APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRENDSETTAH USA, INC. and TREND SETTAH, INC. Plaintiffs-Appellants / Cross-Appellees, v. SWISHER INTERNATIONAL, INC., Defendant-Appellee / Cross- Appellant.	Nos. 16-56823; 16-56827 D.C. No. 8:14-cv-01664-JVS-DFM MEMORANDUM* February 8, 2019

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted November 16, 2018
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: FLETCHER and PAEZ, Circuit Judges, and GLEASON,** District Judge.

Following a jury verdict for Trendsettah USA, Inc. and Trend Settah, Inc. ("TSI") in TSI's antitrust and breach of contract case against Swisher International, Inc. ("Swisher"), the district court granted Swisher's motion for a new trial as to TSI's antitrust claims but not as to TSI's contract claims. The district court granted Swisher judgment as a matter of law ("JMOL") as to TSI's monopolization claim but not as to TSI's attempted monopolization claim. Later, following our decision in *Aerotec International, Inc. v. Honeywell International, Inc*., 836 F.3d 1171 (9th Cir. 2016), the district court reconsidered its earlier summary judgment order, this time granting Swisher summary judgment as to TSI's antitrust claims.[1]

1. We begin our analysis with the district court's reconsideration of summary judgment because, were we to affirm the district court's post-trial grant of summary judgment to Swisher, we would not reach many of the district court's rulings on the other issues.[2] We review the district court's decision to reconsider summary judgment for abuse of discretion, and we review the district court's summary judgment determination de novo. *See Smith v. Clark Cty. Sch. Dist*., 727 F.3d 950, 954–55 (9th Cir. 2013).

** The Honorable Sharon L. Gleason, United States District Judge for the District of Alaska, sitting by designation.

[1] Swisher properly cross-appealed as to the district court's antitrust rulings. *See* Fed. R. App. P. 28.1(c)(4); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984).

[2] We need not decide whether the district court erred in denying Swisher a new trial as to the breach of contract claims due to our disposition of other issues as set forth in this memorandum.

The district court did not abuse its discretion in reconsidering summary judgment in light of *Aerotec's* holding that "there is only a duty not to refrain from dealing where the only conceivable rationale or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition.'" 836 F.3d at 1184 (quoting *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004)). Aerotec's holding addressed a question of law that Swisher had raised prior to trial regarding what constitutes anticompetitive conduct. *See F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 962–63 (9th Cir. 2010) (holding that a court may reconsider a question of law that was raised "at some point before the judge submitted the case to the jury" where argument does not rest on the sufficiency of the evidence); *see also Williams v. Gaye*, 895 F.3d 1106, 1122 (9th Cir. 2018) (discussing *Ortiz v. Jordan*, 562 U.S. 180 (2011)).

However, in reconsidering summary judgment, the district court failed to draw all reasonable inferences in favor of TSI, the nonmoving party. To the contrary, the district court cited evidence that Swisher had introduced at trial to support its assertion that it had legitimate business reasons for its conduct. But in rendering its verdict, the jury clearly had rejected this evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) ("[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe."). Therefore, the district court's post-trial grant of summary judgment to Swisher on the antitrust claims must be reversed.

2. We turn then to the jury instruction issue, which formed the basis of the trial court's granting of

a new trial on the attempted monopolization claim. Swisher adequately preserved its objection to the trial court's failure to give Swisher's proposed Jury Instruction 29. *See Hunter v. Cty. of Sacramento*, 652 F.3d 1225, 1230–31 (9th Cir. 2011). Swisher's "claim of error relating to the jury instructions, preserved by way of objection at trial, is subject to harmless-error analysis." *United States v. DeJarnette*, 741 F.3d 971, 983 (9th Cir. 2013). However, on the merits, we hold that the jury instruction that was given adequately and accurately instructed the jury on the applicable law. Although the precise wording of the proposed instruction was different, the principle in the instruction that was given is the same: in order for Swisher to have violated the antitrust laws, its *only* purpose must have been to harm TSI.[3] Therefore, the district court erred in granting a new trial as to the attempted monopolization claim.

3. We turn next to the district court's JMOL rulings. The district court erred in granting JMOL to Swisher as to TSI's monopolization claim because the jury could agree with Swisher's expert that the relevant market was national, and agree with TSI's expert that Swisher was liable for national damages. *See Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1038 (9th Cir. 2003) ("We must accept any reasonable interpretation of the jury's actions, reconciling the jury's findings 'by exegesis if necessary[.]'" (quoting *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963))).

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[3] Jury Instruction 29, which was given, states in relevant part: "Thus, if Swisher's conduct harmed TSI's independent interests and made sense only to maintain monopoly power, it was not based on legitimate business purposes." *Cf. Aerotec*, 836 F.3d at 1184

The district court did not err in denying Swisher's JMOL motion as to attempted monopolization because "a reasonable jury could find that Swisher attempted to monopolize a national market, but was successful in monopolizing only some regional markets." *See Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016) ("The test is whether 'the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury.'" (quoting *White v. Ford Motor Co*., 312 F.3d 998, 1010 (9th Cir. 2002), *opinion amended on denial of reh'g*, 335 F.3d 833 (9th Cir. 2003))), *cert. denied sub nom. City of Anaheim, Cal. v. Estate of Diaz*, 137 S. Ct. 2098 (2017).

The district court also properly rejected Swisher's assertion in its JMOL motion that TSI had failed to show antitrust injury. "Swisher failed to rebut" TSI's evidence that "Swisher failed to timely deliver approximately 200 million cigarillos under the private label agreements." The district court correctly held that "a reasonable jury could find that the restricted market output for cigarillos harmed competition." *See Ohio v. Am. Express Co*., 138 S. Ct. 2274, 2288 (2018) ("[We] 'will not infer competitive injury from price and output data absent *some evidence* that tends to prove that output was restricted or prices were above a competitive level.'" (emphasis added) (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 237 (1993))).

We hold as follows: the district court's decision to reconsider its summary judgment ruling is **AFFIRMED**. The district court's grant of summary judgment to Swisher as to its antitrust claims is **REVERSED**. The district court's grant of a new trial to Swisher as to the attempted monopolization claim is **REVERSED**. The district court's grant of JMOL to Swisher as to the monopolization claim is **REVERSED**. The district court's denial of JMOL to Swisher as to the attempted monopolization claim is **AFFIRMED**. On remand, the district court is directed to reinstate the jury's verdict in its entirety. We award costs to TSI. *See* Fed. R. App. P. 39(a)(4).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Trendsettah USA, Inc., et al., Plaintiffs, v. Swisher International Inc., Defendant.	Case No. SACV14-01664 JVS (DFMx) November 9, 2016 The Honorable James V. Selna

Proceedings: **(IN CHAMBERS) Order GRANTING Defendant's Motion for Reconsideration and DENYING Plaintiff's Motion for Reconsideration**

Before the Court are two motions for reconsideration.

Defendant Swisher International, Inc. ("Swisher") has moved for reconsideration of the Court's August 17, 2016 order, Docket No. 262, denying Swisher judgment as a matter of law on its attempted monopolization claims. Docket No. 268. Plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. (together "Trendsettah") have opposed. Docket No. 271. Swisher has replied. Docket No. 272.

Trendsettah has also moved for reconsideration of the Court's August 17 order, Docket No. 262, granting Swisher a new trial on the attempted monopolization claim and a conditional new trial on the monopolization claim. Docket No. 267. Swisher has opposed. Docket No. 269. Trendsettah has replied. Docket No. 271.

For the following reasons, the Court **grants** Swisher's motion for reconsideration and **denies** Trendsettah's motion for reconsideration.

BACKGROUND

Swisher is a cigar manufacturer with its principal place of business in Florida. In January 2011, Swisher entered into a supply agreement with Trendsettah, another cigar manufacturer, to manufacture cigarillos for Trendsettah under the "Splitarillos" brand name. In early December 2011, Swisher notified Trendsettah that it was terminating the supply agreement because Trendsettah failed to meet certain minimum order requirements as specified in the agreement. After discussions between the parties, they amended the supply agreement to terminate in October 2012. In February 2013, after the supply agreement expired, Swisher and Trendsettah entered into another supply agreement, this time scheduled to terminate in February 2014. The parties did not renew the second supply agreement when it ultimately expired in February 2014.

In October 2014, Trendsettah sued Swisher for claims arising out of Swisher's alleged breach of the supply agreements. The complaint alleged nine causes of action: (1) monopolization and attempted monopolization in violation of the Sherman Act, 15

U.S.C. § 2; (2) monopolization and attempted monopolization in violation of Florida Antitrust Law, Fl. Stat. § 542.19; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) trade libel; (6) tortious interference with contract; (7) intentional interference with prospective business relationships; (8) negligent interference with prospective business relationships; and (9) unfair competition in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. Docket No. 1.

In May 2015, the Court dismissed the state law claims for negligent interference and unfair competition for failure to state a claim. Docket No. 40. In January 2016, the Court dismissed the state law claims for trade libel, tortious interference with contract, and intentional interference with prospective business relationships on summary judgment. Docket No. 99. The Court then scheduled trial on the remaining antitrust and contract claims for March 2016.

At trial, a jury found Swisher liable on the antitrust and contract claims. Docket No. 207 at 2-3. Swisher then moved for renewed judgment as a matter of law on the antitrust claims or, in the alternative, for a new trial on both the antitrust and contract claims. Docket No. 233. The Court granted Swisher's motion on the monopolization claim, but denied it on the attempted monopolization claim. Docket No. 262 at 19. The Court granted the motion for a new trial on the attempted monopolization claim and a conditional new trial on the monopolization claim, but the Court denied Swisher's motion for a new trial on the contract claims. Id.

LEGAL STANDARD

Reconsideration is permissible "only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." L.R. 7-18. Furthermore, no motion for reconsideration may "repeat any oral or written argument made in support of or in opposition to the original motion." Id.

ANALYSIS

I. SWISHER'S MOTION FOR RECONSIDERATION

Swisher argues that the Ninth Circuit's recent decision in Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016), supports reconsideration because it shows that Trendsettah's anticompetitive claims fail as a matter of law. Def. Mot., Docket No. 268. Alternatively, Swisher argues that Aerotec also supports reconsideration of the Court's earlier decision to deny summary judgment in Swisher's favor on Trendsettah's Sherman Act Section 2 claims. Id.

A. Under Aerotec, a defendant is only liable for a refusal-to-deal if its only purpose was to sacrifice short-term profits for anticompetitive gains.

Businesses generally have no duty to deal with competitors. High Tech. Careers v. San Jose News, 996 F.2d 987, 990 (9th Cir. 1993) (citing Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S.

451, 483 n.32 (1992)). Businesses therefore are "free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448 (2009) (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919)). As a result, businesses typically do not face antitrust liability for their unilateral refusal-to-deal with their competitors. See Id.

But this right is not absolute. Aspen Skiing v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) ("[T]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified."). "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). For example, businesses may be liable for antitrust violations when there are no legitimate business reasons for their refusal to deal. See Eastman Kodak, 504 U.S. at 483 n.32 (citing Aspen Skiing, 472 U.S. at 602-605) ("But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.").

Therefore, businesses have a duty to deal with competitors when (1) the business unilaterally terminates a voluntary course of dealing spanning several years, sacrificing short-term profits or (2) the business refuses to provide competitors with products that are already sold in a retail market to other customers. Trinko, 540 U.S. at 409-10; see also MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132-33 (9th Cir. 2004) (analyzing the scope of the antitrust duty to deal under Aspen Skiing and Trinko). Even with these ex-

ceptions, however, courts have been reluctant to impose antitrust liability for purely unilateral conduct. Trinko, 540 U.S. at 408.

Aerotec recently added to this law. Aerotec International Inc. ("Aerotec") sued Honeywell International Inc. ("Honeywell") on antitrust claims. 836 F.3d at 1174. Honeywell is a large manufacturer of auxiliary power units ("APUs"); APUs "power aircraft functions such as electricity and temperature." Id. In contrast, "Aerotec is a small, independent company that maintains and repairs Honeywell APUs." Id. To perform these repairs, Aerotec must obtain the necessary parts "by submitting purchase orders for parts on an as-needed basis through spot contracts with Honeywell." Id. at 1176. In contrast, the majority of Aerotec's competitors, called Honeywell affiliates, enter into long-term contracts for parts. Id. "Under these agreements, a servicer typically agrees to certain obligations and royalty fees in exchange for discounts on Honeywell OEM parts, priority in allocation of parts in shortages, and a license to use Honeywell's intellectual property for APU repairs." Id. Honeywell itself also repairs APUs. Id.

Honeywell uses a tiered pricing structure. Id. This means that independent servicers, such as Aerotec, pay more for necessary parts "in spot orders than do self-servicing airlines, and typically pay more than Honeywell affiliates who negotiate prices as part of their long-term agreements." Id. The structure also gives independent companies a lower priority than Honeywell affiliates. Id. at 1177. Because of this lower priority, a worldwide parts shortage damaged Aerotec. Id. Honeywell continued to sell parts to Aer-

otec, but could not fulfill all of its orders. Id. As a result, Aerotec could not complete its contracts with clients and suffered dwindling market share. Id.

In response, Aerotec filed antitrust claims against Honeywell. Aerotec alleged that Honeywell delayed shipments, "maintained an overly burdensome ordering process, held Aerotec to stringent payment terms at the same time that it failed to deliver parts, withheld needed technical information that previously had been provided as a matter of course, lured airline clients away from independent servicers by offering steeply discounted bundles of parts and repair services, and imposed a pricing penalty on independent servicers vis-a-vis airlines and Honeywell affiliates." Id.

The Ninth Circuit affirmed the district court's grant of summary judgment in Aerotec's favor. Id. It held that, "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Id. at 1183 (quoting Trinko, 540 U.S. at 408). The court recognized Aspen Skiing's "limited exception" but found it inapplicable because "Aerotec simply did not like" Honeywell's business terms. Id. at 1184. The Ninth Circuit rejected Aerotec's argument that "intent to foreclose competition is sufficient to establish § 2 liability." Id. Intent is necessary – but not sufficient – to establish attempted monopolization. Id. The court reaffirmed the rule that "there is no duty to deal under the terms and conditions preferred by rivals." Id. (citing Linkline, 555 U.S. at 457). Instead, "there is *only* a duty not to refrain from dealing where the *only* conceivable rationale or purpose is to sacrifice short-term

benefits in order to obtain higher profits in the long run from the exclusion of competition[.]" Id. (internal quotations omitted) (emphasis added) (citing Metro-Net, 383 F.3d at 1132).

B. The Court may consider Swisher's arguments for reconsideration of its motion for summary judgment because the sufficiency of a plaintiff's theory of anticompetitive conduct is a question of law that remains reviewable even without a Rule 50(a) motion.

The Court must first determine whether Swisher has waived the ability to bring this issue on a motion for reconsideration.

In its prior order the Court held that Swisher waived its arguments regarding an antitrust duty to deal. Docket No. 262 at 9. In particular, it held that Swisher's initial motion for judgment as a matter of law argued only that Trendsettah failed to show antitrust or causal antitrust injury. Id. at 7. The Court relied on the preverdict motion's transcript; there Swisher did not mention an antitrust duty. The Court rejected Swisher's claims that the argument was preserved by counsel's statement that "plaintiffs' case-in-chief has been based on really a breach of contract case and nothing more." Id. at 9 (quoting Docket No. 250 at 16 (quoting Docket No. 233-9 at 70-71)).

Swisher offers three arguments for why the Court should reconsider its order. First, it argues that, under Aerotec, Swisher did not waive its refusal-to-deal challenge because Swisher repeatedly argued that Trendsettah's case was foreclosed by refusal-to-deal precedent. It stated that Trendsettah had "'not intro-

duced evidence to prove every element of [its] antitrust claim,' and that '[t]hroughout the presentation, . . . [TSI's] case-in-chief has been based on really a breach of contract case and nothing more.'" Swisher Mot. at 10, Docket No. 268 (alterations in original) (quoting Docket. No. 250 at 10 (citing 3/23 T.195-96)).

This is the same argument the Court rejected in its prior order – Aerotec does not compel a different result. Docket No. 262 at 7-9. Although Aerotec addresses refusal-to-deal claims, it does not alter the law on Rule 50(b) motions. Therefore, reconsideration is not proper on this basis.

Second, Swisher argues that, under Aerotec, refusal to deal is a question of law that is "preserved even in the absence of a specific Rule 50(a) motion." Def. Mot. at 11, Docket No. 268. Rule 50(b) motions may only be made on the same ground as the party's Rule 50(a) motion. See E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009).

A court may review questions of law if they were raised before the judge submitted the case to the jury. F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958, 963 (9th Cir. 2010). For instance, in F.B.T., the plaintiff did not file a Rule 50(a) motion. Id. at 962. But it did file a motion for summary judgment arguing that the contracts at issue were ambiguous. Because this argument did not rest on the sufficiency of the evidence presented, the Ninth Circuit held that the plaintiff preserved it for appeal. Id. at 963.

Here, the Court previously denied Swisher's motion for summary judgment because it found a "a genuine dispute of material fact as to whether valid business reasons motivated Swisher's alleged failure to fulfill orders and refusal to renew the Second Private

Label Agreement." Docket No. 99 at 13-14. The sufficiency of a plaintiff's theory of anticompetitive conduct is a question of law. MetroNet, 383 F.3d at 1130, n.11 (quoting SmileCare Dental Grp. v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir. 1996)) ("Whether specific conduct is anti-competitive is a question of law reviewed de novo."); Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 368 (9th Cir. 1988) (reviewing de novo jury determinations that conduct was anticompetitive). Therefore, Swisher may seek reconsideration of its summary judgment motion.

C. Under Aerotec, Swisher is entitled to summary judgment because it presented evidence that any refusal had other purposes besides sacrificing short term profits for long-term anticompetitive gains.

Aerotec clarified previous Supreme Court precedent: under Aerotec there is no antitrust duty to deal if the defendant had some "conceivable rationale or purpose" aside from anticompetitive conduct. See 836 F.3d at 1184. Aerotec's repeated use of "only" means that any legitimate "rationale or purpose" precludes liability. Therefore, to prove an antitrust duty to deal, the plaintiff must establish that the defendant had no motivations other than anticompetitive conduct. See id. See also Aspen, 472 U.S. at 610-11 (decision to forsake short-term profits "not motivated by efficiency concerns" but "entirely" by anticompetitive goals); Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1197 (10th Cir. 2009) (emphasis added) ("The critical fact in Aspen Skiing was that there were *no* valid business reasons for the refusal.").

As discussed, even evidence of anticompetitive intent is insufficient if the defendant also has some legitimate reason for its actions. See Aerotec, 836 F.3d at 1184 ("§ 2 of the Sherman Act regulates anti-competitive conduct, not merely anti-competitive aspirations or an independent decision on terms of dealing with a competitor."). Therefore, the defendant can defeat the plaintiff's refusal-to-deal claim with evidence that shows it had some purpose besides anticompetitive intent. See id.; See also In re Adderall XR Antitrust Litig., 754 F.3d 128, 135 (2d Cir. 2014), as corrected, (June 19, 2014) (rejecting a refusal-to-deal claim because the terminated agreements were unprofitable); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013) (quoting Trinko, 540 U.S. at 407) (emphasis added) (defendant's conduct "*must* suggest a willingness to forsake short-term profits to achieve an anti-competitive end."). This clarifies the standard and means that, in the Ninth Circuit, any non-monopolistic rationale precludes liability for a refusal-to-deal theory. Therefore, reconsideration is appropriate.

Here, Swisher presented significant evidence that it had business reasons to prioritize production of its own cigarillos over Splitarillos—and thereby increase its profits. For instance, Swisher presented evidence that it was more profitable for Swisher to produce its own cigarillos instead of Splitarillos. Compare Trial Ex. 156 with Trial Ex. 157. Swisher's profits ranged from -1.5 percent to 19 percent on Splitarillos; in contrast its margins for Swisher's products were 25.1 percent to 34.4 percent during the same period. Id. This suggests that Swisher's cigarillos were generally more profitable to Swisher than Splitarillos. Swisher even lost money on Splitarillos one year. 3/24 Trans. 13:5-

10; Trial Ex. 156, Docket No. 242-1. Hence, prioritizing Splitarillos might have increased Swisher's profits.

Swisher may have also gained production efficiencies from prioritizing its own products. Pom Poms and Splitarillos were produced on the same machinery at the same plant; this meant that Swisher had to shift capacity to produce Splitarillos. Green Decl. ¶ 14; Docket no. 67-10. Swisher also suggested that Trendsettah failed to place orders with sufficient specificity and advance notice. Id. ¶ 6. Therefore, Swisher may have terminated the relationship because of production difficulties. If this, or any other efficiency concern, played a part in the decision, then Swisher is entitled to summary judgment as a matter of law. See Oahu Gas, 838 F.2d at 368-69 (overturning jury finding of anticompetitive conduct as a matter of law because the defendant's decision was motivated, at least in part, by legitimate business reasons).

Furthermore, Trendsettah repeatedly argued that Swisher prioritized its own production over Trendsettah's. For instance, in opening arguments Trendsettah argued that Swisher prioritized its own Pom cigarillos over Trendsettah's Splitarillos. 3/15 Trans. 132: 19-25, Docket No. 233-9. But such prioritization is perfectly legal from an antitrust standpoint as long as Swisher did so to help its own business. See Aerotec, 836 F.3d at 1176 (no duty to deal when Honeywell prioritized delivery of its own parts over Aerotec's).

Trendsettah offers four arguments for why Aerotec does not control here. First, Trendsettah argues that this is not a refusal-to-deal case because Trendsettah disclaimed that theory. Pl. Opp'n at 9, Docket No. 270. Trendsettah argues that anticompetitive conduct is a standard, not any single label. Id. at 9-10.

While this is a true statement of law, Trendsettah's proposed anticompetitive actions fit under the rubric of a refusal-to-deal claim. Although anticompetitive conduct comes in many forms, courts have developed "specific rules for common forms of alleged misconduct." See Novell, 731 F.3d at 1072. These rules apply regardless of how a plaintiff characterizes its conduct. See Linkline, 555 U.S. at 450 (applying refusal-to-deal precedent even when plaintiff did not explicitly assert such a claim); Novell, 731 F.3d at 1079 ("Traditional refusal-to-deal doctrine is not so easily evaded. . . . Whether one chooses to call a monopolist's refusal-to-deal with a rival an act or omission, interference or withdrawal of assistance, the substance is the same and it must be analyzed under the traditional test we have outlined."). Therefore, because Trendsettah's allegations fit under refusal-to-deal precedents, the Court must apply such rules despite Trendsettah's representations.

Second, Trendsettah argues that this is not a refusal-to-deal case because the parties had a voluntary agreement. Trendsettah attempts to distinguish Aerotec on the basis that Aerotec and Honeywell did not have a contract, while Trendsettah and Swisher did have one. Pl. Opp'n at 11. But this mischaracterizes Aerotec's facts: Aerotec regularly purchased parts from Honeywell through spot contracts. 836 F.3d at 1176. Furthermore, Aerotec never discussed the parties' relationship because it held that "there was no actual refusal to deal." Id. at 1184. Trendsettah relies on Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 316 (3d Cir. 2007), to argue that the parties' voluntary agreements preclude the applicability of refusal-to-deal precedent. But Broadcom only reinforces the Trinko rule that involuntary conduct cannot create an

antitrust duty to deal. Id. It does not suggest that voluntariness prevents the applicability of otherwise relevant duty-to-deal precedent. Such a ruling would contradict Aerotec, which applied to duty-to-deal precedents to a voluntary contractual relationship. 836 F.3d at 1176.

Third, Trendsettah distinguishes this case from Aerotec on the basis that Aerotec eventually received all the parts it ordered. Pl. Opp'n at 12. But Aerotec did not base its holding on that fact. Instead, Aerotec rejected Aerotec's refusal-to-deal claim because the parties' "business pattern" was not "so onerous as to be tantamount to the conduct in Aspen Skiing." 836 F.3d at 1184. Likewise, Swisher's conduct does not rise to the level of Aspen Skiing's "narrow exception" – unlike the Aspen Skiing defendant, Swisher's evidence suggested numerous, non-monopolistic reasons for its action. See 472 U.S. at 610-11 (defendant "was not motivated by efficiency concerns . . . and was willing to sacrifice short-term benefits" to harm its smaller rival).

Fourth, Trendsettah argues that Aerotec sought different remedies. Pl. Opp'n at 13. While Aerotec asked the court to "artificially recreate pre-2007 market conditions[,]" 836 F.3d at 1184, Trendsettah seeks damages. Pl. Opp'n at 13-14. But, although Aerotec expressed concerns about this remedy, they did not control the holding. 836 F.3d at 1184. Furthermore, even treble damages can chill the conduct antitrust laws seek to protect. See Trinko, 540 U.S. at 414 (discussing costs of imposting antitrust liability in a treble damages case).

Overall, this evidence shows that Swisher had at least some rationale for prioritizing its own production over Splitarillos. The situation here is in sharp

contrast to the classic situation in which the monopolist forgoes short-term profit, only to raise prices later. Here, Swisher's allocation decisions made it more profitable. Aerotec, 836 F.3d at 1184; MetroNet, 383 F.3d at 1131. Therefore, under Aerotec's standard, Swisher is entitled to summary judgment as a matter of law.

II. TRENDSETTAH'S MOTION FOR RECONSIDERATION

The Court previously granted Swisher a new trial on its antitrust claims because the Court's failure to instruct the jury on Swisher's antitrust duty to deal was harmful error. Docket No. 262 at 11-14. Trendsettah based its monopolization and attempted monopolization claims solely on Swisher's breach of the private label agreements. Id. at 13. To impose antitrust liability, the jury first had to determine whether Swisher properly refused to deal with Trendsettah regarding the private label agreements. Id. Therefore, the Court erred when it failed to instruct the jury on Swisher's duty to deal. Id.

Trendsettah argues that the Court should reconsider its prior ruling granting Swisher a new trial for two reasons.[1] First, it argues that the jury was properly instructed under Aerotec. Pl. Mot. at 6-10, Docket No. 267. Second, it argues that Swisher waived its objection to the jury instruction. Pl. Mot. at 11, Docket No. 267. Neither argument warrants reconsideration.

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[1] The Court's ruling that Swisher is entitled to summary judgment as a matter of law renders its previous order for a new trial moot. But, even were the Court to deny Swisher's motion for reconsideration, it would still deny Trendsettah's motion for the reasons discussed in II, supra.

A. The jury was not properly instructed under Aerotec because the jury was not told that Swisher had no general duty to deal and that Swisher was only liable if it sacrificed short-term profits.

First, Trendsettah argues that Aerotec clarified the legal standard for refusal-to-deal claims and shows that the jury was properly instructed. Pl. Mot. at 6-10, Docket No. 267. The jury received the following instruction:

> You must determine whether Swisher had a legitimate business purpose for undertaking alleged anticompetitive conduct. If Swisher's conduct was designed to protect or further Swisher's legitimate business purposes, it does not violate the antitrust laws, even if Swisher's conduct injured TSI. A leg itimate business purpose is one that benefits the actor regardless of any harmful effect on competitors, such as a purpose to promote efficiency or quality, offer a better product or service, or increase short run profits.
>
> Thus, if Swisher conduct was undertaken for a legitimate business purpose, that conduct deal does not violate antitrust laws even if it ultimately harmed TSI. The desire to maintain monopoly power or to block entry of competitors is generally not a legitimate business purpose. Thus, if Swisher's conduct harmed TSI's independent interests and made sense only to maintain monopoly power,

> it was not based on legitimate business purposes.
>
> If Swisher's conduct was based in part on legitimate business reasons, even if it is also motivated by the desire to harm competitors, it does not violate the antitrust laws. It is up to you to determine whether Swisher's conduct was motivated by legitimate business purposes or whether it was designed solely to obtain or maintain monopoly power.

Jury Instruction No. 29, Docket No. 208 at 53 (alteration to paragraph format).

Trendsettah argues that the jury found that Swisher's conduct lacked a legitimate business purpose and sought solely to maintain monopoly power; this finding necessarily concluded that Swisher's "only conceivable rationale or purpose" was exclusionary. Pl. Mot. at 7, Docket No. 267. Therefore, the jury found that Swisher had an antitrust duty to deal under Aerotec. Id. Because the jury applied the correct standard, Trendsettah argues that the Court should overturn its decision granting a new trial. Id.

Reconsideration is not appropriate. The jury's instruction did not meet the Aerotec standard. To impose liability, Aerotec explicitly requires that "the only conceivable rationale or purpose" for an action was "to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition." 836 F.3d at 1184.

Here, the jury was not instructed that Swisher lacked a general duty to deal with Trendsettah. Although the jury may have found specific intent to maintain monopoly power, it might not have done so

if it had considered the special rules governing a monopolist's refusal to deal. Docket No. 262 at 14. As a result, Swisher suffered prejudice and could not effectively argue its refusal-to-deal defense in closing argument. Id. Furthermore, while the jury was told that a legitimate business justification would preclude liability, it was not instructed that Swisher must have forsaken short-term profits. Instead, the jury was instructed that an action must have benefitted Swisher to be considered a legitimate business justification. Jury Instruction No. 29, Docket No. 208 at 53. Under this instruction, the jury could have imposed liability if it found that Swisher's actions did not benefit Swisher – even if they did not forsake short-term profits. Such a conclusion is error under Aerotec.

B. Swisher properly preserved its objection because its proposed jury instruction broadly applied refusal-to-deal precedents.

Second, Trendsettah argues that the Court failed to consider that Swisher did not object to the exclusion of its first refusal-to-deal instruction on the basis that Swisher first identified post-trial.[2] Pl. Mot. at 11, Docket No. 267. Therefore, the Court applied the harmless error standard instead of the appropriate plain error standard. Id. at 15. Trendsettah is incorrect: Swisher properly objected to the jury instruction in a manner that preserved its refusal-to-deal arguments for post-trial. Thus, reconsideration on this basis is also inappropriate.

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[2] Because the Court finds that Swisher did not waive its objection, it does not address whether Trendsettah conceded that harmless error applies. Def. Opp'n at 9, Docket No. 269.

Rule 51(c) requires a party objecting to a jury to instruction to "do so on the record, stating distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. Pro. 51(c)(1). An objection does not need to be formal, as long as it is "sufficiently specific to bring into focus the precise nature of the alleged error." Hunter v. Cty. of Sacramento, 652 F.3d 1225, 1230 (9th Cir. 2011). It is sufficient if the objecting party offered alternative instructions that were denied. Id. at 1231. For instance, in Hunter the "plaintiffs explained that they did "'not object to [the Monell instruction] as written,' but they 'specifically request[ed] the following proposed instructions be provided as well[.]'" Id. at 1230 (alterations in original). The list of proposed instructions was a proper objection. Id. at 1231.

Trendsettah argues that the objection was insufficient because it cited the complaint's allegations that "Swisher violated Section 2 by its refusal to deal with TSI to manufacture Splitarillos after January 2014." Pl. Mot. at 12 (citing Proposed Jury Instruction No. 29, Docket No. 171 at 102). It also argues that Swisher linked the refusal-to-deal claim with an "essential facilities" claim, thus limiting its objection. Id. But Swisher's proposed instruction does not contain any limitations; instead it is a broad instruction that explains how the jury could find that Swisher lawfully refused to deal. The proposed instruction included a general statement on the company's duty to deal. Proposed Jury Instruction No. 29, Docket No. 171 at 100. And it further specifies the standards necessary to find for or against Swisher under refusal-to-deal precedent. Id. It does not specify any particular refusal to deal – in contrast the instruction's breadth suggests that refusal-to-deal issues permeate this case. Id. Alt-

hough Swisher's objection to the instruction's exclusion is not as broad, when combined with the proposed instruction it gives sufficient notice. See Hunter at 1230.

In sum, the instruction applies duty-to-deal precedents to all possible antitrust claims and provides the Court adequate notice of the basis for Swisher's objection. The Court properly applied the harmless error standard in its previous order and found that Swisher was entitled to a new trial on its antitrust claims.[3] Therefore, the Court denies Trendsettah's motion for reconsideration.

CONCLUSION

For the foregoing reasons the Court **grants** Swisher's motion for reconsideration of its motion for summary judgment. After reconsideration, the Court grants Swisher's motion for summary judgment on its antitrust claims. The Court **denies** Trendsettah's motion for reconsideration.

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[3] Because the Court finds that it previously applied the proper standard it does not address whether Swisher is entitled to a new trial under the plain error standard.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Trendsettah USA, Inc., et al., Plaintiffs, v. Swisher International Inc., Defendant.	Case No. SACV14-01664 JVS (DFMx) August 17, 2016 The Honorable James V. Selna

Proceedings: **(IN CHAMBERS) Order GRANTING IN PART and DENYING IN PART Defendant's Motion for Judgment as a Matter of Law and Motion for New Trial**

Order Setting Scheduling Conference

Defendant Swisher International, Inc. ("Swisher") has moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). Docket No. 233. Swisher also seeks a new trial under Rule 59(a). Id. Plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. (together, "Trendsettah") filed an opposition.

Docket No. 242. Swisher filed a reply. Docket No. 250.

For the reasons stated below, the Court **grants in part** and **denies in part** Swisher's renewed motion for judgment as a matter of law and **grants in part** and **denies in part** Swisher's motion for a new trial.

1. Background

Swisher is a cigar manufacturer with its principal place of business in Florida. In January 2011, Swisher entered into a supply agreement with Trendsettah, another cigar manufacturer, to manufacture cigarillos for Trendsettah under the "Splitarillos" brand name. In early December 2011, Swisher notified Trendsettah that it was terminating the supply agreement because Trendsettah failed to meet certain minimum order requirements as specified in the agreement. After discussions between the parties, the parties amended the supply agreement to terminate in October 2012. In February 2013, after the supply agreement expired, Swisher and Trendsettah entered into another supply agreement, this time scheduled to terminate in February 2014. The parties did not renew the second supply agreement when it ultimately expired in February 2014.

In October 2014, Trendsettah sued Swisher for various misconduct arising out of Swisher's alleged breach of the supply agreements. The complaint alleged nine causes of action: (1) monopolization and attempted monopolization in violation of the Sherman Act, 15 U.S.C. § 2; (2) monopolization and attempted monopolization in violation of Florida Antitrust Law, Fl. Stat. § 542.19; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) trade libel; (6) tortious interference with contract; (7)

intentional interference with prospective business relationships; (8) negligent interference with prospective business relationships; and (9) unfair competition in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. Docket No. 1.

In May 2015, the Court dismissed the state law claims for negligent interference and unfair competition for failure to state a claim. Docket No. 40. Several months later, in January 2016, the Court dismissed the state law claims for trade libel, tortious interference with contract, and intentional interference with prospective business relationships on summary judgment. Docket No. 99. Trial on the remaining antitrust and contract claims was then scheduled for March 2016.

At trial, a jury found Swisher liable on the antitrust and contract claims. Docket No. 207 at 2-3.[1] Swisher now moves for judgment as a matter of law on the antitrust claims or, in the alternative, for a new trial on both the antitrust and contract claims. Docket No. 233.

2. Renewed Motion for Judgment as a Matter of Law

Swisher argues that it is entitled to judgment as a matter of law on Trendsettah's monopolization and attempted monopolization claims for four reasons: (1) Swisher had no antitrust duty to deal with Trendsettah; (2) Trendsettah failed to prove antitrust injury; (3) Trendsettah failed to prove actual or threatened monopoly power; and (4) Trendsettah failed to prove causal antitrust injury. Docket No. 233 at 11-35. As explained below, the Court grants Swisher's

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[1] All citations are made to the CM/ECF pagination.

motion for judgment as a matter of law on the monopolization claim for failure to prove causal antitrust injury. The Court denies the motion in all other respects.

2.1. Legal Standard

Rule 50 authorizes the defendant to move for judgment as a matter of law anytime after the plaintiff's case-in-chief. Fed. R. Civ. P. 50(a). In determining whether to grant judgment as a matter of law, the court must determine whether the jury has a "legally sufficient evidentiary basis" to find for the plaintiff. Id. If the judge denies the motion, and the jury later returns a verdict against the defendant, the defendant may renew its motion for judgment as a matter of law after trial. Fed. R. Civ. P. 50(b); EEOC v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009). Like the preverdict motion, the postverdict motion also challenges the sufficiency of the plaintiff's evidence. Hagen v. City of Eugene, 736 F.3d 1251, 1256 (9th Cir. 2013). If the jury verdict is "supported by substantial evidence," the court must uphold the jury verdict. Pavao v. Pagay, 307 F.3d 915, 918 (9th Cir. 2002). However, if the evidence "permits only one reasonable conclusion, and that conclusion is contrary to the jury," the court may grant judgment as a matter of law to the defendant. White v. Ford Motor Co., 312 F.3d 998, 1010 (9th Cir. 2002) (internal quotation marks omitted). When reviewing the evidence, the court must view the evidence "'in the light most favorable to the nonmoving party" and draw "all reasonable inferences" in favor of the nonmoving party. Torres v. City of Los Angeles, 548 F.3d 1197, 1205-06 (9th Cir. 2008).

2.2. The Court grants Swisher judgment as a matter of law on the monopolization claim for failure to prove causal antitrust injury.

Section 2 of the Sherman Act prohibits businesses from monopolizing or attempting to monopolize interstate trade or commerce. 15 U.S.C. § 2. To show monopolization in violation of the Sherman Act, the plaintiff must show that (1) the defendant possessed monopoly power in a relevant market; (2) the defendant willfully acquired or maintained that power; and (3) the plaintiff suffered causal antitrust injury. SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996). By contrast, to show attempted monopolization, the plaintiff must show that (1) the defendant engaged in predatory or anticompetitive conduct; (2) the defendant had a specific intent to monopolize; (3) the defendant had a dangerous probability of achieving monopoly power; and (4) the plaintiff suffered causal antitrust injury. Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1432-33 (9th Cir. 1995) (citing McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)).

Swisher argues that Trendsettah failed to prove causal antitrust injury on both its monopolization and attempted monopolization claims. Docket No. 233 at 32-35. To show causal antitrust injury, the plaintiff must show that the defendant's anticompetitive conduct caused the plaintiff to suffer damages. Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1007-08 (9th Cir. 2003); Rebel Oil, 51 F.3d at 1433 ("To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior."). In complex antitrust cases like this one, this requires the plaintiff to provide an antitrust damages model that establishes how

the defendant's alleged anticompetitive conduct injured the plaintiff. See Comcast Corp. v. Behrend, -- U.S. ---, 133 S. Ct. 1426, 1433 (2013) ("If respondents prevail on their claims, they would be entitled only to damages resulting from reduced . . . competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court."); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1224 (9th Cir. 1997) ("The ISOs must segregate damages attributable to lawful competition from damages attributable to Kodak's monopolizing conduct."). Further, the model must be "'consistent with [the plaintiff's] liability case, particularly with respect to the alleged anticompetitive effect of the violation.'" Comcast, 133 S. Ct. at 1433 (quoting ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)). Otherwise, the model may impermissibly allow recovery for damages that are unrelated to the defendant's anticompetitive conduct. If the model fails to "measure only those damages attributable to [the plaintiff's liability] theory," the model will not survive scrutiny. Id.

2.2.1. Monopolization

Trendsettah failed to provide sufficient evidence of causal antitrust injury on its monopolization claim because its national damages models were inconsistent with its regional theory of antitrust liability. At trial, Trendsettah presented a regional theory of antitrust liability on its monopolization claim. The regional theory proposed that the relevant markets for Trendsettah's monopolization claims were twelve regional markets, and that Swisher had actual or threatened monopoly power in seven of the twelve regions. See, e.g., Docket No. 233-9 at 94 ("The other issue about relevant market is the relevant geographic

market . . . . We pointed to evidence that these are regional markets based on the MSA regions or even state markets . . . .”). To establish causal antitrust injury in these regional markets, Trendsettah then presented two alternative damages models: the logistic model and the Good Times model. However, both models relied only on national data, not regional data. For example, the Good Times Model calculated damages using comparative national sales data from Trendsettah’s competitor, Good Times USA. Docket No. 243-4 at 44-45 (testimony from Dr. DeForest McDuff (“McDuff”), Trendsettah’s economic expert, describing Good Times and logistic damages models); Docket No. 233-9 at 82 (“The numbers that [McDuff] was presenting yesterday or two days ago, starting at 30 million and then some various iterations, those are national . . . . They’re not tied to geography. That is the sum of the cause that [Trendsettah] suffered.”). And because both models relied only on national data, neither model was consistent with Trendsettah’s regional theory of monopolization. Moreover, Trendsettah has failed to explain how the jury could otherwise determine causal antitrust injury in the regional markets based when relying only on evidence regarding national antitrust injury. Indeed, McDuff’s trial testimony made clear that monopoly power (or the dangerous probability thereof) did not exist in all Trendsettah regions and, in some cases, even in all states in a given region. The jury therefore lacked “sufficient evidentiary basis” to find causal antitrust injury on the monopolization claim. Fed. R. Civ. P.

50(a)(1). Accordingly, the Court grants Swisher judgment as a matter of law on the monopolization claim.[2]

Trendsettah's opposition argues that this argument is barred by the doctrine of judicial estoppel because Swisher has previously argued that the jury's damages award does not necessarily track expert testimony. Docket No. 242 at 26. This argument misunderstands the issue. The issue is not whether the antitrust verdict was consistent with McDuff's expert testimony regarding Trendsettah's causal antitrust injury. Rather, the issue is whether the jury had "sufficient evidentiary basis" to find causal antitrust injury. Docket No. 233-9 at 80 ("Said another way, I don't know how the jury could take the present evidence and award damages for the territories in which [McDuff] found either monopolization or attempted monopolization.").

2.2.2. Attempted monopolization

Trendsettah has produced sufficient evidence of causal antitrust injury on its attempted monopolization claim. Unlike with the monopolization claim, Trendsettah presented *two* alternative theories of attempted monopolization at trial: one based on regional markets, and another based on a national market. See, e.g., Docket No. 233-9 at 98 ("If you agree with Swisher that it's a national market, then they do have a significant market share to get dangerous probability. They can be liable for attempted monopoly. I submit to you that this is kind of the simplest and the straightforward measures of antitrust damages because it counts all sales around the country.").

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[2] If the Court is mistaken in granting judgment as a matter of law on this basis, the Court would nevertheless grant a new trial for the reasons stated infra.

Viewing the evidence regarding national antitrust injury in the light most favorable to Trendsettah, and drawing all reasonable inferences in favor of Trendsettah, a reasonable jury could find causal antitrust injury resulting from Swisher's attempt to monopolize a national market.

Swisher does not directly dispute this. Swisher instead argues that the entire antitrust verdict must be rejected because it was inconsistent with the antitrust damages award. Specifically, Swisher argues that, because the damages award was based on Trendsettah's national antitrust injury, the jury could not consistently find both attempted monopolization in the national market but actual monopolization in the regional markets. Docket No. 250 at 25-26 (arguing that the Court may reject the jury verdict "given that the jury found Swisher liable for actual monopolization and there was never a claim that Swisher monopolized a national market"); Tr. Mot. JMOL Hr'g (June 27, 2016) at 35:24–47:10 ("So if the jury is checking the box on monopolization and checking the box on attempt, the only way to reconcile those two together is on the basis that the jury went with Dr. McDuff's regional markets. That brings us back to the mismatch between liability theory and the supposed proof of injury and damages."). The Court rejects this argument. Given the evidence presented at trial, a reasonable jury could find that Swisher attempted to monopolize a national market, but was successful in monopolizing only some regional markets. In that case, the antitrust damages award was consistent with the attempted monopolization verdict, even if inconsistent with the actual monopolization verdict. The jury therefore would have sufficient evidence of attempted monopolization, notwithstanding Trendsettah's failed monopolization claim. Accordingly, the Court denies

Swisher judgment as a matter of law on the attempted monopolization claim.

2.3. The Court rejects Swisher's remaining three arguments for judgment as a matter of law.

Swisher raises three additional arguments for judgment as a matter of law: (1) Swisher had no antitrust duty to deal with Trendsettah; (2) Trendsettah failed to show antitrust injury; and (3) Trendsettah failed to show actual or threatened monopoly power. Docket No. 233 at 11-32. The Court rejects all three arguments.

2.3.1. Swisher waived its arguments regarding antitrust duty to deal and failure to establish actual or threatened monopoly power.

"A Rule 50(b) motion for judgment as a matter of law is not a freestanding motion. Rather, it is a renewed Rule 50(a) motion." Go Daddy, 581 F.3d at 961. "Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion." Id. This requirement is strict: if the defendant fails to move for judgment on an issue in its preverdict motion, the defendant cannot move for judgment on that same issue in its postverdict motion. Id.; Freund v. Amersham, 347 F.3d 752, 761 (9th Cir. 2003) ("A party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion."). Nevertheless, courts must liberally interpret the defendant's preverdict motion when determining whether there is waiver. See Go Daddy, 581 F.3d at 961 ("Absent such a liberal interpretation, the rule is a harsh one." (internal quotation marks omitted)). Under the

Ninth Circuit's "liberal" standard for determining waiver, id., "an inartfully made or ambiguously stated motion for a directed verdict . . . may constitute a sufficient approximation of a motion for a directed verdict to satisfy the requirements of Rule 50(b)," Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1347 (9th Cir. 1985) (internal citations and quotation marks omitted)).

At trial, Swisher waived its arguments regarding antitrust duty to deal and failure to establish actual or threatened monopoly power because Swisher's initial motion for judgment as a matter of law argued only that Trendsettah failed to show antitrust injury or causal antitrust injury. The trial transcript for Swisher's preverdict motion shows the following:

- Swisher begins its preverdict motion by stating: "The basis of Swisher's motion is that plaintiffs have not introduced evidence to prove every element of their antitrust claim . . . . Throughout the presentation, Your Honor, plaintiffs' case-in-chief has been based on really a breach of contract case and nothing more."
- After discussing potential double recovery on the antitrust and contract damages, Swisher continues: "Let me move into *the specific elements* of the antitrust claim as well."
- Swisher first argues that Trendsettah has failed to show bare antitrust injury: "*With respect to competition*, Your Honor, the uncontroverted testimony from [Trendsettah's] own witnesses is that competition has increased, not decreased."

- Swisher next argues that Trendsettah has failed to show anticompetitive conduct: "*Moreover*, there has been no evidence presented of tortious interference in this case."
- After arguing that Trendsettah has failed to show antitrust injury or anticompetitive conduct, Swisher tries to end its preverdict motion: "*Based on all of those lacking elements*, . . . Swisher seeks a directed verdict on count one, the antitrust claim."
- The Court interjects, challenging Swisher's assertion that Trendsettah has failed to show anticompetitive conduct: "Well, can't the antitrust claim, both monopolization and attempt, be made without demonstrating disparagement?"
- After answering the Court, Swisher again tries to end its preverdict motion: "*Based on that argument*, Your Honor, Swisher moves for a directed verdict on the antitrust claim."
- On the Court's invitation, Swisher declines to raise any additional arguments: "Do you want to address any of the other claims?" "No, Your Honor."
- After Trendsettah presents its opposition, Swisher withdraws its argument regarding anticompetitive conduct and reasserts its initial argument regarding antitrust injury: "Your Honor, *I'm just going to rely on the arguments I made with respect to competition*. I think that the testimony was clear that competition increased, not just competitors. I think that is a fundamental element of the claim, and it was not established."

- After Swisher ends its preverdict motion, the Court *sua sponte* states that Trendsettah may have insufficient evidence of causal antitrust injury: namely, antitrust damages resulting from anticompetitive conduct in regional markets.

Docket No. 243-1 at 2-9 (emphases added). During this exchange, Swisher nowhere mentioned either an antitrust duty to deal or actual or threatened monopoly power when presenting its initial motion for judgment as a matter of law. Instead, Swisher specifically argued only that Trendsettah has failed to show antitrust injury or causal antitrust injury. See, e.g., id. at 2 ("Your Honor, *I'm just going to rely on the arguments I made with respect to competition*. I think that the testimony was clear that competition increased, not just competitors." (emphasis added)). Swisher has therefore waived its arguments regarding an antitrust duty to deal or actual or threatened monopoly power for purposes of the present motion.

Swisher's reply argues that it preserved the argument regarding an antitrust duty to deal because Swisher's initial motion for judgment as a matter of law argued that "plaintiffs' case-in-chief has been based on a really a breach of contract case and nothing more." Docket No. 250 at 16 (quoting Docket No. 233-9 at 70-71). The Court rejects this argument. Under the Ninth Circuit's "liberal" standards for waiver, the plaintiff may preserve an argument for a renewed motion for judgment as a matter of law even when the argument is "inartfully made or ambiguously stated." Farley Transp., 786 F.2d at 1347. However, Swisher's motion was neither "inartful[]" nor "ambiguous[]." Id. As the excerpts from the trial transcript make clear, Swisher specifically argued only that Trendsettah has

failed to show antitrust injury or causal antitrust injury, and not that Swisher had no antitrust to deal or that its showing of monopoly power failed.

2.3.2. Trendsettah provided sufficient evidence of antitrust injury.

To show monopolization or attempted monopolization in violation of the Sherman Act, the plaintiff must show, among other things, "antitrust injury." SmileCare, 88 F.3d at 783. To show antitrust injury, the plaintiff must show that defendant's anticompetitive conduct harmed competition. Glen Holly, 343 F.3d at 1007-08 ("[I]t is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." (citing Atlantic Richfield Co. v. USA Petroleum, Inc., 495 U.S. 328, 334 (1990)). Harm to competition can include restricted market output, supracompetitive pricing, and poor product quality. See Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., 2013 WL 5694452, at *15 (N.D. Cal. Oct. 18, 2013) ("Market power can be shown by actual harm to competition inflicted by the defendant, such as restricted output or supra-competitive prices, or by the defendant's dominant market share and barriers to entry in the relevant market.") (emphasis added); Stearns v. Select Comfort Retail Corp., 2009 WL 1635931, at *13 (N.D. Cal. June 5, 2009) ("The antitrust laws are intended to prevent harm to competition manifested as higher prices, lower output, or decreased quality in the products within a defined market.").

Trendsettah provided sufficient evidence of antitrust injury here. At trial, Trendsettah established that Swisher failed to timely deliver approximately 200 million cigarillos under the private label agreements. Docket No. 243-4 at 24 ("And there's a figure

corresponding to that that says 202,309,970. Do you have an understanding as to what that number refers to?" "That is the total deficit over time as calculated by [Swisher's economic expert.]"). As the Court explained on summary judgment, this evidence is sufficient to establish harm to competition based on restricted market output. Docket No. 99 at 14-15. At trial, Swisher failed to rebut the evidence of restricted market output, for example, by showing that total market output for cigarillos would have remained the same even if Swisher had timely delivered cigarillos to Trendsettah. Indeed, that some firms may have entered and that overall market volume may have increased do not negate harm to competition, particularly when viewed from the perspective of still higher market volumes had Swisher performed. See id. Without such rebuttal evidence, a reasonable jury could find that the restricted market output for cigarillos harmed competition. White, 312 F.3d at 1010 (holding that judgment as a matter of law is permissible only when evidence "permits only one reasonable conclusion, and that conclusion is contrary to the jury"). The Court therefore denies judgment as a matter of law on this ground.

3. Motion for New Trial

Swisher also seeks a new trial on both the antitrust and contract claims. Swisher raises four arguments for retrial: (1) the Court erroneously failed to instruct the jury on Swisher's antitrust duty to deal; (2) the Court erroneously instructed the jury on indirect proof of monopoly power; (3) the contract verdict is contrary to the evidence regarding Trendsettah's contract damages; and (4) retrial on the antitrust claims requires retrial on the contract claims. Docket No. 233 at 35-39. As explained below, the Court

grants a new trial on the antitrust claims for failure to instruct the jury on Swisher's antitrust duty to deal. The Court denies the motion in all other respects.

3.1. Legal Standard

Rule 59(a) authorizes courts to grant a new trial in three circumstances: (1) when the verdict is contrary to the clear weight of the evidence; (2) when the verdict is based on false or perjurious evidence; and (3) when necessary to prevent a miscarriage of justice. Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007) (quoting Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 510 n.15 (9th Cir. 2000)). Unlike with a motion for judgment as a matter of law, when determining whether the verdict is contrary to the clear weight of the evidence, the court is not required to view the evidence in the light most favorable to the nonmoving party. Experience Hendrix LLC v. Hendrixlicensing.com Ltd., 762 F.3d 829, 842 (9th Cir. 2014). The court must instead independently weigh the evidence and assess the credibility of the witnesses. Id.

3.2. The Court grants a new trial on the antitrust claims.

Swisher seeks a new trial on the antitrust claims based on two errors in the jury instructions: (1) the Court erroneously failed to instruct the jury on Swisher's antitrust duty to deal, and (2) the Court erroneously instructed the jury on indirect proof of monopoly power. Docket No. 233 at 35-36. As explained below, the Court grants retrial on the antitrust claims for failure to instruct the jury on Swisher's antitrust duty to deal. However, the Court denies retrial for the incorrect jury instructions regarding indirect proof of

monopoly power because Swisher waived this argument under the invited error doctrine.

3.2.1. The Court's failure to instruct the jury on Swisher's antitrust duty to deal was harmful error.

Swisher first challenges the Court's failure to instruct the jury regarding Swisher's antitrust duty to deal. Docket No. 233 at 35-36. "Harmless error applies to jury instructions in civil cases." Kennedy v. So. Cal. Edison Co., 268 F.3d 763, 770 (9th Cir. 2001). Under the harmless error standard, "[a]n error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless." Caballero v. City of Concord, 956 F.2d 204, 206 (9th Cir. 1992). In the Ninth Circuit, courts "presume prejudice where civil trial error is concerned." Galdamez v. Potter, 415 F.3d 1015, 1025 (9th Cir. 2005). Accordingly, the Ninth Circuit uses a two-step burden-shifting analysis on harmless error review. First, the moving party must show that the jury instruction was incorrect. Id. Second, if the moving party sustains its initial burden, "the burden shifts to the [non-moving party] to demonstrate 'that it is more probable than not that the jury would have reached the same verdict' had it been properly instructed.'" Id. (quoting Obrey v. Johnson, 400 F.3d 691, 701 (9th Cir. 2005)). Here, the Court's failure to instruct the jury regarding Swisher's antitrust duty to deal was not harmless error.

First, Swisher has sustained its initial burden to show that the Court erred by failing to instruct the jury regarding Swisher's antitrust duty to deal. To see why, the Court must first review antitrust law regarding a business's duty to deal with competitors. Under antitrust law, businesses generally have no duty to

deal with competitors. High Tech. Careers v. San Jose News, 996 F.2d 987, 990 (9th Cir. 1993) (citing Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 483 n.32 (1992)). Businesses therefore are "free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448 (2009) (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919)). As a result, businesses typically do not face antitrust liability for their unilateral refusal to deal with their competitors. See In re Adderall XR Antitrust Litig., 754 F.3d 128, 135 (2d Cir. 2014), as corrected (June 19, 2014) ("Nor do business disputes implicate the antitrust laws simply because they involve competitors."). This right is not absolute, however. Aspen Skiing v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) ("[T]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified."). "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). For example, businesses may be liable for antitrust violations when there are no legitimate business reasons for their refusal to deal. See Eastman Kodak, 504 U.S. at 483 n.32 ("But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal." (citing Aspen Skiing, 472 U.S. at 602-605)). In these cases, federal courts will find that businesses have a duty to deal with competitors when (1) the business unilaterally terminates a voluntary course of dealing spanning several years, sacrificing short-term profits or (2) the business refuses to provide competitors with products that are already sold in a retail market to other

customers. Trinko, 540 U.S. at 409-10; see also MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132-33 (9th Cir. 2004) (analyzing the scope of the antitrust duty to deal under Aspen Skiing and Trinko); Safeway Inc. v. Abbott Labs., 761 F. Supp. 2d 874, 893-94 (N.D. Cal. 2011) (same). Even with these exceptions, however, courts have been "very cautious" in imposing antitrust liability for purely unilateral conduct. Trinko, 540 U.S. at 408. Antitrust liability for purely unilateral conduct therefore remains "rare." Linkline, 555 U.S. at 448.

At trial, Trendsettah's claims for monopolization and attempted monopolization were based solely on Swisher's breach of the private label agreements. Trendsettah's antitrust claims thus do not trigger antitrust liability on their face. Adderall, 754 F.3d at 135 ("The mere existence of a contractual duty to supply goods does not by itself give rise to an antitrust 'duty to deal.'"). Accordingly, to impose antitrust liability on Swisher, the jury was required to first determine whether, as a threshold issue, Swisher properly refused to deal with Trendsettah regarding the private label agreements. Trinko, 540 U.S. at 408. The Court's failure to instruct the jury regarding Swisher's duty to deal was therefore error.

Second, Trendsettah has not met its burden to show that the Court's failure to give the refusal-to-deal instruction was harmless. In its opposition, at the hearing, and in supplemental briefing,[3] Trendsettah raised numerous arguments that, even if the

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[3] After the hearing, the Court ordered supplemental briefing to determine whether the jury's finding of specific intent on Trendsettah's attempted monopolization claim rendered harmless the Court's failure to give the refusal-to-deal instruction on the attempted monopolization claim. Docket No. 253. As Swisher

refusal to-deal instruction was given, the jury still would have found for Trendsettah. These arguments are principally based on three events from trial: (1) the jury found that Swisher had no legitimate business reason for its alleged anticompetitive conduct and acted with the specific intent to create a monopoly;[4] (2) Swisher's trial counsel expressly eschewed arguing jury instructions at closing argument; and (3) the jury deliberated for less than three hours before reaching a verdict for Trendsettah on all claims. Mot. JMOL Hr'g Tr. (June 27, 2016) at 63-65, 68-69; see also Docket No. 258 at 8.

However, none of these arguments addresses the fundamental issue of prejudice here: the Court's failure to provide the refusal-to-deal instruction prejudiced Swisher because, without the instruction, the jury had no basis to determine whether Swisher's ordinary contract breach also constituted anticompetitive conduct under the antitrust law's special rules governing breach of contract claims between competitors. See generally Aspen Skiing, 472 U.S. at 600-05.

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correctly noted in supplemental briefing, anticompetitive conduct cannot be inferred from evidence of anticompetitive intent alone. See William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1028 (9th Cir. 1981) ("[D]irect evidence of intent alone, without corroborating evidence of conduct, cannot sustain a claim of attempted monopolization.") (collecting cases).

[4] Ostensibly, the jury's findings were based on evidence presented at trial that (1) Swisher's anticompetitive conduct began in the fourth quarter of 2012, twenty months into the parties' course of dealing; (2) Swisher entered into the private label agreements only after senior management learned that Trendsettah had approached its competitors with the same manufacturing proposal; and (3) Swisher sacrificed short-term profits by refusing to both fill more profitable orders for unflavored cigarillos and transfer production of cigarillos to their Dominican Republic facilities. Docket No. 242 at 14-16, 28.

As discussed *supra*, under these special rules, businesses generally have no duty to deal with their competitors, and thus typically face no antitrust liability for their breach of contract. Id. That the jury may have found specific intent under the Court's instructions, see Docket No. 208 at 49-50, 54-55, is no assurance that it would done so had it considered the special rules governing a monopolist's refusal to deal, and indeed the Court is skeptical that it would have done so. The Court's failure to instruct the jury on this unique aspect of antitrust law therefore prejudiced Swisher. Moreover, the Court's failure to provide the refusal to deal instruction effectively prohibited Swisher from arguing its refusal-to-deal defense at closing argument, thus doubly prejudicing Swisher's defense. Given this prejudice to Swisher, the Court cannot say that its failure to provide the refusal-to-deal instruction was harmless error. The Court therefore grants a new trial on the attempted monopolization claim and a conditional new trial on the monopolization claim.

3.2.2. Swisher waived its argument regarding the Court's instructions on indirect proof of monopoly power.

Swisher next argues that the Court incorrectly instructed the jury on indirect proof of monopoly power: specifically, that the Court incorrectly instructed the jury regarding barriers to entry and the entry and exist of competitors in the relevant market. Docket No. 233 at 36. Swisher waived this argument under the invited error doctrine.

Under the invited error doctrine, courts will not review challenges to jury instructions when the moving party itself proposed the challenged jury instructions. United States v. Hui Hsiung, 778 F.3d 738, 747-

48 (9th Cir. 2015) ("Because the defendants were the ones who proposed the instruction in the first place, they cannot now claim that giving the instruction was error."); United States v. Baldwin, 987 F.2d 1432, 1437 (9th Cir. 1993) ("Where the defendant himself proposes the jury instruction he later challenges on appeal, we deny review under the invited error doctrine."); see also United States v. Lemusu, 135 F. App'x 52, 53 (9th Cir. 2005) (unpublished) ("As Herman jointly proposed the relevant jury instructions, his argument is also barred by the invited error doctrine." (citing Baldwin, 987 F.2d at 1437)); Yates v. GunnAllen Fin., 2006 WL 1821194, at *1 (N.D. Cal. June 30, 2006) ("Defendants cannot now claim that the jury was inadequately instructed on certain punitive damage issues because the instructions given by the court were either instructions submitted by defendants or joint instructions to which defendants had agreed."). Here, Swisher and Trendsettah jointly proposed the challenged jury instructions on indirect proof of monopoly power. Compare Docket No. 171 at 52 (Trendsettah's proposed jury instructions) with id. at 58 (Swisher's proposed jury instructions). This argument is therefore waived under the invited error doctrine.

3.3. The Court denies Swisher's request for a new trial on the contract claims.

The Court now turns to the contract claims. Swisher makes two arguments for retrying the contract claims: (1) the contract verdict was inconsistent with the evidence of Trendsettah's contract damages, and (2) retrial on the antitrust claims requires retrial on the contract claims. Docket No. 233 at 36-39. The Court rejects both arguments.

3.3.1. The contract verdict was consistent with the evidence of Trendsettah's contract damages.

Trendsettah brings its contract claims under Florida law. Docket No. ¶¶ 60-70. In Florida, a person injured by a breach of contract or bad faith "is entitled to recover a fair and just compensation that is commensurate with the resulting injury or damage." MCI Worldcom Network Servs., Inc. v. Mastec, Inc., 995 So. 2d 221, 223 (Fla. 2008) (citing Winn & Lovett Grocery Co. v. Archer, 171 So. 214 (Fla. 1936); Broxmeyer v. Elie, 647 So. 2d 893 (Fla. Dist. Ct. App. 1994)). "A plaintiff, however, is not entitled to recover compensatory damages in excess of the amount which represents the loss actually inflicted by the action of the defendant." Id. (citing 17 Fla. Jur. 2d Damages §§ 3-7 (2004)).

Swisher argues that the Court must grant a new trial on contract damages because the contract damages award exceeded Trendsettah's contract losses. Docket No. 233 at 36-37. Swisher's argument is as follows. The second private label agreement imposed monthly caps on the number of cigarillos that Swisher was required to supply. Docket No. 233-2 at 4-5 art. 3.1(c). Accordingly, Swisher could not be held liable in contract for unfilled orders that exceeded the monthly caps. See MCI Worldcom, 995 So. 2d at 223 (barring compensatory damages that exceed "the loss actually inflicted by the action of the defendant"). However, the jury incorrectly awarded damages for unfilled orders that exceeded the monthly caps. The contract damages award was based on the Good Times damages model, which calculated contract damages using the deficit figure from Swisher's economic expert, Dr. Alan Cox ("Cox"). See Trial Tr. (Mar. 18,

2016) at 112:14-15 ("Where was the source for the data for Slide 2 here?" "These data come from the expert report of Dr. Cox."). But Cox's deficit figure did not exclude unfilled orders that exceeded the monthly caps; the figure instead included all unfilled orders regardless of whether the order exceeded the monthly caps. Accordingly, Swisher concludes, the jury improperly awarded contract damages for unfilled orders that exceeded the monthly caps.

The Court rejects this argument. At trial, Trendsettah presented two contract damages models: the logistic model and the Good Times model. The logistic model calculated that contract damages were $17,656,350, Trial Tr. (Mar. 18, 2016) at 175:19 21, and the Good Times model calculated that contract damages were $9,062,679, Docket No. 243-4 at 44-45. The jury awarded Trendsettah $9,062,679 in contract damages, the same amount calculated under the Good Times model. Docket No. 207 at 3. This amount is slightly higher than an award under a "corrected" Good Times model,[5] but significantly lower than an award under the logistic model. The jury's acceptance of the Good Times model could reflect its discounting of excess sales in the logistic model; plainly, there is a

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[5] In Swisher's view, the Good Times model must exclude unfilled orders that exceeded the monthly caps. After an independent review of Trendsettah's monthly deficit figures for the second private label agreement, see Pls.' Trial Ex. 137 at 1 ("Revised Ex. 10.a to Cox Report"), the Court determines that excluding excess orders would reduce the total deficit figure from 202,309,970 unfilled orders to 182,603,170 unfilled orders. This is a difference of 19,706,800 unfilled orders, or 9.74% of the total deficit figure. All such unfilled orders occurred in February 2013, the first month of the second private label agreement. Id. After February 2013, there were no unfilled orders that exceeded the monthly caps. Id.

reduction. But apart from the contract damages figure itself, there is no evidence, in the jury verdict or elsewhere, establishing that the jury did that. See id. ("[W]hat damages do you find by a preponderance of the evidence that [Trendsettah] has sustained as a result of Swisher's breach of contract(s) with [Trendsettah] and/or it [*sic*] breach of the implied covenant of good faith and fair dealing in its contractual dealings with [Trendsettah]?" "$9,062,679."). Without such evidence, the Court cannot find that contract damages were "contrary to the clear weight of the evidence." Molski, 481 F.3d at 729. The Court therefore declines to retry the contract claims on this ground.

3.3.2. Retrying the antitrust claims does not require retrying the contract claims.

As a general rule, courts may order a partial retrial that is limited to specific issues. However, courts have recognized an exception to this general rule: when the issue to be retried is "[in]distinct and [in]separable" from another issue, the court must order full retrial on both issues. Gasoline Prods. Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 500 (1931) ("Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."). Courts typically grant a full retrial under this exception in two circumstances: (1) when an error on one issue affected the jury verdict on another issue, and (2) when full retrial is necessary to avoid confusion and uncertainty with the jury on retrial. Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1255-56 (10th Cir. 1999) (citing National R.R. Passenger Corp. v. Koch Indus., Inc., 701 F.2d 108, 110 (10th Cir. 1983);

11 Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 2814 at 154-56 (2d. ed. 1995); Gasoline Prods., 283 U.S. at 500)). Neither circumstance applies here.

First, there is no evidence that the antitrust verdict affected the contract verdict. Although the antitrust and contract claims are based on Swisher's breach of the private label agreements, both categories of claims involve substantially different elements requiring substantially different kinds of evidentiary proof. For example, to find monopolization, the jury was required to find, *in addition to breach of the private label agreements*, that (1) Swisher possessed "monopoly power" in certain regional non-tipped cigarillo markets; (2) Swisher's breach constituted willful acquisition or maintenance of monopoly power in these markets; and (3) Swisher's breach caused antitrust injuries. SmileCare, 88 F.3d at 783 (quoting Pacific Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992)). Proving each element in turn required proof of multiple sub-elements. Again, for example, to show that Swisher possessed "monopoly power,"

Trendsettah was required to provide either (1) direct evidence of monopoly power through restricted market output and supracompetitive pricing or (2) indirect evidence of monopoly power through (a) Swisher's dominant share of the various regional non-tipped cigarillo markets and (b) significant barriers to entry in those markets. Rebel Oil, 51 F.3d at 1434 (citing FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61 (1986); Ryko Mfg. Co. v. Eden Serv., 823 F.3d 1215, 1232 (8th Cir. 1987); Ball Memorial Hosp. Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986)). This required the jury to consider, among

other things, complex economic evidence regarding restricted market output, supracompetitive pricing, and barriers to entry in regional tobacco product markets. See Rebel Oil, 51 F.3d at 1434.

Trendsettah's contract claims required no such showing. To show breach of contract under Florida law, Trendsettah need only show that (1) Swisher and Trendsettah entered into the private label agreements; (2) Swisher breached the private label agreements; and (3) the breach damaged Trendsettah. Friedman v. New York Life Ins. Co., 985 So. 2d 56, 58 (Fla. Dist. Ct. App. 2008). But unlike with the antitrust claims, the jury did not need to consider complex economic evidence regarding regional non-tipped cigarillo markets to determine whether Swisher breached the private label agreements. Instead, the jury needed only to review the terms of the private label agreements and evaluate Swisher's performance under those terms. See id. Given the substantial differences between the contract and antitrust claims, the Court cannot find that the antitrust verdict improperly influenced or affected the original contract verdict. See Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 487 (3d Cir. 1997) (ordering retrial on sexual harassment claim when inclusion of time-barred sex discrimination claim "infected the entire verdict").

Second, and for substantially the same reasons, there is no evidence that retrying the antitrust claims, while preserving the contract claims, would result in "confusion and uncertainty" with the jury on retrial. Morrison Knudsen, 175 F.3d at 1256. The fact that it was verbally conceded that Swisher's failure to deliver cigarillos was breach only underscores the Court's conclusion. Accordingly, the Court denies Swisher's

motion for a new trial on the contract claims on this ground.

4. Conclusion

For the reasons stated above, the Court **grants in part** and **denies in part** Swisher's renewed motion for judgment as a matter of law as follows:

(1) The Court **grants** Swisher judgment as a matter of law on the monopolization claim; but

(2) The Court **denies** Swisher judgment as a matter of law on the attempted monopolization claim.

The Court **grants in part** and **denies in part** Swisher's motion for a new trial as follows:

(1) The Court **grants** Swisher a new trial on the attempted monopolization claim and a conditional new trial on the monopolization claim; but

(2) The Court **denies** Swisher a new trial on the contract claims.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

TRENDSETTAH USA, INC. and TREND SETTAH, INC., Plaintiffs, v. SWISHER INTERNATIONAL, INC, Defendant.	Case No. 8:14-CV-01664-JVS (DFMx) **JUDGMENT**

This action came on for trial on March 15, 2016, in Courtroom 10C of the above-entitled Court, the Honorable James V. Selna, United States District Judge, presiding. Plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. ("Plaintiffs") appeared by their attorneys, Mark Poe, Randolph Gaw, and Victor Meng of Gaw | Poe LLP, and Defendant Swisher International, Inc. ("Defendant") appeared by its attorneys, Michael Marsh, Ryan Roman, Kimberly Lopez, and Jennifer Glasser of Akerman, LLP.

A jury of seven persons was impaneled and sworn to try the action. After an eight-day trial and after deliberations, the jury returned a Special Verdict in favor of Plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. ("Plaintiffs"), and against Defendant Swisher International, Inc. ("Defendant"), on each of the four causes of action tried: (1) breach of contract;

(2) breach of the covenant of good faith and fair dealing; (3) violation of Section 2 of the Sherman Act by creating or maintaining a monopoly through anti-competitive practices; and (4) violation of Section 2 of the Sherman Act by attempting to create or maintain a monopoly through anti-competitive practices. On Plaintiffs' claims for breach of contract and breach of the covenant of good faith and fair dealing, the jury awarded $9,062,679.00. On Plaintiffs' claims for monopoly and attempted monopoly under Section 2 of the Sherman Act, the jury awarded $14,815,494.00. The contents of the jury's Special Verdict, which was filed on March 30, 2016, is hereby incorporated by reference as if set forth fully herein.

Based upon the jury's Special Verdict, the Court NOW ENTERS JUDGMENT AS FOLLOWS:

1. Judgment is entered in favor of Plaintiffs and against Defendant on all of Plaintiffs' claims so tried before the jury;

2. As to Plaintiffs' claim for violation of Florida Antitrust Law, Fla. Stat. § 542.19, judgment is entered in favor of Defendant and against Plaintiffs;

3. Pursuant to a stipulation made on the record by the parties, because the amount of the antitrust damages exceeds the amount of the contract damages awarded by the jury, the contract damages are reduced to zero;

4. Plaintiffs shall recover the antitrust damages awarded by the jury, which is automatically trebled to $44,446,482.00 pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15(a); and

5. Post-judgment interest shall run on this judgment in accordance with 28 U.S.C. § 1961.

6. As the prevailing parties, Plaintiffs shall recover their costs and reasonable attorney fees from Defendant to the extent ordered by the Court.

IT IS SO ORDERED

Dated: April 14, 2016

_____
Hon. James V. Selna
United States District Court Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Trendsettah USA, Inc., et al, Plaintiffs, v. Swisher International Inc, Defendants.	Case No. SACV14-01664 JVS (DFMx) August 19, 2019 The Honorable James V. Selna, U.S. District Court Judge

Proceedings: **(IN CHAMBERS) Order Regarding Motion for Relief from Judgment or for Expedited Discovery, Motion to Stay, and Motion for Summary Adjudication**

The Court, having been informed by the parties in this action that they submit on the Court's tentative ruling previously issued, hereby rules in accordance with the tentative ruling as follows:

Defendant Swisher International, Inc. ("Swisher") filed a motion for relief from judgment pursuant to Federal Rules of Civil Procedure 60(b)(2), 60(b)(3), and 60(d), or in the alternative, for an order accelerating discovery into Plaintiffs' Trendsettah USA, Inc. and Trend Settah International, Inc. (collectively,

"TSI") alleged misconduct. Mot., Docket No. 377. TSI filed an opposition. Opp'n, Docket No. 397. Swisher replied. Reply, Docket No. 414. With leave of the Court, TSI filed a sur-reply. Sur-Reply, Docket No. 421-1.

Swisher also moved to stay execution of any judgment against it in this case and related discovery under Federal Rule of Civil Procedure 62 until five business days after the filing of an order resolving the above motion for relief from judgment or, if later, five business days after notice of entry of any judgment entailed by such resolution. Docket No. 380. TSI opposed. Docket No. 404. Swisher replied. Docket No. 418.

Lastly, TSI moved for summary adjudication as to Swisher's supersedeas bond. Docket No. 364. Swisher opposed. Docket No. 372. Swisher replied. Docket No. 386.

For the following reasons, the Court **grants** the motion for relief from judgment. Therefore, the motions to stay and for summary adjudication are **denied as moot.**

I. BACKGROUND

The background of this case is familiar to the parties and detailed in the Court's prior orders. Docket Nos. 262, 274, 340; see also Docket No. 349. The Court recites only those facts necessary to this order.

A. Procedural History

The parties are manufacturers of cigars and other related products who entered into multiple supply agreements between 2011 and 2014. See Docket No. 262 at 1–2. In 2014, TSI filed this action against Swisher, initially alleging nine causes of action: (1)

monopolization and attempted monopolization in violation of the Sherman Act, 15 U.S.C. § 2; (2) monopolization and attempted monopolization in violation of Florida Antitrust Law, Fl. Stat. § 542.19; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) trade libel; (6) tortious interference with contract; (7) intentional interference with prospective business relationships; (8) negligent interference with prospective business relationships; and (9) unfair competition in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. Docket No. 1.

In May 2015, the Court dismissed the state law claims for negligent interference and unfair competition for failure to state a claim. Docket No. 40. In January 2016, the Court dismissed the state law claims for trade libel, tortious interference with contract, and intentional interference with prospective business relationships on summary judgment. Docket No. 99. The Court then scheduled trial on the remaining antitrust and contract claims for March 2016.

On August 17, 2016, following a jury verdict for TSI on its antitrust and breach of contract claims, the Court granted Swisher's motion for a new trial as to TSI's antitrust claims, but not its contract claims. Docket No. 262. The Court also granted Swisher judgment as a matter of law as to TSI's monopolization claim, but not as to its attempted monopolization claim. Id. Following the Ninth Circuit's decision in Aerotec Int'l Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016), the Court reconsidered its earlier decision denying Swisher summary judgment on TSI's antitrust claims, and granted Swisher summary judgment as to those claims. Docket No. 274.

Subsequently, the Ninth Circuit reversed the Court's grant of summary judgment to Swisher as to its antitrust claims, its grant of a new trial to Swisher as to the attempted monopolization claim, and its grant of judgment as a matter of law to Swisher as to the monopolization claim. Docket No. 349.

On July 8, 2019, TSI filed motions for attorneys' fees, expenses, and post-judgment interest, and for summary judgment as to Swisher's supersedeas bond. Docket Nos. 363, 364. On July 22, 2019, Swisher filed motions for relief from judgment or for expedited discovery, and to stay the proceedings. Docket Nos. 377, 380. The Court now turns to these motions.

B. Relevant Factual Background

On April 12, 2019, the Southern District of California unsealed the criminal indictment of Akrum Alrahib ("Alrahib") in connection with his arrest. See Declaration of Minae Yu, Docket No. 379, Ex. A. Alrahib is the founder, chief executive officer of TSI, and one of its principals/shareholders. Docket No. 162 at 3. He also oversees the day-to-day operations of TSI. Id.

The federal excise tax on imported cigarillos during the relevant time period was 52.75%. See Docket No. 377 at 4 n.3. According to the indictment, TSI fraudulently avoided paying federal excise taxes on cigarillos it imported from the Dominican Republic through its importer, Havana 59, for a period between 2013 and 2015. Yu Decl., Ex. A; see also Declaration of Ryan Roman, Docket No. 378, Ex. K at Response No. 22. The indictment lists a number of allegedly falsified invoices which marked down the price TSI was actually paying for cigars to avoid federal excise taxes. Yu Decl., Ex. A. The indictment further alleges that,

in reality, TSI did not purchase cigarillos from Havana 59; instead, it purchased them from Productos del Tobacco ("Productos") at prices approximately 3 to 4 times the sales price reported to the government by wiring money from TSI's bank account in California to Productos' bank account. Id.; see also Yu Decl., Ex. G at Attachment C-6. The government also alleges that TSI received over $700,000 from Havana 59 as kickbacks in the form of payroll checks for TSI's employees and free cigar manufacturing equipment that TSI sent to Products. See id., Ex. A at 7, Ex. B at 7. The government is seeking a forfeiture judgment of $9,914,921 against property in which Alrahib has an interest allegedly traceable to these violations. Id., Ex. A at 14.

In a voluntary video-recorded interview conducted by Internal Revenue Service ("IRS") and Alcohol and Tobacco Tax and Trade Bureau ("ATTAB") agents on May 11, 2017, Alrahib made a number of admissions regarding his and Bryant's participation in a tax evasion scheme. Relevant portions of the interview are reproduced below:

> ALRAHIB: Okay. That's the time that Tony Bryant approached me and says, look, I could import it for you, and I could save you money, and then I'll kick you back the money on the side. Okay.
>
> . . . .
>
> AGENT 2: On him giving you kickbacks on the 2 to 3 million dollars –
>
> ALRAHIB: Yes.
>
> AGENT 2: **Just to be clear, the kickbacks were from federal excise taxes evaded.**

ALRAHIB: **That he evaded, yes. Yes.**

. . . .

ALRAHIB: Well, he was the importer . But was I aware that he was evading federal excise tax? Yes, if that's what you want me to say.

AGENT 1: Yeah.

ALRAHIB: I mean, that's what it was. Everybody knew that. . . . . AGENT 1: . . . [W]hat was your part in that?

ALRAHIB: My part in what? In -- AGENT 1: With the activity related to Tony [Bryant]'s importation.

ALRAHIB: My part is, as the cheaper you could get it for me, Tony, and the more I could save on the back end, thank you very much.

. . . .

AGENT 1: What was it that you and Tony were doing, specifically, that allowed the product to, you know, be available cheaper? What was it that you were doing specifically to reduce your burden, your financial burden?

ALRAHIB: I wasn't doing anything. I wouldn't know how Tony was breaking up the importation tax. **He would just send me an email of how his BS breakdown was and then give us the invoice.** That was it. And then from that invoice of the total amount, I was

supposed to take back 40, 50 percent, ...

AGENT 1: Okay. And then, so he would then have money to send back to you, to kick back to you, correct?

ALRAHIB: Yes.

AGENT 2: All right. So Tony invoices [ALRAHIB's company]. And you send him 36 grand. Of that 36 grand, your understanding was, you're getting half of it back?

ALRAHIB: I'm supposed to get 30 to 40 percent of that, of that money.

AGENT 2: And it's supposed to come back to you?

ALRAHIB: Yes. And however you break it down, however you do it, good luck to you. That's great. Give me my rebate.

AGENT 2: **No, I got -- let me figure -- but the rebate, though, is based on him evading federal excise tax.**

ALRAHIB: **Yes.**

AGENT 2: Okay.

AGENT 1: Thank you.

ALRAHIB: Yes, it is. Of course it is. I don't know what else to say, but I know I'm screwing – I mean, it is. I mean, yes. We all know that.

. . . .

AGENT 2: So Tony's scheme, there's -- putting someone in between, but Tony --

The scheme you worked with Tony, he took the extra step of instead of just putting someone in between -- ALRAHIB: I didn't work the scheme with Tony. I rode Tony's train because his scheme was already moving. And then Tony said, you want to come and save money riding my train? **Then I realized it's a scheme. Then when I saw his scheme, I said, wait a minute, I need to benefit from your scheme.**

. . . .

ALRAHIB: . . . let's say, for example, [the manufacturer] was charging me at the time 6 or 7 cents a stick, but Tony [Bryant] was claiming 2 cents a stick, so he never had extra money. He never had extra money because he never put the actual dollar amount that [the manufacturer] was charging us.

. . . .

AGENT 2: Tony [Bryant] never charged Trendsettah, being you, enough money to cover the actual cost of the product?

ALRAHIB: **No. Of course not. It was all a game.**

AGENT 2: No.

ALRAHIB: This water costs a dollar, right. But when Tony [Bryant] -- he's the importer, right?

AGENT 1: Yeah.

> ALRAHIB: He's showing that this water is 30 cents. And then from the 30 cents, he's supposed to give me 10 cents.

Yu Decl., Ex. B at 3–5, 10–11 (quoting interview transcript) (emphasis in prosecutors' reproduction). Bryant pled guilty to related fraud and tax-evasion charges in 2016, and was sentenced to seven years in prison. See Yu Decl., Exs. D–F. Alrahib's criminal trial is scheduled to commence on December 16, 2019. Id., Ex. C.

C. Evidentiary Objections and Requests for Judicial Notice

On Rule 60 motions, "[t]he proffered evidence must be admissible." Winding v. Wells Fargo Bank, 2012 WL 603217, at *9 (E.D. Cal. Feb. 23, 2012), aff'd 706 F. App'x 918 (9th Cir. 2017); Norris v. F.B.I., 1990 WL 134276, at *2 (9th Cir. Sept. 18, 1990) (same). Furthermore, "[w]hen alleging a claim of fraud on the court, the plaintiff must show by clear and convincing evidence that there was fraud on the court, and all doubts must be resolved in favor of the finality of the judgment." Weese v. Schukman, 98 F.3d 542, 552 (10th Cir. 1996) (emphasis added).

TSI objects to the Court's consideration of either the indictment or the government's brief appealing the magistrate's grant of bail to Alrahib, which contains passages from Alrahib's interview transcript with IRS and ATTAB agents. Docket No. 403; see also Yu Decl., Exs. A, B.

TSI objects to the indictment on the ground that it is well-established that an indictment is not evidence. See United States v. Ramirez, 710 F.2d 535, 545 (9th Cir. 1983) ("[An] indictment is not evidence against the accused and affords no inference of guilt

or innocence."). The Court agrees. Therefore, the Court will not consider the facts contained in the indictment for their truth. However, the Court takes judicial notice of the existence of the indictment and its contents as a public record, the accuracy of which cannot reasonably be questioned.

TSI objects to the government's brief appealing the magistrate's grant of bail to Alrahib, arguing (1) that statements in a brief are not evidence, and (2) that the evidence is inadmissible hearsay. Docket No. 403 at 2. However, admissions of a party opponent are not hearsay and are admissible. Fed. R. Evid. 801(d)(2). Moreover, the record of the interrogations is also admissible as a public record, resolving concerns about a potential second layer of hearsay as to the government's filing itself. Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398, 412 (6th Cir. 2006) (affirming admission of interrogation transcripts as public records and statements against declarant's interests). Therefore, TSI's objection to the Court's consideration of Alrahib's admissions in his interview with government agents is overruled because Alrahib's conduct is imputable to TSI, and thus his confession contained in the brief is admissible as an admission of a party opponent. Fed. R. Evid. 801(d)(2); see also Fed. R. Evid. 803(5), 803(8), and 804(b)(3).

TSI also objects to Exhibit A to the Supplemental Declaration of Minae Yu, Docket Nos. 415, 415-1. The document is a transcript of an April 30, 2019 hearing in the matter of USA v. Akrum Alrahib. TSI argues that the document, which contains statements of government employees characterizing what Alrahib supposedly told other government employees, constitutes double hearsay. Docket No. 419 at 1. The Court

agrees. This evidence is distinct from direct statements from Alrahib quoted from an interview transcript. Therefore, the objection is sustained.

Swisher also filed evidentiary objections. Docket No. 416. Because there are 39 separate objections, the Court declines to address each one-by-one. To the extent the Order cites evidence to which Swisher objects, the objection is impliedly overruled. To the extent the Court does not rely on the evidence submitted, the Court declines to rule on the objections.

Finally, TSI filed a request that the Court take judicial notice of (1) The Order Denying Government's Motion for Pretrial Detention, filed in United States v. Alrahib, in the United States District Court for the Southern District of Florida, No. 1:19-cr-20165-RS, on May 1, 2019, as Docket Entry 17; (2) Swisher's Motion to Stay the Mandate, filed with the Ninth Circuit in the matter of Trendsettah USA, Inc., et al. v. Swisher International Inc., No. 1656823, on April 23, 2019, as Docket Entry 87; and (3) Swisher's Opposition to Lift Stay of the Mandate, filed with the Ninth Circuit in the matter of Trendsettah USA, Inc., et al. v. Swisher International Inc., No. 16-56823, on May 9, 2019, as Docket Entry 90. RJN, Docket No. 402, Exs. A–C. The Court may take judicial notice of matters of public record, Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001), including related filings from another case. Headwaters Inc. v. U.S. Forest Service, 399 F.3d 1047, 1051 n.3 (9th Cir. 2005). Therefore, TSI's request for judicial notice is granted.

II. LEGAL STANDARDS

A. Federal Rules of Civil Procedure 60(b)(2) and (b)(3)

"[T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding [based on] . . . newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). To prevail, "the movant must show the evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'" Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990).

The court may also grant relief from judgment based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). To prevail under this subsection, the movant "must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." De Saracho v. Custom Food Mach., Inc., 206 F.3d 874, 880 (9th Cir. 2000). In addition, this subsection "require[s] that [the alleged] fraud . . . not be discoverable by due diligence before or during the proceedings." Casey v. Albertson's Inc., 362 F.3d 1254, 1260 (9th Cir. 2004).

Under either subsection (b)(2) or (b)(3), the motion "must be made . . . no more than a year after the judgment or order." Fed. R. Civ. P. 60(c)(1).

B. Federal Rule of Civil Procedure 60(d)

The court may also "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). Relief under this subsection is not subsection is not subject to the one-year time limit. United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1167 (9th Cir. 2017) (citation omitted), cert. denied, 138 S. Ct. 2675 (2018).

"A court's power to grant relief from judgment for fraud on the court stems from 'a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.'" Id. (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S.238, 244 (1944)). "[R]elief from judgment for fraud on the court is 'available only to prevent a grave miscarriage of justice.'" Id. (quoting United States v. Beggerly, 524 U.S. 38, 47 (1998)). Thus, "not all fraud is fraud on the court." Id. (citation omitted).

"In determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct prejudiced the opposing party, but whether it harmed the integrity of the judicial process." United States v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011) (internal quotation marks and citation omitted). Therefore, fraud on the court must be an "intentional, material misrepresentation," In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007),[1] and "involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995) (citation omitted).

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[1] Abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009).

The relevant misrepresentations must also go "to the central issue in the case," Estate of Stonehill, 660 F.3d at 452, and must "affect the outcome of the case," id. at 448. In other words, the newly discovered misrepresentations must "significantly change the picture already drawn by previously available evidence." Id. at 435. Thus, "[m]ere nondisclosure of evidence is typically not enough to constitute fraud on the court, and 'perjury by a party or witness, by itself, is not normally fraud on the court' " unless it is "so fundamental that it undermined the workings of the adversary process itself." Id. at 444–45 (quoting In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999)). However, "perjury may constitute fraud on the court if it involves, or is suborned by, an officer of the court." Sierra, 862 F.3d at 1168 (internal quotation marks and citation omitted).

Lastly, the fraud must have been unknown at the time of settlement or entry of judgment because "issues that are before the court or could potentially be brought before the court during the original proceedings 'could and should' be exposed at trial.'" Id. (quoting In re Levander, 180 F.3d at 1120). However, relief is available for fraud discovered after entry of judgment, or "after-discovered fraud," Hazel-Atlas, 322 U.S. at 244, particularly if the opposing party attempted to uncover the fraud before trial, but was "thwarted by a witness who blatantly lied about the relevant issue." Sierra, 862 F.3d at 1168–69. Accordingly, relief is supported if "key information" is revealed only after entry of judgment. Sierra, 862 F.3d at 1169.

III. DISCUSSION

A. Rule 60(d)

As noted, to grant Swisher relief for fraud on the court, it must prove that (1) TSI engaged in misconduct that undermined the judicial process and (2) the misconduct went to the central issues in the case. See Estate of Stonehill, 660 F.3d at 445, 452.

Swisher sought information relevant to TSI's payment of federal excise taxes during discovery. Swisher served on TSI requests for production seeking federal excise tax filings made by or on behalf of TSI, its costs and profits, and the sources of funds for its machinery. See Roman Decl., Ex. A, RFP Nos. 26–29, 32–34; Ex. B, Interrogatory No. 17; Ex. L, RFP Nos. 21–24, 26, 57. In response to the requests for production seeking the federal excise tax filings made by or on behalf of TSI, TSI objected on the grounds that the production of the actual filings was burdensome and that the documents were irrelevant. Id., Ex. C, Resp. Nos. 26–28. Swisher responded that "FET payments are an essential component to calculating profits and profitability, which, of course, is the baseline for the lost profits analysis TSI's allegations require." Id. ¶ 3, Ex. E. However, TSI would later argue that "[t]he information Swisher seeks will already be found in TSI's financial records, sales orders, and invoices, which it has agreed to produce," id. ¶ 4, Ex. F, and that "[g]iven that the tax rates are publicly available, and given that the same information you seek will be available in TSI's sales records (and it's fair to say that TSI has no incentive to overestimate its tobacco sales to the government), we do not think the probative value of these filings outweighs the burden of collecting them." Id. ¶ 7, Ex. I. TSI also sought to remove search terms relating to federal excise taxes

in connection with electronically-stored information ("ESI") production. Id. ¶¶ 5–6, Exs. G–I. Swisher then agreed to remove these search terms. Id. ¶ 8. TSI's general counsel subsequently testified that TSI had produced all documents responsive to Swisher's discovery requests. See Yu Decl., Ex. R at 164:24–165:22.

Of course, TSI never disclosed the information Alrahib later admitted in his interview with federal agents, i.e., the scheme through which Bryant evaded federal excise taxes on TSI's cigarillos and passed along a portion of the profits from this evasion to Alrahib in the form of kickbacks. Nor did TSI disclose documents which demonstrated what Alrahib admits were falsified invoices prepared by Bryant which perpetrated the scheme. Therefore, the documents produced did not reflect the true cost of manufacturing and importing TSI's cigarillos, even though they were presented to Swisher as an accurate reflection of TSI's costs and profits. See, e.g., Yu Decl., Exs. J–L; Romand Decl., Ex. K at Resp. No. 17, Ex. P at Resp. No. 17, Ex. S at 88:5–95:2, 100:22–105:25, 113:1–7.

These misleading financial records were in turn relied on by TSI's economic expert, Dr. Deforest McDuff ("Dr. McDuff"), who used them as the basis of his damages analysis. See, e.g., Yu Decl., Ex. G at 42–48, Attachments C-1, C-6, C-7, D-13, D-14, E-12. Dr. McDuff also worked with Alrahib and Bryant, who submitted to his interviews. See, e.g., id. at 2–3, 23–25, 33–36. Dr. McDuff's damages calculations relied on TSI's profit margins during 2013 and 2014 which, based on Alrahib's admissions, were artificially inflated by the underpayment of federal excise taxes, infecting Dr. McDuff's entire analysis. See id. at 47–48, Attachments C-6, C-7. Swisher also presents the declaration of its own expert, Dr. Alan Cox ("Dr. Cox")

concluding that TSI's avoidance of federal excise taxes would allow it to lower costs and charge "artificially low prices . . . to sell more cigarillos than they would have in the absence of fraud." Declaration of Alan Cox ("Cox Decl."), Docket No. 377-2 ¶ 20. Dr. Cox also opines that, because of TSI's low gross profit margins, when corrected for the correct federal excise tax, TSI would have operated on a negative margin on sales of imported cigarillos from 2013–15. Id. ¶¶ 30–31.

At trial, TSI moved to exclude "any evidence or argument regarding any tax or regulatory enforcement actions Mr. Alrahib faced in the years prior to TSI's manufacturing relationship with Swisher." Docket No. 112 at 1. Prior to founding TSI, Alrahib faced a civil forfeiture action for failing to pay excise taxes on tobacco products distributed through one of his prior businesses. Yu Decl., Ex. M at 48:11–51:12. In support of its motion, TSI argue that Alrahib's failure to pay excise taxes more than a decade prior had nothing to do with the two central issues in this case, and that the admission of such past crimes, wrongs, or tax issues would lead to unfair prejudice. Docket No. 112 at 1. The Court ruled in TSI's favor on the basis of these representations, reasoning that "[s]tripped of a proper link, the evidence is merely improper character evidence." Docket No. 163 at 4. Of course, had TSI disclosed Alrahib and Bryant's scheme, that "proper link" would have been clear. But based on TSI's inaccurate arguments that Alrahib's federal excise tax violations were merely past wrongs, Swisher was foreclosed from asking Alrahib about excise tax evasion, a line of questioning that, absent perjury, would likely have led to the disclosure of the fraudulent scheme he later disclosed to federal IRS and ATTAB agents.

Alrahib's credibility was central to the trial. He was TSI's first witness, and offered testimony regarding nearly element of TSI's claims. See Yu Decl., Ex. U at 28–102. In addition, other TSI witnesses presented a materially false portrayal of TSI's financial records, costs, profitability, injury, and damages. For instance, TSI's CFO Salah Kureh testified that every item of revenue or expense was properly recorded in TSI's financial records and that all this information was provided to TSI's expert. Id., Ex. V at 9–13. He also testified that TSI had higher profits on Productos-manufactured products compared to Swisher-manufactured products because Products' costs were lower, without disclosing the tax evasion scheme which reduced these costs. Id. at 20. Dr. McDuff further testified about TSI's profit margins, projected sales, lost profits, and the fact and extent of TSI's damages. Id. at 175–82, 187–88, 190, 193–98. TSI also offered, and the Court admitted into evidence, Trial Exhibits 135 and 136, which set forth artificially inflated profit margins for TSI. Id. at 193–95; id., Exs. X–Z. Based on these inaccurate profit margins, Dr. McDuff opined that TSI suffered $9,062,679 in lost profits between 2012 and 2015, and $5,752,815 in future sales, totaling $14,815,494 in damages. Id., Ex. V at 193–97, Exs. X–Y, Ex. A at 35, 53. After trial, the jury awarded the exact amounts Dr. McDuff computed based on TSI's false financial records. Id., Ex. Z at 35.

Based on the foregoing, TSI presented to the jury and the Court a theory of "lost profits" premised on inaccurate data which was a product of a fraudulent tax evasion scheme. Therefore, TSI's conduct tainted the integrity of the trial and interfered with the judicial process, and the judgment must be set aside. Fed. R. Civ. P. 60(d).

TSI's opposition does not present any argument which persuades the Court to alter this conclusion. TSI argues that, even if it falsely represented that further responsive information did not exist, it is not "fraud on the court" because the representation was made to Swisher, not the Court. Opp'n, Docket No. 410 at 21–22. However, this "trail of fraud continued without break" into proceedings before the Court and infected key evidence presented to the jury. Hazel-Atlas, 322 U.S. at 250.

TSI further argues that no misrepresentations were made to the jury because, regardless of Alrahib's participation in a "private conspiracy," the cost basis that formed the basis of Dr. McDuff's damages calculations "would have been the same anyway." Opp'n, Docket No. 410 at 18. However, as demonstrated above, this statement is untrue based on Alrahib's own admissions. His tax evasion was not a "private conspiracy" because it was engineered to avoid taxes on TSI's products, artificially boosting TSI's profits. TSI contends that no false evidence was presented because "Swisher does not allege that Trendsettah actually had higher costs than were reported to the jury, or that it actually had a lower profit margin . . . only that Trendsettah should have had higher costs and/or lower profit margins" from 2013–15. Docket No. 410 at 12. This argument is unavailing. TSI had no rights to the "profits" that were, by Alrahib's admission, stolen from the government. See AlphaMed Pharms. Corp. v. Arriva Pharms., Inc., 432 F. Supp. 2d 1319, 1348 (S.D. Fla. 2006) ("It is beyond dispute that [a plaintiff] cannot recover lost profits that are predicated on the completion of illegal activity."); Carruthers v. Flaum, 365 F. Supp. 2d 448, 470 (S.D.N.Y. 2005) (dismissing claims with prejudice because plaintiff's claims for damages "are predicated on the

completion of illegal activity . . . and are not recoverable for that reason alone").

TSI also argues that relief is not justified based on Swisher's counsels' lack of diligence, i.e., failure to uncover the fraud sooner. Opp'n, Docket No. 410 at 22. For instance, TSI argues that Swisher failed to pursue documentation regarding TSI's obligation to pay federal excise taxes, and failed to ask "a single witness a single question about" the subject. Id. at 6. However, as noted, Swisher served discovery calling for the production of the information which would have revealed the fraud, including "all documents showing or reflective of federal excise tax paid with respect to Splitarillos, whether paid by TSI or on TSI's behalf." Roman Decl., Ex. A, RFP Nos. 26, 27 (emphasis added). TSI resisted this discovery by objecting to its production on grounds of irrelevance and undue burden. Id., Ex. C, Resp Nos. 26, 27. Moreover, TSI's witnesses testified that all relevant documents were collected and produced. See Yu Decl., Ex. R at 164–65.

TSI also successfully moved in limine to exclude any evidence or argument regarding Alrahib's past tax-related enforcement actions, in part based on the argument that Alrahib's tax evasion was merely past conduct that had no relevance to this trial. Docket Nos. 112 at 1, 148-1 at 2. The Court found that there was no "proper link" between such evidence and this case. Docket No. 163 at 4. TSI also claimed that Swisher would be able to determine the amount of federal excise taxes paid on its products using other documents to be produced and the publicly available tax rate; however, this misrepresentation did not account for TSI's failure to comply with the law by paying that rate. Roman Decl.¶¶ 4, 7, Exs. F, I. Alrahib also testified in a deposition that he had learned from his past

tax-related mistakes, giving Swisher even less of a basis on which to pursue a theory of ongoing tax fraud. Yu Decl., Ex. M at 48:11–49:1, 50:3–7, 541:7–12. Furthermore, TSI submits invoices with its opposition that it argues show that TSI did not fail to pay excise taxes, but those are the very types of documents that TSI's CEO has admitted are fraudulent. Docket No. 379-2 at 3–5, 10–11; Docket No. 410-2 at 3–4, 10–11. Therefore, TSI's claim that excise taxes were of "no interest" to Swisher in discovery or trial, and that the "criticality" of the issue was not asserted until over three years after the verdict was returned, is incorrect.

Based on the foregoing, Swisher's discovery efforts constituted "due diligence" for purposes of Rule 60(d)(3). Swisher was "entitled to accept [TSI's] answers to [its] discovery requests as accurate and not to seek additional discovery relating to the issue." Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 305 F. Supp. 2d 939, 961 (E.D. Wis. 2004), reversed on other grounds, 402 F.3d 1198 (Fed. Cir. 2005). TSI cannot blame Swisher for the success of its obstructionist conduct. Id.; see also Wyle v. R. J. Reynolds Industries, Inc., 709 F.2d 858, 591 (9th Cir. 1983) (holding that it would be improper to allow a party to "profit from its own failure to provide discovery"); Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1537 (8th Cir. 1996) (holding that plaintiff's failure to timely produce relevant documents requested by the defendant should not be viewed as lack of due diligence on the part of the defendant); Hazel-Atlas, 322 U.S. at 246 (stating "[w]e cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud" where plaintiff interfered with defendant's attempts to uncover the fraud);

Pumphrey, 62 F.3d at 1133 (where defendant prevented disclosure of critical evidence during trial through the use of misleading, inaccurate, and incomplete responses to discovery requests and presentation of fraudulent evidence and testimony during trial, defendant "is in no position to dispute the effectiveness of the scheme in helping to obtain a favorable jury verdict").

Moreover, where, as here, the Court itself was a victim of the fraud, "even if [the moving party] did not exercise the highest degree of diligence [the] fraud cannot be condoned for that reason alone." Hazel-Atlas, 322 U.S. at 246. As the Supreme Court explained, "[t]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Id. Thus, "it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of litigations." Id.

In sum, Swisher has shown by clear and convincing evidence that TSI engaged in misconduct that undermined the judicial process which went to the central issues in the case. See Estate of Stonehill, 660 F.3d at 445, 452; Fed. R. Civ. P. 60(d)(3). Accordingly, the motion for relief from judgment under Federal Rule 60(d)(3) is granted.

B. Rules 60(b)(2) and (b)(3)

TSI argues that relief under subsections (b)(2) and (b)(3) is time-barred by their one-year statute of limitations. Opp'n, Docket No. 410 at 13–15. TSI argues that Swisher is not entitled to relief under Rule

60(b)(2) because Swisher discovered TSI's fraud before the Court entered a new operative judgment in this case. However, Rule 60(b)(2) states that new evidence is that which "could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Here, the evidence demonstrating fraud — Alrahib's May 2017 interview which was revealed to the public in April 2019 — was not available during that time frame.

TSI also points to Ninth Circuit precedent holding that this "one-year limitation period is not tolled during an appeal." Nevitt v. United States, 886 F.2d 1187, 1188 (9th Cir. 1989). However, "if the appeal results in a substantive change, then the time would run from the substantially modified order entered on mandate of the appellate court." Transit Casualty Co. v. Security Trust Co., 441 F.2d 788, 791 (5th Cir. 1971). Here, the Ninth Circuit's decision substantially altered the judgment, and the time for bringing a Rule 60(b) motion restarts. Therefore, this case is distinguishable from Nevitt, in which the court affirmed the district court's initial judgment. Nevitt, 886 F.2d at 1187. TSI argues that "the clock is restarted only if the resulting 'change' to the prior judgment was such as to present a new basis for the moving party's challenge, which had not existed under the prior judgment," citing to Jones v. Swanson, 512 F.3d 1045, 1049 (8th Cir. 2008). Opp'n, Docket No. 410 at 15. However, Jones states that the relevant inquiry is whether the "legal rights and obligations of the parties" have changed as a result of the appellate court's decision. Jones, 512 F.3d at 1049. Distinguishing between liability and damages, the Eight Circuit in Jones found that the appellate court's decision did not result in substantial changes because it only modified the amount of dam-

ages, not the liability determination, while the defendant's Rule 60 motion challenged only the liability ruling. Id. Here, as noted, the Ninth Circuit's decision substantially altered both Swisher's liability and damages, and its motion challenges both. Therefore, the motion is timely.[2]

Moreover, based on the same reasoning applied above to Swisher's motion for relief from judgment under Rule 60(d), the requirements of Rule 60(b)(2) and 60(b)(3) are satisfied. To prevail under subsection (b)(2), the movant must show that (1) the evidence constitutes "newly discovered evidence" within the meaning of Rule 60(b), (2) the movant exercised due diligence to discover this evidence, and (3) the newly discovered evidence would have likely changed the disposition of the case. Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003). Subsection (b)(3) requires that the movant show (1) fraud, misrepresentation, or misconduct by an opposing party which (2) prevented it from fully and fairly presenting its case or defense. Jones, 921 F.2d at 879. As demonstrated above, Swisher exercised the requisite diligence, newly discovered evidence of fraud was uncovered in 2019, and the evidence fraud would have likely changed the disposition of the case. Furthermore, the absence of this evidence of fraud from the record substantially interfered with Swisher's defense.

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[2] The Ninth Circuit's ruling did not alter anything with respect to the breach of contract claims. Therefore, they are time barred from relief under Rules 60(b)(2) and (b)(3). However, it is immaterial for purposes of this ruling because the judgment in favor of TSI on its breach of contract claims is vacated under Rule 60(d)(3).

In sum, because Swisher has shown that relief is appropriate under Rule 60(b)(2) and Rule 60(b)(3) by clear and convincing evidence, its motion is granted under these subsections as well.

C. Mandate Rule

TSI also argues that the Ninth Circuit's mandate deprives the Court of authority to grant Swisher's Rule 60 motion. Opp'n, Docket No. 410 at 22–25. The Court disagrees. "Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to 'file additional pleadings, vary or expand the issues.'" Nguyen v. United States, 792 F.3d 1500, 1502 (9th Cir. 1986) (quoting Rogers v. Hill, 289 U.S. 582, 587–88 (1933)). The Supreme Court and several Courts of Appeals have held that district courts have the authority to rule on Rule 60 motions after the issuance of an appellate mandate.

Standard Oil Co. of California v. United States, 429 U.S. 17, 18 (1976); Gould v. Mut. Life Ins. Co. of New York, 790 F.2d 769, 775 (9th Cir. 1986); Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 818 F.3d 1320, 1329 (Fed. Cir. 2016). Therefore, the Ninth Circuit's mandate does not preclude the Court's consideration of Swisher's Rule 60 motion.

IV. CONCLUSION

For the foregoing reasons, the Court **grants** the motion for relief from judgment. Therefore, the motions to stay and for summary adjudication are **denied as moot.**

IT IS SO ORDERED.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Trendsettah USA, Inc., et al, Plaintiffs, v. Swisher International Inc, Defendants.	Case No. SACV14-01664 JVS (DFMx) August 19, 2019 The Honorable James V. Selna, U.S. District Court Judge

Proceedings: **(IN CHAMBERS) Order Setting Status Conference**

Minute Order Setting Scheduling Conference

The Court sets a scheduling conference for Monday, September 23, 2019 at 11:00 a.m. The parties shall submit a joint report seven days in advance which should address:

- New trial and pretrial conference dates.
- What additional fact discovery do the parties wish to undertake.
- What additional or revised expert reports do the parties desire to submit, including discovery requirements.
- Date for a further settlement conference.
- Any other matters the parties wish to address at the conference.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRENDSETTAH USA, INC.; TRENDSETTAH, INC., Plaintiffs-Appellants, v. SWISHER INTERNATIONAL, INC., Defendants-Appellee.	No. 16-56823 D.C. No. 8:14-cv-01664-JVS-DFM Central District of California, Santa Ana **ORDER**
TRENDSETTAH USA, INC.; TRENDSETTAH, INC., Plaintiffs-Appellants, v. SWISHER INTERNATIONAL, INC., Defendants-Appellee.	No. 16-56827 D.C. No. 8:14-cv-01664-JVS-DFM Central District of California, Santa Ana [Issued April 18, 2019]

Before: W. FLETCHER and PAEZ, Circuit Judges, and GLEASON, District Judge.*

Defendant-Appellee filed a petition for rehearing or rehearing en banc on March 22, 2019 (Dkt. No. 83). The panel has voted to deny the petition for rehearing. Judges W. Fletcher and Paez have voted to deny the petition for rehearing en banc, and Judge Gleason so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing or rehearing en banc is **DENIED**.

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* The Honorable Sharon L. Gleason, United States District Judge for the District of Alaska, sitting by designation.

APPENDIX H

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TRENDSETTAH USA, INC.; TRENDSETTAH, INC., Plaintiffs, v. SWISHER INTERNATIONAL, INC., Defendants.	Case No. 8:14-cv-01664-JVS (DFMx) The Hon. James V. Selna **JOINT PROPOSED JURY INSTRUCTIONS**

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 29 MONOPOLIZATION - UNILATERAL REFUSAL TO DEAL WITH A COMPETITOR

As stated before, one of the elements TSI must prove is that Swisher engaged in anticompetitive conduct. TSI claims that this element is satisfied in this case because TSI claims that Swisher unlawfully refused to deal with TSI, a competitor.

Ordinarily, a company may deal or refuse to deal with whomever it pleases, as long as it acts independently. Even a company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and ordinarily may refuse to deal with them.

Swisher's alleged refusal to deal with TSI only constitutes anticompetitive conduct if (i) it was contrary to Swisher's short-run best interests, and

(ii) only made sense for Swisher because it harmed TSI and helped Swisher maintain monopoly power in the long run. In other words, if Swisher's refusal to deal results in, or was expected to result in, a short-run benefit to Swisher – such as more profits, a higher market share, or avoiding the loss of customers – then it is not anticompetitive and you must find for Swisher on this element. Also, if Swisher's refusal deal hurt (or was expected to hurt) Swisher, but was not done specifically to harm TSI, then you likewise must find for Swisher on this element.

On the other hand, if Swisher's refusal to deal hurt Swisher in the short run (or was expected to do so), and was undertaken only because Swisher expected it to harm TSI and enhance Swisher's monopoly power in the long run, then you must find for TSI on this element.

If you find that Swisher had mixed motives for its refusal to deal – that is, that the conduct was expected to result in some short run benefits for Swisher as well as harm competitors – then you must find for Swisher on this element. A refusal to deal is only anticompetitive where it hurts the defendant in the short run and benefits the defendant only by harming competitors.

Source: ABA Model Jury Instructions in Civil Antitrust Cases 2005 Ed. Instruction 3 No. 2 at C-36 through C-38.

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

TRENDSETTAH USA, et al., Plaintiffs, v. SWISHER INTERNATIONAL, INC., Defendant.	SACV-14-1664-JVS Santa Ana, California

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Trial Day 4 - March 18, 2016

Q For your engagement have you calculated Swisher's market share for the cigarillo market?

A Yes -- the cigarillo segment as well as the non-tipped cigarillo segment.

Q And what data did you use to calculate the market share?

A I used the same MSA data that we've been discussing because it provides a comprehensive measure.

Q The same data as Dr. Cox?

A Correct.

MR. GAW: Okay, can we go to Slide 16, please.

Q What's on Slide 16?

A Slide 16 shows Swisher's market share using the market definition, geographic market definition put forward by Swisher. This is for non-tipped cigarillos for the entire United States. You can see Swisher's share there from 2012 to 2015. Those figures are 35.23 percent in 2012, 35.02 in 2013, 39.84 in 2014, and 43.6 in 2015.

Q Now, to be clear, by presenting this slide, are you saying that the real relevant geographic market is the entire country?

A No. As discussed, I think that regional markets are more appropriate, yet this is the market definition put forward by Swisher.

Q This is just for the non-tipped cigarillo market; correct?

A Correct.

Q And there is a checked box here, yes, with dangerous probability. What does that refer to?

A That refers to a view that there is a dangerous probability of achieving market power in the non-tipped cigarillo market for the entire United States if there is a finding of that market definition.

Q Based on the percentages here, do you have an opinion as to whether Swisher possessed a dangerous probability of achieving monopoly power in the nationwide market for non-tipped cigarillos?

A Yes. I'm of the view that they do.

Q Okay. You weren't here for the opening, but there was some to-do about an earlier iteration of your report having a big no under dangerous probability of monopoly. Did your report in fact say that?

A I'm aware that my earlier report did in the attachment, yes.

Q Did you explain during your deposition why it said no?

A Yes. We discussed it at deposition. It was essentially a formula that was implemented on page something hundred of my attachments, yet it was not meant to convey an opinion one way or the other.

APPENDIX J

Attachment B-1.

Estimates of U.S. Non-Tipped Cigarillo Market Volume

Year	Non-lipped Cigarillos in Top 100 [A]	All Products in Top 100 [B]	Non-Tipped Cigarillo Share [C]	All Products in Large Cigars [D]	All Non-Tipped Cigarillos [E]
2011	1,497,189,899	2,862,740,690	52.3%	4,095,234,632	2,141,774,120
2012	1,753,174,689	3,194,536,213	54.9%	4,438,832,778	2,436,049,791
2013	2,205,867,243	3,762,962,739	58.6%	4,941,206,716	2,896,559,651
2014	2,433,847,004	4,006,655,956	60.7%	5,244,585,897	3,185,828,735
2015	2,814,946,225	4,439,000,865	63.4%	5,652,476,557	3,584,459,213
Total	10,705,025,060	18,265,896,463	58.6%	24,372,336,580	14,244,671,510

Notes and sources:

[A] [B] Data are from Attachment E-2.

2011 data are estimated based on the CAGR from 2012-2015.

2015 data are adjusted by (12 / 10) to estimate annual values.

[C] = [A] / [B].

[A] [B] Data are from Attachment E-1.

2011 data are estimated based on the CAGR from 2012-2015.

2015 data are adjusted by (12 / 10) to estimate annual values.

[E] = [C] x [D].

APPENDIX K

From: Akrum Alrahib

Sent: October 25, 2012 03:27 PM

To: Jane Green

Subject: Splitarillo forecast till end of the year

Here is our breakdown.
3/99 3pk
Og 14,000 mc
100nat. 10,000 mc
G6 3,500 Da Bomb 1,500
Swag 1,000
Rozay 1,000

3/99 60's
Og 4,000
100nat 3,000

3/149 3pks
Og 6,000
100nat 4,000
G6 2,000
Da Bomb 1,000
Swag 500
Rozay 500

3/149 60's
Og 2,000
100nat 1,000
3for2 pks
Og 4,000
100nat. 2,500
G6 1,000
Da Bomb 750

Swag 500
Rozay 500

I need this order broken down into 9-11 ship dates if you can from now until the end of the year. The more I have spread out to offer wholesalers the more I can turn it quicker. Right now I am currently out of product and the order that we will receive is already pre sold. Thanks. Call me if you have any questions.

Trend Settah Inc.
AK

End of 2012 Production Forecast
TSI End of Dec Forecast

	3/99 Packs	3/99 60 ct	3/1.49 60 Pks	3/1.49 60 cts	3 for 2 Packs	
OG Sweet	16,000	3,000	6,000	1,000	2,000	
100 Natural	10,000	2,000	4,000	1,000	1,000	
G6 Grape	5,000		2,500		500	
Swagberry	2,000		1,000		250	
Rozay Wine	2,000		1,000		250	
Da Bomb Blueberry	3,000		1,500		250	
Total:	**38,000**	**5,000**	**16,000**	**2,000**	**4,250**	
						TOTAL
Cigars	68,400,000	12,000,000	28,800,000	4,800,000	7,650,000	121,650,000

1st Order

October 17th Order

	3/99 3 pks	3/99 60 ct	3 for 2s
OG Sweet	2,500	1,000	500
G6 Grape	1,000	200	64
Rozay Wine	500	150	
Swagberry	500	150	
Da Bomb Blueberry	500	200	
One Hundred Natural	1,500	1,000	250
Total:	**6,500**	**2,700**	**814**

Ship whatever you have please

2nd Order

	3/99 3 pks	3/99 60 ct	3/1.49 3 pks	3/1.49 60 ct	3 for 2s
OG Sweet	3,000	1,000	1,000	500	400
G6 Grape	1,200	300	500	100	200
Rozay Wine	500	200	200	100	100
Swagberry	500	200	200	100	100
Da Bomb Blueberry	500	200	200	100	100
One Hundred Natural	2,000	1,000	1,000	300	300
Total:	**7,700**	**2,900**	**3,100**	**1,200**	**1,200**

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APPENDIX L

Exhibit 10a Revised
Analysis of Monthly Order Deficit
TSI

January 2012 - February 2014

		Replication of Dr. McDuff's Attachment D-3		Correcting Order Calculations					
				Ordered			Received		
Year	Month	Ordered	Received	Branded	Bulk	Total	Branded	Bulk	Total
		(Cigarillos)							
		(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
2012	1	-	n/a	-	-	-	2,214,000	-	2,214,000
2012	2	28,660,000	5,983,200	13,852,333 [1]	-	13,852,333	5,983,200	-	5,983,200
2012	3	-	5,166,000	14,807,667 [1]	-	14,807,667	5,166,000	-	5,166,000
2012	4	20,700,000	4,108,800	-	-	-	4,108,800	-	4,108,800
2012	5	8,820,000	10,185,040	29,520,000 [2]	-	29,520,000	10,259,440	-	10,259,440
2012	6	35,496,000	11,592,600	13,140,000 [3]	-	13,140,000	11,592,600	-	11,592,600
2012	7	69,960,000	21,092,400	20,580,000 [4]	-	20,580,000	21,092,400	-	21,092,400
2012	8	16,000,000	21,530,040	53,700,000 [5]	3,920,400 [5]	57,620,400	17,609,640	-	17,609,640
2012	9	20,850,000	12,558,420	20,850,000	4,000,000 [5]	24,850,000	8,638,020	6,857,400	15,495,420

		Replication of Dr. McDuff's Attachment D-3		Correcting Order Calculations					
		Ordered	Received	Ordered			Received		
Year	Month			Branded	Bulk	Total	Branded	Bulk	Total
		----------	----------	----------	----------	(Cigarillos) ----------	----------	----------	----------
2012	10	129,650,000	26,530,800	12,522,794 [6]	8,000,000 [6]	20,522,794	18,690,000	3,920,400	22,610,400
2012	11	4,000,000	14,883,000	53,669,118 [6]	4,000,000	57,669,118	10,962,600	7,840,800	18,803,400
2012	12	-	4,150,860	55,458,088 [6]	-	55,458,088	4,150,860	3,920,400	8,071,260
2013	1	79,860,000	15,642,000	42,606,000 [7]	3,900,000 [7]	46,506,000	3,880,800	3,920,400	7,801,200
2013	2	16,000,000	16,251,000	27,468,000 [7]	16,000,000	43,468,000	8,892,000	11,761,200	20,653,200
2013	3	4,000,000	6,768,000	5,886,000 [7]	4,000,000	9,886,000	2,847,600	7,840,800	10,688,400
2013	4	-	13,024,800	-	-	-	5,184,000	3,920,400	9,104,400
2013	5	31,936,800	12,533,400	-	3,900,000 [8]	3,900,000	8,613,000	3,920,400	12,533,400
2013	6	13,000,000	11,058,000	10,036,800 [8]	4,000,000 [8]	14,036,800	7,137,600	3,920,400	11,058,000
2013	7	-	15,859,800	9,000,000 [8]	-	9,000,000	11,939,400	3,920,400	15,859,800
2013	8	4,000,000	14,289,600	9,000,000 [8]	4,000,000	13,000,000	10,369,200	7,840,800	18,210,000
2013	9	-	8,136,000	9,000,000 [8]	-	9,000,000	8,136,000	983,400	9,119,400
2013	10	35,323,200	13,683,600	8,323,200 [9]	-	8,323,200	13,683,600	-	13,683,600
2013	11	-	8,236,800	9,000,000 [9]	-	9,000,000	8,236,800	-	8,236,800
2013	12	-	4,123,800	9,000,000 [9]	-	9,000,000	4,123,800	-	4,123,800
2014	1	-	3,567,600	9,000,000 [9]	-	9,000,000	3,567,600	-	3,567,600
2014	2	-	2,184,270	-	-	-	2,184,270	-	2,184,270
(i)	**Totals:**	**518,256,000**	**283,139,830**	**436,420,000**	**55,720,400**	**492,140,400**	**219,263,230**	**70,567,200**	**289,830,430**
(ii)	**Total Deficit:**		**235,116,170**				**217,156,770**	**(14,846,800)**	**202,309,970**

APPENDIX M

From: Akrum Alrahib
Sent: Monday, December 31, 2012 11:30 AM
To: John Miller, Buzz, Salah Cpa
Subject: Jan 2013

John hope you are having a great holiday. I wish you nothing but success in the coming New Year. I am very puzzled as to how this year wrapped up. I thought we had a great insightful meeting together and that you would get back with me to let me know how TSI and Swisher will proceed. After you left a couple days later Jane tells me about an electrical problem. I have sent you numerous emails and have called Barry several times in order to try and get some kind of direction/explanation.

John, I have a team of employees that as of right now have no direction at all. I have over 300 wholesalers hounding and barking at me about Splitarillo product and when will they receive it.

I have Swisher reps in the marketplace going around telling wholesalers that we have cut off Splitarillos completely!!! And lastly I have products like Good Times and Show Cigars filling in my backorders and are gaining the traction and momentum that I started. (Not splitarillos or swisher)

I am counting on you as a FRIEND TO DO THE RIGHT THING!!! I really need to know where we stand and how to move forward. If you can call me or let me know that would be great.

Thanks and Happy New Year,

Trend Settah Inc
AK