APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DIGITAL ALLY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:16-cv-02032
	)	
TASER INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	
_____	)	

FINAL JUDGMENT UNDER RULE 54(b)

In accordance with Rule 54(b) of the Federal Rules of Civil Procedure, and this Court's April 14, 2017, Order Certifying Memorandum and Order Entered January 12, 2017 [Doc. 105] as Final and Directing Clerk to Enter Judgment Thereon as Provided Under Fed. R. Civ. P. 54(b) (Doc. No. 118), the Court GRANTS Final Judgment in favor of Defendant TASER International, Inc. with respect to its antitrust and unfair competition claims in Counts III-VIII of the Second Amended Complaint, pursuant to the Court's January 12, 2017, Memorandum and Order granting TASER International, Inc.'s Motion to Dismiss (Doc. No. 105).

IT IS SO ORDERED.

Date: APRIL 18, 2017

/s/ Jeffrey S. Hokanson
Jeffrey S. Hokanson, Deputy
Clerk for TIMOTHY O'BRIEN
CLERK OF THE COURT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DIGITAL ALLY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:16-cv-02032
	)	
TASER INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	
	)	

ORDER CERTIFYING MEMORANDUM AND ORDER ENTERED JANUARY 12, 2017 [DOC. 105] AS FINAL AND DIRECTING THE CLERK TO ENTER JUDGMENT THEREON AS PROVIDED UNDER FED. R. CIV. P. 54(b)

The Court has before it plaintiff Digital Ally, Inc.'s ("Digital") Combined Motion to Alter, Amend or Reconsider [Doc. 107] ("Combined Motion") the Court's Memorandum and Order entered January 12, 2017 [Doc. 105] ("Dismissal Order") and otherwise to certify such Order of Dismissal or such other or further order as may modify or decline to modify it, as final, within the meaning of Fed. R. Civ. P. 54(b). By notice filed April 12, 2017, Digital has withdrawn that portion of the Combined Motion wherein it seeks

reconsideration the Order of Dismissal. Since it appears that defendant Taser International, Inc. ("Taser") does not oppose certification of the Order of Dismissal and entry of a final judgment thereon, *see*, Taser's Memorandum in Opposition to the Motion filed February 9, 2017 [Doc. 111], the Court has determined to grant that the remaining portion of the Combined Motion and does so based upon the following findings and conclusions:

1. In Counts III-VIII, inclusive, of its Second Amended Complaint herein [Doc. 19], Digital asserted five (5) anti-trust/unfair competition claims against Taser including, *inter alia*, claims for unlawful restraint of competition in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 and claims under § 2 of the Robinson-Patman Amendments to the Clayton Act, 15 U.S.C. § 13. Each of these claims is distinct, factually, from the claims for patent infringement that appear in Counts I and II of Digital's Second Amended Complaint and, on the contrary, it does not appear that they share operative facts, to any material extent, or that they arise out of the same nucleus of facts.

2. Likewise, the legal principles which govern Digital's anti-trust claims, on one hand, and its patent infringement claims, on the other, as well as Taser's defenses to each are themselves distinct and, among other things, share no essential elements in common.

3. Accordingly, the Court finds and concludes that both factually and legally the claims which are the subject of the Court's Dismissal Order and the patent claims that remain to be adjudicated in this case are separable, one from the other, State of

New Mexico ex rel. State Engineer v. Trujillo, 813 F.3d 1308, 1316 (10th Cir. 2016).

4. Second, in its Dismissal Order, the Court dismissed each/all of the anti-trust/fair trade practices claims appearing in Counts III-VIII of Digital's Second Amended Complaint for the reason that Digital had failed to state any claims upon relief may be granted, within the meaning of Fed. R. Civ. P. 12(b)(6).

5. In so doing, the Court concluded that Digital was unable, even on the face of its Complaint, to prove sufficient facts to sustain any of those claims and such determination is final.

6. Third, given that Digital's anti-trust claims and its still-pending patent claims do not share facts in common and that they are not governed by the same or perhaps even similar legal principles, the Court concludes that even in the event there are multiple appeals from the Court's determinations in this case and, in particular, an appeal of its dismissal of the anti-trust claims now followed, at some point, by an appeal respecting the patent claims, no appellate court will be required to decide the same issues more than once.

7. As the Court has assessed the facts and the law governing these two distinct species of claim, no issues which any appellate court may decide in connection with a more or less immediate appeal of the dismissal of Digital's anti-trust claims will have to be revisited and/or re-determined, even should a second appeal arise hereafter in connection with the patent claims.

8. For all of these reasons, the Court finds and concludes that notwithstanding the fact that its Dismissal Order adjudicates fewer than all of the claims at issue in this case, it is, nonetheless, final and dispositive with respect to the anti-trust claims that are the subject thereof and notwithstanding the pendency of the patent infringement claims, there is no just reason for delaying the entry of a final and appealable judgment upon and with respect to the anti-trust claims.

IT IS, THEREFORE, for good cause appearing, and as provided under Fed. R. Civ. P. 54(b)

ORDERED, ADJUDGED AND DECREED that the Court's prior Memorandum and Opinion entered January 12, 2017 [Doc. 105] be and hereby is certified and declared to be final, for all purposes, as provided under Fed. R. Civ. P. 54(b), and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk be and hereby is directed to enter judgment in accordance and conformity with the Court's said Memorandum and Opinion of January 12, 2017 [Doc. 105] as provided under Fed. R. Civ. P. 54(b) and 58, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that notwithstanding the foregoing, the issue of the entitlement of any party to the recovery of costs, *vel non*, will be and hereby is reserved for decision at such time as Digital's remaining claims against Taser are determined by final judgment pursuant to Fed. R. Civ. P. 54.

IT IS SO ORDERED.

Dated this **14TH** day of **APRIL, 2017** in Kansas City, KS.

/s/ Carlos Murguia
HON. CARLOS J. MURGUIA
United States District Judge

APPENDIX C

DIGITAL ALLY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 16-02032
	)	
TASER INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff Digital Ally, Inc., filed this lawsuit, alleging that defendant TASER International, Inc., violated federal and state antitrust and unfair competition law. Highly summarized, plaintiff claims that defendant conspired with and bribed numerous municipalities to purchase its law enforcement body cameras, effectively denying plaintiff market access. Plaintiff also raises claims of patent infringement, but those claims are not presently before the court. Defendant moved to dismiss all of the antitrust and unfair competition claims. (Doc. 24.) Among other arguments, defendant claims that it is entitled to *Noerr-Pennington*[1] immunity. The court agrees. For the following reasons, the court grants defendant's motion.

[1] *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Plaintiff and defendant both sell body-worn cameras to law enforcement. Plaintiff claims that defendant has conspired with law enforcement agencies to exclude plaintiff and others from competition. Plaintiff quotes a number of news reports that suggest that defendant essentially bribed members of law enforcement and their agencies to buy its products. According to plaintiff, defendant was able to get several agencies to buy its body cameras without submitting competing bids with other sellers.

In Counts III and IV of its complaint, plaintiff alleges violations of federal antitrust law, citing the Sherman Act and the Robinson Patman Amendments to the Clayton Act. *See* 15 U.S.C. §§ 1 (Sherman); 13(c) (Robinson Patman). The Supreme Court, however, has limited the reach of this law. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379–80 (1991) ("*Omni*") ("The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government."). In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court held that when private individuals took actions designed to influence government action, those individuals were immune from antitrust liability. This doctrine (called the "*Noerr-Pennington* doctrine") "exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition." *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503 (10th Cir. 1997); *see also Omni*, 499 U.S. at 383 ("In *Noerr* itself, where the private party 'deliberately deceived the public and public officials in its successful lobbying campaign, we said that 'deception, reprehensible as it is, can be of no

consequence so far as the Sherman Act is concerned.'"). Once a defendant asserts the *Noerr-Pennington* doctrine, the plaintiff bears the burden of showing it does not apply. *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 54 F. Supp. 2d 1042, 1053 (D. Kan. 1999) (citing *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1558 n.9 (11th Cir. 1992)).

To avoid application of *Noerr-Pennington* immunity, antitrust plaintiffs have urged courts to apply exceptions to the doctrine. They have advocated for a conspiracy exception, a bribery exception, and a commercial exception. In *Omni*, the Supreme Court rejected a conspiracy exception. 499 U.S. at 383. Conspiring with government officials is acceptable, just as is petitioning them for action. *GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 883 (10th Cir. 2005). Likewise, *Omni* addressed bribery, declining to create a bribery exception. *Id.* at 378 (addressing state-action immunity under *Parker v. Brown*, 317 U.S. 341 (1943)); *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 898 (10th Cir. 2011) ("The Supreme Court in [*Omni*] understood that risk and held that corruption—and even bribery explicitly—would not vitiate a claim of *Noerr-Pennington* immunity."). And other courts have rejected a commercial exception. *See, e.g., Greenwood Utils. Comm'n v. Miss. Power Co.*, 751 F.2d 1484, 1505 (5th Cir. 1985); *see also TEC Cogeneration Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560, 1573 (11th Cir. 1996); *Bright v. Ogden City*, 634 F. Supp. 31, 35 (D. Utah 1985), *aff'd sub nom. Bright v. Moss Ambulance Serv.*, 824 F.2d 819 (10th Cir. 1987); *cf. Allright Colo., Inc. v. City & Cty. of Denver*, 937 F.2d 1502, 1510 & n.11 (10th Cir. 1991) (holding that state-action

immunity applied despite the City's status as a possible competitor).

Without application of these potential exceptions, defendant remains immune for its actions intended to influence municipalities' decisions. The court believes that this conclusion is dictated by the Tenth Circuit's decision in *Coll v. First American Title Insurance Co.* In *Coll*, the plaintiffs claimed that the defendants (insurers) conspired with each other and the state superintendent of insurance to bribe the superintendent to set unreasonably high insurance premium rates. 642 F.3d at 886. The Tenth Circuit panel held that the defendants were immune under *Noerr-Pennington*, regardless of whether the allegations involved bribery or corruption. *Id.* at 898–99. In so holding, the court relied heavily on the Supreme Court's decision in *Omni*.

Plaintiff urges this court to regard *Omni*'s language addressing bribery and corruption as non-binding dicta. (Doc. 35, at 33–35.) Plaintiff also argues that *Coll* is directly contrary to other Tenth Circuit authority. (*Id.* at 39–40.) But *Coll* certainly did not treat the language in *Omni* as dicta. And the one case plaintiff cites that did not allow antitrust claims to proceed based on an exception for bribery and corruption—*Instructional Systems Development Corp. v. Aetna Casualty and Surety Co.*, 817 F.2d 639 (10th Cir. 1987)—preceded *Omni*. The court also does not agree with plaintiff's assessment that the Supreme Court recently abrogated *Omni* in its decision *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015). There, the dissent complained that the majority had diminished the impact of *Omni*'s holding. 135 S. Ct. at 1122 (Alito, J., dissenting). This,

however, is not the same as recognizing abrogation of a prior Supreme Court decision.

To be certain, plaintiff made many additional arguments why the actions of defendant should not be immune to antitrust liability. The court has fully considered those arguments, even though not addressed here. Based on the law in the Tenth Circuit, plaintiff simply cannot overcome *Noerr-Pennington* immunity. That fact is also dispositive of plaintiff's claims under Kansas law (Counts VII and VIII). *See* Kan. Stat. Ann. § 50-163(b) ("The Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal antitrust law by the United States Supreme Court.")

As for Count V—plaintiff's claim under § 17043 of the California Unfair Trade Practices Act—the court dismisses this claim, as well. Section 17043 makes it "unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition." But to state a cause of action under this section, a plaintiff must plead the defendant's costs and prices. *Eastman v. Quest Diagnostics Inc.*, 108 F. Supp. 3d 827, 838 (N.D. Cal. 2015). Plaintiff has not done so.

Count VI likewise is subject to dismissal. Plaintiff seeks relief under the California Unfair Competition Law ("UCL"). This claim is derivative of plaintiff's other claims. *See Aleksick v. 7 Eleven, Inc.*, 205 Cal. App. 4th 1176, 1185 (2012). Because the court has dismissed plaintiff's underlying claims, this claim must be dismissed like the others.

IT IS THEREFORE ORDERED that Defendant Taser International, Inc.'s Motion to Dismiss Second Amended Complaint (Doc. 24) is granted. Counts III-VIII are dismissed.

Dated this 12th day of January, 2017, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2017-2296

DIGITAL ALLY, INC.,
Plaintiff – Appellant

v.

TASER INTERNATIONAL, INC.,
Defendant – Appellee

Appeal from the United States District Court for the District of Kansas in No. 2:16-cv-02032-CM-TJJ, Judge Carlos Murguia.

MANDATE

In accordance with the judgment of this Court, entered May 2, 2018, and pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

cc: Clerk of Court, District of Kansas
James F.B. Daniels
John D. Garretson
Lynn C. Herndon
Pamela Beth Petersen

APPENDIX E

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DIGITAL ALLY, INC.,
Plaintiff-Appellant

v.

TASER INTERNATIONAL, INC.,
Defendant-Appellee

2017-2296

Appeal from the United States District Court for the District of Kansas in No. 2:16-cv-02032-CM-TJJ, Judge Carlos Murguia.

JUDGMENT

JAMES F.B. DANIELS, McDowell, Rice, Smith & Buchanan, PC, Kansas City, MO, argued for plaintiff-appellant.

PAMELA BETH PETERSEN, Axon Enterprise, Inc., Scottsdale, AZ, argued for defendant-appellee.

Also represented by JOHN D. GARRETSON, LYNN C. HERNDON, Shook, Hardy & Bacon, LLP, Kansas City, MO.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (WALLACH, MAYER, and TARANTO, *Circuit Judges).*

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

May 2, 2018	*/s/* Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court