NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GERMAN AUTOMOTIVE MANUFACTURERS ANTITRUST LITIGATION, ——————— AUDUBON IMPORTS, LLC, DBA Mercedes Benz of Baton Rouge; et al., Plaintiffs-Appellants, v. BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT, (BMW AG); et al., Defendants-Appellees.	No. 20-17139 D.C. No. 3:17-md-02796-CRB MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted October 22, 2021**
San Francisco, California

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,*** District Judge.

Appellants, a putative class of U.S. automobile dealers (the "Direct Purchasers"), appeal the district court's dismissal of their consolidated class action complaint alleging that five German automakers and their American subsidiaries violated § 1 of the Sherman Act, 15 U.S.C. § 1. We review the district court's decision de novo, *see Fayer v. Vaughn*, 649 F.3d 1061, 1063-64 (9th Cir. 2011), and we affirm.

To survive a challenge under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Direct Purchasers' complaint had to plead "enough facts to state a claim to relief that [was] plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint needed to answer "basic questions," like "who, did what, to whom (or with whom), where, and when?" *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008).

1. The district court properly dismissed the Direct Purchasers' claim alleging that Defendants engaged in a no-arms-race conspiracy to allocate market share. The Direct Purchasers' few specific examples of Defendants' alleged collusion were either devoid of factual development, pertinent to technology "used predominantly in passenger vehicles sold in Europe," or simply too narrow to establish "an overarching conspiracy" to "restrict innovation on all, or most, aspects of

*** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

vehicle development." Moreover, the allegations that Defendants coordinated major product updates and refreshes "could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy." *Kendall*, 518 F.3d at 1049; *see also In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193 (9th Cir. 2015) ("In an interdependent market, companies base their actions in part on the anticipated reactions of their competitors."). Dismissal of the Direct Purchasers' claim premised on a no-arms-race to allocate market share was therefore warranted.[1]

2. The district court properly dismissed the Direct Purchasers' claim alleging that Defendants conspired to pay higher prices for steel because the complaint did not plausibly allege a credible antitrust injury. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012). The Direct Purchasers alleged that they suffered antitrust injury in the form of inflated vehicle prices. But this overcharge theory is implausible because the Direct Purchasers have not alleged any facts suggesting that the price of Defendants' vehicles increased while the alleged steel conspiracy was in effect or decreased after it ended. *See Somers v. Apple, Inc.*, 729 F.3d 953, 964 (9th Cir. 2013)

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[1] We are not persuaded by the Direct Purchasers' argument that *Kendall* and *Musical Instruments* are inapposite because the district court did not allow limited discovery in this case. *See Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1177 (9th Cir. 2021) ("Our case law does not permit plaintiffs to rely on anticipated discovery to satisfy Rules 8 and 12(b)(6); rather, pleadings must assert well-pleaded factual allegations to advance to discovery.").

(rejecting a plaintiff's argument that she "suffered injury in the form of inflated music prices" because she did "not allege that Apple's music price changed"). Moreover, the allegation that steel manufacturers "experienced 'squeezing margins' after the alleged conspiracy was exposed does not support the Direct Purchasers' claim, particularly given that the market for steel is distinct from the market alleged in this case.

The complaint's remaining allegations do not give rise to a plausible inference that the alleged steel conspiracy caused the Direct Purchasers to suffer antitrust injury. These allegations "could just as easily suggest rational, legal business behavior," *Kendall*, 518 F.3d at 1049, or are too speculative to support a plausible antitrust injury, *see Name. Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1131 (9th Cir. 2015) (declining to "infer a conspiracy based on speculation"). Thus, dismissal of the Direct Purchasers' claim based on an alleged steel conspiracy was proper.

3. The district court properly dismissed the Direct Purchasers' claim alleging that Defendants conspired to not develop electric vehicles. The complaint acknowledges that three Defendants "launched plug-in/hybrid vehicles" while the alleged conspiracy was in effect. And the complaint alleges a benign explanation for Defendants' conduct: "Defendants had already invested heavily in diesel engines" when the demand for low-emission vehicles began to rise. *See Name.Space, Inc.*, 795 F.3d at 1130 ("We cannot . . . infer an

anticompetitive agreement when factual allegations just as easily suggest rational, legal business behavior." (internal quotation marks omitted)).

The Direct Purchasers' references to purported "plus factors" do not save their § 1 claim from dismissal. Contrary to the Direct Purchasers' argument, "common motive does not suggest an agreement." *Musical Instruments*, 798 F.3d at 1194. Defendants' conduct does not constitute an "extreme action against self-interest" because, as the complaint observes, a non-conspirator did not release its first all-electric vehicle until 2018. *Id.* at 1195 ("[E]xtreme action against self-interest . . . may suggest prior agreement [if] . . . individual action would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such an agreement."). Defendants' participation "in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement." *Id.* at 1196. And the Direct Purchasers offer no explanation for how alleged violations of European law, arising from cars sold in Europe, render their claims under American law and relating to cars sold in the United States plausible. Indeed, no well-pleaded facts suggest that Defendants' conduct in Europe affected American commerce. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."). Dismissal of the Direct

Purchasers' claim premised on an alleged agreement to not develop electric vehicles was proper.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: GERMAN AUTOMOTIVE MANUFACTURERS ANTITRUST LITIGATION /	MDL No. 2796 CRB (JSC).
This Order Relates To: Dkt. Nos. 321, 339, 340, 341, 345, 377. /	**ORDER RE: DEFENDANTS' MOTIONS TO DISMISS** (Filed June 17, 2019)

Consumers and auto dealers have filed two related consolidated class actions against the five leading German car manufacturers—Audi AG, BMW AG, Daimler AG, Porsche AG, and Volkswagen AG ("VW AG")—and their American subsidiaries. Plaintiffs allege that since the mid-1990s, Defendants have colluded to restrain trade in ways that constitute per se violations of the Sherman Act and that violate various state laws. Defendants have moved to dismiss the claims. Finding the allegations currently insufficient to state a claim, the Court GRANTS Defendants' joint motion to dismiss, with leave to amend. The Court DENIES the German Defendants' separate motions to dismiss for lack of personal jurisdiction.

I. BACKGROUND[1]

As alleged, U.S. consumers and auto dealers have been overpaying for Audi, BMW, Mercedes, Porsche, and Volkswagen cars for over twenty years. They have paid premiums for "German engineering," a phrase that is synonymous with innovation and exceptional performance, but they have received something less.

Plaintiffs claim that in the mid-1990s, Defendants started intentionally slowing down the pace of innovation. (IPP ¶¶ 123, 139, 183; DPP ¶¶ 2, 76.) Doing so resulted in their cars having "fewer features and reduced performance." (IPP ¶ 5.) Defendants took this approach, Plaintiffs maintain, in order to "reduce production costs" and "avoid[] price and technology wars." (DPP ¶¶ 76, 81; *see also* IPP ¶ 92.) All the while they continued to charge premiums for cutting edge technology and engineering. (IPP ¶¶ 6, 92; DPP ¶¶ 68-69, 76.)

At least 200 employees are alleged to have participated in the agreement to reduce innovation, meeting for decades in dozens of working groups and at trade association events. (IPP ¶¶ 123, 129, 196; DPP ¶¶ 77-79.) Since 2011 alone, at least 1,000 meetings in furtherance of the agreement have purportedly taken place. (IPP ¶ 123; DPP ¶ 77.)

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[1] Citations to "IPP ¶" and "DPP ¶" are respectively to the indirect purchaser plaintiffs' and the direct purchaser plaintiffs' complaints. (Dkt. Nos. 241, 244.) The IPPs are U.S. consumers; the DPPs are U.S. auto dealers.

All sorts of vehicle components are claimed to have been covered by the agreement (e.g., brake controls, chassis, electronics, gas and diesel engines, clutches, transmissions, exhaust systems, and drivetrains (IPP ¶¶ 123, 131; DPP ¶ 86)), although only two examples are explained in any detail in the complaints.

Soft-top convertibles. Minutes from a meeting in Bad Kissingen, Germany document that Defendants discussed the cost, safety, weight, and technical risks of soft-top convertibles and then collectively agreed that their soft-top convertible roofs should only be allowed to open and close at vehicle speeds below 50 kilometers (or 31 miles) per hour. (IPP ¶ 138.) In memorializing this agreement, Defendants allegedly noted that there should be "[n]o arms race when it comes to speeds for [soft-top convertibles]." (*Id.* (alterations in complaint).)

AdBlue tanks. As explained in the complaints, AdBlue is a substance that is used to breakdown emissions from diesel engines into less harmful compounds. (IPP ¶ 145; DPP ¶ 102.) It became popular in the early 2000s when Defendants started marketing their diesel cars as fuel-efficient alternatives to electric and hybrid cars. (IPP ¶¶ 144-45.) With the use of AdBlue burgeoning, Defendants reportedly determined that they could save up to 20ac80 per car by agreeing on a standard tank size. (IPP ¶ 150.) They first agreed, in or around 2006, to only use AdBlue tanks that were between 17 and 23 liters. (IPP ¶¶ 149, 151.) Several years later they shifted to smaller, 8-liter tanks after their marketing departments touted the cost savings of smaller

tanks and the benefits of having more space in the cars for passengers, cargo, and equipment. (IPP ¶¶ 148, 152.) Eight-liter tanks were then ditched in favor of 16-liter tanks after Defendants learned in 2010 that new U.S. regulations would soon require tanks to contain enough AdBlue to last for 10,000 miles before needing to be refilled. (IPP ¶¶ 153-55.) Even the 16-liter tanks were not large enough to meet U.S. standards, according to the IPP complaint. (IPP ¶ 153.) But Plaintiffs maintain that Defendants agreed to use 16-liter tanks despite knowing this. Documents purportedly reflect that VW AG encouraged the others to stick with the 16-liter tanks despite regulatory concerns (IPP ¶ 159) and Audi AG cautioned against a potential "arms race with regard to tank sizes," which "we should continue to avoid at all costs" (IPP ¶ 160).

The European investigation. The above allegations, like most others in the complaints, are based largely on articles that were published in the German news magazine *Der Spiegel*. In the summer of 2017, *Der Spiegel* reported that the European Commission's competition department ("ECC") and Germany's Federal Cartel Office were investigating "allegations of an antitrust cartel among the Defendants." (IPP ¶¶ 119-20.) As Plaintiffs note, ECC investigations only proceed when there are "reasonable indications of a likely infringement" of competition laws. (IPP ¶ 112 (quoting Antitrust Manual of Procedures, EUROPA.EU, 102-109 (March 2012), *Opening of Proceedings, Conditions for Opening of Proceedings*).)

VW AG and Daimler AG reportedly submitted proffers to the ECC as part of the agency's leniency program. (IPP ¶¶ 113-14, 121; DPP ¶¶ 111-12.) In VW AG's proffer, it admitted (1) that "Daimler, BMW, Volkswagen, Audi and Porsche made agreements 'for many years, at least since the 1990s, up to today' about the development of their vehicles, costs, suppliers and markets;" (2) that Defendants "discussed vehicle development, brakes, petrol and diesel engines, clutches and transmissions as well as exhaust treatment systems;" (3) that there had been an "exchange of internal, competitively sensitive technical data;" (4) that Defendants had jointly established "technical standards" and agreed to use "only certain technical solutions" in new cars; and (5) that "behavior in violation of cartel law" may have occurred. (IPP ¶ 124.)

Plaintiffs assert that by seeking leniency from the ECC, VW AG and Daimler AG effectively "admitted the existence of a secret cartel." (IPP ¶ 118; *see also id.* ¶ 115 ("Leniency is not available for lesser anti-competitive infringements, nor is it available to a company that claims it did not participate in a cartel." (citing *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, OFFICIAL JOURNAL OF THE EUROPEAN UNION (Aug. 12, 2006), Introduction ¶ 1)).) In October 2017, following VW AG's and Daimler AG's proffers and in connection with the ECC's investigation, the ECC conducted "dawn raids" in Germany at several of Defendants' headquarters, including the headquarters of BMW AG, Daimler AG, and VW AG. (IPP ¶ 120; *see also* DPP ¶ 114.)

The investigation is narrowed. In September 2018, after Plaintiffs had filed their complaints in this action, the ECC announced in a press release that the scope of its investigation was changing.[2] The ECC explained in the press release that its investigation had not unearthed a vehicle-wide conspiracy to restrain technological development, but that it would be opening an in-depth investigation into one issue: whether Defendants "colluded, in breach of EU antitrust rules, to avoid competition on the development and roll-out of technology to clean the emissions of petrol and diesel passenger cars." (Dkt. No. 377-3 at 2 (emphasis omitted).) The ECC announced that specifically it would be examining whether Defendants colluded to limit the development and roll-out (i) of "selective catalytic reduction ('SCR') systems to reduce harmful nitrogen oxides emissions from passenger cars with diesel engines," and (ii) of "Otto particulate filters ('OPF') to reduce harmful particulate matter emissions from passenger cars with petrol engines." (*Id.* (emphasis omitted).)

In its press release, the ECC emphasized that its formal investigation would concern "solely the emissions control systems" just identified. (*Id.*) Referring to Defendants as the "circle of five," the Commission

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[2] Defendants filed a copy of that press release (*see* Dkt. No. 377-3) and the Court takes judicial notice of its contents as information that is from a source "whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The Court will not consider Defendants' supplemental briefing on the press release (*see* Dkt. No. 377), as Defendants did not seek the Court's leave before filing the brief, as required. *See* Civil L.R. 7-3(d).

explained that although Defendants had also exchanged other technical information and had cooperated on other areas of vehicle development, there was no reason to believe that those exchanges were unlawful:

> [In addition to emissions control systems,] [n]umerous other technical topics were discussed, including common quality requirements for car parts, common quality testing procedures or exchanges concerning their own car models that were already on the market. The "circle of five" also had discussions on the maximum speed at which the roofs of convertible cars can open or close, and at which the cruise control will work. Cooperation also extended to the area of crash tests and crash test dummies where the car companies pooled technical expertise and development efforts to improve testing procedures for car safety.
>
> At this stage the Commission does not have sufficient indications that these discussions between the "circle of five" constituted anticompetitive conduct that would merit further investigation. EU antitrust rules leave room for technical cooperation aimed at improving product quality. The Commission's in-depth investigation in this case concerns specific cooperation that is suspected to have aimed at limiting the technical development or preventing the roll-out of technical devices.

(*Id.*)

Other agreements. Plaintiffs allege that Defendants reached other anti-competitive agreements in addition to their agreement to reduce innovation.

- *Price fixing.* Plaintiffs claim that Defendants agreed to "artificially fix, raise, stabilize, and control prices" for their cars in the United States. (*E.g.*, IPP ¶ 261.) No specifics on this agreement are offered.

- *Agreements on suppliers.* Defendants allegedly agreed to use the same suppliers for certain vehicle components. Three concrete examples are offered in the complaints. In or around 2006, Defendants agreed that, if possible, AdBlue tanks should be produced by only two manufactures. (IPP ¶ 156.) In 2011, one of Defendant's managers explained to a working group that Defendants needed to select the same supplier for diesel-motor sensors. (IPP ¶ 142.) And in 2013, one of Defendants' working groups reviewed and criticized the performance of a shared supplier of suspension equipment. (IPP ¶ 141.)

- *Agreement on steel purchases.* Starting in the 1990s, Plaintiffs contend that Defendants and German steel manufacturers began using a shared pricing formula for steel purchases. (IPP ¶ 169.) The formula set a fixed long-term price for raw steel and a variable price, based on a selected price index, for scrap steel, precious metals and alloys—three materials that are combined with raw steel to build cars. (IPP ¶¶ 166, 169; DPP ¶ 91.) The formula helped bridge a divide between Defendants

and the steel manufacturers: Defendants wanted long-term contracts with fixed, predictable costs to effectively set car model prices, while steel manufacturers wanted short-term contracts that could be adjusted to account for fluctuations in the markets for these materials. (IPP ¶¶ 167-68; DPP ¶ 90.) Defendants apparently stopped using the variable index in 2015, after European officials began investigating anticompetitive conduct in the German steel industry. (IPP ¶ 175.) But soon after that decision, Plaintiffs submit that Defendants started communicating about setting up a replacement index. (IPP ¶¶ 175-76.)

- *Agreement to fund scientific studies.* As alleged, Defendants sponsored now-debunked scientific studies that were aimed at promoting their diesel vehicles. (IPP ¶ 178.) Plaintiffs claim that the studies were flawed because they purported to show that new German-made diesel cars had low emissions, but at least some of those cars used emissions cheating software and were not in fact clean or safe for human health. (IPP ¶¶ 178-82.)

Both the IPPs and DPPs assert that through the conduct described above Defendants have violated § 1 of the Sherman Act. The IPPs also assert that Defendants have violated various state antitrust, unfair competition, consumer protection, and unfair trade practices laws, and have triggered certain state unjust enrichment and disgorgement statutes. The IPPs and DPPs seek to bring class actions respectively on behalf of all persons and U.S.-based car dealers that, since the

mid-1990s, bought or leased in the United States one or more new passenger cars manufactured or sold by Defendants. (IPP ¶¶ 4, 10, 245; DPP ¶ 129.)

After the complaints were filed, Defendants filed a joint motion to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6); (Dkt. No. 321). The German Defendants (Audi AG, BMW AG, Daimler AG, Porsche AG, and VW AG) also filed individual motions to dismiss for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2); (Dkt. Nos. 339, 340, 341, 345).

II. LEGAL STANDARDS

At the pleading stage, plaintiffs in civil proceedings must make "a prima facie showing" of personal jurisdictional over the defendants. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011) (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010)). They cannot rely on "bare allegations" in doing so, but "uncontroverted allegations in the complaint must be taken as true." *Id.* (citation omitted). If a prima facie case is made, the burden shifts to the defendants to "present a compelling case" for why the exercise of jurisdiction would be unreasonable. *Id.* at 1079 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 477-78 (1985)).

The complaints must also include factual allegations that, if true, would plausibly support a claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-57 (2007). In the antitrust context, the Ninth Circuit has

explained that the facts that count in this assessment are "evidentiary facts." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Evidentiary facts are those that can answer the questions "who, did what, to whom (or with whom), where, and when." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194, n.6 (9th Cir. 2015) (quoting *Kendall*, 518 F.3d at 1047).

Unlike evidentiary facts, legal conclusions and conclusory facts will not be accepted as true. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). When the nonconclusory facts are accepted, they "must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

III. PERSONAL JURISDICTION

The Court first considers the German Defendants' motions to dismiss for lack of personal jurisdiction. Audi AG, BMW AG, Daimler AG, Porsche AG, and VW AG are German corporations. They also allegedly made the agreements at issue in Germany. Because they are foreign companies and the challenged conduct occurred abroad, they argue that this Court lacks personal jurisdiction over them.

In a federal antitrust case, a district court may not enter a binding judgment against a defendant that has

insufficient contacts with the United States. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (general standard); *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (applied in antitrust context). Where, as here, the defendants are not "at home in the forum," *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), personal jurisdiction will be appropriate only if they "purposefully direct[ed] [their] activities" at the forum or "purposefully avail[ed] [themselves] of the privilege of conducting activities in the forum," *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

During the relevant period, the German Defendants purposefully directed their activities at the United States. Through subsidiaries that they established in the United States, they annually sold hundreds of thousands of cars to auto dealers and consumers in this country. (DPP ¶¶ 16-18, 20-22, 25-26, 28-32, 34-36.) They designed their cars to meet federal and state motor vehicle regulations. (DPP ¶ 126; IPP ¶¶ 153-55 (alleging that Defendants chose to use larger AdBlue tanks in their U.S.-bound cars than in their Europe-bound cars because of U.S. emission standards).) Their executives publicly noted that the U.S. market was one of the "most important," a "core region," a "strategic pillar," a "very high priority," and a "second home." (Opp'n, Dkt. No. 362 at 22, 26, 29-30, 32, 34 (quoting annual reports, press releases, and

statements at annual meetings.)[3] Indeed, they allegedly made billions of dollars selling their cars in the United States. (DPP ¶ 55.)

The German Defendants, in short, targeted the United States as a market for their cars; and because the claims at issue are tied to the cars that they indirectly sold in the United States, personal jurisdiction over them is appropriate. Two well-known Supreme Court decisions support this conclusion.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court held that an Oklahoma court could not exercise personal jurisdiction "over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma [was] the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma." *Id.* at 287. In reaching that holding, the Court took care to distinguish the facts before it from a scenario that would have given rise to personal jurisdiction over the nonresident defendants:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not

[3] The Court may consider evidence presented outside the pleadings in assessing personal jurisdiction. *See Dole Food Co. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002).

> unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id. at 297.

Relying in part on *World-Wide Volkswagen*, a plurality of the Court in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), concluded that a Japanese valve manufacturer's "mere awareness" that its valves would reach the forum State "in the stream of commerce" after it sold the valves to a Taiwanese tire manufacturer was insufficient to support that the valve manufacturer "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Id.* at 105, 109, 112-13 (O'Connor, J.). But the plurality explained that certain "[a]dditional conduct," if present, could have established the "substantial connection between the defendant and the forum State necessary for a finding of minimum contacts":

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State [and support personal jurisdiction.] [F]or example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

Id. at 112 (citation omitted).

The facts that were absent in *World-Wide Volkswagen* and *Asahi*, but which the Supreme Court noted could support personal jurisdiction over a foreign defendant, are sufficiently alleged here. During the over 20 year conspiracy that is claimed, Plaintiffs submit that more than 20 million of the German defendants' cars were sold in the United States (DPP ¶ 54)—far from "simply an isolated occurrence." *World-Wide Volkswagen*, 444 U.S. at 297. And those 20 million cars didn't simply arrive in the United States through "the stream of commerce." *Asahi*, 480 U.S. at 112. The German defendants "establish[ed] channels for . . . marketing [their] product[s] . . . in the [United States]" (*see* IPP ¶¶ 53-66; DPP ¶¶ 40-43), and they "design[ed] [their] product[s] for the market in the [United States]" (*see* IPP ¶¶ 153-55; DPP ¶ 126). *Asahi*, 480 U.S. at 112.[4]

It is an "unexceptional proposition" that when a foreign manufacturer "seek[s] to serve a given . . . market," the manufacturer may be subject to the jurisdiction of courts within that market even "without entering the forum." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (plurality). Given the German Defendants' efforts to target the U.S. market (and the success they had), this Court "has the power to

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[4] In *Williams v. Yamaha Motor Co.*, 851 F.3d 1015 (9th Cir. 2017), a case on which the German Defendants rely, there were no allegations that the Japanese defendant, Yamaha Motor Co. Ltd., had designed the defective boat motors at issue for sale in the forum state of California. The Ninth Circuit's conclusion that personal jurisdiction was lacking over the foreign defendant there, even though its U.S. subsidiary sold the motors in California, *id.* at 1022-25, is thus not controlling.

subject [them] to judgment concerning that conduct." *Id.* at 884; *see also Schwarzenegger*, 374 F.3d at 802 (explaining that personal jurisdiction exists when a foreign defendant directs his activities at the forum, the claim arises from that forum-directed conduct, and the exercise of jurisdiction is otherwise reasonable).

Plaintiffs have made a prima facie showing of personal jurisdiction. The burden accordingly shifts to the German Defendants to "present a compelling case" for why the exercise of jurisdiction would be unreasonable. *CollegeSource*, 653 F.3d at 1079 (quoting *Burger King*, 471 U.S. at 477); *see also Asahi*, 480 U.S. at 113-15. They have not met this burden.

Defendants first assert that the European Union and Germany have sovereign interests in adjudicating this matter, as it involves German companies, German witnesses, and conduct in Germany. They argue that the exercise of jurisdiction here would conflict with those sovereign interests. A conflict with "the sovereignty of the defendant's state" is a factor that courts consider in determining whether the exercise of personal jurisdiction is reasonable. *CollegeSource*, 653 F.3d at 1079 (*Dole Food*, 303 F.3d at 1114). But Defendants have not persuaded the Court that such a conflict exists. While Germany and the European Union are investigating Defendants' actions, Plaintiffs bring their cases for violations of U.S. antitrust laws based on conduct that is tied to the United States. This Court will not interfere with the sovereign interests of Germany and the European Union by

considering whether Defendants violated U.S. law and harmed U.S. consumers.

The German Defendants next note that hundreds of their employees are alleged to have been involved in the agreements in question and most (if not all) of those employees are located in Germany. If litigation in this forum continues, the German Defendants argue that the burdens will be significant, as witnesses and attorneys will need to shuttle back and forth between the United States and Europe. Inconveniences of the type asserted "will not overcome clear justifications for the exercise of jurisdiction" unless they are "so great as to constitute a deprivation of due process." *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1481 (9th Cir. 1986). At this stage, the Court cannot conclude that the identified inconveniences are of this magnitude. If Plaintiffs' cases move forward and the travel and expense burdens that are forecasted crystalize, the German Defendants may renew their inconvenience argument at a later date. *See IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 116 n.5 (D.D.C. 2018) (noting that "jurisdictional issues, like merits issues, are adjudicated in stages" and considering a Rule 12(b)(6) motion after determining that the plaintiffs made out a prima facie showing of personal jurisdiction).

Plaintiffs have made a prima facie showing of personal jurisdiction and the German Defendants have not presented a compelling case for why the exercise of jurisdiction would be unreasonable. The Court thus concludes that it has personal jurisdiction over the

German Defendants for Plaintiffs' Sherman Act claims. Under the doctrine of pendent personal jurisdiction, the Court also exercises jurisdiction over the German Defendants for Plaintiffs' state law claims, which are based on the same operative facts as their Sherman Act claims. *See CollegeSource*, 653 F.3d at 1076 (citing *Action Embroidery*, 368 F.3d at 1180-81). The German Defendants' motions to dismiss for lack of personal jurisdiction are DENIED.

IV. SHERMAN ACT CLAIMS

Section 1 of the Sherman Act forbids competitors from entering into agreements that unreasonably restrain trade. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Multiple anticompetitive agreements are claimed here, although the principal focus is on an agreement by Defendants to reduce innovation.

If Defendants agreed to what is alleged—"a *de facto* whole car conspiracy" to reduce innovation (Opp'n Dkt. No. 360 at 20)—that agreement plausibly would have violated § 1. Plaintiffs maintain that the innovation-reducing agreement resulted in Defendants' cars having "fewer features and reduced performance." (IPP ¶ 5.) An agreement "to make a product of inferior quality . . . count[s] as [an] output reduction," Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1901d (3rd & 4th Eds., 2018 Cum. Supp. 2010-2017), and agreements to restrict output are per

se illegal under § 1, *see Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 & n.21 (1984).

The question is whether the well-pled allegations plausibly support the output reducing agreement that is claimed. After considering that question next, the Court will later address the other agreements that are described in the complaints.

A. Agreement to Reduce Innovation

The complaints identify two instances in which Defendants reached consensus on vehicle specifications. As alleged, they agreed not to manufacture convertibles with roofs that opened when the cars were traveling above a particular speed, and they agreed to use the same sized AdBlue tanks in their diesel-engine cars.

Neither of these is a compelling example of an agreement "to make a product of inferior quality." Areeda & Hovenkamp ¶ 1901d. The complaints do not suggest that consumers even want convertibles with roofs that open at speeds above 31 miles per hour, the chosen limit; and common sense suggests that there are safety reasons for why consumers would *not* want that feature. It's also not clear if the selected 16-liter AdBlue tanks were inferior to larger tanks. Larger tanks would have needed to be refilled less often, but they also would have taken up more space in the cars, as Defendants recognized. (IPP ¶¶ 148, 152.)

Even assuming, though, that the convertible and AdBlue tank agreements reduced innovation and resulted in inferior cars, those two examples are not enough to support a "*de facto* whole car conspiracy" to reduce innovation. The two examples relate to niche vehicle features that are only found in a small subset of Defendants' cars. Only two of 37 named IPPs allege that they purchased a convertible (IPP ¶¶ 34, 44), and only one alleges that he purchased a diesel-engine car (*id.* ¶ 26). To maintain lawsuits against Defendants on behalf of almost everyone in the United States who has purchased one of their cars (of any model type) over the past 20 years, more is needed.

To support the broader agreement that they allege, Plaintiffs rely heavily on VW AG's admissions to European antitrust authorities. To review, Plaintiffs allege that VW AG admitted to the ECC that:

1. "Daimler, BMW, Volkswagen, Audi and Porsche made agreements 'for many years, at least since the 1990s, up to today' about the development of their vehicles, costs, suppliers and markets;" that
2. Defendants "discussed vehicle development, brakes, petrol and diesel engines, clutches and transmissions as well as exhaust treatment systems;" that
3. there had been an "exchange of internal, competitively sensitive technical data;" that

4. Defendants jointly established "technical standards" and agreed to use "only certain technical solutions" in new vehicles; and that

5. "behavior in violation of cartel law" may have occurred.

(IPP ¶ 124.)

These admissions may seem significant at first glance, but it is hard to make much of them when they are examined more closely. The first admission is vague. That Defendants made agreements for many years "about the development of their vehicles, costs, suppliers and markets" says little about the scope of those agreements, and says nothing about the alleged agreement to reduce innovation.

The second admission is similar. VW AG admitted that Defendants "discussed vehicle development," but there is no indication of what those discussions entailed. More detail is needed because a discussion among competing auto manufacturers about brakes, or about any of the other identified car parts, need not be anticompetitive. *See Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (explaining that collaboration among competitors can "reduce costs, facilitate innovation, eliminate duplication of efforts and assets, and share risks that no individual member would be willing to undertake alone"); FTC & Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 1 (2000) (noting that "to compete in modern markets, competitors sometimes need

to collaborate," and that collaboration may "not only [be] benign but procompetitive").

The third, fourth, and fifth admissions do a bit more for Plaintiffs. An "exchange of internal, competitively sensitive technical data" among Defendants may have been anti-competitive and, as VW AG appears to have acknowledged, may have violated European cartel law. Defendants' agreement to use "'only certain technical solutions' in new vehicles" also sounds similar to an agreement to reduce innovation. Yet even these allegations lack important specificity.

For one thing, European and American antitrust laws are not uniform, so Defendants' possible violation of European cartel law does not necessarily mean that they violated the Sherman Act. *See* D. Daniel Sokol, *Troubled Waters Between U.S. and European Antitrust*, 115 Mich. L. Rev. 955, 970 (2017) (explaining that "European case law and enforcement on information sharing [among competitors] is more aggressive than the United States").

Even more importantly, an agreement to only use certain technical solutions is not the same as an agreement to reduce product quality. The former may be equivalent to "standard setting," which "serves many useful ends, such as protecting consumers from inferior goods, increasing compatibility among products that must be interchangeable with the products of other manufacturers, or focusing customer comparison on essential rather than nonessential differences." Areeda & Hovenkamp ¶ 2136a. For these reasons,

"most instances of standard setting . . . are lawful." *Id.* It is not appropriate to infer that Defendants reached a per se illegal agreement to reduce product quality, which is what Plaintiffs allege, simply because they agreed to exchange "competitively sensitive technical data" and to use "only certain technical solutions."

Also of significance, VW AG's admissions do not identify the specific types of competitively sensitive technical data that Defendants exchanged, or the technical solutions to which Defendants agreed. Maybe those exchanges and technical solutions touched on many different areas of vehicle development, as Plaintiffs allege. But it is also possible that the exchanges were more limited in scope. Indeed, perhaps the exchanges and technical solutions related only to the speed at which soft-top convertibles open and the size of AdBlue tanks, the two examples that Plaintiffs have identified in their complaints.

VW AG's admissions to European antitrust authorities, in short, are too general and too vague to plausibly support the broad agreement to reduce innovation that Plaintiffs allege.

Other allegations require even more speculation. For example, putting aside VW AG's admissions, Plaintiffs argue it is significant that the ECC is investigating Defendants' coordinated activities. But courts in this district have explained that government antitrust investigations ordinarily carry "no weight in pleading an antitrust conspiracy," for it is "unknown whether the investigation[s] will result in indictments or

nothing at all." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007); *see also In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1064 (N.D. Cal. 2015).

The ECC investigation at issue proves why this skepticism is well founded. Since Plaintiffs filed their complaints, the scope of that investigation has narrowed significantly. The ECC was initially investigating whether Defendants had unlawfully colluded on numerous areas of vehicle development. But having determined from its initial investigation that Defendants' collaboration was mostly akin to standard setting, the ECC is now only looking into whether Defendants colluded on the development of certain emissions technologies. (*See* Dkt. No. 377-3 at 2.) That targeted investigation into one area of vehicle development does little to support a "whole car conspiracy" to reduce innovation.

Some allegations in the complaints do support the expansive agreement to reduce innovation that is claimed, but these allegations are not well pled. For example, Plaintiffs allege that the innovation-reducing agreement covered "almost all areas of automotive development." (DPP ¶ 86 (emphasis omitted); *accord* IPP ¶ 131.) Absent are evidentiary facts supporting this allegation. It is a conclusory factual statement and will not be accepted as true. *See Iqbal*, 556 U.S. at 678-79.

Allegations about how Defendants used working groups and trade associations to further their "whole car conspiracy" also lack sufficient detail. Although the

IPPs spend more than a dozen pages of their complaint discussing these working groups and trade associations, they almost never identify what was agreed to in these meetings and instead only vaguely refer to "clandestine agreements to limit technological innovation." (IPP ¶ 129.) More facts are needed to plausibly support that Defendants used working groups and trade associations to reach the broad anticompetitive agreement that is alleged. *See In re Musical Instruments*, 798 F.3d at 1196 ("[M]ere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement.").

As the Supreme Court noted in *Twombly*, antitrust discovery can be "sprawling, costly, and hugely time-consuming," and can "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 559 & n.6. These concerns are at play here. Plaintiffs propose two class actions that would include almost every purchaser and dealer of German cars in the United States over the past 20 years. Discovery would require Defendants to search through decades of information; and because Plaintiffs allege that Defendants' agreement covered most (if not all) areas of vehicle development, discovery would reach into almost every nook and cranny at five giant automakers.

With the potential for such a massive and expensive factual investigation, the Court "retain[s] the power to insist upon some specificity in pleading." *Id.* at 558 (citation omitted). Before Plaintiffs are allowed to pursue such a broad antitrust claim, they must do

more than point to a European antitrust investigation (the scope of which is now much narrower than Plaintiffs' claims), two examples of agreements by Defendants to use certain technical standards, and Defendants participation in working groups and trade associations. Even when viewed together, these allegations do not plausibly support that Defendants reached a "*de facto* whole car conspiracy" to reduce innovation.[5]

B. The Other Agreements

While the principal focus of the complaints is on the asserted agreement to restrain innovation, Plaintiffs also allege that Defendants violated § 1 by (i) fixing prices, (ii) agreeing to only use certain part suppliers, (iii) using a shared pricing formula for steel purchases, and (iv) jointly funding now-debunked scientific studies that were aimed at promoting their diesel cars. The allegations do not support these claims.

No factual allegations support price fixing. Plaintiffs simply state in the Claims for Relief sections of their complaints that Defendants "agree[d] to fix, increase, maintain and/or stabilize prices of German Automobiles sold in the United States." (DPP ¶ 153; *see*

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[5] As the Court reads the complaints, Plaintiffs do not offer the soft-top convertible and AdBlue tank allegations in support of separate, component-level Sherman Act claims. They instead offer those allegations to support the broader "whole car conspiracy" to reduce innovation that is claimed. The Court, then, will not separately consider whether the soft-top convertible and AdBlue tank agreements would plausibly violate the Sherman Act on their own.

also IPP ¶ 261 (Defendants "entered into a continuing agreement . . . to artificially fix, raise, stabilize, and control prices for new German Passenger Vehicles in the United States"). These are conclusory statements and will not be accepted as true. *See Iqbal*, 556 U.S. at 678.

For the other three agreements, even if they were reached it is unclear how Plaintiffs were injured by them. If, as is alleged, the five leading German car makers agreed to coordinate their purchases of car parts and steel, the prices they paid for those inputs would presumably have dropped. *See*, *e.g.*, Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1178 (2001) ("If, for example, many buyers in the relevant market participate in a purchasing joint venture, the venture is more likely to give those buyers the clout to lower their purchasing costs."); Areeda & Hovenkamp ¶ 2135b (explaining that the most common purpose of "joint purchasing arrangements" is "to obtain lower prices on more favorable terms"). Lower input prices would likely have benefited car purchasers, not harmed them. *See* John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. Rev. 1485, 1505 n.75 (2012) (noting that "[l]ower input prices generally yield lower prices and greater output of end products" (quoting Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 Antitrust Bull. 1, 4 (1991))).

Plaintiffs claim that they were harmed because any savings from the car-part and steel supplier

agreements were not passed on to them. (*See*, *e.g.*, DPP ¶ 87 (alleging that with respect to the steel-purchasing agreement, "Defendants pocketed the cost savings and did not pass along a single cent to the Dealer Plaintiffs").) That result would have been odd, as "[a] firm will normally pass on some portion of its cost-per-unit savings to consumers even if it is a profit-maximizing monopolist." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145 n.11 (9th Cir. 2003). But in any event, Plaintiffs do not explain why Defendants were required to pass on their cost savings. If Defendants had collectively agreed that none of them would share cost savings with consumers, then perhaps that agreement would have unreasonably restrained trade and harmed consumers. But the complaints do not include any factual allegations supporting such an agreement.

As for Defendants funding of now-debunked studies on diesel emissions, Plaintiffs do not explain how they were injured or how trade was restrained by this conduct. They do not allege that these scientific studies affected the price of their cars or that they relied on these studies in purchasing their cars; nor do they dispute that the principal study discussed in the IPP complaint was never published. (*See* Joint Mot., Dkt. No. 321 at 41 n. 17.)

To support a Sherman Act claim, a private plaintiff must "allege some credible injury caused by the [challenged] conduct." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1056 (9th Cir. 1999). The nonconclusory, evidentiary facts in the complaints do not support a credible injury to Plaintiffs resulting

from Defendants' agreements regarding part suppliers, steel purchases, and scientific studies.

* * *

The well-pled allegations do not plausibly support any of the anticompetitive agreements that are alleged. The Court accordingly GRANTS Defendants' joint motion to dismiss Plaintiffs' Sherman Act claims. Having reached that conclusion, the Court need not consider other arguments for dismissal of the Sherman Act claims that Defendants have raised.

V. STATE LAW CLAIMS

In addition to their Sherman Act claims, the IPPs also assert that Defendants violated various state laws. The factual bases and theories of injury for these claims are the same as those for the Sherman Act claims. Like the Sherman Act claims, then, the state law claims are not well pled. Having reached that conclusion, the Court will not consider additional claim-specific arguments that Defendants have made for dismissal of the state law claims. Their joint motion to dismiss the state law claims is GRANTED.

VI. CONCLUSION

Plaintiffs have not stated a claim for relief. It is not a certainty, however, that they cannot allege facts sufficient to address the identified deficiencies. The Court thus grants them leave to amend their complaints. To the extent that they choose to do so, they

must file their amended complaints within 45 days of this Order.

IT IS SO ORDERED.

Dated: June 17, 2019

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: GERMAN AUTOMOTIVE MANUFACTURERS ANTITRUST LITIGATION /	MDL No. 2796 CRB (JSC)
This Order Relates To: Dkt. Nos. 391, 392, 409, 410, 411 /	**ORDER RE: DEFENDANTS' MOTIONS TO DISMISS** (Filed Mar. 31, 2020)

Consumers and auto dealers ("IPPs" and "DPPs," respectively) have filed two related consolidated class actions against the five leading German car manufacturers—Audi AG, BMW AG, Daimler AG, Porsche AG, and Volkswagen ("VW") AG—and their American subsidiaries. Plaintiffs allege that Defendants colluded to restrain competition in violation of the Sherman Act and various state laws. Last June, this Court granted Defendants' joint motion to dismiss without prejudice, concluding that Plaintiffs' allegations were insufficient to state a claim. IPPs and DPPs both filed amended complaints. IPPs have narrowed their focus, zeroing in on an alleged agreement to standardize the dosage rate and tank sizes for the substance AdBlue. DPPs continue to allege a broad conspiracy, now styled as a "no arms race" agreement to divide market share by limiting brand differentiation and technical innovation. Neither effort is sufficient to plead Sherman Act violations or Plaintiffs' related state law claims. Both complaints are dismissed without prejudice.

I. BACKGROUND

On June 17, 2019, this Court granted without prejudice Defendants' initial joint motion to dismiss. See generally Order re MTD (dkt. 387). The initial consolidated complaints alleged that Defendants agreed to "slow[] down the pace of innovation," reducing the quality of their cars. Id. at 1–2. But Plaintiffs provided only two specific examples. The first was an alleged agreement that soft-top convertibles should only open or close at speeds under thirty-one miles per hour. Id. at 2. The second example was a series of alleged agreements on the size of AdBlue tanks (AdBlue is a substance that breaks emissions from diesel engines down into less harmful compounds). Id. at 2–3. These allegations (like many in the initial complaints) were based on reports of investigations by the European Commission's competition department ("ECC") and Germany's Federal Cartel Office into a possible antitrust cartel among Defendants. Id. at 3. Plaintiffs also relied on VW and Daimler's proffers to the ECC as part of that agency's leniency program. Id. VW's proffer admitted agreements amongst the defendants about vehicle development, costs, suppliers and markets, discussions about vehicle development, "exchange of . . . sensitive technical data," jointly established "technical standards" and agreements to use "only certain technical solutions," and the possibility that Defendants' actions may have violated cartel law. Id.

This Court rejected Plaintiffs' allegations of a "'de facto whole car conspiracy' to reduce innovation." Id. at 13. It concluded that the two actual examples of

agreement "relate[d] to niche vehicle features" and could not support Plaintiffs' theory of a conspiracy to reduce innovation across the board. Id. It also rejected the significance of VW and Daimler's proffers to European antitrust authorities, finding the admissions "too general and too vague to plausibly support the broad agreement to reduce innovation that Plaintiffs allege." Id. at 13–15. The investigations by European antitrust authorities were also unhelpful, because it was "unknown whether the investigation[s] w[ould] result in indictments or nothing at all." Id. at 15 (citing In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007). Similarly, "[a]llegations about how Defendants used working groups and trade associations to further their 'whole car conspiracy'" lacked crucial details such as "what was agreed to in these meetings." Id.

This Court rejected several other alleged agreements as inadequately pled. Relevant here, it concluded that Plaintiffs had not adequately alleged injury from a purported agreement to "coordinate . . . purchases of car parts and steel," because such an agreement was most likely to have lowered the cost of steel and therefore the prices paid by Plaintiffs. Id. at 17–18 (citing Thomas A. Piraino, Jr., A Proposed Antitrust Approach to Collaborations Among Competitors, 86 Iowa L. Rev. 1137, 1178 (2001)). Although DPPs alleged they were harmed because "Defendants pocketed the cost savings and did not pass along a single cent to the Dealer Plaintiffs," they failed to allege that Defendants either agreed to "pocket[] the cost savings" or

that it was otherwise wrongful for them to do so. Id. at 18.

Finally, this Court dismissed IPPs' various state law claims, because "[t]he factual bases and theories of injury for these claims [were] the same as those for the Sherman Act claims." Id. at 19.

Both IPPs and DPPs filed amended complaints. See IPP Compl. (dkt. 391); DPP Compl. (dkt. 392). The IPP Complaint focuses on an alleged decade-long conspiracy to limit the development and implementation of certain features of diesel emissions control systems. IPP Compl. ¶¶ 3–4. It alleges Defendants agreed to standardize the rate at which AdBlue would be used in their diesel vehicles and the size of those vehicle's AdBlue tanks. Id. ¶ 119. These agreements allegedly occurred during various meetings and in follow-up communications between Defendants' managers, beginning in 2006. See, e.g. id. ¶¶ 129–31, 133, 135, 142, 156–57.

As before, IPPs' allegations rely heavily on the ECC's investigation. In particular, IPPs point to an ECC press release, issued after briefing on the previous motions to dismiss, "announcing that it had sent a Statement of Objections to the Defendant parent companies . . . that reflected the ECC's current view that the Defendants had in fact violated antitrust law by participating in a collusive scheme 'to restrict competition on the development of technology to clean the emissions of petrol and diesel vehicles.'" Id. ¶ 150. The Statement of Objections asserts that Defendants

"coordinated their strategies" on the size of AdBlue tanks and the rate at which AdBlue would be used in diesel vehicles. Id. The IPP Complaint also relies on Daimler and VW's leniency proffers. See id. ¶¶ 112–13.

The DPP Complaint builds on the alleged AdBlue agreements to plead a "no arms race" conspiracy, whose object was ostensibly to ensure "that Defendants would not compete against each other on certain technological innovations to gain market share against each other." DPP Compl. ¶ 109.

DPPs offer various allegations besides the AdBlue agreements to support the purported "no arms race" conspiracy. They allege additional agreements on parking brakes, convertible tops, and particle filters, id. ¶ 157, and that Defendants' failure to meaningfully invest in electric vehicles is another example of the "no arms race" principle at work, id. ¶ 254. They point to examples of Defendants updating or refreshing similar vehicle lines around the same time as additional evidence of collusion. Id. ¶¶ 199–200.

The DPP Complaint also expands on the previously alleged steel-purchasing agreement. DPPs describe a scheme in which Defendants negotiated a baseline price with steel producers and then agreed to a standardized purchase price index on top of the baseline, which accounted for fluctuations in the cost of raw materials. Id. ¶ 161.

DPPs also allege that Defendants prevented dealerships from differentiating their vehicles based on price by setting the highest possible retail price (the

MSRP) unusually close to the lowest possible retail price (the inventory price). Id. ¶¶ 204–11. The DPP Complaint alleges that additional economic evidence, including pricing information and Defendants' relative market shares over time, demonstrates the existence of a successful market allocation conspiracy. Id. ¶¶ 192–98. Finally, DPPs point to various "plus factors" that ostensibly establish that Defendants had the motive or opportunity to collude. Id. ¶¶ 181–89.

In the alternative, DPPs allege that the AdBlue agreement, id. ¶ 250, agreement not to develop electric vehicles, id. ¶ 254, and steel-purchasing agreements, DPP Opp'n (dkt. 419) at 5 n.6, each constitute Sherman Act violations regardless of whether the "no arms race" conspiracy is adequately pled.

Defendants jointly moved to dismiss the IPP and DPP Complaint. See Joint MTD (dkt. 409). VW and BMW also filed individual motions to dismiss. See VW MTD (dkt. 411); BMW MTD (dkt. 410).

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Dismissal may be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal,

556 U.S. 662, 697 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678.

When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

If a court does dismiss a complaint for failure to state a claim, it should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). A court nevertheless has discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

III. DISCUSSION

As explained below, the Amended Complaints fail to plausibly allege any Sherman Act violation that can be traced to a cognizable injury suffered by Plaintiffs. This conclusion is equally fatal for IPPs' state law claims, which depend on the same factual allegations and theories of injury. See Order re MTD at 19. It is therefore unnecessary to consider Defendants' other arguments against the Sherman Act claims, including that those claims are time-barred, Joint MTD at 41–47, and that they are barred by the Foreign Trade Antitrust Improvements Act, id. at 35–41. It is also unnecessary to address various arguments specific to certain defendants, see generally Volkswagen MTD; BMW MTD, or state law claims, see Joint MTD at 47–54.

A. AdBlue Conspiracy

Both IPPs and DPPs allege a conspiracy to standardize certain features related to AdBlue, which ostensibly reduced the quality of Defendants' diesel vehicles. See IPP Compl. ¶¶ 3–4; DPP Compl. ¶ 250. This section first addresses whether Plaintiffs adequately allege the existence of agreements related to AdBlue, and then, concluding that they do, analyzes whether those allegations are sufficient to plead claims under the Sherman Act.

1. Whether an agreement is adequately alleged.

Section 1 of the Sherman Act forbids competitors from entering agreements that unreasonably restrain trade. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007). The Amended Complaints plausibly allege that Defendants agreed on "the rate at which AdBlue pollution treatment solution would be used in their diesel-powered vehicles, as well as the size of the vehicles' AdBlue tanks which determined the range that those vehicles could travel before needing to be refilled with AdBlue." IPP Compl. ¶ 119. Both Amended Complaints contain detailed factual allegations describing Defendants' "coordination" of AdBlue dosage rate and tank size, including the content of Defendants' agreements (including direct quotes from allegedly criminal negotiations), See, e.g. id. ¶ 133, the positions of the conspirators within Defendants' corporate hierarchies, See, e.g. id. ¶ 135, and where and when the agreements were made, see, e.g. id. ¶¶ 130–31; see also DPP Compl. ¶¶ 111–39. "[W]ho, did what, to whom (or with whom), where, and when" is adequately alleged.[1] In re Musical Instruments &

[1] The Amended Complaints also allege various "plus factors" ostensibly supporting their allegations of unlawful anticompetitive conduct. See IPP Compl. ¶ 176; DPP Compl. ¶ 181. Because Plaintiffs plead direct evidence of agreements on AdBlue-related features, it is unnecessary to evaluate whether the plus factors, when combined with parallel conduct, would adequately allege the existence of such collusion. See B&R Supermarket, Inc. v. Visa, Inc., No. 16-01150 WHA, 2016 WL 5725010, at *6 (N.D. Cal. Sept. 30, 2016) ("An impermissible conspiracy can be alleged through either direct or circumstantial evidence."). The plus

Equip. Antitrust Litig., 798 F.3d 1186, 1194 n.6 (9th Cir. 2015) (quoting Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)).

Plaintiffs argue that these allegations are supported by the ECC's Statement of Objections, which concluded that "Defendants coordinated their strategies on the amount of pollution treatment solution (such as AdBlue) that would be used in diesel-powered German Diesel Vehicles, as well as the size of the vehicles' AdBlue tanks and the range the vehicles could travel before needing to be refilled with AdBlue." IPP Compl. ¶ 150. Defendants contest the relevance of the Statement of Objections, pointing out that this Court has previously recognized government investigations typically "carry 'no weight in pleading an antitrust conspiracy,' for it is 'unknown whether the investigation[s] will result in indictments or nothing at all.' " See Order re MTD at 15 (quoting In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007)). Plaintiffs respond that they are now relying on the ECC's Statement of Objections, which is comparable to an indictment. IPP Opp'n at 13–14.

It is unnecessary to determine the significance of the Statement of Objections in this proceeding. Even assuming, without deciding, that the analogy to an indictment is sound, and that an indictment is more significant than a mere investigation, the Statement of Objections adds little to Plaintiffs' case. It establishes

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factors' relevance vis a vis other alleged anticompetitive agreements is discussed below.

agreements on AdBlue tank size and dosing rates. But as explained above, those agreements are already established by Plaintiffs' other well-pled factual allegations. And while the Statement of Objections may support the conclusion that those agreements violated European cartel law, what matters here is whether Plaintiffs' have met the requirements for pleading a violation of the Sherman Act.[2] That requires more than pointing to the findings of European authorities regarding European law. Similarly, it remains the case that Daimler and Volkswagen's leniency applications "are too general and too vague" to plausibly allege that those defendants violated American law. See id. at 13–15.

While the AdBlue agreements are plausibly alleged, Plaintiffs do not adequately plead the existence of a broader conspiracy "to restrict the development of [Defendants'] vehicles' diesel emissions control systems and not to compete on quality." IPP Opp'n at 16. Although this purported conspiracy is narrower than a "'de facto whole car conspiracy' to reduce innovation," Order re MTD at 12, it remains broader than the Amended Complaints' well-pled allegations can support. Every agreement alleged with any amount of detail dealt with AdBlue tank size and dosing rate. See IPP Compl. ¶¶ 119–42; DPP Compl. ¶¶ 102–09, 116–36, 139. Just as agreements on convertible roofs and AdBlue tanks could not plausibly support a "whole car"

[2] These requirements include showing either a per se Sherman Act violation or satisfying the rule of reason. See infra Section III.A.2.

conspiracy, see Order re MTD at 12–13, agreements on AdBlue tank size and dosing rate alone do not plausibly support the existence of a broader conspiracy covering Defendants' entire diesel emissions control system.

It is therefore necessary to determine whether the allegations of an AdBlue conspiracy adequately state a Sherman Act claim. They do not, because Plaintiffs have failed to plead facts showing that the AdBlue agreements were an unreasonable restraint on competition.

2. Whether Plaintiffs adequately allege that the AdBlue agreements constituted an unreasonable restrain on trade in violation of the Sherman Act.

Two forms of analysis may be applied to determine whether a restraint on trade is unreasonable. "The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to 'demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive.'" California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1132–33 (9th Cir. 2011) (quoting Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)). "Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). Per se treatment is reserved for conduct that is "manifestly anticompetitive"

and without "any redeeming virtue." Leegin, 551 U.S. at 886. "The Supreme Court has 'expressed reluctance to adopt per se rules where the economic impact of certain practices is not immediately obvious.'" Safeway, 651 F.3d at 1133 (quoting Dagher, 547 U.S. at 5).

IPPs argue the AdBlue agreements constitute a per se Sherman Act violation, because an agreement to reduce quality is tantamount to output reduction. IPP Opp'n at 28–29. This Court's previous order endorsed the logic of this theory, though not its underlying assumption that the AdBlue agreements necessarily constituted agreements to reduce quality. Order re MTD at 12. In the alternative, IPPs suggest that even if "Defendants' misconduct does not fit into established per se categories," it is of a type which "always or almost always tend[s] to restrict competition and decrease output."[3] IPP Opp'n at 29.

These arguments fail, because it is not "immediately obvious" that the AdBlue agreements had an exclusively anticompetitive impact. Safeway, 651 F.3d at 1133. As this Court recognized in its previous order, an agreement to use only certain technical solutions may have procompetitive benefits, even if it reduces a product's quality in other respects. Order re MTD at 14. For example, standard setting may "serve[] . . . useful ends, such as protecting consumers from inferior goods, increasing compatibility among products that must be interchangeable with the products of other

[3] DPPs do not offer an independent argument for treating the AdBlue agreement as per se unlawful. See DPP Opp'n at 17–18.

manufacturers, or focusing customer comparison on essential rather than nonessential differences." Id. (internal quotations and citations omitted). Similarly, "[c]ollaboration for the purpose of developing and commercializing new technology can result in economies of scale and integrations of complementary capacities that reduce costs, facilitate innovation, eliminate duplication of effort and assets, and share risks that no individual member would be willing to undertake alone." Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010). Because procompetitive effects are possible, per se treatment is inappropriate for joint ventures and standard setting. See Leegin, 551 U.S. at 886.

This logic applies to the alleged AdBlue agreements. The well-pled allegations in the Amended Complaints describe agreements to abide by certain technical standards and adopt the same or similar technical solutions. Plaintiffs' effort to transmogrify those agreements into output restrictions or pricing agreements is strained. See, e.g. IPP Compl. ¶ 5. And their argument that the standard setting and joint venture cases are inapplicable because the alleged conspiracy does not resemble other standard setting organizations, see IPP Opp'n at 27–28; DPP Opp'n at 10–11, misses the point. Defendants do not need to demonstrate that the alleged misconduct fell into a narrow category of behavior governed by the rule of reason. The opposite is true—per se treatment is reserved for narrowly defined categories of collusion that clearly have no redeeming virtues. Leegin, 551 U.S. at

886. The question is not whether the alleged AdBlue conspiracy resembles other standard setting groups. It is whether its anticompetitive economic impact is so obvious that this type of coordination should be per se illegal. Dagher, 547 U.S. at 5.

The Amended Complaints' own allegations demonstrate that the answer to that question is no, because the AdBlue agreements may have had procompetitive effects. Plaintiffs acknowledge that the standards Defendants agreed to were beneficial in some respects. Having fewer AdBlue injections reduced engine clogging and the risk of damage to the vehicle. IPP Compl. ¶ 155. Smaller AdBlue tanks took up less space, leaving more room for other features. DPP Compl. ¶ 115. True, Plaintiffs also plead that these benefits came at a cost—increased NOx emissions. See id. ¶ 115. But Plaintiffs' own allegations demonstrate that the tradeoff did not necessarily result in vehicles of inferior quality. Defendants may have agreed to a standard that they believed would ultimately benefit all consumers. This is not to say that the agreements necessarily improved the quality of Defendants' diesel vehicles or were clearly not unreasonable. It simply demonstrates that whether the agreements were reasonable or not should be assessed under the rule of reason.

And, contrary to Plaintiffs' position, which framework to apply can be determined at the pleading stage. It is true that in some cases courts have concluded that which framework applied was a fact-bound determination that could not be determined on the pleadings. See

Kamakahi v. Am. Soc'y for Reprod. Med., No. C 11-cv-01781, 2013 WL 1768706, at *8 (N.D. Cal. Mar. 29, 2013). But as with any other claim, a Court can determine that a complaint fails to adequately allege a per se violation of the Sherman Act. See, e.g. Analogix Semiconductor, Inc. v. Silicon Image, Inc., No. C 08-2917 JF (PVT), 2008 WL 8096149, at *1, *4 (N.D. Cal. Oct. 28, 2008) (determining, on a motion to dismiss, that rule of reason analysis applied). That is the case here, because Plaintiffs' own allegations contradict their assertion that the AdBlue agreements necessarily lacked any procompetitive effect. It is therefore appropriate to consider whether Plaintiffs have adequately asserted Sherman Act claims under the rule of reason.

They have not. The rule of reason requires Plaintiffs to "plead a relevant market" impacted by Defendants' anticompetitive conduct. Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018). A relevant market "include[s] both a geographic market and a product market." Id. The product market "must encompass the product at issue as well as all economic substitutes for the product." Id. (quoting Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)). Economic substitutes are the goods and services that have "reasonable interchangeability of use" or "cross-elasticity of demand" with the product in question. Id. (quoting Newcal, 513 F.3d at 1045). This standard ensures that the relevant market includes all "sellers or producers who have actual or potential ability to deprive each other of significant levels of business." Id.

(quoting Newcal, 513 F.3d at 1045). Failure to plead a relevant market is grounds to dismiss. Id.

Submarkets may "constitute product markets for antitrust purposes" if they are "economically distinct from the general product market." Id. at 1121 (internal citations omitted). "[I]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" may all indicate an economically distinct submarket. Id. (internal citations omitted).

A plaintiff who successfully pleads a relevant market must also allege "that the defendant has power within that market." Newcal, 513 F.3d at 1044–45. Once a relevant market has been pled, market power can be demonstrated by evidence "that the defendant owns a dominant share of [the relevant] market" and "that there are significant barriers to entry and . . . existing competitors lack the capacity to increase their output in the short run." Id. Alternatively, "direct evidence of the injurious exercise of market power," such as "supracompetitive prices" and "restricted output," may be an adequate substitute for "elaborate market analysis." FTC v. Indiana Fed. of Dentists, 476 U.S. 447, 461 (1986).

Plaintiffs efforts to plead a relevant market are facially deficient. IPPs do not argue that they have pled a relevant product market, see IPP Opp'n at 29, nor could they. To the extent the IPP Complaint suggests

that "German Diesel Vehicles" are a cognizable submarket, that suggestion is belied by IPPs' own allegations that Defendants were driven to collude on "clean diesel" technology by competition from Japanese hybrids. IPP Compl. ¶ 84; see also Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1199 (N.D. Cal. 2008) (complaint that acknowledged that Apple computers running Mac OS faced competition, but which did not include those competitors in its market definition or explain why they should be excluded, failed to plead a relevant market).

DPPs' efforts suffer similar flaws. Their complaint alleges a submarket of "German Luxury Vehicles." DPP Compl. ¶¶ 69–80. But again, that claim is belied by DPPs' own allegations, which acknowledge that Defendants competed with Italian, American, and Japanese brands. See DPP Compl. ¶¶ 80, 95, 130–32, 164. And even if DPPs' own allegations did not undermine their theory, "judicial experience and common sense" would. See Hicks, 897 F.3d at 1121. Non-German luxury cars exist (Tesla, Lexus, and Maserati all come to mind). It is implausible that national origin alone puts German automakers in a separate market from their high-end foreign rivals, or that a buyer looking at a Mercedes would not consider a Tesla if it were cheaper or of higher quality. DPPs rely on a supposed price premium for German cars, see DPP Compl. ¶ 72, but a price differential alone is insufficient to establish an economically distinct submarket. Psystar Corp., 586 F. Supp. 2d at 1199. And if anything, German automakers attempts to set themselves apart with

advertising demonstrate that they were competing with non-German luxury brands. See id. ("[V]igorous advertising is a sign of competition, not a lack thereof."); see also DPP Compl. ¶ 75.

In the alternative, DPPs allege a more plausible submarket of luxury vehicles. DPP Compl. ¶ 80 n.15. But these allegations fail for a different reason: DPPs have not alleged facts to support a finding that Defendants have market power in the luxury car market writ large. The only evidence they offer in support of this claim is their estimate that Defendants enjoy approximately a 50% share "of the broader luxury car market." DPP Opp'n at 23 n.17. But "[c]ourts generally require a 65% market share to establish a prima facie case of market power." Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997).

Nor have DPPs "alleged actual adverse effects," see DPP Opp'n at 23 n.17, that would excuse their failure to show a relevant market and market power. DPPs do not support this claim with any citation to the allegations in their complaint, so it is unclear what actual adverse effects they believe they have alleged. See id. To the extent DPPs argue that the AdBlue agreements were tantamount to price fixing or output restrictions, those claims are inadequately alleged for the same reasons that Plaintiffs have failed to plead a per se Sherman Act violation.

The failure to plead a relevant market is fatal to Plaintiffs' contention that the AdBlue agreements state a cognizable Sherman Act claim. It is equally

fatal to DPPs' alternative theories of liability, which fail to plausibly allege per se Sherman Act violations for the reasons explained below. Indeed, DPPs' other allegations of anticompetitive agreements fail for an additional reason besides the failure to plead a relevant market. DPPs fail to plausibly allege either the existence of or injury from those agreements.

B. "No Arms Race" Conspiracy

DPPs allege that "[t]he operating principle of [Defendants'] conspiracy was 'no arms race,' which was a euphemism for avoiding competition for market share on the basis of technological developments and brand differentiation." DPP Compl. ¶ 10. This theory fails for the same reason as its very similar predecessor, the "whole car conspiracy" rejected by this Court in its previous order. See Order re MTD at 12–17. Once again, DPPs attempt to plead a broad conspiracy with untenably narrow allegations. This Order proceeds by explaining why each of DPPs' several categories of allegations fails to plausibly demonstrate a "no arms race" conspiracy, even when considered as a whole.

1. Agreements to limit technological innovation.

DPPs' chief evidence of the "no arms race" conspiracy is the AdBlue agreement discussed above. The Court previously rejected agreements on AdBlue tank size as insufficient to plead a similarly broad "de facto whole car conspiracy," even in combination with a

second example of collusion on technical standards. Id. at 13. DPPs offer no real argument for a different result here. Their position is that they do not need to "argue that all, or even most, of the class vehicles' components and features were subject to the conspiracy," because they "contend that Defendants refrained from innovating or improving features on the class vehicles in such a way that their respective market shares would remain the same." DPP Opp'n at 10. But DPPs' Complaint and briefing offer no explanation for why an agreement to standardize what the Court has previously described as a "niche vehicle feature[]" would be adequate to maintain each Defendants' market share. Order re MTD at 13.

DPPs suggest Defendants reached agreements on several other vehicle features, such as "particulate filters, convertible roofs, and parking brakes." DPP Compl. ¶ 157. Most of these allegations lack any detail at all. The DPP complaint does not allege what was agreed to regarding parking brakes, who agreed to it, or when and where such an agreement took place. And it alleges only that Defendants agreed they would not allow convertible roofs to open and close at speeds above thirty-one miles per hour, an allegation the Court has previously rejected as insufficient to plead a broad "whole car" conspiracy, even combined with allegations of the AdBlue agreements. Order re MTD at 13.

Only the agreement on particle filters is supported by any factual allegations regarding "who, did what, to whom (or with whom), where, and when." See In re

Musical Instruments, 798 F.3d at 1194 n.6. DPPs allege that "[b]eginning in 2009, Defendants also entered into agreements to avoid, or at least to delay, the introduction of particle filters in their new (direct injection) gasoline passenger car models between 2009 and 2014." DPP Compl. ¶ 137. But DPPs admit these "filters were used predominantly in passenger vehicles sold in Europe." Id. ¶ 137 n.68. The alleged agreement on an additional niche feature predominantly used in cars irrelevant here does not plausibly support the existence of a conspiracy meant to divide the American market into static shares.

2. Steel-buying conspiracy.

DPPs allege that Defendants unlawfully agreed not to compete for the lowest price on steel. DPP Compl. ¶¶ 158–65. Even assuming the existence of an unlawful conspiracy regarding steel prices, this allegation does little to support the "no arms race" theory.[4] DPPs insist that by avoiding competition on the cost of steel, Defendants helped ensure their respective shares of the market would remain static. Id. ¶ 165. Just as it is implausible to infer that standardizing a few niche technical features would enable Defendants to keep their respective market shares stable, it is unlikely that adopting similar formulas for the price of a single raw material (albeit an important one) would be enough to keep shares of the American market in an

[4] Whether the steel-buying conspiracy can stand as its own Sherman Act violation is discussed below.

agreeable equilibrium. The leap from steel prices to overall market allocation is not "plausible on its face," even considered alongside DPPs' other allegations. See Twombly, 550 U.S. at 570.

3. Electric cars.

As explained in greater detail below, the alleged conspiracy to avoid developing electric vehicles has an obvious innocent explanation posited by the DPP Complaint itself. And DPPs do not even allege that all Defendants' conduct was parallel with respect to this alleged conspiracy. See infra Section III.C. These allegations add little or nothing to the "no arms race" conspiracy.

4. Parallel conduct.

Other allegations amount to little more than parallel conduct with obvious innocuous explanations. DPPs' allege that Defendants "coordinated major product updates and refreshes," and provide three examples of similar product lines being updated or refreshed within a year or two of each other. DPP Compl. ¶ 199–200. But as Defendants point out, the fact that they all released new products at similar times tends to suggest that they were competing with each other, rather than the opposite. Joint Reply (dkt. 425) at 10; see also In re Musical Instruments, 798 F.3d at 1193 ("In an interdependent market, companies base their actions in part on the anticipated reactions of their competitors."). Allegations that Defendants' prices remained

mostly constant relative to each other is equally uninformative, DPP Compl. ¶ 194–98, because firms may lawfully set prices in reaction to their competitors, In re Musical Instruments, 798 F.3d at 1193.

Relatedly, DPPs claim that "Defendants prevented dealers from using sales price to upset the status quo." DPP Opp'n at 11. Their complaint explains that Defendants set their vehicles' maximum price (the MSRP) and minimum price (the inventory price) unusually close together, reducing variation in the final sales price. DPP Compl. ¶¶ 204–11. DPPs do not claim that such "manipulation," standing alone, would be unlawful, and in fact acknowledge that "[u]nder the automotive franchise system, Defendants have absolute and sole control over [wholesale] prices" and the MSRP. Id. ¶¶ 205, 210. But the DPP Complaint also does not allege any unlawful collusion in setting wholesale prices and MSRPs, other than a half-hearted claim that it is "highly likely that the manufacturers coordinated the setting of dealer wholesale prices and MSRP." Id. at 204. Apparently, this is because all Defendants set wholesale prices and MSRPs unusually close together and stood to benefit from the thin margins. See id. ¶¶ 207–09, 211. But parallel pricing alone does not demonstrate collusion, even (or especially) when market participants stand to benefit from reacting to each other's decisions or "similar market pressures." In re Musical Instruments, 798 F.3d at 1193.

Because the parallel conduct alleged in the DPP Complaint could just as easily (or even more plausibly) reflect legitimate conscious parallelism as opposed to

collusion, it does not support their "no arms race" theory. Id. at 1194 ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a § 1 violation." (internal quotation marks and citations omitted)).

5. Plus factors.

Nor is this a case where "plus factors . . . inconsistent with unilateral conduct" can push DPPs' otherwise inadequate allegations over the line. See id. ("This court has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain 'plus factors.' "). Most of DPPs' plus factors go either to Defendants' alleged "strong motive to conspire" or the susceptibility of the relevant market to collusion. See DPP Compl. ¶¶ 182, 185–89. The Ninth Circuit has rejected comparable arguments, noting that "alleging 'common motive to conspire' simply restates that a market is interdependent (i.e., that the profitability of a firm's decisions regarding pricing depends on competitors' reactions)." Musical Instruments, 798 F.3d at 1194–95. "Interdependence, however, does not entail collusion, as interdependent firms may engage in consciously parallel conduct through observation of their competitors' decisions, even absent agreement." Id. at 1195. DPPs' allegations that the market was susceptible to collusion or gave Defendants a motive to conspire reduce to allegations that the market is

interdependent,[5] and are therefore of little help in pleading an antitrust conspiracy. See DPP Compl. ¶¶ 182, 185–89.

DPPs allege that "Defendants had and took advantage of literally thousands of opportunities to conspire through secret meetings" and during trade meetings. DPP Compl. ¶ 183. This Court has previously rejected the significance of similar allegations because Plaintiffs failed to "identify what was agreed to in the[] meetings." Order re MTD at 16. Once again DPPs do not allege what was agreed to during the alleged meetings, see DPP Compl. ¶ 183, aside from the purported collusion on certain niche features discussed above.

Defendants' ostensible actions against self-interest are similarly redundant of the insufficient allegations of agreement. DPPs allege "Defendants engaged in conduct inconsistent with their independent self-interests by, among other things, revealing to each

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[5] One arguable exception is DPPs' allegation that "commonality of suppliers increased transparency into cost functions of each of the firms within the German Luxury Car Market, providing mechanisms to police the cartel." DPP Compl. ¶ 185. Since this allegation goes to the ease of enforcing collusive agreements, rather than the extent to which a firm's pricing decisions will be driven by competitors' behavior, it may be distinguishable from allegations that the market is interdependent. However, by facilitating "observation of their competitors' decisions," the alleged "transparency" would facilitate "conscious parallelism" by Defendants just as much as unlawful agreement. See In re Musical Instruments, 798 F.3d at 1195. This allegation, like others about Defendants' motive or ability to successfully collude, is equally consistent with lawful behavior as an anticompetitive conspiracy.

other proprietary technological information and trade secrets." Id. ¶ 184. But the only such revelations alleged in any kind of detail would have to be related to the agreements on AdBlue and particle filters. Those agreements do not plausibly establish a "no arms race" conspiracy for the reasons discussed above.

Finally, DPPs allege "economic . . . outcomes" supposedly inconsistent with independent action. See In re Musical Instruments, 798 F.3d at 1194 (defining "plus factors" as "economic actions and outcomes that are largely inconsistent with unilateral action but largely consistent with explicitly coordinated action"). They allege that Defendants' overall market share grew even as each Defendant's market share remained stable relative to the other alleged conspirators, demonstrating the success of the conspiracy. DPP Compl. ¶¶ 192–93. But although DPPs conclusorily state that "[t]he stability of Defendants' market shares is economically consistent with the existence of a market allocation agreement," id. ¶ 193, they make no effort to allege that it is inconsistent with conscious parallelism or some other innocent explanation. And they undermine their own argument by acknowledging that the inter-Defendant market was not, in fact, completely static. Id. At best these allegations provide only mild support for DPPs' alleged conspiracy.

In sum, DPPs' narrow allegations of agreements to standardize niche features or prices for steel cannot support the wide-ranging conspiracy they attempt to plead. Additional allegations of parallel conduct and

plus factors are too speculative and conclusory to cover the gap.

C. Electric Car Conspiracy

In the alternative, DPPs plead a narrower conspiracy not to engage in an arms race to develop electric vehicles. Once again, this parallel conduct is insufficient to support an antitrust claim, because it has a perfectly innocuous explanation. Indeed, that explanation is provided by the DPP Complaint itself. Defendants did not invest in electric vehicles because they "had already invested heavily in diesel engines." DPP Compl. ¶ 112. That suggests it is just as if not more plausible that Defendants "arrive[d] at identical decisions independently, [because] they [were] cognizant of—and reacting to—similar market pressures." In re Musical Instruments, 798 F.3d at 1193.

The plausibility of a conspiracy not to invest in electric vehicles is further undercut by the DPP Complaint's admission that Audi, BMW, and Porsche did produce electric and hybrid vehicles in 2013 and 2014. DPP Compl. ¶ 144. The DPP Complaint tries to reconcile this fact with the claimed conspiracy by alleging that the electric and hybrid vehicles produced were not advanced enough. Id. This simply underscores the weakness of their theory. DPPs are reduced to arguing that Defendants must have unlawfully agreed to underinvest in electric vehicles, because absent such an agreement they would have made a better electric vehicle. Absent direct evidence of agreement, or more

robust allegations of plus factors than the ones discussed above, this (barely) parallel conduct cannot support an antitrust claim.

D. Steel-Buying Conspiracy

This Court has previously considered DPPs' allegations that "the five leading German car makers agreed to coordinate their purchases of . . . steel." Order re MTD at 17; see also DPP Compl. ¶¶ 158–65. In its prior order, the Court concluded that even if Defendants had agreed on the price of steel, "the prices they paid for those inputs would presumably have dropped," which "would likely have benefited car purchasers, not harmed them." Order re MTD at 17. DPPs seek to avoid a similar result this time around by alleging that Defendants colluded to pay higher prices, because their goal was to pay the same price for steel as their competitors, even if that meant everyone paid more. According to the DPP Complaint, this allowed Defendants to avoid competing for market share based on steel prices and assured they could pass any price increase on to their customers. DPP Compl. ¶¶ 161–65.

This theory is not supported by DPPs' factual allegations. Those allegations describe a scheme in which each Defendant agreed with the steel manufacturers on a baseline price for steel. DPP Compl. ¶ 161. Additionally, and apparently unlawfully, Defendants agreed to a standardized "purchase price 'index' on top of the baseline price to account for fluctuations in the market for raw materials—this element of the cost was

calculated at shorter intervals and, if the index rose or fell, the automobile manufacturers paid more or less, respectively." Id. This arrangement accommodated the steel manufacturers' need to account for short term fluctuations in the cost of raw materials, but also Defendants' desire for a "fixed, predictable [steel] cost[]" that would allow them "to set car model prices for the year." Id. ¶ 160.

Other than conclusory claims to the contrary, DPPs never adequately explain why this agreement would raise the prices they paid to Defendants. Although the index price was additional to the baseline price, that does not mean it increased the price Defendants paid for steel. Absent the baseline/index formula, Defendants presumably would have paid a single, higher price that accounted for the cost of raw materials. See id. The July 12, 2018, Bundeskartellamt press release DPPs seek to rely on is unhelpful, because it discusses only the steel manufacturers—it does not even mention Defendants, let alone support the allegation that they agreed to pay higher prices for steel than they would have absent the collusion. See DPP Opp'n at 14 n.10 (citing Bundeskartellamt, Press Release, Bundeskartellamt imposes first fines totaling approx. 205 million euros on special steel companies, (July 12, 2018) http://tinyurl.com/seeloqn).[6]

[6] Because the Court has reviewed the press release's contents and finds it unhelpful, DPPs'request for judicial notice of this document is denied as moot.

Finally, DPPs' allegations that Defendants offset rising steel costs by increasing prices do nothing to support their theory of injury from the alleged agreement on steel purchases. DPP Compl. ¶ 162–65. Notably, DPPs do not allege that the increased prices were caused by Defendants' agreement. To the contrary, they acknowledge that Japanese automobile manufacturers were also impacted by the alleged price increase. Id. ¶ 164.

DPPs allege that Daimler was able to offset higher steel costs by raising prices and that as a group Defendants maintained higher margins than their Japanese competitors. The DPP Complaint concludes these outcomes are inconsistent with any explanation other than collusion. Id. ¶¶ 162–65. But this bare allegation of collusion is belied by the DPP Complaint's factual allegations, which are more consistent with lawful conscious parallelism. DPPs allege that Daimler, discussing its willingness to raise prices, stated that it preferred to "not be the last to move forward on the pricing front, but rather on the other end." Id. ¶ 162. This suggests not an agreement to raise prices, but various firms watching their competitors' pricing decisions and adjusting their own prices in response. This type of "follow the leader" pricing (in which Daimler aspired to be the leader, rather than a follower) is a well-recognized form of lawful conscious parallelism. In re Musical Instruments, 798 F.3d at 1195 ("[S]o long as prices can be easily readjusted without persistent negative consequences, one firm can risk being the first

to raise prices, confident that if its price is followed, all firms will benefit.").

In sum, neither more recent press releases nor DPPs' amended pleadings change the Court's earlier conclusion (and DPPs' original contention) that the steel-purchasing agreements, even if unlawful, most plausibly led to lower prices. Order re MTD at 17; see also Original DPP Compl. (dkt. 244) ¶ 87 (alleging that the steel-purchasing agreements created "cost savings"). They have therefore failed to plead an injury resulting from this alleged agreement. See Order re MTD at 17–18 (failure to plead injury resulting from steel-buying agreements meant those allegations could not support an antitrust claim).

E. State Law Claims

This Court has previously concluded that "[t]he factual bases and theories of injury for [IPPs' various state law] claims are the same as those for the Sherman Act claims." Id. at 19. Because the Sherman Act claims were not well pled, the state law claims were dismissed as well. Id. IPPs do not contend that this was error, or that their state law claims should not live and die with their Sherman Act claim. See IPP Opp'n at 41, 43, 46. IPPs' state law claims are therefore dismissed without prejudice.

IV. CONCLUSION

For the foregoing reasons, the motions to dismiss are granted.[7] It is not a certainty, however, that Plaintiffs cannot allege facts sufficient to plead a relevant market or injury from the alleged steel-buying agreements. The Court thus grants them leave to amend their complaints to attempt to salvage these claims. To the extent that they choose to do so, they must file their amended complaints within 45 days of this Order.

IT IS SO ORDERED.

Dated: March 31, 2020

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

[7] VW's motion to file under seal (dkt. 412) is also granted.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: GERMAN AUTOMOTIVE MANUFACTURERS ANTITRUST LITIGATION /	MDL No. 2796 CRB (JSC).
This Order Relates To: Dkt. Nos. 452, 453, 454, 455. /	**ORDER GRANTING MOTIONS TO DISMISS** (Filed Oct. 23, 2020)

Consumers and auto dealers (IPPs and DPPs, respectively) filed two related consolidated class actions against the five leading German car manufacturers—Audi AG, BMW AG, Daimler AG, Porsche AG, and Volkswagen (VW) AG—and their American subsidiaries. Defendants have moved to dismiss IPPs and DPPs' second amended complaints. See IPP Second Amended Complaint (IPP 2AC) (dkt. 447); DPP Second Amended Complaint (DPP 2AC) (dkt. 448); Joint MTD 2AC (dkt. 452); BMW MTD 2AC (dkt. 453); VW MTD 2AC (dkt. 454). The Court grants Defendants' motions to dismiss with prejudice.

I. BACKGROUND

Plaintiffs' initial consolidated complaints alleged that Defendants agreed to slow "the pace of innovation," reducing the quality of their cars. See Order re First MTD (dkt. 38) at 1-2. But Plaintiffs provided only two specific examples: (1) an alleged agreement that soft-top convertibles should open or close only at

speeds under thirty-one miles per hour, id. at 2, and (2) a series of alleged agreements about the size of AdBlue tanks, id. at 2-3.[1] These allegations were based on reports of investigations by the European Commission Competition department (ECC) and Germany's Federal Cartel Office. Id. at 3. Plaintiffs also relied on VW and Daimler's proffers to the ECC. Id. VW's proffer admitted agreements among Defendants about vehicle development, costs, suppliers, and markets, "exchange of . . . sensitive technical data," jointly established "technical standards," agreements to use "only certain technical solutions," and an admission that Defendants' actions may have violated European cartel law. Id.

The Court granted Defendants' initial joint motion to dismiss. See id. First, the Court rejected Plaintiffs' allegations of a "whole car conspiracy to reduce innovation." Id. at 13. It concluded that the two alleged agreements related "to niche vehicle features" and did not evince a conspiracy to reduce innovation across the board, id., and held that any admissions in Defendants' proffers to European antitrust authorities were "too general and too vague to plausibly support [a] broad agreement to reduce innovation," id. at 15. European investigations did not establish a whole car conspiracy in part because it was unknown whether they would "result in indictments or nothing at all." Id. at 15. Similarly, "[a]llegations about how Defendants used

[1] AdBlue "is a substance that breaks emissions from diesel engines down into less harmful compounds." Order re Second MTD (dkt. 432) at 2.

working groups and trade associations to further their 'whole car conspiracy' " lacked crucial details such as "what was agreed to in these meetings." Id. Second, the Court rejected other purported agreements as inadequately pleaded. Relevant here, it concluded that Plaintiffs had not alleged injury from an agreement to "coordinate . . . purchases of car parts and steel" because such an agreement was most likely to have lowered the cost of steel and therefore the prices paid by Plaintiffs. Id. at 17-18. Although DPPs alleged that they were harmed because "Defendants pocketed the cost savings and did not pass along a single cent," they failed to allege either that Defendants agreed with one another to keep any cost savings or that it would be wrongful for them to do so. Id. at 18. Third, the Court dismissed IPPs' various state law claims because "[t]he factual bases and theories of injury for these claims [were] the same as those for the Sherman Act claims." Id. at 19.

Both IPPs and DPPs filed amended complaints. See IPP First Amended Complaint (IPP 1AC) (dkt. 391); DPP First Amended Complaint (DPP 1AC) (dkt. 392).

IPPs' First Amended Complaint focused on an alleged decade-long conspiracy to limit the development and implementation of diesel emissions control system features. IPP 1AC ¶¶ 3-4. IPPs alleged that Defendants agreed to standardize the rate at which AdBlue would be used in their diesel vehicles and the size of those vehicles' AdBlue tanks. Id. ¶ 119. IPPs relied heavily on the ECC's investigation, particularly an

ECC press release announcing its "current view that the Defendants had in fact violated antitrust law by participating in a collusive scheme to restrict competition on the development of technology to clean the emissions of petrol and diesel vehicles." Id. ¶ 150 (internal quotation marks omitted). An ECC Statement of Objections had asserted that Defendants "coordinated their strategies" on the size of AdBlue tanks and the rate at which AdBlue would be used in diesel vehicles. Id. IPPs also relied on Daimler and VW's leniency proffers. See id. ¶¶ 112-13.

DPPs' First Amended Complaint included new allegations relating to the purported "no arms race" conspiracy. See DPP 1AC. DPPs alleged additional agreements regarding parking brakes, convertible tops, and particle filters. Id. ¶ 157. DPPs also alleged that Defendants' failure to meaningfully invest in electric vehicles was evidence of their "no arms race" conspiracy. Id. ¶ 254. And they pointed to examples of Defendants updating similar vehicle lines around the same time as evidence of collusion. Id. ¶ 199-200. In the alternative, DPPs alleged that AdBlue agreements, id. ¶ 250, electric vehicle agreements, id. ¶ 254, and steel-purchasing agreements, see DPP Opp'n (dkt. 419) at 5 n.6, constituted Sherman Act Violations even if the "no arms race" conspiracy was not adequately pleaded. DPPs significantly modified their steel-purchasing conspiracy allegations. DPPs alleged that Defendants' joint agreement with steel manufacturers (i.e., to pay baseline prices plus a standard additional price indexed to the cost of raw materials) raised the prices

that Defendants paid for steel—and that Defendants passed this price increase onto customers. DPP 1AC ¶¶ 161, 165. Finally, DPPs alleged that Defendants prevented dealerships from differentiating their vehicles based on price by setting the highest possible retail price (the MSRP) unusually close to the lowest possible retail price (the inventory price). Id. ¶¶ 204-11. They alleged that this and other economic evidence, including price information and Defendants' relative market share over time, showed a successful market allocation conspiracy. Id. ¶¶ 192-98. And DPPs pointed to various "plus factors" as evidence that Defendants had the motive and opportunity to collude. Id. ¶¶ 181-89.

Defendants jointly moved to dismiss the first amended complaints. See Joint MTD 1AC (dkt. 409). VW and BMW also filed individual motions to dismiss. See VW MTD 1AC (dkt. 411); BMW MTD 1AC (dkt. 410).

The Court granted Defendants' motions to dismiss. See Order re Second MTD. The Court held that although IPPs and DPPs had plausibly alleged an agreement relating to AdBlue dosage rates and tank sizes, that agreement was not an unreasonable restraint on competition. Id. at 8. The agreement was not "per se" anticompetitive because AdBlue technical standards could plausibly reduce engine clogging and the risk of vehicle damage, create more room for other vehicle features, and generally "benefit all consumers." Id. at 10. The Court thus applied the "rule of reason" and held that Plaintiffs had not pleaded a relevant

market because, in the United States, "German Diesel Vehicles" and "German Luxury Vehicles" faced obvious competition from non-German manufacturers. Id. at 11-12. Nor had Plaintiffs adequately alleged that Defendants had market power in any relevant market. Id. at 12. These conclusions were fatal to IPPs' claims. Id. at 13.[2]

The Court rejected DPPs' additional claims for failure to plausibly allege agreements and injuries. Id. For example, DPPs had still not plausibly alleged a "no arms race conspiracy." Allegations that Defendants agreed not to innovate regarding several vehicle features either lacked "any detail at all" or referred to features predominantly used in cars sold in Europe, and thus could "not plausibly support the existence of a conspiracy meant to divide the American market." Id. at 14. Similarly, DPPs' alleged agreement not to compete on steel prices could not support DPPs' "no arms race" theory because the "leap from steel prices to overall market allocation [was] not 'plausible on its face.'" Id. at 15 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Defendants' parallel conduct could not plausibly show the "no arms race" conspiracy because there were obvious innocent explanations for that conduct. Id. at 15-16. And Defendants' alleged motive and opportunity to conspire did not support the "no arms race" conspiracy because DPPs failed to allege specifics about Defendants' purported agreements. Id. at 16-17. DPPs' allegations also failed to

[2] The Court dismissed IPPs' state law claims for the same reasons. See Order re Second MTD at 21.

establish narrower unlawful conspiracies. As alleged, Defendants' electric car strategies were not coordinated or even parallel. Id. at 18. And DPPs had not alleged a plausible injury based on Defendants' alleged steel-purchasing conspiracy because DPPs had not plausibly explained why the cost-plus-surcharge pricing arrangement would lead to higher steel prices. Id. 19-20.

The Court thus dismissed Plaintiffs' first amended complaints without prejudice. Id. at 21. Because it was "not a certainty" that Plaintiffs would be unable to plead "a relevant market" or "injury from the alleged steel-buying agreements," the Court granted leave to amend so that they could "attempt to salvage these claims." Id. IPPs and DPPs have now filed second amended complaints. See IPP 2AC (dkt. 447); DPP 2AC (dkt. 448).

IPPs have modified their claims in two ways. First, they have supplemented their allegations of anticompetitive agreements relating to Defendants' vehicles' "diesel emissions systems" in an effort to establish a conspiracy that was (1) broader than AdBlue dosage rates and tank sizes and (2) devoid of any procompetitive effects. See IPP 2AC ¶¶ 6. IPPs point to factual statements from the ECC about Defendants' agreements, see id. ¶¶ 6, 9, 21, 118-119, 148, and argue that this evidence makes "clear that Defendants' collusion covered entire emissions systems and was not aimed at improving product quality or permitted standard setting." IPP Opp. to Joint MTD 2AC (dkt. 456) at 2. Second, IPPs have recharacterized the relevant

market as the "U.S. market for diesel passenger vehicles." IPP 2AC ¶ 11. IPPs allege that they conducted a survey showing that less than 33% of U.S. consumers would switch from a diesel passenger vehicle to another type of vehicle when faced with a small but significant price increase, and that a "Critical Loss Analysis" examining this substitution pattern and Defendants' profit margins establishes that diesel passenger vehicles constitute their own submarket. Id. ¶¶ 176-179. Based on the survey, along with alleged (i) industry and public recognition, (ii) "peculiar characteristics," (iii) "unique production facilities," and (iv) price premiums that customers pay for diesel passenger vehicles, id. ¶¶ 173-75, 180-81, 172, 186, IPPs argue that their Second Amended Complaint plausibly alleges a relevant "market for diesel passenger vehicles sold in the U.S." and "Defendants' dominance of that market," IPP Opp. to Joint MTD 2AC at 4.

DPPs now characterize alleged agreements among Defendants, and between Defendants and steel manufacturers, as a "Steel Price-Fixing Conspiracy." DPP 2AC ¶ 274-77.[3] As before, DPPS allege that Defendants agreed to a standardized price "index" or "surcharge" on top of a baseline price to account for fluctuations in the market for raw materials. See Order re First MTD at 19; DPP 2AC ¶ 167. DPPs now allege that steel manufacturers unlawfully agreed with one another to inflate the surcharges and that Defendants agreed with one another to accept the higher prices, "which allowed

[3] DPPs also incorporate IPPs' argument that diesel passenger vehicles comprise a distinct submarket. DPP 2AC ¶ 159.

them to pass on the cost increase to their customers." Id. ¶ 10. Thus, the purported steel "price-fixing" conspiracy consists of three sets of agreements: (1) a pricing conspiracy among steel manufacturers resulting in inflated surcharges; (2) an agreement among Defendants to pay the surcharges charged by the steel manufacturers, enabling the steel manufacturers to maintain inflated prices; and (3) an agreement among Defendants to pass the increased cost of steel on to consumers. See id. ¶¶ 161-181. According to DPPs, Defendants accepted the unlawful surcharges without informing authorities because they "did not want to expose the conduct and recognized that they could accept higher prices so long as they all agreed to accept the same prices so that none of them would be placed at a competitive disadvantage (as would occur if one Defendant negotiated lower steel prices than other Defendants . . .)." Id. ¶ 171. And their agreement to accept the higher charges "would have been economically irrational unless Defendants had a mutual understanding that they would offset those higher costs by passing them on to their customers." Id. ¶ 177. DPPs allege that, as a result, they paid inflated prices for Defendants' vehicles. Id. ¶ 232.

Defendants have jointly moved to dismiss the second amended complaints, see Joint MTD 2AC (dkt. 452), and VW and BMW have each individually moved to dismiss, see VW MTD 2AC (dkt. 454); BMW MTD 2AC (dkt. 453).

II. LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies when a complaint lacks either "a cognizable legal theory" or "sufficient facts alleged" under such a theory. Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019). Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678. This is not a "probability requirement," but it requires more than a "sheer possibility" that the defendant is liable: "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id. (quoting Twombly, 550 U.S. at 557). Thus, when a plaintiff attempts to allege an unlawful agreement under § 1 of the Sherman Act, "showing parallel conduct or interdependence" with respect to price is not enough. Twombly, 550 U.S. at 554.

Evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828

F.2d 556, 561 (9th Cir. 1987). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

If a court dismisses a complaint for failure to state a claim, it should "freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). A court nevertheless has discretion to deny leave to amend due to, among other things, "repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

III. DISCUSSION

Because the order dismissing Plaintiffs' first amended complaints covers Plaintiffs' previously asserted claims and allegations, the Court incorporates its prior reasoning and addresses only what is new—or purportedly new—in Plaintiffs' second amended complaints. The Court thus addresses (1) IPPs' claim that Defendants' anticompetitively agreed to not innovate with respect to their entire diesel emissions systems, causing harm to competition in the market for diesel passenger vehicles in the United States; and (2) DPPs' claim that Defendants' actively participated in

a steel price-fixing conspiracy and agreed to pass on all increases in the cost of steel to their customers.

IPPs' diesel emissions system conspiracy claim fails because it is factually indistinguishable from IPPs' previously asserted AdBlue conspiracy claim, and IPPs' newly alleged submarket of "diesel passenger vehicles" is not plausible. DPPs' steel purchase and pass-through claim fails because DPPs have not plausibly alleged any injury or an agreement among DPPs to pass-through steel surcharges to their customers. Therefore, the Court grants Defendants' motions to dismiss with prejudice.

A. Diesel Emissions System Conspiracy

IPPs allege that Defendants colluded to restrict competition across their vehicles' diesel emissions systems, causing harm in the market for diesel passenger vehicles in the United States. IPP Opp. to Joint MTD 2AC at 2, 4.

1. Per Se vs. Rule of Reason

Two separate tests may determine whether a restraint on trade is unreasonable. "The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to 'demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive.'" California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1132-33 (9th Cir. 2011) (quoting Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)). "Some types

of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). Per se treatment is reserved for conduct that is "manifestly anticompetitive" and without "any redeeming virtue." Leegin, 551 U.S. at 886. "The Supreme Court has 'expressed reluctance to adopt per se rules where the economic impact of certain practices is not immediately obvious.'" Safeway, 651 F.3d at 1133 (quoting Dagher, 547 U.S. at 5). To reject per se treatment is not to approve a restraint—it simply requires the Court to assess the restraint's actual effect "on competition, taking into account a variety of factors." Khan, 522 U.S. at 10.

IPPs argue that the alleged diesel emissions system conspiracy is a per se anticompetitive restraint because Defendants' collusive agreements covered their entire diesel emissions systems and the ECC found that the agreements lacked any procompetitive benefits. See IPP 2AC ¶¶ 6, 7, 18-20, 21, 118-19, 148. These arguments fail for at least three reasons.

First, IPPs' attempt to broaden their allegations to cover "diesel emissions systems" has no effect on the Court's analysis. IPPs have not detailed any specific collusive agreements relating to diesel emissions system features other than AdBlue dosage rate and tank size. See id. ¶¶ 116-141, ¶¶ 151-158. IPPs extract phrases from ECC quotes referring to "diesel emissions 'systems'" and "emissions cleaning systems." Id. ¶¶ 148, 151. But neither the full quotations (which the

Second Amended Complaint incorporates by reference through attached exhibits) nor IPPs' other allegations show collusion on emissions system features beyond those discussed in IPPs' First Amended Complaint. For example, IPPs argue that the ECC was focused on broader "Selective Catalytic Reduction ('SCR') systems," IPP Opp. to Joint MTD 2AC at 12, but the cited ECC statements regarding SCR systems reference only AdBlue features, see April 2019 ECC Press Release (attached to IPP 2AC at dkt. 447-2). In sum, IPPs have changed this alleged restraint's label without changing its substance.

Second, any ECC finding that the alleged diesel emissions system agreements lacked procompetitive benefits would not affect whether per se treatment applies. Per se treatment is appropriate when a "kind of restraint" obviously lacks any "procompetitive benefit." Khan, 522 U.S. at 10. In that inquiry, the Court does not look at "specific information about the relevant business" or other details about the alleged restraint's actual effect on competition. Id. (citation omitted). Instead, the Court identifies the category of restraint to determine whether such a detailed, resource-intensive inquiry under the rule of reason is necessary. See id. Here, the kind of restraint alleged does not obviously lack any procompetitive benefit. As the Court has explained, establishing uniform standards and agreeing to use only certain technical solutions can have procompetitive effects. See Order re Second MTD at 10. Because the "economic impact" of this "kind of restraint" is not "immediately obvious," per se treatment

is unwarranted. Khan, 522 U.S. at 10 (citation omitted).

Third, even if the ECC's findings mattered at this step, IPPs mischaracterize them. IPPs rely on statements in an April 5, 2019 press release to allege that Defendants agreed to "not compete on quality" and "to introduce lower standards." IPP Opp. to Joint MTD 2AC at 12; see also IPP 2AC ¶¶ 148-149. But the ECC statement attached to IPPs' Second Amended Complaint indicates only the ECC's "preliminary view" that Defendants "may have" entered into collusive agreements relating to AdBlue tank size and dosage rates, and that such agreements could expose Defendants to liability under European law. See April 2019 ECC Press Release. The ECC's additional statement that "EU competition rules do not allow [companies] to collude . . . not to improve their products, not to compete on quality" is merely describes non-binding European law; it is not a definitive conclusion that Defendants' agreements lacked any procompetitive effects. Id.

Therefore, the Court considers whether Plaintiffs have adequately pleaded a Sherman Act claim under the rule of reason.

2. Rule of Reason Analysis

To state a claim for relief under § 1 of the Sherman Act, a plaintiff "must allege both that a 'relevant market' exists and that the defendant has power within that market." Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008). A complaint may

be dismissed under Rule 12(b)(6) if the alleged relevant market is "facially unsustainable." Id. at 1045. To survive a motion to dismiss, "the market must encompass the product at issue as well as all economic substitutes for the product." Id. Thus, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it." Brown Shoe v. United States, 370 U.S. 294, 325 (1962). The relevant market must include any "producers who have actual or potential ability to deprive each other of significant levels of business." Thurman Indus, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989).

That said, within a broader product market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." Brown Shoe, 370 U.S. at 325. To plead a relevant submarket, the plaintiff must plausibly allege "that the alleged submarket is economically distinct from the general product market." Newcal, 513 F.3d at 1045. Although factors like (i) industry or public recognition of the submarket, (ii) the product's peculiar characteristics, (iii) unique production facilities, (iv) distinct consumers, (v) distinct prices, (vi) consumer price sensitivity, and (vii) specialized vendors may bear on the question whether a proposed submarket is economically distinct, see Brown Shoe, 370 U.S. at 325, "their presence or absence does not automatically decide the submarket issue," Pay 'N Pak, 875 F.2d at 1375. At bottom, economic distinction depends on whether the

purported submarket is meaningfully "insulated . . . from competition" with other products in the broader market. Id. at 1375.

"Judicial experience and common sense" help determine whether a submarket is insulated from competition in the relevant sense. Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1121 (9th Cir. 2018) (quoting Iqbal, 556 U.S. at 679). For example, when the Supreme Court decided Brown Shoe, "men's, women's, and children's shoes" were produced in "separate manufacturing facilities," recognized by the public as separate submarkets, had "peculiar characteristics," and were purchased by "distinct customer groups." Pay 'N Pak, 875 F.2d at 1375 (citing Brown Shoe, 30 U.S. at 326). But "[t]hese factors were economically significant in identifying actual fields of competition simply because men [did] not normally buy women's or children's shoes for their own use and women and children exhibit[ed] parallel purchasing habits regarding shoes made for their respective groups." Id. By contrast, even in the presence of "distinct customers and industry perception of a separate submarket," a purported submarket may lack "economic significance as to the actual field of competition" if there is no "barrier to customer cross-over similar to the pattern of gender and age-based purchasing at issue [in] Brown Shoe." Id. at 1376. For example, "in-play" advertising during golf tournaments (i.e., advertising that airs between, not during, commercial breaks) is considered "more effective," is priced more flexibly, and appeals to "smaller" customers than traditional print or

television advertising; but in-play advertising is not a cognizable submarket because it nonetheless faces obvious competition from other forms of advertising. Hicks, 897 F.3d at 1122.

Here, in defining the relevant market as "diesel passenger vehicles," IPPs have once again failed to plead a relevant market or submarket.

IPPs do not squarely argue that they have pleaded a relevant product market in the broad sense, IPP Opp. to Joint MTD 2AC at 18, nor could they. Diesel passenger vehicles do not constitute a relevant market because that market would exclude obvious "economic substitutes." Newcal, 513 F.3d at 1045. IPPs implicitly acknowledge that diesel passenger vehicles compete with (at least) other environmentally friendly vehicles. See IPP 2AC ¶ 88 ("When Defendants needed to compete (especially from a public relations perspective) against fuel-efficient and environmentally friendly hybrid vehicles being manufactured in Japan, Defendants rebranded their diesel vehicles as 'clean diesel' and falsely promoted them as such.' "). It simply defies common sense to assert that other vehicles, including other purportedly environmentally friendly vehicles, lack the "potential ability to deprive" diesel passenger vehicles of "significant levels of business." Pay 'N Pak, 875 F.2d at 1374.

IPPs' argument that "diesel passenger vehicles" nonetheless constitute a cognizable submarket also fails, because IPPs have not plausibly alleged any genuine "barrier to customer cross-over" between diesel

passenger vehicles and other passenger vehicles. Pay 'N Pak, 875 F.2d at 1376. IPPs recite the Brown Shoe factors and allege corresponding facts with no bearing on "the actual field of competition," id., in an effort transparently "contorted to meet their litigation needs," Hicks, 897 F.3d at 1121. For instance, IPPs allege a general "price premium" for diesel vehicles without reference to comparable premiums for other environmentally friendly vehicles. IPP 2AC ¶¶ 173-175; see also Order re First MTD at 12 (stating that merely pointing to a price premium "is insufficient to establish an economically distinct submarket"). Similarly, that certain journalists and industry analysts have referred to a diesel vehicle "segment" says nothing about whether that segment was insulated from competition with other vehicles. Id. ¶¶ 180-181. Defendants correctly point out that these allegations show "only that diesel engines are a thing that automotive writers can address by name." Joint MTD 2AC at 17.

On the other hand, IPPs assert new allegations regarding consumer price-sensitivity that, if plausible, could conceivably overcome the commonsense inference that diesel passenger vehicles compete with other passenger vehicles. IPPs principally rely on this "empirical evidence," a survey meant to show that consumers have a "low sensitivity to price increases for diesel passenger vehicles." See IPP Opp. to Joint MTD 2AC at 17; IPP 2AC ¶ 62. Of course, hard data casting doubt on the Court's commonsense understanding that diesel passenger vehicles compete with other passenger

vehicles (or at least other purportedly environmentally friendly passenger vehicles) could make IPPs' otherwise absurd submarket plausible.

But to describe IPPs' survey is to recognize that it cannot save IPPs' diesel passenger vehicle submarket. IPPs surveyed "over one thousand people in the United States who make decisions about vehicle purchases in their households and who also own a vehicle." IPP 2AC ¶ 178. Per IPPs' own account, this included about 300 people who had purchased a diesel passenger vehicle (more than half of whom had purchased a "new" diesel passenger vehicle). Id. Those people were asked whether they would have switched away from such vehicles "when faced with a $100 or $500 increase in the purchase price of the car." Id. 67% said they would either "stick with" their diesel vehicle or purchase another diesel vehicle. Id.

This "empirical evidence" of a distinct submarket does not pass the straight-face test. Evaluating proposed mergers among competitors (also known as "horizontal" mergers) requires courts and government agencies to assess anticipated competitive effects in relevant product markets. See, e.g., Saint Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., 778 F.3d 775, 783 (9th Cir. 2015). The Department of Justice has promulgated merger guidelines that include a "hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets." U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines § 4.1.1 (2010),

available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (last visited Oct. 21, 2020). This test asks what would happen if a hypothetical monopoly firm that sells the relevant product imposed "a small but significant and non-transitory increase in price ("SSNIP")." Id. "Agencies most often use a SSNIP of five percent of the price paid by customers," though the percentage may change based on "the nature of the industry and the merging firms' positions in it." Id. § 4.1.2. The point is to see "the extent to which consumers would likely substitute away from the products in the candidate market," and "surveys" are one of many sources that can provide evidence. Thus, a survey-based SSNIP analysis could plausibly indicate that a category of products is meaningfully "insulated . . . from competition" with other products in the same market. Pay 'N Pak, 875 F.2d at 1375.

But IPPs have not conducted such an analysis. Without any sensible explanation, IPPs applied a price increase based on the cost of engines that go into diesel passenger vehicles, not based on the price of diesel passenger vehicles. IPP 2AC ¶ 177. IPPs thus applied an insignificant price increase, in the range of 0.2% to 1%, to diesel passenger vehicles. As a result, their analysis tells the Court nothing about whether diesel passenger vehicles are meaningfully shielded from competition with other vehicles. Worse, a significant number (33%) of customers surveyed said they would switch away

from diesel vehicles if faced with such a small price increase.[4]

To add analytical heft to their survey, IPPs cast their submarket argument as a "Critical Loss Analysis" (CLA), not a SSNIP analysis. Id. ¶ 176. Courts and government agencies evaluating horizontal mergers have used a CLA approach "to the extent it corroborates inferences drawn from the [SSNIP] evidence noted above." DOJ & FTC Horizontal Merger Guidelines § 4.1.3. A CLA determines "whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits." DOJ & FTC Horizontal Merger Guidelines § 4.1.3. Thus, a CLA examines not only consumer substitution, but also resulting company profits, to determine whether a hypothetical firm could make more

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[4] IPPs acknowledge that the DOJ & FTC Guidelines require applying a price increase to the "price paid by customers for the products or services to which the . . . firms contribute value." DOJ & FTC Horizontal Merger Guidelines § 4.1.2; IPP Opp. to Joint MTD 2AC at 26. IPPs assert that the extent to which Defendants contribute value to the vehicles they manufacture beyond those vehicles' diesel engines is a factual question. IPP Opp. to Joint MTD 2AC at 27. That is wrong. Assessing value contribution merely requires evaluating the relevant companies' positions in their industry. DOJ & FTJ Horizontal Merger Guidelines § 4.1.2. For example, in a merger "between two oil pipelines," courts and government agencies would evaluate "the price charged for transporting the oil, not . . . the price of the oil itself." Id. Thus, for auto manufacturers, the relevant price is the price of the vehicles (whereas in the vehicle shipping industry, the relevant price would be the price of transporting vehicles). Although special circumstances might require a more nuanced approach, IPPs have not explained why such circumstances apply here.

money even as customers substitute away. See id. Here, IPPs' purported CLA is useless. The cognizable submarket inquiry is concerned with customer substitution, not firm profits. See Pay 'N Pak, 875 F.2d at 1375. And because IPPs did not conduct a legitimate SSNIP analysis, there is nothing for IPPs' CLA to corroborate. IPPs' CLA incorporates the insignificant price increase used in the survey, and thus suffers from the same defect.

Beyond bare allegations and "empirical evidence" of no value, IPPs have alleged nothing to contradict the commonsense inference that diesel passenger vehicles compete with other passenger vehicles and do not constitute a relevant submarket.[5] Because that is fatal to their claims, and because this is IPPs' third attempt to state a Sherman Act claim, the Court dismisses their Second Amended Complaint with prejudice.

B. Steel Conspiracy

DPPs allege that Defendants participated in a "steel price-fixing conspiracy," DPP 2AC ¶ 274-77, by agreeing with each other to accept unlawfully inflated steel prices and pass those costs to their customers, id. ¶ 177. DPPs argue that this constitutes a per se Sherman Act violation, and that (in the alternative) Defendants' conduct was unlawful under the rule of

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[5] IPPs' allegation that Defendants comprise a concentrated set of manufacturers within a relevant market fails because it depends on IPPs' flawed definition of that market. See IPP 2AC ¶¶ 182-193.

reason because it "harmed competition in the United States." Id. ¶ 277.

The Court has previously considered DPPs' allegations that Defendants "colluded to pay higher prices, because their goal was to pay the same price for steel as their competitors, even if that meant everyone paid more," and that Defendants did so because they "could pass any price increase on to their customers." Order re Second MTD at 19 (citing DPP 1AC ¶¶ 161-165). The Court held that this theory was "not supported by DPPs' factual allegations." Id. DPPs seek to avoid a similar result by asserting a separate "price-fixing" claim against Defendants based on this conduct and alleging that Defendants specifically agreed to pass on higher steel prices to customers. DPP 2AC ¶¶ 161-181. Defendants argue that DPPs have not plausibly alleged that (1) DPPs were injured by Defendants' alleged agreements to accept unlawfully inflated prices for steel, or (2) Defendants agreed to pass those inflated costs to their customers. Joint MTD 2AC at 23. They frame this argument in terms of both "Article III Standing" and "Antitrust Standing." Id. at 23, 27.

To have Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). The plaintiff "bears the burden of proof" to establish each element "with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defs. of Wildlife, 504 U.S. 555, 561

(1992). "At the pleading stage, general factual allegations . . . may suffice," though "bare legal conclusion[s] and "ingenious academic exercise[s] in the conceivable" do not. Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011). The Ninth Circuit has nevertheless held that Twombly and Iqbal's familiar plausibility standard is not relevant to this inquiry. Id.

Here, DPPs' "general factual allegations" are enough for Article III standing. Maya, 658 F.3d at 1068. DPPs allege that Defendants entered into a series of unlawful agreements with steel manufacturers and each other, causing DPPs to pay increased prices and thus suffer financial injury, which could be redressed via damages. See DPP 2AC ¶¶ 177, 279.

But in addition to having Article III standing, a Sherman Act plaintiff must plausibly allege "antitrust standing." Associated Gen. Contractors of CA, Inc. v. CA State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983). To do so, the plaintiff must plausibly allege (1) "the defendant's specific unlawful conduct," (2) "some credible injury caused by the unlawful conduct," (3) that this injury flowed "from that which makes defendants' acts unlawful," and (4) that the injury is "of the type the antitrust laws were intended to prevent." American Ad Mgmt., Inc. v. General Telephone Co. of California, 190 F.3d 1051, 1055-57 (9th Cir. 1999).

On this score, DPPs' allegations fall short. DPPs have plausibly alleged that steel manufacturers agreed with one another to fix steel prices, and that Defendants agreed to accept standard surcharges

rather than individually negotiate with steel manufacturers. DPP 2AC ¶¶ 162-169. But DPPs have not plausibly alleged either that (1) Defendants' agreement to accept the steel manufacturers' prices resulted in higher steel prices, resulting in harm to competition in a relevant market, or (2) Defendants agreed to pass-through increased steel costs to DPPs.

1. The Alleged Agreement to Accept Steel Surcharges

DPPs have not plausibly alleged that Defendants' agreement to accept the steel manufacturers' surcharges led to higher steel prices. As the Court has explained, Defendants' decision to accept the prices charged by the steel manufacturers does not mean Defendants are responsible for an increase in the price of steel. See Order re Second MTD at 19. Indeed, given the broad alleged conspiracy among German steel manufacturers to fix steel prices, DPPs' allegations suggest Defendants had little control over the price of steel. See DPP 2AC ¶¶ 162-169. DPPs' allegation that Defendants could have reduced steel prices by reporting German steel manufacturers to the authorities is contradicted by DPPs' allegations indicating that the steel manufacturers were able to charge higher prices because Defendants had nowhere else to turn and did not want to risk disrupting the supply of steel. See id. ¶ 172 n.1 (citing Bundeskartellamt Case Summary, German car manufacturers fined for anticompetitive practices in the purchase of long steel, November 21, 2019, available at https://tinyurl.com/y58tmtoj (last

visited October 14, 2020)). DPPs' allegations plausibly establish that steel manufacturers, not Defendants, inflated the price of steel.

Even were the Court to suspend its disbelief and assume that Defendants' agreement to not negotiate individually for steel prices plausibly raised steel prices, DPPs' allegations could not give rise to liability.[6] First, such an agreement would not warrant per se treatment. Although "price-fixing agreements are unlawful per se under the Sherman Act," Arizona v. Maricopa Cnty. Medical Soc., 457 U.S. 332, 245 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940)), an agreement among competitors to negotiate collectively with suppliers is not price-fixing, even if those suppliers (here, the steel manufacturers) are engaged in price-fixing. For the reasons described above, such an approach could plausibly have led to lower steel prices—as alleged in DPPs' original Complaint. Khan, 522 U.S. at 10; Order re First MTD at 18 (describing DPPs' allegation that Defendants' coordinated steel negotiations resulted in price savings they did not pass to their customers). Second, under the Rule of Reason, DPPs have not pleaded a relevant

[6] The former chair of the Germany Monopoly Commission Justus Haucap's statement that when steel customers do not individually negotiate prices, "competition suffers," and "usually end users, such as car buyers, suffer because they pay too high a price" is not evidence of an agreement to pass-through increased steel costs to customers. See DPP Exhibits 1, 2 (dkt. 448). At most, Justus Haucap's statements indicate that a lack of individual negotiation among Defendants with steel manufacturers could have led to (but did not necessarily lead to) increased steel prices.

market. DPPs incorporate IPPs' argument that diesel passenger vehicles constitute a distinct submarket, see DPP 2AC ¶ 159. As discussed above, this argument fails.

2. The Alleged Agreement to Pass on Increased Steel Costs

DPPs have not plausibly alleged that Defendants agreed with one another to pass increased steel prices to their customers. DPPs argue that Defendants entered into an additional pass-through agreement to make sure that any increase in steel prices would be borne by customers (i.e., DPPs). But this allegation depends on a faulty inference: that Defendants' agreement to accept steel surcharges would have been "economically irrational" unless they knew they could offset those surcharges by passing them on to consumers. DPP 2AC ¶ 177. As the Court previously explained, there are many economically rational reasons why Defendants may have agreed to accept the steel surcharges, including ensuring a stable supply of steel and avoiding frequent renegotiating with the steel manufacturers. Order re First MTD at 19-20. Nor do DPPs allege other facts showing a pass-through agreement as opposed to conscious parallelism. DPPs quote a report from 2008 describing Defendants' reactions to trends in the steel market with no sign of coordination. DPP 2AC ¶ 178. Indeed, DPPs own allegations indicate that increased commodity prices ordinarily get passed on to "end users" without any agreement among competitors. See DPP Exhibits 1, 2 (dkt. 448). Given that,

the specific content and nature of this alleged "pass-through" agreement is not discernable.

Because DPPs have not plausibly alleged that Defendants agreed to pass through increased steel costs to DPPs, or that DPPs were injured by any agreement among Defendants to accept the steel manufacturers' surcharges, DPPs have not plausibly alleged "some credible injury caused by [Defendants'] unlawful conduct." American Ad Mgmt., Inc., 190 F.3d at 1056. DPPs' Second Amended Complaint thus fails to state a claim upon which relief may be granted.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motions to dismiss.[7] And because this is Plaintiffs' third attempt at stating claims under the Sherman Act, the Court does so with prejudice.

IT IS SO ORDERED.

Dated: October 23, 2020

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Court

[7] The Court also GRANTS Defendants' motion to file under seal (dkt. 455).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GERMAN AUTOMOTIVE MANUFACTURERS ANTITRUST LITIGATION, ——————————— AUDUBON IMPORTS, LLC, DBA Mercedes Benz of Baton Rouge; et al., Plaintiffs-Appellants, v. BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT, (BMW AG); et al., Defendants-Appellees.	No. 20-17139 D.C. No. 3:17-md-02796-CRB Northern District of California, San Francisco ORDER (Filed Jan. 25, 2022)

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Bade and Judge Bumatay have voted to deny the petition for rehearing en banc, and Judge Sessions has so recommended. The full court has been advised of the petition for rehearing en banc and no

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.