Blockbuster would respond coercively to any attempt to give independents a level playing field. A January 2000 Universal staff report recognized that "[m]ost small retailers still don't have reasonably priced access" and it identified the "[h]igh risk for existing business due to

backlash from Blockbuster" as a negative associated with any attempt to reduce Blockbuster's control. (AA 3721-3722.)

Defendants also ignore that the output deals were structured to ensure each studio received at least what Blockbuster had historically paid under pre-output purchases, with Blockbuster and the studios sharing the upside from any increased rentals. (AA 165, 456, 1195(CT331), 1318(CT817), 1395(CT1122), 1543(CT1707), 1683(CT2263), 2191, 2220, 4889, 7318; cites at AOB 12.) The studios correctly believed that the copy depth from the deals would substantially increase Blockbuster's total rentals and therefore the studio's overall revenues. (AA 522, 1860(CT2966-67), 2332, 2500, 3387 [studios embraced revenue sharing because "copy depth increased . . . their revenues"]; cites at AOB 20.) But the studios bore no risk if total rentals didn't increase. As Disney explained, "in the remote event that total rentals do not increase, [the studio] is essentially whole, with the retailer bearing the risk." (AA 2500.)

Since the proposed output deals entailed little risk for the studios and were expected to substantially increase studio revenues, a reasonable juror could find that Blockbuster's coercion and enticement was to enlist the studios to deny the independents access to Blockbuster's favored terms—not to enlist them to do output deals. One need not coerce or entice someone to do a good deal.

2. Plaintiffs' evidence shows Blockbuster requested a vertical conspiracy and each studio accepted.

a. Such evidence creates a triable issue.

Our opening brief showed that "'[e]vidence of both an invitation to collude, as well as acceptance of that invitation' satisfies the 'tends to exclude' standard." (AOB 54, quoting *Alakayak*, *supra*, 48 P.3d at p. 458.)

Defendants try to circumvent this rule by asserting a "request for exclusivity cannot give rise to an inference of conspiracy as a matter of

law." (BRB 31; accord, SRB 43.) But the cases they cite merely reflect the principle that a collusion request is not *by itself* sufficient evidence of conspiracy, because the request is unilateral until *accepted*. (See cases at BRB 31-32; SRB 43.)

A triable issue does arise when that collusion request is *coupled with* evidence of its *acceptance*. (*Alakayak*, *supra*, 48 P.3d at p. 458.) Defendants miss the pont by arguing that, "[i]n truth, if plaintiffs had evidence of an 'invitation to collude' and 'acceptance' of that invitation, then plaintiffs would have direct evidence of conspiracy and the 'tends to exclude' standard would not even apply." (BRB 32.) No case holds that the invitation and acceptance must be in the same document or statement—i.e, the direct evidence "smoking gun" that virtually never exists.

The point is that a plaintiff cannot base a conspiracy claim on evidence of a request alone. It must proffer additional evidence supporting a reasonable inference that the request was accepted. The case law refers to this as "evidence implying a traditional conspiracy," as opposed to merely inferring conspiracies from parallel conduct against independent self-interest. (*Flat Glass*, *supra*, 385 F.3d at p. 360; accord, *Petruzzi's*, *supra*, 998 F.2d at p. 1244; *Alakayak*, *supra*, 48 P.3d at pp. 452, 458.)

Alakayak is directly on point. There, the Alaska Supreme Court reversed summary judgment for defendants because plaintiffs proffered (a) documents that tended to show an invitation to collude, and (b) circumstantial pricing evidence from which "[a]cceptance can reasonably be inferred." (*Id.* at p. 458.) As our opening brief showed and we further demonstrate below, plaintiffs' evidence here met that same standard. (See also *Monsanto*, *supra*, 465 U.S. at p. 765 [finding triable issue of vertical conspiracy where Monsanto threatened to restrict distributors' supply if they did not maintain suggested resale prices and

distributor balked but then ultimately complied with suggested pricing: "Evidence of this kind plainly is relevant and persuasive as to a meeting of minds"].)

b. The Fox admissions support a reasonable inference that Blockbuster *requested* each studio to deny the independents access to Blockbuster's terms.

Our opening brief demonstrated that a reasonable juror could infer from the Fox admissions—which constitute direct evidence that Blockbuster asked Fox to conspire against the independents—that Blockbuster made the same conspiracy request on the other studios. (AOB 54-55.)[13]

Defendants concede such an inference is permissible "'where the circumstances indicate a **strong probability** that the course followed in one instance would be followed in others.'" (BRB 33, emphasis added by defendants.) They then argue no such probability exists here. They premise that contention solely on their interpretation of the studio memoranda indicating Blockbuster requested a favored deal. (See BRB 34.)

As our opening brief explained, however, it is undisputed that (a) Blockbuster approached each studio as part of a common plan to obtain new revenue-sharing deals to reverse its competitive slide and increase its market share; and (b) at the time of the May 1998 Fox admissions, Blockbuster had commenced a new revenue-sharing arrangement with every studio *except Fox*. (AOB 55; see also AOB 14, 10-19.) Not only would it be eminently reasonable to infer from these circumstances that

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[13] Blockbuster concedes that this direct evidence establishes for summary judgment purposes that Blockbuster "asked Fox for special terms" to be denied independents. (BRB 31, fn. 14.) Later, Blockbuster utterly ignores its concession and the Fox admissions by proclaiming "[p]laintiffs have not presented a shred of evidence, circumstantial or otherwise, that Blockbuster ever demanded that a studio deny Blockbuster-equivalent revenue-sharing terms to independent retailers . . . ." (BRB 47.)

Blockbuster would have made the same demand to the other studios that it made to Fox, it would be *unreasonable* to conclude otherwise. Even the Texas district court recognized that a reasonable juror could infer from the circumstances that Blockbuster made to *each* studio the conspiracy demand it made to Fox. (See AMJN Exh. C, p. 2.)[14]

c. The studio memoranda further support that reasonable inference.

Defendants again reverse the summary judgment standard when discussing the studio memoranda. (BRB 34-40.) Our opening brief demonstrated that these memoranda further support a reasonable inference that Blockbuster requested a vertical conspiracy from each studio. (AOB 55.)

Defendants argue that a juror could not infer an agreement to conspire from these documents. (BRB 34.) But plaintiffs' point is that the documents further support the inference that Blockbuster *requested* preferential treatment from each studio. The Fox admissions alone are a sufficient basis for a reasonable juror to make this inference. The memoranda are just additional support.

Defendants characterize each document as "ambiguous" because it might be susceptible to an innocent interpretation. (BRB 35.) But the summary judgment question is whether the memoranda reasonably can be

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[14] Our opening brief also cited *Southway Theatres, Inc. v. Georgia Theatre, Co.* (5th Cir. 1982) 672 F.2d 485, which recognized that an invitation to conspire from a movie exhibitor to one distributor was circumstantial evidence that the same request was made to the other distributors. (AOB 55.) Defendants claim the case is irrelevant because it was decided "before *Matsushita* and *Aguilar* and therefore did not apply the more stringent summary judgment standard required under those cases." (BRB 34, fn. 15.) Not only do *Matsushita* and *Aguilar* not establish a more stringent summary judgment standard, but defendants also ignore that *Southway Theaters* applied the same "plus factor" principle—i.e., a plaintiff needs more than mere parallelism—that *Matsushita* and *Aguilar* follow. (See 672 F.2d at pp. 494-495.)

read as indicating Blockbuster sought favored terms, particularly when viewed in the collective light of the Fox admissions and plaintiffs' other evidence. They can.

- *May 1997 Warner memorandum*: Defendants assert this memorandum "contains absolutely no reference to any request for exclusivity" and should be viewed as Warner assessing a "request for price cuts." (BRB 40.) But if Blockbuster was not demanding that other retailers be denied its terms, then why did the memorandum worry that "[p]roviding [Blockbuster's] requested concessions" could pose significant "risks" because Warner must "legally provide requested price concessions to all retailers in the same class of trade" and the concessions "[c]ould spur government inquiry into video industry pricing practices"? (AA 2213.) Indeed, Warner's home video president was unable to offer an alternative explanation for the language so he instead claimed the language did not accurately reflect Blockbuster's requests. (See AA 1237(CT496-98).) Defendants also ignore the memorandum's conclusion that Warner should reject Blockbuster's proposal and instead offer a "framework for future purchase which sends a message that we cannot afford to be pushed around . . . ." (AA 2217.)

- *February 1998 Warner memorandum*: Defendants characterize this memorandum as Warner struggling with how to create copy depth alternatives for retailers who couldn't do direct output deals. (BRB 37.) But the author wrote the two sentences defendants rely upon—"We have to create a solution for the remainder of our accounts that is both executable and fair" and "We must provide a solution which allows all retailers and distributors to participate" (BRB 37)—in the context of recommending that Warner *reject* what Blockbuster was demanding. (See AA 2202 ["we prefer Profit Plus' 20% bonus units program"].) The memorandum indicates that what Blockbuster was demanding was favored pricing,

because it warns that the trade will likely "know there is a difference in the revenue split with Blockbuster and with everyone else." (AA 2206.) Defendants do not even address this language, which directly indicates that Blockbuster demanded a different revenue split than everyone else.

- *The Fox memoranda*: Defendants claim Fox was merely assessing what effects direct output deals might have on the market. (BRB 36.) But the December 1997 memorandum specifically states: "What is unknown is the potential negative effect that a *favored* revenue share relationship with [Blockbuster] would have on the remaining 75% of our rental business." (AA 4361, emphasis added.) The February 1998 memo similarly notes that the "*lower cost* to Blockbuster will place Blockbuster at a severe competitive advantage over other rental retailers." (AA 2333.) Regardless whether the memoranda might be susceptible to alternative interpretations, this language supports a reasonable inference that Blockbuster sought terms that would give it a *better* revenue share and *lower* costs than other retailers.

- *The Disney memorandum*: Defendants assert this document "says absolutely nothing about a request by or an agreement with Blockbuster to deny similar *direct* revenue-sharing terms to independents." (BRB 39, emphasis added.) But independents can only purchase *through distributors*. After noting Disney had "worked out a deal with Blockbuster" that would be very profitable for Disney, the document states Disney's intention to provide the terms to other large chains—without any indication that Disney intended to offer Rentrak or other distributors any new terms that would be comparable to Blockbuster's new deal. (AA 2500; see AA 1509-1510(CT1576-79).) The apparent departure from the studios' prior practice of providing the same pricing to distributors and large chains suggests Disney never intended to make Blockbuster-comparable terms available to distributors and independents.

d. Such non-conduct evidence does not trigger *Matsushita*'s concerns.

Defendants misconstrue *Matsushita* in suggesting the Fox admissions and studio memoranda should be discarded if they could be interpreted in an innocent manner. As Judge Posner explains, ambiguous *statements* by alleged conspirators "are not to be disregarded because of their ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial." (*High Fructose*, *supra*, 295 F.3d at p. 662; accord, *Brand Name*, *supra*, 123 F.3d at p. 614 [triable issue where documents "susceptible to an innocent interpretation," because while "defendants' interpretations may be correct[,] they are not inevitable"].)

Matsushita's notorious comment about "ambiguous evidence" addressed "*conduct* as consistent with permissible competition as with illegal conspiracy" (*Matsushita*, *supra*, 475 U.S. at p. 588, emphasis added), "not *statements* in documents and overheard conversations" (Glazer, *Easy Facts*, *supra*, 17 Antitrust ABA at p. 92, emphasis added.) "Nothing in *Matsushita* suggests that *non-conduct* evidence cannot support a conspiracy finding if such evidence is subject to different interpretations—i.e., if it is ambiguous." (*Id.* at pp. 92-93, emphasis added.)

"There is a big difference between the conduct evidence in *Matsushita*—parallel low prices," and statements upon which "it is possible to place an innocent as well as a sinister interpretation." (*Id.* at p. 93.) "While [courts] certainly do not want to chill low pricing, since that is precisely what the antitrust laws are designed to encourage, [they] should have no compunction about chilling . . . [b]ad language in defendants' files . . . ." (*Ibid.*)

e. Plaintiffs' pricing evidence supports a reasonable inference that the studios *accepted* Blockbuster's conspiracy demand.

(1) The studios' pricing to distributors indicates the studios acquiesced to Blockbuster's demand.

Our opening brief showed that plaintiffs' pricing evidence is circumstantial evidence that each studio *accepted* Blockbuster's conspiracy demand by refusing to provide Blockbuster-comparable terms to distributors serving the independents. (AOB 21-34, 55.) Defendants claim plaintiffs' evidence supports no such inference because it merely shows "studios did not enter into revenue sharing deals with distributors that were identical to Blockbuster's deals." (BRB 30, 32.) That mischaracterizes both plaintiffs' evidence and plaintiffs' point.

Defendants argue that the reason they didn't offer Blockbuster-comparable terms to distributors was because distributors and independents did not want them. As our opening brief demonstrated (AOB 25-33) and we further show in § II.B.4, *infra*, those contentions create a disputed fact issue for a jury to resolve, because substantial evidence shows distributors and independents *did* want and could do Blockbuster-comparable output deals. Not only does that evidence show defendants' explanations are pretextual, it also indicates the studios acquiesced to Blockbuster's conspiracy request. But the circumstantial evidence the studios accepted Blockbuster's conspiracy demand is not limited, as defendants suggest, to the pricing terms the studios *failed* to offer distributors. As the opening brief showed (AOB 21-24) and we further explain below, it also includes the terms the studios *did* offer.

Dr. Sweeney's analysis of the studios' offers explained that the differences between the Blockbuster terms and the only revenue-sharing options the studios actually offered distributors "could not" be "the result of normal competitive economic forces" because the studios made the

distributor terms so much worse than the Blockbuster deals as to make them *non-viable*. (AA 1851(CT2930-31); see AA 1851-1854(CT2930-44), 5020-5023; AOB 21-23.) While the studios offered independents some discounts off the traditional $65 per tape cost under so-called copy depth programs, the end result was independents still paid almost *twice* as much for tapes as Blockbuster. (AA 3385, 4908, 5081, 5027, 5042-5049.) The huge pricing disparity made the independents' devastation virtually inevitable.

Defendants contend Dr. Sweeney mixed "apples and oranges" by comparing Blockbuster's output terms to distributor cherry-pick deals, which defendants claim are "fundamentally different." (SRB 19.) That argument fails for three reasons.

First, their criticisms present a classic jury issue.[15]

Second, defendants mischaracterize Dr. Sweeney's chart (AOB 22; AA 5085-5086) when they claim it only compares Blockbuster's output deals to distributor cherry-pick deals. The chart actually averages *every* revenue-sharing option the respondent studios gave distributors, including the only *output* deals they offered—Fox's and Universal's belated output deals in, respectively, 2000 and 2001. (See AA 5085-5086, 5100, 5106, 5109.) Dr. Sweeney's calculations showed that Universal's 2001 *output* deal charged distributors a 54% revenue share versus the 43% Universal charged Blockbuster (AA 5106, 5109), and that Fox's 2000 *output* deal

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[15] For example, defendants note that cherry-pick deals allow buyers to select tapes after a particular movie's box office performance is known, whereas output deals commit the buyer in advance to taking every studio movie. (SRB 19.) But defendants omit that under the output deals the buyer's actual copy commitment for any given movie was based upon how that movie *actually performed at the box office* and the number of copies historically purchased at that box office level. (See cites at AOB 12.) Nor do they mention that the cherry-pick deals had huge purchase guarantees even for lesser-performing movies, in stark contrast to Blockbuster's output deals which contained minimal to no guarantees for such movies. (See cites at AOB 12-13.) Sorting through and construing the deals' differences is a fact question for the jury.

charged distributors a 48% share versus the 35% Fox charged Blockbuster (AA 5100). Defendants' "apples and oranges" argument cannot explain away these differences.

Third, defendants miss the point in claiming "it is not at all surprising" that the economic terms of output and cherry-pick deals might differ. (SRB 19.) Even if a studio could justifiably charge more under a cherry-pick deal versus an output deal, it makes no economic sense—if a studio truly wanted the deals to be used—for studios to set their share so much higher as to make them unaffordable. Redstone admitted that the studios' share under the Rentrak deals "was higher than the retailer could afford"; that's why he demanded a better share from the studios. (AA 1197(CT336-37), 2147-2148, 4736.) And Warner admitted that the Rentrak deals in place in 1997-1998 were "worse for retailers than the traditional $65 purchase." (AA 4716; see AA 4496-4497.)

So after agreeing to charge Blockbuster a low enough share to permit copy depth and breadth—in Redstone's words, "the deal that works" (AA 1197(CT337)—why did the studios leave the unaffordable Rentrak deals in place instead of offering independents a viable means to obtain copy depth and breadth? (See AOB 21-22.) And why did every new cherry-pick deal offered to distributors after 1997 charge distributors a revenue share equal to or *worse* than the prior non-viable Rentrak deals? (See *ibid.*) Ingram explained that independents could successfully revenue share through distributors if the studios provided "a good revenue-sharing split." (AA 1604(CT1955).) The studios never did.

And when the studios' own internal analyses showed independents were paying twice as much for tapes than Blockbuster (e.g., AA 3385, 3719; AOB 25) and lacked reasonably priced access to videotapes (e.g., AA 1337(CT893-95), 3369, 3722, 3394), why did the studios continue to

offer terms they knew were non-viable and would preclude independents from competing with Blockbuster?

Further, why didn't any studio simply provide the Blockbuster terms to distributors? The studios do not claim doing so would have hurt the studios—they claim the deals would have been onerous *for independents*. So why not just provide comparable terms to distributors and let independents decide for themselves? As previously shown (p. 41, *supra*; AOB 12), the deals were structured to increase studio revenues if the retailer's tape rentals increased and ensure the studio received at least what it had received under traditional sales if they didn't. If independents signed up for the deals (as plaintiffs claim they would have), the studios faced the potential for increased revenues at no risk. But if independents didn't, the studios would have lost nothing and virtually immunized themselves from being sued. So why didn't the studios just make them available?

Defendants may be able to convince a jury of innocent explanations for what happened. But a reasonable juror could also conclude from defendants' suspicious pricing behavior that the studios succumbed to Blockbuster's conspiracy demand.

(2) Plaintiffs do not rely solely on Dr. Sweeney's testimony.

Defendants characterize Dr. Sweeney's testimony as the sole basis for plaintiffs' claim that the studios failed to provide Blockbuster-comparable terms to distributors. (SRB 17.) Wrong. Plaintiffs produced ample additional evidence, including:

- Industry expert Mars & Co.'s findings in 1999 that the studios' revenue-sharing programs to distributors were "non-starters" because the studios charged "too high" a revenue share and independents needed a "re-negotiation of revenue sharing deals to more 'equitable' terms" (AA 3818, 3826, 3876, 3889);

- The findings of Universal's staff in mid-1999 that independents needed "more competitive" revenue-sharing terms, including output options and new cherry-pick deals, and its subsequent finding that "[m]ost retailers still don't have reasonably priced access" (AA 3369, 3394, 3722);
- Ingram's conclusions in December 1998 that the playing field was not level and that the studios were not offering output deals to distributors or only offering terms that were not practicable or profitable (AA 2457-2458; cites at AOB 26);
- Ingram's conclusions in 2000 that the lack of a level playing field persisted, that "something is wrong here," and that Ingram would continue asking the studios to make Blockbuster-comparable output deal terms available through distributors (AA 1629-1630(CT2045-52), 3551-3552).

(3) Defendants fail to construe the pricing evidence in the light most favorable to plaintiffs.

Fox pricing: In trying to circumvent the Fox admissions, defendants proffer jury arguments construing disputed fact issues in the light most favorable to themselves:

(a) They claim the May 1998 Fox admissions are irrelevant because Fox said it was not succumbing to Blockbuster's pressures. (BRB 31.) But evidence shows Fox *later* succumbed to Blockbuster's pressures by agreeing to an output deal with Blockbuster in Fall 1998 and then failing to provide comparable terms to distributors. (See cites at AOB 19-20, 21-25.)

(b) They claim Fox's distributor deals "were identical to or better than Blockbuster's terms," but they only cite a Fox declaration that contains no comparability analysis. (See BRB 32, citing AA 518-526.) Abundant evidence shows Fox's distributor deals were *far worse* than Blockbuster's

terms. Dr. Sweeney's calculations showed that Fox's revenue sharing deals to distributors—both cherry-pick and output—were worse and non-viable. (AA 4890-4892, 4908, 4954-4956, 5020-5021, 5100.) Moreover, Fox conceded that even its distributor *output* deal charged a higher revenue share and other worse terms than its Blockbuster deal (AA 1780-1782(CT2642-52)), that its *non*-revenue-sharing "copy depth options" left distributors with a per-tape price 75% higher than under the Blockbuster-Fox deal (AA 1761(CT2571-72)) and that Blockbuster's terms gave it "a severe competitive advantage" and would increase Blockbuster's market share (AA 2333).

(c) Defendants try to explain away the belatedness of Fox's April 2000 output deal by claiming "it took about as long to conclude as the Fox-Blockbuster deal." (SRB 17, fn. 7.) But the delay's source is disputed. (See AA 1763-1764(CT2582-83).) Rentrak pursued an output deal with Fox in August 1998, and the following April—over a year before the April 2000 deal—Rentrak unsuccessfully proposed an output deal that was better for Fox than Blockbuster's terms and projected to increase Fox's margin dollars from independents by 70%. (AA 1777-1779(CT2631-41), 4371, 4376, 4387-4388.)

Moreover, it took Fox and Blockbuster until Fall 1998 to do an output deal only because (1) Blockbuster strategically chose to sign deals with the largest studios first (AA 1197-1198(CT338-40), 1200(CT348-50), 2149; cites at AOB 14); and (2) Fox initially "was a holdout from doing a deal with Blockbuster"; once Fox agreed, a long-form contract took only *a few months* (AA 523, 1736(CT2472-74), 1774-1773(CT2614-23), 1783 (CT2654), 2414). Negotiating output deals is not inherently onerous or time consuming. The Disney-Blockbuster contract took only *5-6 months* after the parties' initial meetings despite being the first output deal; the Warner-Blockbuster deal was completed only a few months later.

(AA 1192(CT316-17), 1525(CT1641), 1246(CT535), 2593.) After concluding its deal with Blockbuster, it should have taken Fox far less time to offer the terms to other customers since the model already existed.[16]

(d) Defendants also claim "the Fox-Rentrak output terms reflect Rentrak's reluctance to make as long-term a commitment as did Blockbuster." (SRB 17, fn. 7.) Says who? Rentrak didn't say that and Fox never even offered Rentrak the Blockbuster terms. There also is no evidence that a shorter contract length would warrant Fox charging a higher revenue share or justify Fox rejecting Rentrak's April 1999 offer for an output deal projected to increase Fox's margin dollars from independents by 70%. (AA 4371.)

Other than the Fox-Rentrak contract itself, defendants cite only to a Fox witness who could not identify any reason why Fox couldn't have offered Rentrak the same terms as Blockbuster, and instead asserted that it was "not what [Rentrak] proposed" and Fox "didn't think [Rentrak] wanted a three-year deal." (SRB 17, fn. 7, citing AA 1787(CT2671), 1780(CT2645), 1787(CT2672), 3590-3627.) Those assertions ignore that Rentrak never knew Blockbuster's terms. (AA 4494, 7470-7471(CT200-02).)

MGM and Warner pricing: Defendants further obliterate the summary judgment standard by arguing MGM and Warner—who settled with plaintiffs and are not parties to this appeal—"did negotiate output agreements with distributors on terms comparable to or better than Blockbuster's." (SRB 17, fn. 7; accord, SRB 34 [claiming Warner-Ingram

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[16] For example, Universal needed only a *two-page* output amendment to its existing Rentrak cherry-pick deal to create its belated April 2001 output offer. (AA 3479-3480.) Even then, Universal charged Rentrak almost 10% *more*—the typical profit margin for independents—than it charged Blockbuster. (AA 1331-1332(CT870-72), 1371-1374(CT1028-39), 5021, 5106, 5109.)

deal was "identical to" Warner-Blockbuster deal], 35 [claiming MGM-Rentrak deal was "more favorable" than MGM-Blockbuster deal].) They claim Dr. Sweeney "conceded" these deals had financial terms "better than Blockbuster's" and therefore "nitpick[ed]" and highlighted "esoteric differences." (SRB 17, fn. 7, citing AA 1848-1850(CT2420-929).)

As defendants' own record citations show, however, Dr. Sweeney *never* said these deals had better financial terms than Blockbuster's deals —he explained that although some pricing terms were facially similar, the distributor deals diverged in other ways making them worse and non-viable:

Warner: While Warner based Blockbuster's purchase requirements on a movie's actual box office performance, it based the distributor's purchase requirements on a sales goal. (AA 1849-1850(CT2923-26), 5022-5024.) The difference was crucial as it created a substantial risk of retailers losing money. (*Ibid*; AA 1305(CT764-67) [retailer explaining why it would be imprudent to accept output deals based on sales goals instead of market performance].) Warner admitted that a revenue-sharing deal only works if "based on what [the retailer's] historical investment on a title should be" and does not cause the retailer "to invest significantly more." (AA 4717.) Yet Warner provided such terms to Blockbuster but not distributors. Why?

MGM: Differences in the ways rental transactions were counted gave MGM a 10% higher share under its Rentrak deal than its Blockbuster deal. (AA 1850-1851(CT2926-30), 5024-5025.) Moreover, at the time Warner offered the MGM and Warner deals, Rentrak contractually required its customers to revenue share exclusively through Rentrak. (*Ibid.*; AA 4505-4506.) Warner precluded independents from doing both the MGM and Warner deals by inexplicably offering the Warner deal only

through Ingram and the MGM deal only through Rentrak. (*Ibid.*)[17] Again, why?

3. Plaintiffs' evidence shows the studios acted against independent self-interest.

a. Defendants misconstrue this plus factor.

Defendants misconstrue the "against independent self-interest" plus factor by arguing it precludes the inference of a conspiracy from actions that are in any way in a defendant's self-interest. They argue defendants' conduct must be "'contrary to their economic self-interest so as to not to amount to a good faith business judgment.'" (SRB 16.) And they quote the Fifth Circuit's statement in the unpublished Texas case against respondents that "'regardless of whether Blockbuster wrongfully requested preferential treatment . . . even in the face of such requests, a company's decision to take actions that are in its own interest cannot support an inference of conspiracy.'" (SRB 43.)

The notion that a conspiracy cannot be inferred from actions that are in a defendant's self-interest ignores that conspirators only collude *because it is in their economic self-interest.* When couched as a bare "against self-interest" standard, as defendants do, the plus factor becomes "a misnomer, because no rational economic actor does anything contrary to self-interest and obviously 'a price-fixing conspiracy, if successfully implemented, is in the collective self-interest of the conspirators.' What courts mean by the phrase is that a 'defendant acted in a way that, but for the hypothesis of joint action, would not be in its own interest.'" (Warden, *Economic Evidence On The Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory* (2004) 71 Antitrust L.J. 719, 748-749; see Posner, Antitrust Law, *supra*, at p. 100 [criticizing "contrary to self-interest"

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[17] Warner was MGM's distributing agent through early 2000, because MGM only made a few movies a year. (AA 1850(CT2927), 5024.)

formulation as erroneously inviting defendants to argue that acting anti-competitively was in their self-interest].)

In other words, "acts that would be irrational or contrary to the defendant's economic interest if no conspiracy existed, but which would be rational if the alleged agreement existed, do tend to exclude the possibility of innocence." (*Blomkest*, *supra*, 203 F.3d at p. 1044 (dis. opn. of Gibson, J.).) Thus, the question is whether the conduct was against a defendant's *independent* self-interest, i.e., contrary to how that party would ordinarily behave were it acting unilaterally.

In the vertical conspiracy context, a party has not "independently exercised its business judgment" when it engages in anti-competitive conduct only because it acquiesced to a powerful party's anti-competitive pressures and enticement for preferential treatment. (*MCM Partners v. Andrews-Bartlett & Associates* (7th Cir. 1995) 62 F.3d 967, 972-973 ["*MCM Partners*"]; accord, *Interstate Circuit*, *supra*, 306 U.S. at p. 228 [noting movie distributors' restrictions on two theater chains' competitors originated from chains' coercive bargaining power and control, not "the voluntary act of the distributors"]; *Calnetics Corp. v. Volkswagon of America* (9th Cir. 1976) 532 F.2d 674, 684 [finding triable issue whether distributor ceased dealing with supplier because of independent judgment or because of conspiratorial pressure from another supplier with whom it "enjoyed a special supplier-purchaser relationship"].)

As demonstrated below, plaintiffs' evidence shows the studios acted against independent self-interest for purposes of inferring vertical conspiracies—they engaged in anticompetitive conduct that would be irrational or unlikely absent a conspiracy with Blockbuster.[18]

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[18] As our opening brief explained (AOB 52-53), a seller is liable for antitrust conspiracy even if the reason it agreed to disadvantage a large buyer's competitors was because it succumbed in self-interest to that

(continued...)

b. Plaintiffs' evidence and cases show the studios acted against independent self-interest.

(1) Dr. Sweeney's testimony creates a triable issue.

Defendants claim plaintiffs based their against "independent self-interest" argument principally on Dr. Sweeney's opinion that had "*no* evidentiary support." (SRB 21, emphasis in original.) Defendants ignore the record support and pricing data discussed throughout Dr. Sweeney's reports. (See AA 4873-5111.) They further ignore that the trial court never found Dr. Sweeney's analysis was inadmissible or based on improper methodology.

As the California Attorney General cogently explains in its amicus curiae brief, Dr. Sweeney's analysis therefore creates a triable issue of conspiracy even by itself. Defendants' attempted impeachment of Dr. Sweeney merely creates fact questions for the jury.

(2) Additional evidence shows the studios acted against independent self-interest by purposefully increasing Blockbuster's market power.

Regardless, defendants err in suggesting plaintiffs' argument rests solely on Dr. Sweeney's analysis. Defendants fail to acknowledge their own expert's admission that sellers will purposefully increase a powerful buyer's market power *only* when colluding with that buyer. (AA 4621-4622.) They equally disregard the studios' numerous admissions that an individual studio ordinarily would not take steps to favor large buyers over

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[18] (...continued)
buyer's coercive leverage and enticement. (See *United States v. Paramount Pictures* (1948) 334 U.S. 131, 161 [68 S.Ct. 915, 92 L.Ed. 1260] ["*Paramount*"] [sellers liable for succumbing to buyer's inducement because "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one"]; *MCM Partners*, *supra*, 62 F.3d at pp. 972-974.)

small ones, increase Blockbuster's market share, or fuel market consolidation. (See AA 1216(CT414), 1240-1241(CT511-12), 1246(CT534), 1400(CT1142-43), 1408(CT1175), 2266, 2333, 4424-4425, 4574, 4621; AOB 38-39.). Nor do they mention that Blockbuster *told* the studios it intended to double its market share to 50% by "'owning' new release availability." (AA 2235-2236, 2348-2349, 1650-1651(CT2131-34), 1754(CT2544-45).)

Instead, defendants sweepingly claim that any studio's favoritism of Blockbuster could not be a plus factor "because favoring Blockbuster is not necessarily against any Studio's independent interest, but doing so collectively most certainly would be." (SRB 29.) That's smoke and mirrors.

First, it misconstrues the "against independent self-interest" plus factor. The point is that a studio ordinarily would not purposefully increase a particular buyer's market share unless it was colluding *with that buyer*.

Second, the studios' comment that only *collective* favoritism would be against a studio's independent self-interest ignores the overwhelming—essentially undisputed—evidence that each studio knew about the other studios' pricing to Blockbuster and distributors, and each knew Blockbuster would, and did, dramatically increase market share at independents' expense. (See cites/discussion at AOB 13-17, 35-36.)

Third, defendants ignore the court's conclusion in *Toys "R" Us*, *supra,* 221 F.3d 928, that the 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." (*Id.* at p. 932.) Defendants claim plaintiffs' reliance on *Toys "R" Us* is "misplaced" because in that case there was direct evidence of vertical conspiracies. (SRB 22, fn. 9.) But that fact does not negate the court's conclusion that the manufacturers' favoritism of

Toys "R" Us was against their independent self-interest because the manufacturers ordinarily wanted to expand their customer base, not increase Toys "R" Us's power. (*Toys "R" Us*, *supra,* 221 F.3d at pp. 932, 936.)

(3) Additional evidence shows the studios acted against independent self-interest by foregoing the potential for increased revenues from independents at little risk.

Our opening brief also demonstrated that the studios acted against independent self-interest in a second respect—they could potentially have increased their revenues from distributors and independents with little risk by providing Blockbuster-comparable deals to distributors. (AOB 11-12, 37, 56.)

Studio personnel and the studios' expert admitted that it was in each studio's interest to provide Blockbuster-comparable deals to distributors. (See cites at AOB 37-38.) Defendants try to circumvent these admissions by claiming these witnesses "simply acknowledged that it would not be in their interest to refuse to enter into profitable contracts" and these "statements are economic truisms, not *evidence*." (SRB 22, fn. 9, emphasis in original.) But if a juror concluded distributors and independents wanted and could do Blockbuster-comparable deals, these "economic truisms" establish conduct against independent self-interest.

Defendants also claim it is "simplistic" to assume studios would have increased revenues under Blockbuster-comparable distributor deals just because they increased their revenues from Blockbuster. (SRB 28.) That claim ignores that the studios had nothing to lose by making the deals available—as previously explained, the deals were structured to ensure each studio received at least the same revenue it had received under pre-output purchases if the retailer's rentals did not increase, with the studio and retailers sharing the revenue upside if, as expected, rentals increased. (See p. 41, *supra*, AOB 12.)

Regardless, the copy depth and breadth such deals permitted was almost certain to increase a retailer's overall rentals—and thus the studio's overall revenues—because new releases drove the rental market and the studios' pricing had forced independents to operate under a "consumer dissatisfaction" model. (AA 1252(CT556), 1418(CT1215), 1536(CT1676); see AOB 7-9.) Rentrak thus predicted in April 1999 that the increased copies from an output deal it unsuccessfully proposed would "generate approximately 70% more margin dollars" for the studio. (AA 4371.) And Mars & Co. concluded in March 1999 that providing independents with copy depth "could generate an $800 million revenue increase" to independents and "result in significant gains for both studios and retailers," and that independents could do so "by improving rental frequency and quantity with *existing* customers." (AA 3926, 3954, 3964, emphasis added.)

The studios do not claim that providing Blockbuster-comparable terms to distributors would have hurt the studios' interests. Instead, they argue that even if "it would have been beneficial to the Studios to enter output revenue sharing agreements with all of their customers, including the distributors, the realities of the market made that impractical or impossible." (SRB 23.) They claim Dr. Sweeney and plaintiffs ignore *defendants'* assertions that the studios failed to offer Blockbuster-comparable terms to distributors only because distributors and independents did not want them. (SRB 23-27.)

But as we demonstrated in our opening brief (AOB 25-34) and further show in the next section, whether distributors and independents wanted and could do Blockbuster-comparable deals is a *disputed issue of material fact* for a jury to resolve. If the jury agrees that distributors and independents wanted and could have done Blockbuster-comparable deals,

as plaintiffs claim, that finding will further establish the studios acted against independent self-interest.

(4) *Harkins* defeats defendants' argument.

Defendants try to dodge this disputed fact issue by arguing that "[a]t most" the evidence that distributors and independents wanted and could do Blockbuster-comparable deals "calls into question whether Defendants made good business decisions" and "does not tend to exclude the possibility that they made those decisions independently." (SRB 14.) The cases in our opening brief defeat that argument, particularly *Harkins*, *supra*, 850 F.2d 477, which defendants do not even mention. (See AOB 56-57.)

In *Harkins*, the Ninth Circuit found a triable issue that the movie studios' distribution affiliates agreed to a series of vertical conspiracies with large theater chains to disadvantage smaller buyers. It recognized evidence the studios passed up potentially lucrative sales to the smaller buyers "'tends to exclude the possibility of independent action'" because the conduct could "be explained only as extraordinary *exercises of bad judgment* or as accommodation to a request by the [large theater chains] for preferential treatment." (*Id.* at pp. 484-485, emphasis added.)

Harkins directly refutes the studios' attempt to downplay their suspicious pricing here by labeling it bad business decisions. "[C]onsistently bad business judgment is not to be expected from able and experienced corporate decisionmakers," particularly a group of them. (*Id.* at p. 484.)

Like *Harkins*, numerous other cases have recognized—contrary to defendants' argument—that evidence a party failed to pursue or test potentially lucrative opportunities *is* evidence of conduct against independent self-interest and tends to show a conspiracy. (E.g., *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 703-713 ["*Redwood Theatres*"] [evidence movie studios favored a large theater

chain over a smaller theater by restricting the latter's access to new releases needed to compete created inference of unlawful vertical conspiracy if evidence indicated smaller theater's bids were lucrative]; *Petruzzi's*, *supra*, 998 F.2d at p. 1245 [evidence defendants refused to bid on certain business accounts]; *Movie 1 & 2*, *supra*, 909 F.2d at p. 1251 [evidence defendants rejected lucrative bids]; *Toys "R" Us*, *supra*, 221 F.3d at p. 935 ["it is suspicious for a manufacturer to deprive itself of a profitable sales outlet"]; *Milgram v. Loew's, Inc.* (3d Cir. 1951) 192 F.2d 579, 583 [film distributors might have increased profits had they licensed smaller theaters but they never even tested the prospect].)

(5) *Package Shop* is inapposite.

Defendants quote *Package Shop, Inc. v. Anheuser-Busch, Inc.* (D.N.J. 1987) 675 F.Supp. 894, 910, for the proposition that evidence "'defendants have merely foregone profitable business opportunities'" is not conduct against self-interest "'when defendants have offered sound business reasons for their conduct.'" (SRB 27.)

The court there, however, merely recognized that decisions by beer distributors not to sell to retailers located outside territories the brewer had assigned them was not against each distributor's independent self-interest because it comported with each distributor's long term interest of ensuring the brewer maintained its distributorship. (675 F.Supp. at pp. 909-910.)

Here, in contrast, the studios' failure to provide Blockbuster-comparable terms to distributors was against their long term independent interests and thus indicative of a conspiracy with Blockbuster, because the studios increased Blockbuster's market power at independents' expense and relinquished the potential for increased revenues from independents. Here, unlike *Package Shop*, evidence controverts the defendants purported "business reasons" for their conduct.

4. Evidence shows the studio's explanations are pretextual.

It is well settled that evidence indicating a defendant's articulated reasons for its business conduct are pretextual is probative evidence of conspiracy. (See cases at AOB 57.) Indeed, a "general principle of evidence law" is that "the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147 [120 S.Ct. 2097, 147 L.Ed.2d 105].)

Moreover, a party cannot obtain summary judgment where a *disputed* issue of fact is central to the case. (*Aguilar*, *supra*, 25 Cal.4th at pp. 850, 855; *Kodak*, *supra*, 504 U.S. at p. 483 ["[f]actual questions" regarding "validity and sufficiency" of defendant's proffered business justifications precluded summary judgment].)

Here, ample evidence undercuts defendants' explanations for failing to offer Blockbuster-comparable terms to distributors—that they did not offer such terms because distributors and independents did not want them.

a. Whether distributors and independents wanted and could do Blockbuster-comparable deals is a disputed issue of fact only a jury can resolve.

(1) Defendants ignore plaintiffs' evidence.

The substantial evidence that distributors and independents requested and could do Blockbuster-comparable deals establishes a triable issue of pretext. (See AOB 25-33.) Defendants, however, do not mention, let alone attempt to rebut, any of the evidence discussed at pages 31-33 of the opening brief. That evidence establishes for summary judgment purposes that:

(a) All but the "teeniest" stores (mostly convenience stores whose primary business was not video rental) could do output deals;

(b) Rentrak predicted a majority of its customers would do output deals;

(c) Another distributor predicted an additional 5-10 *thousand* independents would revenue share through distributors after Blockbuster obtained its deals;

(d) The output deal's purchase and guarantee commitments were not onerous for independents, and Rentrak unsuccessfully proposed to the studios a viable model as early as August 1998;

(e) Industry experts concluded in mid-1999 that a copy depth deployment to independents would increase the revenues of both studios and independents;

(f) Blockbuster-type guarantees and pricing terms could have been done through distributors;

(g) Studios could provide revenue sharing to even the smallest independents through distributors;

(h) Thousands of independents already had revenue-sharing equipment in 1997 and the rest could easily obtain it; and

(i) Some studios provided output deals to distributors but inexplicably made the terms worse than Blockbuster's and mostly delayed making them until after independents sued and Blockbuster already had seized independents' market share. (AOB 31-33.)

(2) Defendants' evidence does not establish an undisputed issue of fact.

Instead of addressing the above evidence, defendants erect a straw man. Conceding that ample evidence shows distributors and independents *requested* Blockbuster-comparable deals, they argue that such requests do "not exclude the possibility that after discovering the various onerous terms of those deals, those same retailers and wholesalers chose to negotiate different deals." (SRB 23-24.) Plaintiffs, however, do not have to "exclude

the possibility" that that is what happened. The question is whether a *disputed* issue of fact exists. Irrefutably, it does.

The studios speculate that distributors and independents might have rejected the Blockbuster terms and instead negotiated "different arrangements that served their own interests . . . ." (*Ibid.*) But where's the evidence that happened? Defendants' entire argument rests on their own witnesses' unsupported, often contradictory testimony (see § II.B.4.b., *infra*)—all made in a self-serving attempt to avoid a conspiracy claim.

That testimony consists mostly of sweeping generalizations about the studios purportedly broad efforts to discuss output deals with distributors and independents. Those assertions are disputed. (E.g., AA 1589(CT1894) [independent answering, "They missed my street corner . . . [and] all of my friends' street corners" after counsel asked "are you aware of the testimony that has been given in this court that the studios were out there on the streets begging for people to do output deals, or so they say?"].)

The studios do not identify a single specific instance where they actually offered or disclosed the Blockbuster terms to a distributor. To the contrary, distributors uniformly said the studios never disclosed Blockbuster's terms. (AA 1605(CT1956), 1621(CT2014-15), 1633(CT2062), 4494, 7470-7471(CT199-203), 7530-7532(CT91-97), 7557(CT233).)

Defendants' suggestion that Ingram asked for Blockbuster's terms but subsequently rejected them also ignores the abundant evidence that from 1998 *onward* Ingram *continuously* asked the studios to provide Blockbuster's output terms to distributors and complained about their unavailability, and *continuously* sought as many different output options as possible. (See, e.g., AA 1629-1630(CT2046-52), 3531, 3543 [Ingram stating it "will continue" in 2000 and 2001 "to request [that the] studios level the playing field for retailers by making similar direct output deal

terms available for retailers being serviced through traditional distribution"], 1332(CT875) [Ingram wanted a "wide variety" of output revenue-sharing options to offer independents], 1335(CT887) [same], 1389(CT1098-101), 1564-1566(CT1793-800), 1609(CT1972-73),1818(CT2796-97), 3521, 3522.)[19]

Moreover, despite there being over a dozen distributors and over ten thousand independents, the studios *produced no document*—no proposed term sheet, no offer, no letter or e-mail from a studio, distributor or independent, no handwritten note—indicating the studios ever offered Blockbuster-comparable terms to a distributor or independent, or indicating in any manner that distributors and independents rejected Blockbuster-comparable terms and instead purposefully negotiated different terms. The studios admitted no such documents exist. (AA 1393-1394(CT1117-18), 1407(CT1171), 1511(CT1583-85), 1513(CT1592), 1650(CT2130), 4787.)

Likewise, defendants *produced no testimony* from an independent or distributor indicating distributors and independents did not want or could not do Blockbuster-comparable terms. They rely solely on the following:

(a) They cite hearsay testimony of a Paramount witness that one large chain store (Video Update) lacked the computer systems and credit to do revenue sharing. (SRB 25, fn. 10, citing AA 392.) That's hardly a reason to deny viable revenue-sharing deals to all distributors and independents.

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[19] Defendants highlight Ingram's testimony that he did not believe the studios conspired to deny Blockbuster-comparable deals to distributors. (SRB 33.) But they ignore the basis for Ingram's conclusion: Ingram, who never knew Blockbuster's terms (AA 1633(CT2062-63)), opined that it would be "unwise" for the studios "to provide a deal for Blockbuster that was better than they were attempting to provide to the small dealers" (AA 1631 (CT2054)). Abundant evidence shows that happened—a classic indicator of conspiracy.

(b) They cite more hearsay testimony by that same Paramount witness that one distributor (Valley Media) was "against revenue sharing" and called it "'a ball and chain'" for independents. (SRB 23, citing AA 392.) But it is undisputed that other distributors, particularly Rentrak and Ingram, sought revenue sharing deals, including output deals.[20]

(c) Defendants cite testimony by the three Texas plaintiffs that a retailer must individually determine whether revenue sharing makes sense for its own business. (SRB 25, fn. 10, citing AA 648-649, 653, 657-658.) That does not indicate retailers could not do revenue sharing. Defendants also fail to mention that those same three retailers unequivocally testified that they *could* and *would* have done Blockbuster-comparable output deals had the studios provided them *to distributors*. (AA 1301-1302(CT750-52), 1305(CT764-66), 1308(CT776), 1418-1420(CT1217-22), 1433(CT1274-77), 1440(CT1296), 1568(CT1810-11), 1579(CT1853), 1589-1590(CT1894-99).)

(d) Defendants cite a fourth retailer's testimony that buying "everything that every studio has to offer" would have been a bad business decision for her. (SRB 25, fn. 10, citing AA 663.) But that testimony does not establish that it would have been a bad decision for her *under the lower Blockbuster pricing the studios never provided her distributors*, let alone a bad decision for most other retailers.

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[20] Defendants assert Ingram lobbied against revenue sharing, engaged in it as "'an insurance policy,'" and believed the studios' direct revenue-sharing deals were detrimental to the video industry. (SRB 32-33.) But the germane point is that Ingram *did* adopt revenue sharing; Ingram found "revenue sharing is actually quite profitable for distributors." (AA 3521.) Ingram's belief that the studios' revenue-sharing deals were hurting the industry reflects the conspiracy's very essence—the studios' failure to provide Blockbuster-comparable terms to distributors prevented independents from competing. (AA 3521 [Ingram: the direct deals "created unfair advantages" because "the terms have differed from those available to non-direct retailers"], 1622(CT2020) [same].)

(3) Defendants fail to construe the evidence in the light most favorable to plaintiffs.

The IVRG: Defendants equally ignore the disputed nature of the underlying facts by asserting it is *undisputed* that (a) each studio was willing to do an output revenue-sharing deal with the Independent Video Retailers Group ("IVRG") if the IVRG provided "a single ship-to location, proof of financial wherewithal and a unified point of sale system" and (b) the IVRG "was unwilling or unable to do so." (SRB 26.)

Substantial evidence indicates the studios merely gave the IVRG the run-around. (See, e.g., AA 1277(CT654) [there was "never a deal offered, never a deal made, never a deal presented, never a deal written down"], 1280(CT664) [studios never said they would do a deal], 1278(CT658) [the studios "didn't refuse to meet with us, but ultimately, they refused to deal with us"], 1581(CT1860) ["all we ever got out of the studios was a nice lunch. No deals."], 1736(CT2471) [studios first told the IVRG there were no new Blockbuster deals; they later conceded new deals existed but claimed "you wouldn't like them"]; see cites/discussion at AOB 29-31.)

Defendants' suggestion that the IVRG should have provided a single ship-to location and unified sale system ignores that the existing distributors already provided the equivalent of such a system. That is why the IVRG asked the studios to provide the Blockbuster deal *to distributors*. (AA 4816 [Webb: "we knew we would have to buy through distribution" so we asked the studios for "distribution to get the same terms as Blockbuster" so independents could "be competitive" by paying that "plus what distribution adds"], 4822, 1304(CT763).)

Contrary to defendants' suggestion that no independent wanted the Blockbuster terms after learning it was an output deal, Columbia admitted that the IVRG told Columbia its retailers needed "[o]utput agreements to be competitive" and wanted the "Blockbuster deal." (AA 1661(CT2175-76).)

The studios could have resolved the IVRG's request by providing the terms to Ingram, Rentrak or any other distributor. Why didn't they?, is a jury question.

Ingram and Rentrak: Defendants similarly view the evidence in the light most favorable to themselves when discussing Ingram and Rentrak. Since it is indisputable that Ingram and Rentrak repeatedly sought output terms, defendants argue those requests do not show Ingram or Rentrak would have accepted Blockbuster's guarantees or long-term commitments. (SRB 24-25.) The arguments are red herrings. There is no evidence the studios ever offered Ingram and Rentrak the Blockbuster terms, so there is no evidence Ingram and Rentrak rejected them, nor any evidence Ingram and Rentrak would have rejected them had they been offered.

Guarantees: In suggesting Ingram and Rentrak would have refused Blockbuster-type guarantees, defendants claim Blockbuster paid "almost $150 million in guaranteed payments" between 1998-2001 under four agreements, while Rentrak met its guarantees under its cherry-pick deal with Paramount. (SRB 26, citing AA 167.)[21] So? The fact Rentrak fully complied with its Paramount cherry-pick guarantees does not indicate it could *not* have complied with Blockbuster-type guarantees. The per-tape guarantees under cherry-pick deals were often *worse* than Blockbuster's output guarantees. (AA 4891; see cites/discussion at AOB 12-13.) Dr. Sweeney explained that there was no reason the Blockbuster guarantees could not have been done through distributors. (AA 1852(CT2935-36).)

Moreover, the Blockbuster guarantees were not onerous—they merely ensured the studio would receive at least the same revenues it had received under traditional wholesale terms. (AA 165, 456, 1195(CT331),

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[21] The figure is misleading, even if true, because part of Blockbuster's "payments" were to Paramount (AA 396), which entailed Viacom shifting money between its subsidiaries.

1318(CT817), 1362-1363(CT992-94), 1377(CT1053), 1543(CT1707), 1647(CT 2119-20), 1683(CT2263), 1829(CT2839), 4889, 7318.) Also, even if Blockbuster made some guarantee payments, the increased rentals from the output deals allowed Blockbuster to go "from down the tubes to being very, very profitable." (AA 1206(CT373).)

Contract length: Rentrak and Ingram never said they would have refused longer-term commitments or that independents did not want them. Nor did defendants present any evidence that a shorter contract term would justify worse pricing. Nor was there any evidence of a studio ever offering Blockbuster's pricing to Ingram or Rentrak if they would accept longer commitments. Nor can defendants' argument explain the refusals of Disney, Paramount and Columbia to offer output options to distributors of *any length*.

The studios also omit that (a) Warner's and MGM's initial output contracts with Blockbuster were for only *one year*; Warner and MGM subsequently signed 3-year contracts only after the arrangement proved successful (AA 5206); (b) Columbia did its deal with Blockbuster for almost *one year* before signing a 4-year contract (AA 1226(CT452-53), 1641(CT2094-95), 1884-1885(CT3065-66), 2616); (c) Universal did its Blockbuster deal under a *six-month* contract before signing a 2-year contract (AA 1312-1313(CT794-97)); and (d) Paramount did its Blockbuster deal for over *1½ years* before signing a 4-year contract (AA 1814-1815(CT2778-82), 3058.) In contrast, as our opening brief explained, the studios *never* tested Blockbuster-comparable pricing to distributors, let alone offered a six-month or one-year contract with the prospect of a longer commitment if everything went well. (See AOB 34.)[22]

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[22] Defendants misleadingly suggest they *did* test output terms to distributors. (See SRB 39.) Defendants' record cites confirm they didn't. Three of the cites discuss tests Paramount and Columbia conducted with

(continued...)

The studios try to circumvent their failure to test the Blockbuster terms to distributors by suggesting distributors were not ready for revenue sharing. (SRB 39.) They note Ingram spent substantial time and expense implementing a revenue-sharing system. (*Ibid.*) Yet Rentrak already had a fully operational revenue-sharing system in place in 1997 and thousands of customers already connected for revenue sharing. (AA1512-1513(CT1589-91), 1552(CT1741), 1763(CT2582), 1777(CT2630).) The studios also ignore that (a) SuperComm, a Disney-owned distributor, was already set up for revenue sharing in 1997 and its software was available for licensing to other distributors (AA 1527(CT1648-49), 4367-4368); (b) in 1998, Ingram licensed a revenue-sharing system from SuperComm and was "trying to do revenue sharing with all the major studios"; Ingram entered its Warner output deal that April (AA 1608(CT1970), 1632(CT2059), 3520); and (c) *seven* different distributors signed revenue-sharing deals with Columbia (AA 458).

So why didn't the studios test Blockbuster-comparable terms to Rentrak, Ingram, SuperComm or any other distributor?

b. Defendants' contradictory, inconsistent and unsupported testimony further establishes a triable issue of pretext.

A triable issue of pretext also arises where a defendant gives "shifting, contradictory, implausible, uninformed, or factually baseless justifications for its actions." (*Guz v. Bechtel National, Inc.* (2000) 24

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[22] (...continued)
Blockbuster (AA 388-391, 1641(CT2095), 1813-1814(CT2777-79)); the other two cites discuss a limited *direct* revenue sharing test Universal conducted with only a *few* independents (AA 379-378, 1401-1403(CT1147-55); see also AA 1313(CT798), 1318-1319(CT819-20), 1341(CT909).) Universal admitted that it could have resolved the problems its test revealed by providing the revenue-sharing terms *to distributors*, rather than attempting direct deals with independents. (AA 1343-1344(CT919-22), 1405(CT1163-64), 1409-1410(CT1180-82), 7322-7323.)

Cal.4th 317, 363; accord, *Hersant v. Department Of Social Services* (1997) 57 Cal.App.4th 997, 1005; *Hernandez v. Hughes Missile Systems Co.* (9th Cir. 2004) 362 F.3d 564, 569 [conflicting or changing explanations establish triable issue of pretext].)

In trying to explain away their suspicious denial of Blockbuster-comparable deals to distributors and independents, the studios repeatedly contradicted themselves, each other, and abundant contrary evidence:

(a) Universal claimed it "was eager to enter output revenue sharing agreements with distributors, but *none* of the distributors with whom we discussed the possibility, in the end was interested." (AA 380, emphasis added.) Yet Rentrak signed an output deal with Universal in March 2001 (albeit with terms significantly worse than Blockbuster's). (AA 3479; see fn. 16, *supra*.)

(b) Universal claimed any retailer or distributor could have had Blockbuster's revenue-sharing terms if "they had asked" and Universal was "very interested in making [that] happen." (AA 1402 (CT1152).) Yet substantial evidence, including testimony by other Universal witnesses, showed distributors and retailers *did* ask. (AA 1332(CT873-75) [Universal admitting Ingram made "numerous requests" for output terms and wanted "a wide variety of options"], 1335(CT887) [Universal admitting Ingram "asked us for different output revenue-sharing options"], 4376 [in 1998, Rentrak was seeking output deals from all its studio partners], 3479; see also cites/discussion at AOB 25-31).

(c) Universal claimed in the Texas trial that it developed and offered output deals to distributors and independents shortly after consummating the deals with Blockbuster but no one wanted them. (AA 1330 (CT864-67), 1389(CT1099), 1393-1394(CT1115-19).) But in mid-1999, *over a year after* Universal's Blockbuster deal, Universal staff advised Universal management that Blockbuster was rapidly gaining market

share at the expense of independents "who are unable to compete," and that Universal should therefore "*[r]evise* Rentrak agreement to include, among other changes, *output option* and more competitive terms" and "*[d]evelop* Revenue Sharing model for distribution that *includes output* and cherry-pick options." (AA 1329-1331(CT860-68), 3369, 3394, emphasis added.)

Universal could not explain at trial why its staff made such recommendations in mid-1999 when, according to Universal's testimony, Universal had already offered such terms before then and had them rejected. (AA 1330-1331(CT867-68), 1393-1394(CT1115-19).) Nor could Universal explain why its staff subsequently concluded in January 2000 that "[m]ost small retailers still don't have reasonably priced access." (AA 1337(CT893-95), 3722.)

(d) Paramount—Blockbuster's sister company—claimed that Rentrak "had no stomach" for output revenue sharing so Paramount never offered Rentrak an output deal. (AA 1819(CT2800).) Yet evidence shows Rentrak repeatedly requested output deals and eventually did them with Universal, Fox and MGM. (See AA 1331(CT870), 1776-1779(CT2629-41), 1784(CT2661), 3479, 3591, 4371, 4376, 4387, 5024-5025.)

(e) Paramount claimed only Rentrak and Ingram had the reporting/tracking systems necessary for revenue sharing and every other distributor said "they lacked demand sufficient to justify" obtaining them. (AA 391.) Yet Columbia claimed it eventually signed revenue-sharing agreements with *seven* of the ten distributors with whom it did business. (AA 458.)

(f) Paramount asserted it never offered revenue sharing through Ingram because Ingram refused "to implement the full tracking and reporting capability that Paramount required." (AA 391.) But Paramount admitted that Ingram licensed a revenue-sharing system from SuperComm and it never explained why no other studio had experienced such difficulties

with Ingram. (*Ibid.*; see AA 1829-1831(CT2639-850), 1606(CT1961-63) [other studios revenue shared with Ingram in 1998].) And, although defendants cite Ingram's testimony as supporting Paramount's assertion (SRB 34), Ingram only said it had been "trying for a long, long time" to reach an arrangement that "made sense for both companies" (AA 1638 (CT2082-83).

(g) Paramount admitted that the only output deal it ever provided was to Blockbuster, claiming the other large chains only wanted cherry-pick deals charging a higher revenue share. (AA 393-394.) Yet other studios testified that those same chains *did* want and received output deals. (AA 379.)

(h) Columbia claimed that "[a]n output deal through distribution doesn't work," that the "only way [an output deal] made sense was" for the retailer to buy directly from Columbia, and that no "distributors ask[ed] for an output deal." (AA 1650 (CT2130), 1657(CT2158), 1663(CT2184).) Yet ample evidence shows distributors requested output deals (AA 1332 (CT875), 1335(CT887), 1564(CT1793), 1566(CT1800), 1609(CT1973), 1630(CT2051), 4376, 4371, 4387), and that studios could provide such deals to distributors, e.g., the fact Warner, Universal, Fox and MGM offered them through Ingram and Rentrak (AA 3479, 3591, 5022-5025).

(i) In the Texas trial, Disney witness Michael Johnson admitted that Disney's Rentrak deals were all cherry-pick and Disney never offered output deals to any distributor. (AA 1501(CT1545-46), 1503(CT1552-53), 1505(CT1559).) Other evidence uniformly shows Disney never offered Rentrak an output deal. (AA 2147, 3477, 4491-4492, 5208.) Yet in his California summary-judgment declaration, Johnson contrarily asserted that Disney entered a 5-year *output* agreement with Rentrak in 1994 and that Disney chose to focus on chain retailers in 1997-1998 because it "already had an output revenue sharing agreement with Rentrak." (AA 421-422.)

Besides contradicting his prior testimony, Johnson ignored that the 1994 Disney-Rentrak deal—whether output or cherry-pick—had *higher* per-tape fees, splits, guarantees and other *worse* terms than the 1997 Disney-Blockbuster deal. (AA 5206, 5208 [compare BVHE deals].) Johnson further ignored that instead of modifying that deal to make it comparable to Blockbuster's new deal, Disney replaced it in June 1998 with a Rentrak deal containing *higher* fees and other *worse* terms than the 1994 Rentrak deal. (AA 5208 [compare 1994 and 1998 BVHE deals].) Johnson attempted no explanation.

(j) Johnson also claimed in the Texas trial—further contradicting his assertion in California that Disney gave Rentrak an output deal—that Disney never offered distributors an output deal because "distributors had said to us they didn't want an output deal" and "[n]obody wanted to do output with us." (AA 1503(CT1552), 1505(CT1560), 1507(CT1570).) Yet another Disney witness admitted that Ingram continuously complained to Disney about the unavailability of output deals through the date the witness left Disney in late 2000; that witness contended—contradicting Johnson—that "there really was no point in offering a distributor" an output deal because such deals could be done only with retailers. (AA 1565-1566 (CT1796-800).) The abundant evidence that Rentrak and Ingram requested output deals, and that some output deals were done through them, rebuts both of the Disney witnesses' contradictory assertions. (See cites at ¶¶ (d), (h) above; AOB 25-29.)

(k) Johnson admitted at his deposition that he didn't know whether Disney ever offered output deals to distributors. (AA 1503 (CT1553).) Yet he asserted at the Texas trial that he now remembered that Disney didn't offer the deals and the reason was because independents and distributors didn't want them. (AA 1503-1504(CT1553-55).)

(l) Fox claimed "Ingram never asked us for an output deal." (AA 1785 (CT2663).) Yet Fox admitted that it received Ingram's December 1998 letter complaining about the unavailability of output deals (AA 1763(CT2580)—a letter Ingram characterized as a request for each studio to provide Blockbuster's output terms to distributors (AA 7555 (CT225).) Additional evidence shows Ingram asked the studios for output deals. (AA 1332(CT875), 1335(CT877), 1389(CT1098-101), 1564-1566(CT1793-800), 1609(CT1972-73), 1629-1630(CT2046-52), 1818(CT2796-97), 3522, 3531, 3543).

(m) The studios claimed independents could not do output deals because they lacked the computers and software necessary for revenue sharing. (AA 66, 84 fn. 15, 423, 1213(CT403), 1400(CT1143-44), 1512(CT1589).) But evidence showed thousands of independents already had the necessary equipment and the others could easily obtain it. (AA 1512-1513(CT1589-91), 1526(CT1644-46), 1552(CT1741), 1635(CT2071), 1663(CT2182), 1763(CT2582), 1777(CT2630), 4367, 4508-4509; see AOB 33.)

(n) The studios claimed independents could not do Blockbuster-comparable deals because studios and independents lacked the necessary administrative resources. (AA1213(CT403), 1341(CT910-11), 1355(CT959).) But those same witnesses, and others, admitted that those purported problems could be solved by offering the deals *through distributors*. (AA 1214(CT404-05), 1343-1344(CT919-22), 1405(CT1163-64), 1409-1410(CT1180-82), 7322-7323.)

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The studios' inconsistent, contradictory and unsupported explanations for their conduct further establish a triable issue of pretext. The evidence of pretext, combined with plaintiffs' evidence that Blockbuster and the studios had the motive and opportunity to conspire

against the independents, that Blockbuster asked each studio to conspire, that the studios' engaged in pricing conduct indicating they accepted Blockbuster's request, and that the studios acted against independent self-interest, establishes a triable issue that Blockbuster reached a series of vertical conspiracies with the studios.

5. Blockbuster cannot nullify the vertical conspiracy evidence by belatedly claiming the vertical conspiracies are not anti-competitive.

Blockbuster argues that even if the alleged vertical conspiracies existed, plaintiffs must show they "had an anticompetitive effect on the relevant market under the 'rule of reason'" and "[p]laintiffs presented no evidence of harm to competition in the trial court," one of the elements of a "rule of reason" claim. (BRB 27-28.) Blockbuster asserts this as an alternative basis for affirming summary judgment as to vertical conspiracy. (BRB 28.) Blockbuster's argument fails for three reasons.

First, defendants are barred from asserting this argument, because they never raised any "rule of reason" argument in the trial court or addressed the issue of anticompetitive effect in their separate statement of undisputed fact. (See AA 43-152, 7255-7311.) They moved for summary judgment on the conspiracy claims on only two grounds: (1) insufficient evidence that the alleged conspiracies *existed*; and (2) plaintiffs were bound by the Texas lawsuit. (AA 43-152, 7255-7311.) Plaintiffs only needed to address and present evidence on those issues. As a result, defendants "rule of reason" argument on appeal necessarily fails.

Summary judgment cannot be granted or affirmed based upon factual and legal issues that the moving parties never raised in the trial court or addressed in their separate statement. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29-30; *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 333, 337.) In summary judgment proceedings, "due process requires a party be fully

advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

Second, the "rule of reason" does not apply where the vertical agreements have no purpose except eliminating competition; such vertical conspiracies are illegal *per se*. (See *Bert G. Giannelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1045-1046 [noting courts have found *per se* violations where a seller, at a powerful buyer's direction, imposes restraints on the buyer's competitors for the buyer's benefit]; *Redwood Theaters*, *supra*, 200 Cal.App.3d at pp. 702-703 [noting series of buyer-induced vertical boycott agreements between buyer and suppliers designed to drive buyer's competitors out of business may be illegal *per se*]; *Harkins*, *supra*, 850 F.2d at pp. 485-486 [series of vertical market split agreements between chain theaters and movie distributors held illegal *per se*]; *State Oil Co. v. Khan* (1997) 522 U.S. 3, 17 [118 S.Ct. 275, 139 L.Ed.2d 199] [although "rule of reason" applies to vertical *maximum* price fixing, vertical arrangements that "fix *minimum* prices . . . remain illegal *per se*" (first emphasis added)]; *Kunert v. Mission Financial Services Corp.* (2003) 110 Cal.App.4th 242, 262 [vertical resale price maintenance agreements illegal per se under Cartwright Act].)

Here, the series of vertical conspiracies to deny independents access to Blockbuster's favored terms are illegal *per se*, because the agreements could have only one purpose—to stifle competition by independents. (Areeda & Hovenkamp, Fundamentals Of Antitrust Law, *supra*, at § 16.01c, p. 16-11 ["[A] manufacturer may restrict intrabrand competition not to serve its own interests in effective distribution but to accommodate powerful dealers . . . . *It is widely agreed that such a restraint, if it can be identified, should be illegal* . . . ."; emphasis added]; *id.* at § 16.03a, p. 16-26 ["The antitrust objection to such restraints is not that the manufacturer is

'coerced' but that competition is limited for an illegitimate end."].) Defendants claim Blockbuster's revenue-sharing terms were "pro-competitive" because they helped retailers meet consumer demand for copy depth and breadth on new movies. (BRB 4.) An agreement to deny independents such pro-competitive terms is manifestly anti-competitive.

Third, even if the "rule of reason" applied, a triable issue exists because "'[w]hether a restraint of trade is reasonable is a *question of fact* to be determined at trial.'" (*Redwood Theaters*, *supra*, 200 Cal.App.3d at p. 713, emphasis added.) Although plaintiffs were not required to present evidence of anticompetitive effect given defendants' failure to raise the issue, the record still abounds with such evidence.

Overwhelming evidence shows the studios' favoritism of Blockbuster denied independents the lower cost and copy depth/breadth they needed to meet consumer demand and to compete with Blockbuster; drove thousands of independents out of business, denying consumers the convenience, better service and lower prices they typically provided; and led to an increase in consumer rental prices. (See cites/discussion at AOB 16-17, 35-37.)[23] There is no benefit to consumers from denying deals to a large segment of the market that would increase videotape supply and cause lower rental prices. Indeed, the studios' expert *conceded* that if Blockbuster-comparable terms "were not made available as a result of a

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[23] Blockbuster asserts there is no evidence the challenged conduct "somehow caused consumer prices to increase." (BRB 28, fn. 13.) The studios, however, admitted Blockbuster used its revenue-sharing deals to increase its market share and used that new market power to raise prices. (AA 1513(CT1593-94); see also AA 752 ["[a]ccording to one movie studio, Blockbuster's success with revenue sharing has enabled it to raise rental prices"], 2523 [studio concluding revenue-sharing deals increased the "industry average rental rate"].) Additional evidence also shows consumer rental prices increased after Blockbuster obtained its new deals and independents were denied comparable pricing and copy depth. (E.g., AA 1919(CT3203-05), 3369, 3699, 4915.)

conspiracy, [he] would consider that anti-competitive and harm to consumers." (AA 4610.)

Thus, even the partial record here shows that, assuming it applies at all, there is a triable issue under the "rule of reason." (*Redwood Theaters*, *supra*, 200 Cal.App.3d at p. 702 [Paramount and Warner's preferential treatment of chain theater presented triable issue of unreasonable vertical restraints under Cartwright Act]; *Toys "R" Us*, *supra*, 221 F.3d at pp. 930, 936-937 [vertical agreements between Toys "R" Us and toy manufacturers flunked "rule of reason"; manufacturers' reduction of output to wholesale clubs and protection of Toys "R" Us against clubs' price competition were "actual anticompetitive effects"]; *Paramount*, *supra* 334 U.S. at p. 160 ["competitive advantages" of terms movie studios included in contracts with large theater chains but not in "contracts with the small independents constituted an unreasonable discrimination against the latter"].) The district court recognized this as obvious in the Texas lawsuit, which presumably is why defendants did not raise the argument in their California motion:

> The anti-competitive consequences of the alleged vertical conspiracy are apparent. If the alleged conspiracy existed, the [independents] would lose their ability to compete because comparable agreements were not available to them and they would be forced to pay higher prices for new-release videos. The higher prices resulting from the unavailability of comparable deals would prevent the [independents] from expanding copy-depth to levels that would enable them to compete with Blockbuster stores.

(AA 1105.)[24]

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[24] Blockbuster erroneously argues that the fact Blockbuster increased its market share to 40% at independents' expense "does not

(continued...)

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

1. Direct evidence of vertical conspiracies is not a prerequisite.

Blockbuster contends that a plaintiff may prove a buyer orchestrated a horizontal conspiracy among its suppliers only where there is *direct* evidence it reached a vertical conspiracy with each supplier. (BRB 49-54.) Wrong.

Because none exists, Blockbuster cites not a single supporting case. Instead, it attempts to distinguish the opening brief's cases by claiming they all involved direct evidence. (*Ibid.*) The purported distinctions fail.

Blockbuster notes there was direct evidence of vertical agreements in *Interstate Circuit*, *supra*, 306 U.S. 208, and *Toys "R" Us*, *supra*, 221 F.3d 928. (BRB 50-51.) But *Toys "R" Us*, relying on *Interstate Circuit*, expressly holds that "a horizontal agreement among [sellers], *with [a powerful buyer] in the center as ringmaster*, . . . may be proved by either direct *or circumstantial evidence*, under cases such as *Matsushita* . . . (horizontal agreements), *Monsanto* . . . (vertical agreements), and *Interstate Circuit* . . . ." (*Toys "R" Us*, *supra*, 221 F.3d at p. 934, emphasis added.)[25]

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[24] (...continued)
demonstrate harm to competition" because "harm to a **competitor** is insufficient to demonstrate harm to **competition.**" (BRB 28, fn. 13, emphasis in original.) But the principle that a plaintiff must show more than "harm to a competitor" merely means "[a] showing of only individual detriment is insufficient"; plaintiff must show the conduct had "serious anticompetitive effects within the relevant market." (*Feldman v. Sacramento Bd. of Realtors, Inc.* (1981) 119 Cal.App.3d 739, 747-748.) Here, the challenged conduct precluded *an entire market sector* from competing.

[25] Blockbuster claims Professor Areeda "cautions against applying [*Interstate Circuit*] as broadly as plaintiffs urge here," quoting Areeda's commentary that the vertical conspiracies "were embodied in unreasonable vertical contracts between each distributor and each exhibitor." (BRB 50.)
(continued...)

JTC Petroleum, *supra*, 190 F.3d 775, also directly refutes Blockbuster's argument. Blockbuster claims *JTC Petroleum* "is distinguishable because the court's holding that the plaintiffs raised a material issue of fact on conspiracy depended on direct evidence of collusion at both the buyer and seller levels." (BRB 52.) In truth, the Seventh Circuit relied *entirely* on *circumstantial* evidence in finding a triable issue that the buyers orchestrated a horizontal conspiracy among their suppliers:

> *All of the evidence we have discussed is circumstantial*, but of course an inference of conspiracy—of, in this case, an informal agreement among the applicators and the producers to deny supply to firms that tried to break into the applicators' closely divided market—can be drawn from circumstantial evidence as well as from admissions or other direct testimony of the conspirators' communications with each other. . . . *[Plaintiff] has some direct evidence as well. It strikes us as equivocal, and we have not thought it necessary to discuss it* . . . .

(*JTC Petroleum*, *supra*, 190 F.3d at p. 779, emphasis added.)

Blockbuster also constructs a straw man by asserting "**none** of plaintiffs' cases found a buyer liable for orchestrating a horizontal conspiracy based solely on a circumstantial theory of conscious parallelism

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[25] (...continued)
But Areeda was not focusing on whether the evidence of vertical conspiracies in *Interstate Circuit* was direct or circumstantial; his point was that the Supreme Court's finding of a horizontal conspiracy was *unnecessary* because the unreasonable vertical conspiracies were enough to make the defendants' conduct illegal. (See 6 Areeda, Antitrust Law (1986) ch. 14, ¶ 1426a.) None of Professor Areeda's comments about *Interstate Circuit* undermines the validity of the evidence of horizontal conspiracy here. (See *id.* at ¶¶ 1426a-1426d.)

at the seller level and alleged acts against the sellers' interest." (BRB 53, emphasis in original.) That is not the only evidence against Blockbuster. Plaintiffs' evidence shows that the studios' parallelism occurred because Blockbuster—to reverse a competitive slide and increase its market share to 40-50% by seizing independents' market share—demanded a new pricing model (output revenue sharing) and insisted that the independents be denied access to comparable terms. (AOB 9-25.) In short, the evidence of conspiracy includes not only the studios' conduct against independent self-interest, but also evidence that Blockbuster requested favored pricing and the studios accepted that request.

2. The studios' consciously parallel conduct against independent self-interest creates a reasonable inference of horizontal conspiracy.

a. Conscious parallelism.

Our opening brief explained that competitors need not engage in identical pricing conduct to establish conscious parallelism for purposes of inferring a horizontal conspiracy and that the studios' conduct here was sufficiently similar for the inference to be drawn. (AOB 59-61.)

Defendants, nevertheless, emphasize that the studios' output deals to Blockbuster were not exactly identical, nor were their revenue-sharing and copy-depth terms to distributors. (SRB 17-19; BRB 14.) The differences, however, are inconsequential given the nature of the conspiracy at issue.

This is not a case where a plaintiff urges an inference of a price fixing agreement solely from evidence that a group of manufacturers sold widgets at an identical price. In that context, evidence the manufacturers did not actually sell the widgets at the same price might undermine an inference that the prices reflected an understanding or agreement. Here, in contrast, each movie studio was the only source of its particular movies; and the conspiracy involves a buyer—Blockbuster—negotiating similar, favored

revenue-sharing deals from each studio and inducing each studio to deny independents access to comparable terms.

In this context, the key "conscious parallelism" question was whether each studio *knew* Blockbuster was pursuing and obtaining similar output deals from the other studios and *knew* each studio was favoring Blockbuster at independents' expense by failing to provide distributors with Blockbuster-comparable pricing. For summary judgment purposes, the answer is clearly "yes." The studios do not deny that, as the trial court expressly found, plaintiffs' evidence showed "each studio was aware of the terms of the other studios' deals with Blockbuster and the distributors." (AA 7739; see cites at AOB 13-15.)

While that knowledge is not enough by itself to create an inference of horizontal conspiracy, it suffices when coupled with plaintiffs' evidence that a studio ordinarily would not favor Blockbuster at independents' expense without an understanding that all studios would adopt similar pricing—i.e., evidence the studios acted against independent self-interest.

b. Conduct against independent self-interest.

Plaintiffs' evidence showed the studios acted against independent self-interest, which together with the evidence of knowing parallel conduct permits an inference of horizontal conspiracy. (AOB 59-64.)

In claiming plaintiffs' evidence does not show defendants acted against independent self-interest, defendants only address plaintiffs' evidence that it was against the studios' independent self-interest to (a) purposefully increase Blockbuster's market share at independents' expense; and (b) refuse to potentially increase their revenues with little risk by providing Blockbuster-comparable terms to distributors. (SRB 22-23, 29.) As shown previously, defendants' arguments that this evidence does not show conduct against independent self-interest misconstrues both the standard and the evidence. (See § II.B.3, *supra*.) More important,

defendants ignore an entire category of plaintiffs' evidence—evidence the "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." (AOB 38; accord, AOB 62.)

Defendants do not deny that evidence shows the studios knew independents would retaliate against any studio that favored Blockbuster unless all the studios adopted similar pricing. (See, e.g., 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"].)

Nor do defendants deny their own experts' admission that "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." (AA 4626.)

Defendants likewise offer no response to Dr. Sweeney's testimony that "because the studios were offering a better deal to Blockbuster than to independent retailers, each studio faced the prospect of independent retailers responding by shifting their purchases to non-discriminating studios" and *"[o]nly joint studio action could reduce or eliminate this risk."* (AA 4906, emphasis added.)

It is telling that defendants sweep this entire category of evidence under the carpet. As *Toys "R" Us* recognizes, a group of sellers acts

against independent self-interest for purposes of inferring a horizontal conspiracy where, as here, they knowingly increase a powerful buyer's market power and discriminate against that buyer's competitors in a manner that would be unlikely without the sellers having an understanding to price similarly. (*Toys "R" Us*, *supra*, 221 F.3d at pp. 932, 936; see AOB 61-62.)

3. Plaintiffs are not required to show joint communications to or from the studios to prove a horizontal conspiracy.

In trying to distinguish plaintiffs' cases, defendants urge a variety of arguments that reduce to the same erroneous contention: There must be direct evidence of conspiratorial communications between the studios. The purported distinctions fail.

a. Direct evidence of inter-studio communication is unnecessary.

Defendants emphasize that there is no *direct* evidence that the studios communicated directly with each other about their deals to Blockbuster or distributors. (BRB 50.) But as our opening brief explained, courts have repeatedly found triable issues of horizontal conspiracy where, as here, evidence shows a powerful non-competitor orchestrated the alleged conspiracy through a series of vertical communications and agreements. (See cases at AOB 62-63 & fn. 19.)

Defendants claim these types of cases all involve *direct* evidence "that the buyer orchestrated communications and unlawful agreements among the sellers." (BRB 53.) There was no such "communication" evidence, however, in *JTC Petroleum*, *supra*, 190 F.3d 775, or in *Interstate Circuit*, *supra*, 306 U.S. 208. (See Areeda, Antitrust Law, *supra*, at ch. 14, ¶ 1426a ["There was no evidence [in *Interstate Circuit*] that any distributor communicated directly or indirectly with any other. Nor was there evidence of what [the orchestrating buyer] reported to other distributors of its conversations with each."].)

Defendants similarly claim that plaintiffs' cases all involve "abrupt and inexplicable changes in defendants' business practices" that "immediately follow[ed] inter-firm communications" or a "group communication" specifically suggesting the conspiracy at issue. (SRB 38.) But there was no such group or joint communication in *JTC Petroleum* or in *Toys "R" Us*, *supra*, 221 F.3d 928.

Defendants try to circumvent that fact by claiming *Toys "R" Us* "concerned express exclusionary agreements, each conditioned on other distributors' participation." (SRB 39.) But the vertical contracts in *Toys "R" Us* were *not* expressly so conditioned. The court found that it could *infer* Toys "R" Us orchestrated a horizontal conspiracy among its suppliers, in addition to vertical agreements, given evidence the studios acted against independent self-interest by increasing their dependence on Toys "R" Us and evidence some manufacturers said they would not restrict sales to wholesale clubs unless their competitors also did. (221 F.2d at pp. 932-933, 936.) Here, as previously shown, plaintiffs' presented similar evidence that the studios engaged in conduct that would be unlikely absent a horizontal conspiracy.

Again incanting their "direct evidence" mantra, defendants note there is no *direct* evidence that Blockbuster discussed or shuttled information about distributor pricing. (BRB 43, 50.) No such evidence is required. What matters is that the studios knew the other studios' pricing. Defendants cannot, and do not, dispute that the studios had that information—they instead claim it came from *distributors*, not Blockbuster or studios. (*Ibid.*) Even if true, that is a distinction without a difference. The studios' conscious parallelism against independent self-interest suffices to create a triable issue of horizontal conspiracy.

Regardless, a reasonable juror could infer from the circumstances that Blockbuster told each studio it was asking every studio to conspire

against the independents. Defendants admit substantial evidence shows Blockbuster shuttled information among the studios about the output deals it was seeking and obtaining. (BRB 42, 43, fn. 19; see cites at AOB 14.) If Blockbuster shuttled such confidential information, it is reasonable to infer it also relayed its requests about the independents. Defendants also concede substantial evidence shows the studios actively sought and obtained information about distributor pricing from their "customers" and "retailers," which would include Blockbuster. (BRB 43, fn. 19.)[26] No smoking gun confession that Blockbuster shuttled distributor pricing is required.

b. No evidence of inter-studio communication is necessary.

In any event, to prove a horizontal conspiracy, plaintiffs need not show the studios ever explicitly communicated—either indirectly through Blockbuster or directly—regarding their pricing to Blockbuster and distributors. As Judge Posner explains,

> *If the economic evidence presented in a case warrants an inference of collusive pricing, there is neither legal nor practical justification for requiring evidence that will support*

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[26] In claiming the studios' information about distributor pricing "certainly did not come from Blockbuster" (BRB 43, fn. 19), Blockbuster improperly characterizes the evidence in the light most favorable to itself. For example, it claims Universal testified it obtained pricing "from **distributors**," (*ibid.*) when the witness actually said Universal and Disney sought pricing information from its "customers," including *Blockbuster* (AA 1325(CT846-47)); it claims Paramount testified that Blockbuster only "**shared terms of its own deals**" (BRB 43, fn. 19), when the testimony generally referenced the studio's customers, including Blockbuster and Rentrak, providing confidential pricing information (AA 1821-1822(CT2808-11); it claims Disney testified it only received information "from **independent retailers and distributors**" (BRB 43, fn. 19), when the witness actually referenced the studio's distributors and retailers, which would include Blockbuster (AA 4698-4699); and it claims Fox testified it only received information "from **distributors**" (BRB 43, fn. 19), when the witness actually said it obtained information "from a variety of sources," including distributors (AA 4846).

> *the further inference that the collusion was explicit rather than tacit.* [¶] From an economic standpoint it is a detail whether the collusive pricing scheme was organized and implemented in such a way as to generate evidence of actual communications. It is not a detail sanctified by the language of section 1 of the Sherman Act . . . . If seller A restricts his output in the expectation that B will do likewise, and B restricts his output in a like expectation, there is a literal meeting of the minds—a mutual understanding—even if there is no overt communication.

(Posner, Antitrust Law, *supra*, at p. 94, emphasis added; see *High Fructose*, *supra*, 295 F.2d at p. 654 [Judge Posner noting the Sherman Act "is broad enough . . . to encompass . . . an agreement made without any actual communication among the parties to the agreement"].)[27]

In oligopolies like the studios' market, conspiracies are easily formed without explicit communication. Thus, as Judge Posner warns, mistakenly heightening the "tends to exclude" standard "produces the paradox that the more conducive the market's structure is to collusion without express communication, the weaker the plaintiff's case," when actually the opposite is true. (Posner, Antitrust Law, *supra*, at p. 100.)

Here, if Blockbuster orchestrated a series of vertical conspiracies with the studios, as substantial evidence shows, a studio only needed to examine the other studios' pricing to Blockbuster and distributors—which they knew (AOB 17-19)—to confirm the other studios were acquiescing to Blockbuster's demands. As Judge Posner instructs, explicit communication is not needed to form a horizontal conspiracy in oligopolies.

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[27] Although Judge Posner addressed the Sherman Act, his comments apply equally to the Cartwright Act. (Compare 15 U.S.C. § 1 with Cal. Bus & Prof. Code, §§ 16720, 16726.)

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

Our opening brief showed the trial court erred in ruling that the evidence Fox and Columbia did their output deals with Blockbuster to meet other studios' deals excluded an inference of conspiracy. (AOB 64-65.) Defendants, nonetheless, sweepingly assert that "it is in a seller's economic interest and an exercise of prudent business judgment to meet rivals' terms to a large buyer without changing terms offered to other buyers" and the Ninth Circuit "[r]el[ied] on these principles" in *Zoslaw v. MCA Distributing Corp.* (9th Cir. 1982) 693 F.2d 870 ("*Zoslaw*") to conclude "that evidence that a defendant was merely meeting competition precludes an inference of conspiracy." (SRB 41.)

The argument is frivolous. As our opening brief explained, *Zoslaw* says no such thing. (AOB 64-65.) The Ninth Circuit merely recognized that a horizontal conspiracy cannot be inferred from pricing parallelism alone. None of the evidence upon which plaintiffs rely—e.g., that Blockbuster induced the price discrimination to reverse a competitive slide and seize independents' market share, that Blockbuster requested a conspiracy against the independents and the studios accepted, that the studios acted against independent interest in not offering Blockbuster-comparable terms to distributors, that the defendants' proffered explanations were pretextual, and that the sellers' conduct drove independents out of business and caused higher prices to consumers—was present in *Zoslaw*.

Since plaintiffs' evidence tends to show a conspiracy when viewed in the light most favorable to plaintiffs, a triable issue of conspiracy exists as to *all five* respondent studios. Even if Fox and Columbia negotiated their Blockbuster deals to meet other studios' deals, that cannot immunize their

refusal to provide Blockbuster-comparable terms to distributors. There is no "meeting competition" defense to antitrust conspiracy.

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

As our opening brief explained, the California Legislature expressly mandated in Business and Professions Code section 17002 that section 17045 must be "liberally construed" to effectuate its purpose. (AOB 67; *ABC Internat. Traders*, *supra*, 14 Cal.4th at p. 1257.) That purpose, the California Supreme Court has recognized, is to protect "smaller, independent stores" from sellers unfairly providing powerful chain stores with favored terms designed to drive the independents out of business. (14 Cal.4th at p. 1261.)

Defendants do not even attempt to reconcile their interpretations of section 17045 with the UPA's purpose. They can't. If, as plaintiffs claim, the studios refused to make Blockbuster-comparable revenue sharing available to distributors, thereby leaving distributors and independents no choice but to pay higher prices for videotapes, then the studios engaged in the very price discrimination the UPA was enacted to prevent. Because the studios' interpretations of section 17045 would permit this price discrimination, defendants' arguments must be rejected.[28]

Defendants also violate another cardinal rule of statutory construction. They refuse to construe section 17045 according to its plain meaning. For example, they posit a "meeting competition" defense absent

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[28] Of course, the studios claim they *did* make Blockbuster-comparable terms available to all customers, but distributors and independents *chose* other options. Only a jury can resolve that disputed issue of fact. For summary judgment purposes, the substantial evidence that the studios engaged in price discrimination must be accepted. (See AOB 21-25.)

from section 17045 and claim the statute's "like terms and conditions" requirement modifies its first clause. (SRB 52-56, 60-63.)

Application of these two fundamental rules—liberally construing section 17045 to effectuate its purpose and enforcing the statute's plain language—defeats *all* of defendants' UPA arguments.

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

Our opening brief demonstrated that settled rules of statutory construction and section 17045's plain language compel the conclusion that section 17045's "like terms and conditions" requirement only modifies its "special services or privileges" clause. (AOB 68-71.)

Defendants do not claim their interpretation of section 17045 comports with the statute's plain language or with any principle of statutory construction—because they can't. Instead, they premise their entire argument on the erroneous contention that "[a] long line of California authority has interpreted the limitation in section 17045 of purchases 'upon like terms and conditions' to include secret rebates and discounts." (SRB 53.) As our opening brief explained, however, none of defendants' cases actually addressed that issue. (See AOB 69-70.)

In addition to the three cases the trial court cited, which the AOB addresses (AOB 70), defendants now also quote a statement in *Uneedus v. California Shoppers, Inc.* (1978) 86 Cal.App.3d 932, that the UPA and Robinson Patman Act proscribe "'the granting of rebates and discounts not made available to all buyers on like terms and conditions.'" (SRB 53.) *Uneedus*, however, solely involved a plaintiff's right to recover treble damages, not the statutory construction issue before this Court. (See *Uneedus*, *supra*, 86 Cal.App.3d at pp. 936-937.) Defendants improperly

transmogrify *Uneedus*' passing description of the UPA and Robinson-Patman Act into a holding on an unaddressed issue.

And at best, *Uneedus*' description of the UPA is ambiguous. Defendants suggest it means a plaintiff must have purchased on "like terms and conditions" to recover under section 17045. But *Uneedus* did not mention section 17045, and the quotation more reasonably describes the UPA as requiring sellers to make the "terms and conditions" of any rebates or discounts equally available to all buyers. This reading of *Uneedus* comports with the fact that section 17045 "[o]n its face . . . is 'aimed at preventing a [seller] from discriminating between customers.'" (*ABC Internat. Traders*, *supra*, 14 Cal.4th at p. 1254.)

As our opening brief demonstrated, only one California case—*Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 216, fn. 5 ["*Diesel Electric*"]—has specifically addressed the issue that this Court must decide, and it squarely rejected defendants' argument. (AOB 68-69.) As they did below, defendants try to cast aside *Diesel Electric*'s holding as dicta (SRB 54), which it is not (AOB 69).

They also ignore that the California State Bar has expressly rejected their view (see State Bar of California, California Antitrust Law Jury Instructions (1998) § 1.10 & Com., pp. 19-20), as have other jurisdictions (see *Jauquet Lumber Co. v. Kolbe & Kolbe Millwork Co.* (1991) 164 Wis.2d 689, 699-700 [476 N.W.2d 305, 308] ["*Jauquet Lumber*"] [statute's plain language shows "'not extended to all purchasers purchasing upon like terms and conditions'" clause "does not modify 'discounts'"]). They further ignore that the Supreme Court recognized in *ABC Internat. Traders* that section 17045 prohibits "the secret allowance of an unearned discount where such allowance injures a competitor and tends to destroy

competition." (14 Cal.4th at p. 1256; accord, *Fisherman's Wharf, supra*, 114 Cal.App.4th at p. 331.)

The studios claim plaintiffs' interpretation of section 17045 makes no sense and "would render part of the statute meaningless as a practical matter." (SRB 55.) Wrong. State unfair practices acts were enacted to combat two distinct concerns about powerful chain stores: (1) chains were securing "special-price concessions having no relationship to the savings in cost resulting from the size of the transaction" (i.e., special rebates and "unearned" discounts); and (2) chains were securing "nonprice concessions and collateral privileges which have not been made available to all purchasers on substantially equal terms." (Tannenbaum, *Cost Under the Unfair Practices Act* (1939) Studies In Business Administration, Vol. IX, No. 2, p. 3.)

Section 17045 addresses these two discrimination contexts. Its first clause addresses secret rebates and unearned discounts. A plaintiff can recover under it by showing the price concession "tends to destroy competition" and that plaintiff itself was injured by it. (Bus. & Prof. Code § 17045; *ABC Internat. Traders, supra*, 14 Cal.4th at p. 1256; *Diesel Electric, supra*, 16 Cal.App.4th at pp. 212, 216, fn. 5.) Section 17045's second clause, in contrast, addresses "special services or privileges." To recover under it, a plaintiff must additionally show that it purchased "upon like terms and conditions" and thus qualified for the services or privileges. (*Ibid.*) Defendants' attempt to rewrite the statute's plain language must be rejected.

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

Even if the "like terms and conditions" requirement applied to unearned discounts, defendants are wrong that the requirement is not met

here. Blockbuster and plaintiffs' distributors both purchased identical products at the same wholesale level; and both used revenue-sharing programs and executed multi-year contracts. (AOB 71.)

Defendants identify no authority establishing that the Blockbuster and distributor deals are *per se* incomparable for price-discrimination purposes just because Blockbuster purchased under multi-year output contracts and distributors and independents mostly bought movies on a title-by-title basis after release. None exists. (See *First Comics, Inc. v. World Color Press, Inc.* (N.D.Ill. 1987) 672 F.Supp. 1064, 1067 [denying summary judgment where defendant's contracts with the favored buyer were "long-term agreements with automatic yearly renewals, while its contracts with [plaintiff] were merely individual orders made on a one-shot basis"; defendant failed to demonstrate "long-term contracts are *per se* unlike spot orders under the [Robinson-Patman] Act"].) Defendants cite several Robinson-Patman cases here but "[a]ll th[at] Act requires is that the transactions be made at approximately the same period of time." (*Ibid.*)

More important, defendants' argument must be rejected because, if adopted, it would defeat the UPA's central purpose of preventing sellers from unfairly favoring large chains at the expense of independent retailers. None of defendants' cases allows a seller to price discriminate by making pricing terms for the same product available to only large chains but not the seller's other customers.

As defendants' cases demonstrate, comparability of transactions becomes relevant only when the seller *actually made functionally equivalent terms available* to all its customers (and thus did not actually price discriminate), but the plaintiff later *chose* to purchase under different terms. (See SRB 55, citing *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* (7th Cir. 1989) 881 F.2d 1396, 1407; *Texas Gulf Sulphur Co. v. J.R. Simplot Co.* (9th Cir. 1969) 418 F.2d 793, 807; *M.C. Mfg. Co. v. Texas*

Foundries, Inc. (5th Cir. 1975) 517 F.2d 1059, 1066, fn. 13.) Thus, if buyer A signs a long term contract available to all buyers, but market conditions change and prices increase, there is no violation if buyer B subsequently signs a contract at the increased prices.

Defendants point to *A.A. Poultry*'s statement that "[n]o one supposes that a seller must charge the same price on contracts signed at different times, or on long-term contracts and spot sales." (881 F.2d at p. 1407, cited at SRB 56.) But the *A.A. Poultry* court found those terms were always functionally available to *all* customers. (*Ibid.* [the "only evidence we could find on the subject suggested that at any given moment [the seller] was offering the same terms to anyone who then signed on as a customer"]; accord, *Texas Gulf Sulfur Co.*, *supra*, 418 F.2d at p. 806 [Act violated unless "competitors similarly situated are treated alike at the time of the transaction"].)

Accordingly, if—as substantial evidence shows—the studios refused to make Blockbuster-comparable output deals available to distributors, thereby giving distributors and independents no choice but to obtain videos on a title-by-title basis, the studios cannot immunize themselves from their price discrimination by claiming their transactions with Blockbuster and distributors are incomparable.

Defendants try to end-run this fact by claiming that "[p]laintiffs' real complaint is an alleged refusal to deal" and "a claimed denial of terms is not within the scope of the analogous Robinson-Patman Act." (SRB 57.) Nonsense. Not only do defendants fail to cite any California or UPA authority for this proposition, they disregard that this is not a "refusal to deal" case—the studios did choose to sell their movies to distributors and distributors did buy them. As defendants' own authorities show, the UPA and Robinson-Patman Act fully apply where a seller actually sells its product to a customer: "[A] supplier may refuse to deal absolutely with any

customer, but once it decides to deal, it must do so evenly among all its customers as to price." (*L & L Oil Co., Inc. v. Murphy Oil Corp.* (5th Cir. 1982) 674 F.2d 1113, 1121, cited at SRB 57.)

C. The Studios Cannot Immunize Themselves From Their Price Discrimination By Labeling Blockbuster A "Retailer".

Our opening brief demonstrated that Blockbuster and distributors performed the same functional services in terms of their purchases from studios and therefore the studios cannot immunize themselves from price discrimination by labeling Blockbuster a "retailer." (AOB 72-74.) Defendants, however, claim that the UPA—unlike the Robinson-Patman Act—"provides a statutory, unqualified defense" that precludes section 17045 claims where a seller provides a chain store with lower prices than a wholesale distributor. (SRB 60.) Two fundamental flaws defeat defendants' argument.

First, defendants cannot, and do not even attempt to, square their interpretation of section 17045 with the statute's purpose. The UPA was enacted because of the "extraordinary purchasing power" chain stores gained after they "integrated wholesale and retail functions"; section 17045 was specifically designed to prevent sellers from favoring those chain stores with "secret rebates, unearned discounts and other unearned allowances" because they had "highly destructive effects on competition at the wholesale and retail levels . . . ." (*ABC Internat. Traders*, *supra*, 14 Cal.4th at pp. 1258, 1261; accord, *id.* at p. 1266 [section 17045 addresses "anticompetitive abuse historically engaged in by the chains as *buyers*, to the injury of competing *buyers*, i.e., the independent retailers and wholesalers"; emphasis in original].) Defendants' interpretation of the UPA would give sellers an unqualified right to price discriminate in favor of chain stores over wholesale distributors serving the independent retailers.

Because that interpretation, if adopted, would effectively abrogate *ABC Internat. Traders* and defeat section 17045's purpose, it must be rejected.

Second, defendants' argument nullifies a portion of section 17045's plain language. Section 17045 expressly prohibits "unearned" discounts, which are discounts (i.e., lower prices) that do not reflect cost savings or special services the buyer performs for the seller. (*Jauquet Lumber*, *supra*, 476 N.W.2d at p. 309.) The statute's plain language therefore shows that the only time a secret discount is not actionable is if the favored buyer actually "earned" it. (*Ibid.*) Defendants' interpretation renders this language meaningless as it would allow sellers to provide unearned discounts to large chain stores merely because they integrated wholesale and retail functions.

The only way to construe section 17045 in a manner comporting with its legislative purpose and plain language is to interpret it as *Diesel Electric* and the California State Bar have done: Secret discounts are permissible only where they reflect *actual* functional services the favored buyer performed for the seller. (*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, where a seller performs all packaging and distribution functions itself and then sells directly to a retailer, it can charge that retailer a higher price than it charges distributors or chain stores who perform the packaging and distribution functions themselves. But where a chain store buys at the same market level as wholesale distributors, sellers cannot price discriminate between them merely because the chain performs the wholesale functions only for its own stores.[29]

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[29] Defendants now, for the first time, claim Blockbuster "performs many functions that a distributor does not perform . . . ." (SRB 58.) Defendants' record cites, however, indicate nothing more than that Blockbuster performed wholesale services only for its own retail stores.

(continued...)

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

Defendants do not deny they never disclosed or offered the terms of Blockbuster's deals to any independent or distributor, or that they have repeatedly claimed the terms are confidential. (See AOB 75-76.) Instead, they claim Blockbuster's favored terms are as a matter of law not "secret" for section 17045 purposes because certain media articles stated in various forms that Blockbuster had reached new revenue sharing deals with the studios. (SRB 45-51.) A triable issue of "secrecy" exists.

First, defendants have failed to establish that the media articles, either singly or collectively, disclosed every term needed to evaluate the deal's economics and properly compare it to other revenue sharing deals. Defendants claim "the only issue to be resolved is whether Blockbuster's alleged 'discount' or 'special privilege'—output revenue sharing and a 60/40 revenue split—was 'secret.'" (SRB 46.) Wrong.

Defendants ignore that the studios also gave Blockbuster special marketing and promotional support. (See AOB 13.) In referencing "a 60/40 revenue split," defendants further ignore that a split reveals little about the actual economics of a revenue-sharing deal without knowing the deal's purchasing commitments and per-tape guarantees. (See AOB 12-13.) Defendants also misleadingly blur the distinction between the per-tape revenue split specified in revenue sharing contracts and the studio's

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[29] (...continued)
(See *ibid.*, citing "AA 7744-45; AA 161, ¶ 9, AA 381 ¶ 22.") As our opening brief explained, ample evidence shows there was no functional difference between Blockbuster's and distributors' purchases from studios. (AOB 73; see AA 388, 1314(CT801), 1507(CT1568), 1913-1914(CT3178-82), 4834-4835.) Defendants never claimed below or asserted in their separate statement that Blockbuster performed different functional services than distributors or that its lower pricing reflected the value of such services. (See AA 95-97, 139, 7292-7294.) They only claimed section 17045 was inapplicable because Blockbuster is a "retailer." (*Ibid.*)

ultimate revenue share, which can only be determined by factoring all pricing terms, including the revenue split, any up-front or back-end fees, and all purchasing and guarantee requirements. (See AOB 11, fn. 4.)

Paramount explained that "six key economic points" drive any revenue-sharing deal's economics: (1) the guarantee; (2) any up-front or back-end fees; (3) the revenue split; (4) terms for previously-viewed tapes; (5) minimum-pricing terms; and (6) the purchasing grid. (AA 3131, 4463-4465.) Columbia similarly identified thirteen "Key Deal Terms." (AA 2644.) As Paramount admitted:

> 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. . . . [T]hese 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.*

(AA 4460, emphasis added.)

Defendants therefore distort the nature of revenue sharing deals by suggesting the scattered bits of information potentially gleaned from the various articles about Blockbuster disclosed all the information needed to compare Blockbuster's deals to distributor deals. Defendants rely predominantly on two articles: (1) an April 1998 Video Business article that generically referenced "a 40/60 split" without elaboration or discussing any other terms (SRB 46-47, citing AA 672-676); and (2) a June 1998 Forbes article which merely referenced per-tape fees ranging from "$0 to $7" and a studio split of "between 30% to 40%." (SRB 47, citing AA 699-705.) Neither article mentioned they were output deals or identified all of the fundamental terms Paramount conceded were necessary to evaluate any

revenue-sharing deal. The most detailed article—the Forbes article—did not mention at least 4 of the 6 key terms. (AA 699-705, 2064.)[30]

Defendants also miss the mark by claiming Bob Webb asked the studios in June 1998 "for the Blockbuster revenue-sharing terms that were supposedly 'considerably more favorable than the terms available to independent retailers through Rentrak'" and that Webb's request "alone defeats the 'secrecy' element." (SRB 48, citing AA 7215.) Webb's letters to the studios, however, show that although it "appeared" to Webb that Blockbuster must be receiving special terms given its sudden copy depth and promotional guarantees, he did not know if that was true. (AA 7213, 7215.) His May 1998 letter explained he was hiring a law firm to investigate discrimination rumors and "[i]f the rumors prove to be unfounded, then so be it." (AA 4364.) And his June 1998 letter asked the studios to explain whether they believed they "already offer[ed] [independents] the same terms." (AA 7216.) The studios also ignore that:

- Webb explained that he understood that Blockbuster had revenue sharing deals but "wasn't sure if all [Blockbuster] deals with all studios were output, necessarily"; he "didn't know." (AA 7238.)
- Webb explained that he "would have to know certainly all the terms of the revenue-sharing agreement" to compare the Blockbuster and distributor deals. (AA 790-795.) If he knew Blockbuster's agreement had a 60/40 split and another agreement had a 45/55 split, he still would not be able to determine which

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[30] The other articles were even less informative; they merely mentioned Blockbuster was entering or considering direct revenue sharing deals, without describing any pricing terms or mentioning they were output deals. (See AA 465, 689-690, 692-693, 695-697.) Defendants also cite a Blockbuster SEC filing; it stated only that Blockbuster "entered into revenue sharing agreements with the major studios" in 1998, without disclosing any pricing terms. (See SRB 48, citing AA 180.)

deal was better for the retailer because "there's a lot of other terms that would come into play." (AA 790.)

- Columbia conceded "there was no way" Webb could have known the Blockbuster terms. (AA 1663(CT2183).)

In sum, while some media articles may have indicated Blockbuster was entering direct revenue sharing deals, none disclosed the information needed to compare those deals to distributor programs. Indeed, Columbia admitted that while it knew from "the video industry trade press that Blockbuster had entered into revenue sharing deals with several of the [studios]," it "did *not* know the terms or details of any of Blockbuster's deals . . . ." (AA 459, emphasis added.)

Second, defendants provided no evidence establishing as a matter of law that plaintiffs necessarily would have read, or known the content of, the various articles defendants now cite, or that the content was so prevalent it can be imputed to plaintiffs. (Cf. *Hygrade Milk & Cream Co., Inc. v. Tropicana Products, Inc.* (S.D.N.Y. 1996) 1196-1 Trade Cases (CCH) ¶ 71,438, 1996 WL 257581, * 5 [triable issue whether seller's advertisements in trade journal sufficed to give plaintiffs notice of seller's new pricing plan].)

Third, since this Court must liberally construe section 17045 to effectuate its purpose—preventing sellers from unfairly favoring chain stores at the expense of independent retailers (*ABC Internat. Traders*, *supra*, 14 Cal.4th at pp. 1257, 1260-1261)— it should reject defendants' suggestion that media reports indicating new deals exist, but not disclosing their key terms, can preclude a section 17045 claim.

Defendants try to dodge this issue by erecting a straw man. Relying on the false premise that the articles disclosed every term needed to evaluate Blockbuster's new deals, defendants accuse plaintiffs of arguing that the secrecy element is satisfied if "*a seller itself* fails to disclose *any*

material term" even if the terms are well known. (SRB 49.) They claim (a) no case requires a defendant to "disclose facts that the plaintiff already knows" or holds that information "is 'secret' simply because it was not the defendants who disclosed it" (SRB 50); and (b) "[p]laintiffs do not dispute that the media accurately reported the terms constituting the alleged secret discount or special privilege" (SRB 52).

As explained above, defendants' contentions are pure fiction. Plaintiffs *do* dispute that independents and distributors already knew the material terms and that media reports conveyed all the material terms. (See AA 2063-2065.) Further, evidence shows that when distributors and independents asked the studios themselves about Blockbuster's new deals, the studios refused to disclose the actual terms and used that secrecy to try to shield themselves from price discrimination claims. For example, when Webb asked the studios in June 1998 whether they had already made Blockbuster's terms available to independents, the studios denied any discrimination without disclosing or offering Blockbuster's terms. (AA 7216, 7218-7224.) The studios falsely told independents no new deals existed; they later admitted new deals existed but claimed independents would not want them. (AA 1278-1279(CT658-61), 1736(CT2471).) Studios also misleadingly told distributors they were receiving deals "similar to the ones offered to Blockbuster." (AA 4541; accord, 1623(CT2021).) The studios' refusal to disclose the actual terms precluded distributors and independents from confirming whether illegal price discrimination was occurring.

Under the circumstances, it would undermine section 17045's purpose to allow the studios to use a hodgepodge of articles indicating new deals existed to immunize themselves from the very type of favoritism section 17045 was enacted to prevent. What plaintiffs and the industry actually knew about Blockbuster's new deals is a triable issue.

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

Our opening brief explained that the trial court erred in ruling that Fox and Columbia cannot be liable under section 17045 because they purportedly entered their revenue-sharing deals with Blockbuster in response to the other studios' deals. (AOB 78-81.) Defendants' responses are unavailing.

1. Whether Fox and Columbia's discriminatory pricing had a tendency to destroy competition in the wholesale and retail markets is a triable issue.

Diesel Electric, *supra*, 16 Cal.App.4th 202, rejected defendants' argument that there is a "meeting competition" defense to a section 17045 claim. (See AOB 78-79.) Defendants accuse plaintiffs of "ignor[ing] *Diesel Electric*'s conclusion that meeting a competitor's price can defeat the 'tendency to destroy competition' element of section 17045." (SRB 61.) They claim "a seller's good-faith attempt to meet competitor's terms defeats the element of 'tendency to destroy competition,'" and the reason "is that courts have uniformly recognized that such conduct is pro-competitive." (SRB 62.)

This Court should reject defendants' attempt to backdoor a "meeting competition" defense into section 17045 by way of the "tendency to destroy competition" element. As *Diesel Electric* recognized, because the Legislature specifically included "meeting competition" defenses in other UPA provisions but not section 17045, one must conclude that the Legislature would have expressly included such a defense in section 17045 had it intended for "meeting competition" evidence to conclusively negate a section 17045 claim. (16 Cal.App.4th at p. 218.) Nor does *Diesel Electric*'s comment that "*in certain situations* the meeting of a competitor's pricing" might show there was no "tendency to destroy competition"

support defendants' contention that such evidence conclusively defeats a section 17045 claim. (*Ibid.*, emphasis added.)

The reason the Legislature excluded a "meeting competition" defense from section 17045 seems obvious given the statute's purpose. As the California Supreme Court recognized in *ABC Internat. Traders*, section 17045 "was intended primarily to protect against competitive injury in the secondary line of commerce, i.e., at the level of the discount's recipient," not the seller level. (14 Cal.4th at pp. 1261-1262.) Its focus was the "highly destructive effect" that sellers' favoritism of chain stores had "on wholesale and retail competition." (*Id.* at p. 1258.)

Although a seller's meeting of another seller's price to a chain store might reflect or further competition *at the seller level*, it in no way indicates that the pricing would not tend to destroy competition *among the chain's competitors*—the wholesalers and independent retailers. Indeed, where one seller provides unearned discounts or other favored terms to a large chain store, a second seller's adoption of the same discriminatory pricing actually *increases* the anti-competitive effect on wholesalers and retailers.

Thus, where, as here, the claim concerns harm to the favored buyer's competitors, allowing "meeting competition" evidence to negate the claim would destroy section 17045's purpose. Here, as our opening brief showed (AOB 79-80) and *Diesel Electric*, *supra*, 16 Cal.App.4th at pp. 213-214 expressly recognized, the huge pricing disparity between what distributors and Blockbuster paid for videotapes and the independents' resulting lost sales and store closures not only created a triable issue that Fox and Columbia's pricing had a *tendency* to destroy competition at the wholesale and retail levels, it showed the price discrimination actually *did* destroy competition. (AOB 79-80.)

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

Our opening brief further explained that Fox and Columbia's "meeting competition" evidence would not entitle them to summary judgment even under the Robinson-Patman Act. (AOB 80-81.)

Defendants claim that "meeting competition" is, under the Robinson-Patman Act, "an *absolute* defense even if it results in discriminatory pricing." (SRB 64-65, emphasis added.) But "[t]he concept of good faith lies at the core of the defense" and it almost always presents a fact issue for a jury. (*Alan's of Atlanta*, *supra*, 903 F.2d at pp. 1425-1426; *Hoover Color Corp. v. Bayer Corp.* (4th Cir. 1999) 199 F.3d 160, 164; AOB 80.) Fox and Columbia suggest *Standard Oil Co. v. F.T.C.* (1951) 340 U.S. 231 [71 S.Ct. 240, 95 L.Ed. 239], does not require them to justify their pricing to distributors. (SRB 64.) To the contrary, it requires sellers to prove the price "differentials were justified." (340 U.S. at pp. 243-244.)

Defendants also argue that a "'prudent business man responding fairly to what he believes in good faith is a situation of competitive necessity might well raise his prices to some customers to increase his profits, while meeting competitors' prices by keeping his prices to other customers low.'" (SRB 65.) But that isn't what happened here. Here, Fox and Columbia entered a new revenue-sharing deal with Blockbuster that was designed to *increase their profits from Blockbuster* by allowing Blockbuster the lower cost and copy depth/breadth needed to increase consumer rentals, but they then refused to offer comparable terms to distributors. (AOB 10-12, 16, 21-25.) Even if Fox and Columbia entered their Blockbuster deals because they believed in good faith that the deals were a competitive necessity, that does not establish as a matter of law that their treatment of distributors was in good faith or a competitive necessity.

Moreover, Robinson-Patman's "meeting competition" defense does not protect "a good faith attempt to meet general competition in the market place"; it only protects a good faith attempt to match a competitor's lower price. (*Hoover*, *supra*, 199 F.3d at pp. 165-166.) It "places emphasis on individual competitive situations, rather than upon a general system of competition." (*F.T.C v. A.E. Staley Mfg.* (1945) 324 U.S. 746, 753 [65 S.Ct. 971, 89 L.Ed. 1338] ["*Staley*"].)

The evidence here does not show as a mater of law that Fox and Columbia entered the Blockbuster deals to match a competitor's lower price. To the contrary, Fox and Columbia admitted that each did its particular Blockbuster deal because it "negotiated a good deal" that would make the studio *more money* than traditional pricing. (AA 100, 102, 144-145, 147, 457, 522.) Even if Fox and Columbia knew the other studios had reached similar deals with Blockbuster and believed they would be at a competitive disadvantage without one, that at most shows they were meeting general competition in the marketplace. That is not enough to avoid Robinson-Patman liability.

Defendants cite no case indicating that if the other studios' discriminatory pricing to Blockbuster and distributors violated the Robinson-Patman Act, Fox and Columbia can avoid liability merely by claiming they met the other studios' pricing. Case law shows they remain liable or that, at a minimum, a triable issue exists. (E.g., *Staley*, *supra*, 324 U.S. at p. 757 ["We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system"]; *In The Matter Of Surprise Brassiere* (1967) 71 F.T.C. 868, 1967 FTC LEXIS 53, *173-175 [even if seller gave extra promotional allowance to large buyers only in response to competitors' offers, defendant could not meet "good faith" requirement]; aff'd (5th Cir. 1969) 406 F.2d 711, 716; *Zoslaw*, *supra*,

693 F.2d at pp. 876-882, 885 [Ninth Circuit found triable Robinson-Patman claim based on sellers' favoritism of large chains even though it discussed meeting competition evidence in rejecting Sherman Act claim]; *Zoslaw v. MCA Distributing Corp.* (N.D.Cal. 1984) 594 F.Supp. 1022, 1031-1032 [on remand, district court found triable issue as to whether defense applied].)[31]

Defendants obfuscate the issue by arguing plaintiffs "have offered no evidence that the Blockbuster revenue-sharing agreements were illegal." (SRB 64.) The illegality—the unlawful price discrimination—arises from the studios' refusal to provide Blockbuster-comparable deals *to distributors*, not their decision to give Blockbuster the deals.

F. Blockbuster's Untimely And Unfounded Attempt To Avoid Derivative UPA Liability Must Be Rejected.

Blockbuster argues that even if plaintiffs "raised a triable issue on whether the studios violated the UPA," summary judgment on the UPA claims must be affirmed as to Blockbuster because plaintiffs "have not carried their burden of presenting ***additional*** evidence that Blockbuster knowingly solicited or effectuated those violations." (BRB 55.) It claims "[w]ithout evidence that Blockbuster knew of a disparity between the prices it paid and the prices that distributors were paying for videocassetes . . . plaintiffs have failed to show that Blockbuster possessed the requisite knowledge under the UPA." (BRB 55.) The argument is unfounded.

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[31] Defendants claim *Staley* is inapposite because "[t]he pricing systems that the defendant in *Staley* adopted had been previously adjudicated to be unlawful by the FTC and the Supreme Court." (SRB 63-64, citing *Corn Products Refining Co. v. F.T.C.* (1945) 324 U.S. 726 [65 S.Ct. 961, 89 L.Ed. 1320].) But *Corn Products* and *Staley* were companion cases *decided the same day*. *Corn Products* held that a particular price discrimination scheme violated the Robinson-Patman Act. *Staley*, in turn, held that a seller could not escape liability for that price discrimination simply by claiming it was meeting the other sellers' pricing. (See 324 U.S. at pp. 753-754.)

First, it fails because defendants never moved for summary judgment on this ground or otherwise raised it in the summary judgment proceedings. (See AA 43-152, 7255-7311.) Defendants did not specify in their separate statement of undisputed facts (AA 135-152) any of the "facts" that Blockbuster now claims (based on its own witnesses' testimony) were "uncontroverted" or "undisputed" (e.g., BRB 57 ["the only evidence of Blockbuster's knowledge" shows Blockbuster did not knowingly induce a violation], 58 [it is "uncontroverted" Blockbuster believed the output deals "would actually **increase** its costs"], 59, fn. 17 ["the evidence demonstrates that Blockbuster actually paid more for its videos than plaintiffs"]). Therefore, Blockbuster's newfound contentions cannot be a basis for affirming summary judgment. (*North Coast Business Park*, *supra*, 17 Cal.App.4th at pp. 29-30; *United Community Church*, *supra*, 231 Cal.App.3d at pp. 333, 337.)

Second, even the record on those issues defendants did raise defeats Blockbuster's new argument. Redstone admitted that Blockbuster demanded and obtained a *lower* revenue share than what the studios charged Rentrak because that share was "higher than the retailer could afford." (AA 2147-2148, 4736; see also AA 4361 [Fox admitting Blockbuster sought a "favored revenue share relationship"].) Blockbuster further admitted that its output deals gave it an advantage by lowering its purchasing costs (AA 1209(CT384-85), 1898(CT3118-19), 4216, 4740-4741) and that without the deals it would "have to purchase videocassette[s] at high wholesale prices," which would hurt its business (AA 318; accord, AA 180). Those admissions create a triable issue under the standard Blockbuster proposes—that "Blockbuster knew of a disparity between the prices it paid and the prices the distributors were paying." (BRB 58.)

Third, Blockbuster's proposed standard is wrong. Unlike the Robinson-Patman Act, "proof of a knowing or intentional receipt by a buyer

of a secret, unearned discount is not required under section 17045." (*Diesel Electric*, *supra*, 16 Cal.App.4th at p. 214, fn. 4.) The UPA prohibits Blockbuster from "solicit[ing] any violation" or using "any threat, intimidation, or boycott" to effectuate UPA violations. (Bus. & Prof. Code, §§ 17046, 17047.) Since summary judgment evidence must be construed in the light most favorable to plaintiffs, the evidence that Blockbuster sought favored terms at independents' expense (e.g., the Fox admissions and the studio memoranda) and the evidence that Blockbuster threatened and used purchase reductions to get what it wanted amply create a triable issue of Blockbuster's UPA liability. (See cites at AOB 17-21.)

G. The Trial Court Erred In Exempting Paramount's Sales To Blockbuster From Section 17045 Liability.

Section 17045 applies when a seller provides different terms to different purchasers. (Bus. & Prof. Code, § 17045.) Defendants claim Blockbuster's purchases from Paramount are exempt from section 17045 because Viacom, Paramount and Blockbuster are "commonly-controlled members of the same corporate family" and therefore the transactions between Blockbuster and Paramount "'may not be considered separate sales to a favored customer.'" (SRB 67-68.)

Defendants' argument fails because substantial evidence shows Blockbuster and Paramount dealt with each other at arms length, not as one intermingled entity. Defendants do not deny that the companies admitted in SEC filings that Blockbuster purchased videos from Paramount; that the companies accounted for their transactions as sales; and that Paramount admitted it dealt with Blockbuster "'as we would with any other customer'" and their commercial relationship "is typical of a relationship between a large customer and one of its suppliers." (See cites at AOB 84-85.)

Accordingly, there is no cogent basis to exempt Blockbuster's purchases from Paramount from section 17045 coverage.

In arguing no authority supports plaintiffs' view, defendants claim that "whether intra-enterprise transactions are immune from the UPA was *not* before the court in *Diesel Electric*." (SRB 68.) *Diesel Electric*, however, rejected defendants' argument in dicta. After holding a distributor should not be allowed to claim "that it is part of its sister company" for purposes of seeking functional discounts, the Court of Appeal noted that, "[i]n a similar vein," defendants argued in the trial court but not on appeal that "its discounts were exempt from section 17045 as mere interdivision transfers or transfers among subsidiaries." (*Diesel Electric*, *supra*, 16 Cal.App.4th at pp. 216-217, fn. 6.) The Court rejected the argument, concluding there was no evidence of mere intradivision transfers (i.e, a parent or subsidiary delivering the product at cost) and, regardless, "we doubt such device would be successful in avoiding section 17045 liability." (*Ibid.*)

Defendants also err in claiming plaintiffs "propose a rule whereby conduct that is entirely appropriate under federal law would be illegal in California." (SRB 69.) The U.S. Supreme Court has not addressed whether intra-enterprise transactions are immune from Robinson-Patman coverage and the lower courts are in conflict.[32]

Some federal courts, including the Fifth Circuit, apply a *per se* rule that transfers between a parent and subsidiary can never be purchases for

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[32] Regardless, defendants' suggestion the UPA must be construed identical to federal law ignores that the UPA was enacted to further *California* public policy and *supplement* federal law. (See Cranston & Leslie, *The Tension Between Federal And State Unfair Competition Laws* (1996) 915 PLI/Corp 71, 73 [the tension between federal law and California's Unfair Competition Act and Unfair Practices Act "is caused by the fact that federal law seeks generally to maximize competition, while state law seeks, in part, to protect competitors"].)

Robinson-Patman purposes, which a few courts have applied to sister subsidiaries. (E.g., *Security Tire & Rubber Co. v. Gates Rubber Co.* (5th Cir. 1979) 598 F.2d 962, cited at SRB 67.)

Other courts recognize that there can be a purchase for Robinson-Patman purposes where corporate affiliates conducted their business and pricing decisions independently, not as a single economic entity. (See *Brown v. Hansen Publications, Inc.* (9th Cir. 1977) 556 F.2d 969, 972 ["*Brown*"]; *Zoslaw*, *supra*, 693 F.2d at p. 880 [parent's transactions with subsidiaries not necessarily immune; courts should examine whether "subsidiaries acted as independent distributors in their pricing and marketing decisions"]; *Schwimmer v. Sony Corp. of America* (2d Cir. 1980) 637 F.2d 41, 49 [Robinson-Patman Act may apply if seller did not exercise "dominion and control" over affiliate or control its prices]; *Supra USA, Inc. v. Samsung Electronics Co.* (S.D.N.Y. 1987) 1987-2 Trade Cases (CCH) ¶ 67,760, 1987 WL 19953, *7 [rejecting Fifth Circuit's approach]; *Reines Distribs., Inc. v. Admiral Corp.* (S.D.N.Y. 1966) 256 F.Supp. 581, 586 [Act may apply where affiliated companies "deal at arm's length"].)

Defendants miss the point by describing *Brown* as "affirming dismissal of Robinson-Patman Act claim because sister subsidiaries are 'parts of a single integrated enterprise and . . . transfers between them were indistinguishable from dealings within the same corporate entity.'" (SRB 68.) The *Brown* court relied on evidence that the two subsidiaries were wholly owned by the same individual who effectively ran them as one economic entity—the subsidiaries had the same officers, directors, employees, and offices and the owner centrally handled all accounting and payroll. (*Brown*, *supra*, 556 F.2d at pp. 971-972.) The same cannot be said of Blockbuster and Paramount.

Because sales between affiliated corporations dealing at arm's length are just as destructive to small competitors as sales to an unrelated

company, they should be treated as sales for price discrimination purposes. (See Huddleston, *Can Subsidiaries Be "Purchasers" From Their Parents Under The Robinson-Patman Act? A Plea For A Consistent Approach* (1988) 63 Wash.L.Rev. 957, 977 ["Courts should study the entire relationship . . . to decide whether the subsidiary is a different purchaser under the Robinson-Patman Act. This 'dominion and control' test would best assure that economic substance would prevail over legal form."].) The Fifth Circuit's *per se* view

> adopted in *Security Tire* is . . . undesirable. If the subsidiary really is an independent, profit-making center, with an ability to make its own pricing and resale decisions, and if goods are indeed sold to it, *i.e.*, if the title and risk of loss have passed, the likelihood of substantial injury to competition may be as great as with sales to a completely unrelated company. Given such a true 'sale,' the courts should hold that the jurisdictional requirements of [a price discrimination claim] are met.

(Kintner & Bauer, Federal Antitrust Law (1983) § 21.15, p. 212.)

Since section 17045 must be liberally construed to effectuate its purpose, this Court should reject the *per se* rule that defendants urge.

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

Our opening brief explained that (1) a trade practice that violates the policy or spirit of antitrust or price discrimination laws is actionable under the Unfair Competition Law even if it does not technically violate the Cartwright Act or Unfair Practices Act; and (2) plaintiffs' evidence that the defendants' conduct here was anti-competitive and harmed consumers created a triable issue that the studios violated the policy or spirit of those laws. (AOB 82-84.) A UCL claim is barred only where a statute or

common law doctrine specifically upholds or authorizes the conduct at issue, i.e., the conduct falls within a legislative or judicial "safe harbor." (*Ibid.*)

Defendants claim they are not relying on any "safe harbor" here. (SRB 72.) Their arguments show otherwise. They rely entirely on the "safe harbor" ruling in *Chavez v. Whirlpool Corp* (2001) 93 Cal.App.4th 363, by arguing a "'determination that the conduct is not an unreasonable restraint of trade'" and therefore does not violate antitrust laws precludes a separate claim that the conduct is "unfair" for UCL purposes. (SRB 70.)

The fatal flaw in defendants' argument is that the trial court did not find, and no statute or case holds, that the conduct at issue here was not "unreasonable" or not "unfair" or not harmful to consumers. The trial court only found that plaintiffs' evidence did not support an inference of conspiracy and that defendants' conduct did not meet certain technical requirements for section 17045 claims, e.g., the "secrecy" term. The evidence that the studios harmed consumers by refusing to provide Blockbuster-comparable terms to distributors created a triable UCL claim.

V. THE TRIAL COURT ERRED IN EXCLUDING THE INGRAM EXHIBITS.

A. Ingram's Letters.

Defendants claim the grounds for admission of the two Ingram letters "are no more persuasive now than what they were in Texas." (SRB 72.) They omit that while the Texas district court initially excluded the letters on hearsay grounds, it allowed the letters' content to come into evidence through the testimony of Ingram and the studio recipients. (See AA 1388(CT1097), 1505(CT1562), 1594(CT1912-13); AOB 27, fn. 10.)

In the trial court below, defendants asserted that the Texas court "permitted testimony only from witnesses with first-hand knowledge about

the letters to testify about the events, *which is the correct resolution of the evidentiary objections* urged by defendants then and reasserted now in this Court." (AA 7646, fn. 2, emphasis added.) Thus, at a minimum, defendants' implicit suggestion on appeal that the letters' content is inadmissible must be rejected. Nor, as we show below, have defendants presented a legitimate reason why the letters themselves are inadmissible.

The letters are admissible to show Ingram's state of mind. (AOB 86.) Defendants claim "Mr. Ingram's state of mind has no bearing on any issue in this dispute." (SRB 76.) That's nonsense. *Defendants themselves* placed Ingram's state of mind at issue by claiming—in arguing against the conspiracy charge—that Ingram did not want or could not do output revenue sharing deals. Indeed, Ingram characterized the December 1998 letter as a "request" that the studios "level the playing field for retailers" by making Blockbuster-comparable "output deal terms available" to independents through distributors. (AA 7555(CT225).) Thus, not only did defendants place Ingram's state of mind at issue by claiming he didn't want output deals, they made Ingram's request for the deals an operative fact, another independent ground for admission.

The letters also are admissible to prove notice. (AOB 86-87.) Defendants, however, claim "[p]laintiffs themselves admit" that "they offer the documents to show the Studios' purported acts 'against self-interest.'" (SRB 75.) That is not what plaintiffs said. Plaintiffs' point was that the letter was relevant to show the studios received joint *notice* that their largest distributor believed each was denying independents a level playing field, driving independents out of business, and failing to make output deals available to independents or offering only impractical terms—which supports plaintiffs' claim that the studios had knowledge of their parallel pricing and its devastating impact. (AOB 86-87.)

The letters also are admissible as adoptive admissions because one would expect the studios to have denied the accusations in Ingram's letters had they been untrue. (AOB 87.) Defendants claim the adoptive admissions exception applies only where a party fails to question "'a statement of account or a bill'" or a similar business transaction. (SRB 73.) Even if that is "'[t]he most common instance'" (SRB 73), the exception still applies to *all* circumstances where a party would be expected to have denied a statement were it untrue. (Evid. Code, § 1221; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 88; *Nungaray v. Pleasant Valley Etc. Assn.* (1956) 142 Cal.App.2d 653, 666-667; 2 McCormick on Evidence (5th ed. 1999) § 262, pp. 167-172.)

Defendants claim the letters cannot be adoptive admissions because Ingram "did *not* expect a response." (SRB 74.) But the exception requires only that a response would normally be expected if the statements were *untrue*. A declarer who believed his statements were true, as Ingram did, would not necessarily expect a response.

Defendants also try to avoid the exception by claiming "Mr. Ingram *did* receive responses to his letters, contrary to Plaintiffs' portrayal of the record." (SRB 74.) What matters is that no response *denied* Ingram's accusations. (2 McCormick on Evidence, *supra*, § 262, at p. 167.) According to Ingram, the studios either gave no response whatsoever or merely claimed they "had to follow Disney, or Blockbuster encouraged us to do it." (AA 1621-1622(CT2015-20), 1613(CT1988), 7549(CT202).)

Defendants also claim the letters are inadmissible because Ingram characterized their content as speculative, hyperbole, inaccurate or not based on personal knowledge. (SRB 75-76.) That mischaracterizes Ingram's testimony. Defendants' cites pertain only to the December 1998 letter. (See *id.*, citing AA 1621(CT2015), 1622(CT2020), 1636(CT2075).) Ingram testified that the letter reflected his "firmly held conviction about

the situation" (1613(CT1988); he believed the information was correct when he wrote it (AA 1636(CT2076)); and he "had data" supporting the impact on independents (AA 1622(CT2019)).

Ingram did *not* testify that the December 1998 letter was "speculation" or "not based on personal knowledge." Defendants misleadingly cite to testimony where Ingram merely explained that the Disney-Blockbuster terms were secret, so Ingram therefore had to rely on his personal observations of the marketplace. (AA 1621-1622(CT2015-20).) Ingram irrefutably knew what terms the studios had offered his company, and the impact on, and requests of, Ingram's own customers. (See, e.g., cites/discussion at AA 7477-7478.) Ample foundation therefore exists for the letter's comments, such as the fact "[o]utput deals have either not been available to all retailers or, if available, have not been practical or profitable." (AA 2457.)

The studios further distort the record by suggesting Ingram said the letter's assertions were "hyperbole" and he "had no idea if this was accurate information." (SRB 75-76.) Ingram made those particular comments after defense counsel showed him a document that defense counsel claimed showed Ingram's letter overstated the number of retailers going out of business. (AA 1636-1637(CT2075-77).) Ingram explained that he had "no way of knowing" whether *defense counsel's* document was "accurate"; that the numbers in his letter were based on data received from his top reports, *which he believed was true*; and that he would have to examine the actual data he relied on to resolve the dispute. (AA 1622(CT2019), 1636-1637(CT2076-77), 1639(CT2087).)

B. Ingram's Strategic Plans.

Our opening brief explained that Ingram's strategic plans for 1999, 2000 and 2001 are admissible under the "business records" hearsay

exception and also to prove Ingram's state of mind regarding industry conditions and revenue sharing. (AOB 87-88.)

Defendants tacitly admitted in their briefs that Ingram's state of mind is relevant to this lawsuit and that Ingram's strategic plans are relevant to showing it; in their conspiracy arguments, they quoted from the plans in claiming Ingram did not want revenue sharing. (See SRB 32-33.) In their evidentiary arguments, however, defendants wholly ignore the "state of mind" issue and argue only that the business records exception is inapplicable. (SRB 76-77.) At a minimum, the plans are admissible to prove Ingram's state of mind.

Regardless, the business records exception applies. (AOB 87-88.) Defendants claim it is inapplicable for one reason only—that "Ingram's own testimony established that the information in the strategic plans is *not* sufficiently reliable . . . ." (SRB 76.) But Ingram never testified that all the information is unreliable. His point was that while his company tried "to write an accurate plan with accurate information"—as "accurate as [Ingram] could make it"—*some* of the information could be inaccurate because Ingram's management may have made a "best guess" as to industry situations where Ingram was not "privy to the actual information." (AA 1602(CT1944).)

Defendants have not identified any portions of the strategic plans that are not based on the personal knowledge of Ingram and his employees. Indeed, the only cites defendants provide other than Ingram's general comment above are the same cites regarding *the December 1998 letter* that we addressed in the previous section. (See SRB 75, 77.)

Even assuming Ingram's vague, general comment warrants the redaction of some information, it cannot justify excluding the entirety of the strategic plans. The plans contain numerous, highly relevant statements of which Ingram's management irrefutably had personal knowledge—such as

the plans' statements that "revenue sharing is actually quite profitable for distributors," that Ingram "will continue to enhance its revenue sharing program," and that Ingram "will request" or "continue to request" that the "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, 3530-3531, 3542-3543.) Although our opening brief highlighted these statements (AOB 87-88), defendants do not mention them (SRB 76-77).

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Defendants want to argue that Ingram did not want or could not do Blockbuster-comparable deals, yet at the same time exclude letters and strategic plans evidencing the opposite. The exclusion order should be reversed.

CONCLUSION

For all the reasons set forth in this Reply, the Appellants' Opening Brief, and the Attorney General's Amicus Curiae Brief, the summary judgment should be reversed on each claim and the matter remanded for trial. The order excluding the five Ingram exhibits should also be reversed.

Dated: January 27, 2005

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CERTIFICATION

Pursuant to California Rules of Court, Rule 14(c), I certify that this **APPELLANTS' REPLY BRIEF AND RESPONSE TO ATTORNEY GENERAL'S AMICUS CURIAE BRIEF** contains **33,750** words, not including the tables of contents and authorities, the caption page, and this Certification page.

Dated: January 27, 2005

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