

APPENDIX

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-10813
D.C. Docket No. 1:16-cv-03595-MLB

[Filed March 4, 2021]

AMERICAN CONTRACTORS SUPPLY, LLC,)
Plaintiff-Appellant,)
versus)
HD SUPPLY CONSTRUCTION SUPPLY, LTD.,)
Defendant-Appellee.)

Appeal from the United States District Court
for the Northern District of Georgia

(March 4, 2021)

Before ROSENBAUM, LAGOA, and ANDERSON,
Circuit Judges.

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ANDERSON, Circuit Judge:

This appeal requires us to determine whether Plaintiff-Appellant American Contractors Supply, LLC (“ACS”), a distributor of tilt-wall equipment, presented evidence of facts tending to exclude the inference that a competing distributor and a manufacturer acted independently when the manufacturer terminated further business with ACS in the Florida market. ACS appeals the entry of summary judgment against it and in favor of the competitor distributor, Defendant-Appellee HD Supply Construction Supply, Ltd., known as “White Cap,” on ACS’s Sherman Antitrust Act and Georgia state law claims, all based on the theory that White Cap illegally conspired with the manufacturer, Meadow Burke. Because the evidence in this case is at least “as equally consistent with permissible competition as it is with an illegal conspiracy,” Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1533 (11th Cir. 1987), we affirm.

I. BACKGROUND

A. The Tilt Industry

ACS and White Cap are both distributors of equipment used in tilt concrete wall construction in the southeast. “Tilt” or “tilt wall” construction is a method of building concrete buildings: concrete walls are cast in panels on site, lifted into place with cranes, and linked together. ACS and White Cap distribute tilt products and equipment such as the cranes for lifting the wall panels and stilts to hold the panels up and in place during construction.

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ACS and White Cap were competitors in the Georgia and Florida markets. In Georgia, there have been a total of three successful distributors of tilt-wall equipment: ACS, White Cap, and Construction Materials, a company not involved in this dispute. ACS distributed Meadow Burke-manufactured tilt products and equipment and enjoyed a 25% share of the Georgia market. White Cap had a market share of over 35%, and Construction Materials had a market share of about 40%.

In Florida, however, before 2016, only two main distributors operated: Construction Materials primarily distributed equipment from manufacturer Dayton Superior, and White Cap—with the largest presence in the state—nearly exclusively distributed Meadow Burke equipment. White Cap invested in the Meadow Burke brand in Florida by, for example, co-sponsoring events and employing over 100 employees with more than 10 years' experience with Meadow Burke products. In their respective levels in the market chain, White Cap had over a 75% share of the Florida market, and Meadow Burke had over a 65% share.

B. ACS's Entry into the Florida Market

ACS wanted to expand. The location it settled on was Florida, and the products it settled on were those from Meadow Burke—the manufacturer whose products ACS sold in Georgia but that only White Cap had sold in Florida. ACS has described Meadow Burke as a “superior product” when compared with the other suppliers’ products, hence its desire for expansion into Florida with Meadow Burke products.

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ACS moved to make the entry into Florida happen by working with Mike Wolstenholme, Meadow Burke's Director of Tilt Up.¹ ACS Chief Executive Officer Jason Reuter and General Manager Ron Barteski met with Wolstenholme at ACS's Atlanta, Georgia office on April 28, 2016, where the Florida expansion idea was discussed. Wolstenholme told ACS that Meadow Burke would supply ACS with its products in the state if ACS opened an office in Tampa, Florida.

After this April meeting, ACS began its entry into the Florida market. Before establishing ACS's Florida office, Jason Reuter took steps to secure a bid with a contractor in Florida; on May 10, 2016, he communicated with contractor Flagship Tilt-Wall about bidding on its projects. Meadow Burke's Wolstenholme had told Jason Reuter to proceed with the bid—for a project to be supplied by Meadow Burke—despite ACS not having yet opened its Florida office. ACS says part of the reason it had the opportunity to bid on a Flagship project was because Flagship complained to Meadow Burke and White Cap that there was a lack of communication and coordination by White Cap. In other words, ACS saw an opportunity, perceiving a competitor to be faltering and not fulfilling customer needs.

On June 22, 2016, Jason Reuter forwarded project drawings to Meadow Burke's engineering department to facilitate the Flagship bid. Around that same time, he updated Wolstenholme on the progress of ACS's

¹ Wolstenholme also held the title of Northeast Regional Sales Manager.

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development of a Tampa office. And on July 1, ACS opened the office.

On July 5, 2016, ACS won the Flagship bid, and ACS notified Meadow Burke. The Meadow Burke engineering department, which had already been working on the matter, prepared the bill of materials. White Cap then accidentally found out about ACS's winning the bid (with Meadow Burke products) for the Flagship project in Florida. Lori Dykes at Meadow Burke sent the bill of materials in an email to Christina Miller, an equipment rental coordinator at White Cap, an incident that White Cap describes as a clerical error. Miller forwarded the email to Doug Bartle of White Cap, the White Cap contact for Meadow Burke.

C. Alleged Anticompetitive Conduct

The fallout from the clerical error started when Doug Bartle felt "hurt" after seeing the bill of materials for a Meadow Burke-supplied project with ACS as the distributor. He left a voicemail for Meadow Burke's Lori Dykes and then had a thirteen-minute phone call with her. After the call, Dykes sent an email on July 13, 2016, to Meadow Burke's Wolstenholme and Greg Arnett, Meadow Burke's Southern Regional Sales Manager, describing the call with the subject line "John House"; John House was the sales representative for Dayton Superior, another supplier of tilt equipment in Florida and Meadow Burke's primary competitor in Florida. The email, which ACS labels as a "smoking gun," read as follows:

Hello Greg and Mike,

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I just talked to Bartle and WC is very upset and totally disappointed in MB! They can not believe we let someone else sell Tilt in FL nor can I! John [H]ouse^[2] is flying in to meet with Doug^[3] at [W]hite [C]ap tomorrow to discuss tilt for the Carolina area and I am sure Florida as well. We need damage control ASAP, it was brought up to upper management today during a meeting to discuss bringing in more braces and strong backs but that PO^[4] is now on hold because letting someone else into Florida. Please confirm we will NO Longer allow anyone other than WC to sell Tilt in Florida. Please call to discuss how we can move forward and fix what we have done.

Lori

After receiving the email, Arnett and Wolstenholme each proceeded to make phone calls. Arnett spoke internally with their immediate supervisor, Meadow Burke's Vice President of Sales Doug Crawford, about what had taken place. Wolstenholme had a conversation with Bartle of White Cap later on July 13, during which Bartle said that they needed to have a sit-down, face-to-face conversation. Wolstenholme and Bartle agreed to a meeting in Tampa, which took place on July 25, 2016. Wolstenholme also responded later

² "John House" is the sales representative for Dayton Superior.

³ "Doug" is Doug Bartle, the White Cap representative who coordinated with Meadow Burke.

⁴ "PO" is a "purchase order" from White Cap on another project that White Cap was putting on hold because of its concern about Meadow Burke's letting ACS sell the Meadow Burke product in Florida.

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that day, on July 13, to the email from Dykes, copying Arnett, saying, “I’m coming to meet them in person. Not going to get things straight over the phone or on any damn emails.” At some point, Arnett and Crawford met to discuss the issue, and Arnett and Wolstenholme had a follow-up conversation.

A week later, on July 20, 2016, Arnett emailed Crawford, stating, “Mike [Wolstenholme] and I have discussed the ACS/WC issue and we will not be supporting them in FL going forward.” Later that day and into the next, Crawford emailed the decision up the chain of command to Meadow Burke President Eoin Lehane, and the two had the following exchange:

[Crawford:] ACS will not be opened in FL. Arnett and I discussed with Mike [Wolstenholme] and came to that conclusion. Not as straight forward as initially thought and Mike had put a fair amount of thinking into his perspective, but Greg [Arnett] and I were against it and Mike is fine with our decision. . . .

[Lehane:] Good deal - glad Mike came to same conclusion. . . .

[Crawford:] The call was really mine and Greg’s though Mike saw both sides from the beginning. Mike ultimately needed us to be the scapegoats so he could tell his customer/ friend that the call wasn’t his. . . .

[Lehane:] Sounds good - glad the call was made. Hopefully Mike realizes not to do this again and not without proper consultation first.

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A few days later, on July 25, 2016, Meadow Burke’s Wolstenholme, Arnett, and Dykes met with White Cap’s Bartle and its local managers at White Cap’s Tampa, Florida offices. At the meeting, Meadow Burke “reassured” White Cap that apart from the single Flagship project already assigned to ACS, Meadow Burke was not going to support ACS in the Florida market.

Later that same day, Wolstenholme and Arnett met with ACS CEO Jason Reuter and his brother Jacob Reuter, another principal of ACS—both of whom were working out of ACS’s new Tampa office. Wolstenholme told them that Meadow Burke was cutting ACS off in Florida. Wolstenholme acknowledged that they “wouldn’t be sitting [at the meeting] if [they] didn’t receive pressure.” Notes from this meeting indicate that they discussed how Meadow Burke “owns” Florida and that ACS has four projects in the northeast but “nobody cares.”

Later communications implemented the decision to terminate ACS. On August 10, 2016, Meadow Burke, through Wolstenholme, denied a request by ACS to bid on a new project. Then, sometime in August or September 2016, the president (also a co-owner) of Flagship—the company for whose project ACS had won its only Meadow Burke-supplied Florida bid—was told by Bartle that White Cap had the buying power to get Meadow Burke to cut off ACS in Florida, stating, “We sent him packing. We do millions a year with Meadow Burke.” Finally, on October 13 and 14, 2016, Wolstenholme and Arnett exchanged emails internally

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at Meadow Burke, referencing Meadow Burke and Bartle:

Subject: Re: MB equipment orders for WC -S
E . . .

[Wolstenholme:] . . . Mr. Bartle has issued several nice PO's for equipment going to the South East. Do you know if these orders will fall under your guys when invoiced? Just an FYI . . . Had a good talk with Doug – things will get interesting . . .

[Arnett:] You drinking the kool aide? . . .

[Wolstenholme:] Doug Bartle

D. Alleged Effects

During the summer of 2016 and through the summer of 2018, despite the lack of support from Meadow Burke in Florida, ACS operated from its new office in Tampa, but not without struggle. Having stocked up on inventory and equipment and having made other investments for expansion in Florida, ACS decided to start working with another, newer manufacturer, SureBuiT, after losing out on Meadow Burke's business. Despite this, ACS identified safety concerns with SureBuiT products, which ACS linked to the inability for ACS to reach a level of sales sufficient to scale up Florida operations. ACS had at least nine projects supplied by SureBuiT. ACS closed shop in Florida in late August and early September 2018, more than two years after learning of Meadow Burke's decision.

In addition to its own exit from the market, ACS attributes other market effects to the alleged anticompetitive conduct of White Cap. ACS offers certain economic evidence paired with expert evidence, including evidence of increases in prices for certain products in the market and in White Cap's gross margins and market share in Florida.

E. Procedural History

ACS filed suit in September 2016 against White Cap.⁵ ACS alleged four causes of action in its operative complaint that were all based on the same allegations of anticompetitive conduct—that White Cap and Meadow Burke conspired to terminate ACS. The causes of action alleged by ACS are: (1) unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. §§ 1, 15; (2) monopolization and (3) attempted monopolization in violation of section 2 of the Sherman Act, *id.* §§ 2, 15; and (4) tortious interference with a business relationship in violation of Georgia law.

White Cap moved for summary judgment on all four claims, and ACS filed a motion for partial summary judgment on the issue of the relevant market for its Sherman Act claims.

After the motions were fully briefed, the district court granted summary judgment in favor of White Cap on all four of ACS's claims. With respect to ACS's § 1 claim, the district court recognized that proof of concerted action was a prerequisite. The district court held that ACS had failed to adduce evidence creating a genuine issue of fact that White Cap and Meadow

⁵ Meadow Burke was not named as a defendant.

Burke had entered into a conspiracy (i.e., an agreement) for Meadow Burke to cease doing business with ACS in Florida. Thus, summary judgment was warranted. The district court also rejected ACS's § 2 claims, concluding that there was no anticompetitive conduct to form the basis for the § 2 claims. For the same reason, the district court rejected ACS's Georgia tortious interference claims, ACS having asserted to support that claim only antitrust violations as the necessary improper conduct without privilege. And because there was no violation of the antitrust laws, ACS's partial motion for summary judgment on the relevant market for its § 2 claims was denied as moot.⁶

Judgment was entered, and ACS timely appealed.

II. ANALYSIS

We review *de novo* a grant of summary judgment. *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1341 (11th Cir. 2020). Summary judgment is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). We view the evidence in the light most favorable to the non-moving party. *Cowen*, 960 F.3d at 1342. “[T]his Court may affirm the judgment of the district court on any ground supported by the record, regardless of whether that ground was relied upon or even considered by the district court.” *Kernel*

⁶ ACS does not challenge the district court's denial of its motion for partial summary judgment. We would reach the same conclusions as the district court, that the motion is moot, in light of our conclusion that ACS has failed to demonstrate any genuine issue of material fact on its antitrust claims.

Records Oy v. Mosley, 694 F.3d 1294, 1309 (11th Cir. 2012).

ACS argues that summary judgment was erroneously granted because the evidence demonstrates that White Cap agreed with Meadow Burke to have Meadow Burke stop supplying ACS projects in Florida. Because the antitrust law does not permit liability for conduct that is equally consistent with independent conduct as it is with concerted action, and because all of ACS's claims are based on the same theory of this agreement, we hold that ACS's evidence is deficient and summary judgment was properly granted. We take each of ACS's claims in turn.

A. Section 1 Claim

Section 1 of the Sherman Antitrust Act declares illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1. “Despite the different terminology, there is no magic unique to each term” in § 1; the terms “contract,” “combination,” and “conspiracy” are used interchangeably to capture the concept of concerted action, that is an “agreement.” Tidmore Oil Co. v. BP Oil Co./Gulf Prods. Div., a Div. of BP Oil Co., 932 F.2d 1384, 1388 (11th Cir. 1991). And in interpreting § 1, “the Supreme Court has long concluded that Congress intended only to prohibit ‘unreasonable’ restraints on trade.” Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1260 (11th Cir. 2019) (en banc) (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 2472–73, 73 L. Ed. 2d 48 (1982)).

“Thus, § 1 prohibits (1) conspiracies that (2) unreasonably (3) restrain interstate or foreign trade.” Id. “The first inquiry, in any section 1 claim, then, is to locate the agreement that restrains trade.” Tidmore, 932 F.2d at 1388.

In this case, ACS has alleged that it, as a distributor, was harmed by the vertical conspiracy to exclude it from the Florida market by way of an agreement between a competing distributor, White Cap, and the manufacturer that both distributors sought to sell for, Meadow Burke. ACS fails to meet the standard of proving concerted action under § 1.

1. There is No § 1 Agreement When the Evidence is Equally Consistent with an Inference of Independent Action

In considering an agreement under § 1, “there is the basic distinction between concerted and independent action” of alleged anticompetitive actors. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984). “Independent action is not proscribed” under § 1; only concerted action is. Id. “A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.” Id. (citing United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919)).

This distinction means that at the summary judgment stage, the plaintiff must present “evidence that tends to exclude the possibility that the manufacturer and nonterminated distributor[] were acting independently.” Monsanto, 465 U.S. at 764, 104

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S. Ct. at 1471; see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (“[A]t the summary judgment stage a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.” (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))). The terminated distributor, as the non-moving party, must “point to evidence which tends to exclude the possibility that the manufacturer was operating independently in making his determination to terminate the distributor.” Helicopter, 818 F.2d at 1534. Mere equipoise of the evidence does not establish an agreement. Quality Auto Painting, 917 F.3d at 1267 (“[I]ndependent action is at least as plausible as concerted action pursuant to prior agreement; thus nothing ‘tends to exclude the possibility of independent action,’ or ‘remove[s] . . . [this case] from the realm of equipoise and render[s] [this case] more probative of conspiracy’” (alterations in original) (citation omitted)); City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 569 (11th Cir. 1998) (“[T]he plaintiffs’ circumstantial documentary evidence is in equipoise, and in the absence of further evidence of collusion, summary judgment against the plaintiffs would be in order.”). ACS, “in other words, must show that the inference of conspiracy is reasonable in light of the competing inference[] of independent action.” Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356.

“The summary judgment standard in vertical restraint cases is more stringent than in other areas of antitrust law because a higher possibility of capturing

and invalidating legitimate business conduct exists.” DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1508 (11th Cir. 1989). Indeed, we have observed that this standard even seems contrary to the general rule in evaluating summary judgment “since it is at least arguable that a jury might reasonably infer such an agreement from the existence of complaints by a distributor and a manufacturer’s response to those complaints by terminating the offending distributor.” Helicopter, 818 F.2d at 1533. But this antitrust standard accounts for the purpose of the antitrust laws to only deter anticompetitive conduct, not chill legitimate business practices. As such, “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.” Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356.

Furthermore, this standard means that evidence of mere complaints from a competitor to the manufacturer fails to establish a § 1 conspiracy.

Mere complaints from other competing distributors are not sufficient in this regard since they are equally consistent with both an independent and a collusive interpretation. The distributor must, instead, adduce positive evidence which tends to exclude the possibility of unilateral action.

Helicopter, 818 F.2d at 1534 (footnote omitted). “This evidence ‘need not be such that only an inference of conspiracy may be derived from it. It must, however, go beyond equivocal complaints and tend to exclude the inference of independent action.’” DeLong, 887 F.2d at 1509 (quoting Helicopter, 818 F.2d at 1534 n.4). This

application of the standard protects a manufacturer's decision to deal or not deal with whomever it pleases, allowing it the benefit of hearing legitimate complaints. Thus, a decision to terminate a business relationship will not normally give rise to liability without concerted or other illegal action. See Constr. Aggregate Transp., Inc. v. Fla. Rock Indus., Inc., 710 F.2d 752, 773 (11th Cir. 1983).

Applying this standard, we affirmed the grant of summary judgment in Dunnivant v. Bi-State Auto Parts, holding that plaintiff Dunnivant, a retailer in the local auto parts market, failed to present evidence tending to exclude the possibility that one of his suppliers, Auto Electric, and a competitor, Paul Spence, acted independently when Auto Electric terminated its business relationship with Dunnivant in favor of Spence after Spence complained. 851 F.2d 1575, 1582 (11th Cir. 1988). Spence had complained that Dunnivant's customers were leaving their empty oxygen cylinders with Spence, leaving Spence responsible for returning the cylinders to the original oxygen supplier but without the benefit of the sale of the oxygen (which Dunnivant received). Id. at 1578. Spence threatened to pull his business with Auto Electric because of Auto Electric's relationship with Dunnivant. Id. Auto Electric initially decided to stay with Dunnivant, but it lost what turned out to be more substantial business with Spence. Id. Auto Electric's sales were cut by more than half when compared to the prior business with Spence, attributed to Dunnivant's insufficient purchasing practices and refusal to stock inventory. Id. After just over a year, Auto Electric terminated Dunnivant and reestablished business with

Spence. Id. A former Auto Electric employee “testified that the only reason Auto Electric terminated business relations with Dunnivant was due to pressure from Paul Spence.” Id. at 1580.

Dunnivant sued Spence and Auto Electric pursuant to section 1 of the Sherman Act, alleging concerted action, and we held that the evidence did not tend to exclude the possibility of independent action. Id. at 1579–81. That Spence complained and Auto Electric subsequently listened was not enough to tend to exclude the inference of independent action under Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471, and Helicopter, 818 F.2d at 1533–34. Dunnivant, 851 F.2d at 1580–81. ‘Mere complaints of illegal conspiracy that are equally consistent with permissible competition, without more, do not support even an inference of conspiracy.’ Id. at 1579. Auto Electric had independent and legitimate business reasons to terminate Dunnivant and reestablish a business relationship with Spence given that Spence’s purchases per month had been more than twice as much as Dunnivant’s turned out to be, and given its concern with Dunnivant’s failure to consistently purchase Auto Electric’s products, leading to the significant drop in Auto Electric’s sales. Id. at 1580. Auto Electric had the right to “deal or not deal with customers for ‘reasons sufficient to itself.’” Id. at 1581 (quoting Fla. Rock Indus., 710 F.2d at 772).

For similar reasons, after examining the evidence in this case, we conclude that ACS fails to meet the standard to prove a claim for a § 1 conspiracy.

2. ACS's Evidence is Equally Consistent With Competitive Conduct

ACS argues that the evidence "tends to exclude the possibility of independent action by the manufacturer [Meadow Burke] and distributor [White Cap]." See Monsanto, 465 U.S. at 768, 104 S. Ct. at 1473. ACS argues that interactions between White Cap and Meadow Burke employees demonstrate an agreement between the two companies for Meadow Burke to terminate its Florida relationship with ACS. It urges that Meadow Burke only changed its mind about ACS after White Cap threatened to pull its business, and they met so Meadow Burke could reassure White Cap of exclusivity in the future, indicating that there was an agreement. While the evidence shows that Meadow Burke's Mike Wolstenholme facilitated ACS's Florida entry and indicated a continuing supply of Meadow Burke products for projects, and that changed only after White Cap's "pressure," the following analysis demonstrates that the evidence is at least equally consistent with an inference of independent, competitive conduct.

ACS places great emphasis on the internal email from Lori Dykes of Meadow Burke that followed the clerical error and first documented the expressed dismay of Doug Bartle at White Cap that Meadow Burke was initiating a Florida relationship with ACS. The impact of this "smoking gun" email, as ACS labels it, is best understood in the context of the status quo beforehand.

White Cap, by all accounts, had enjoyed a nearly exclusive relationship with Meadow Burke in Florida

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up until that point, though not formalized in an agreement. While ACS began working with Meadow Burke's Wolstenholme on a Florida presence, White Cap was unaware that its otherwise exclusive dealer was making plans to no longer be exclusive.

About three months passed before any indication to White Cap of ACS's entry into Florida. Then, on or before July 13, 2016, Meadow Burke's Dykes accidentally sent paperwork for the ACS project to White Cap. This was how White Cap learned that Meadow Burke was supplying an ACS project, a clerical error seemingly brought about because it was so common for Meadow Burke to be sending its project documentation in Florida to White Cap, and White Cap only.

White Cap's Bartle called Dykes on July 13, 2016, and expressed surprise and indignation that Meadow Burke was permitting a competitor to distribute Meadow Burke's tilt product in Florida. Bartle threatened to take White Cap's business away from Meadow Burke and shift to Meadow Burke's main competitor, Dayton Superior, with whom he would soon be meeting. Immediately after that telephone call from Bartle, Dykes sent the internal "smoking gun" email to others at Meadow Burke.

The email was sent from Dykes—who had been the only one to have then communicated with White Cap directly at that point on the issue—to Meadow Burke executives Greg Arnett and Mike Wolstenholme. Wolstenholme had been the only Meadow Burke employee in contact with ACS about Florida. The email's subject line read "John House," clearly referring to Bartle's contact at the competitor, Dayton Superior.

Dykes wrote that she had “just talked to Bartle and W[hite] C[ap] is very upset and totally disappointed in M[eadow]B[urke]!” White Cap could “not believe [Meadow Burke] let someone else sell Tilt in F[lorida],” said Dykes, nor could Dykes herself. Dykes also reported that she had learned that Bartle and John House of Dayton Superior would be meeting the next day to discuss tilt supplies in the Carolinas. Dykes was “sure Florida as well” would be discussed, given White Cap’s learning of the newly minted ACS-Meadow Burke Florida relationship. Dykes explained that this meant that Meadow Burke needed “damage control ASAP.” Dykes said that “upper management” had already met that day to discuss bringing in more products to supply but that the purchase order from White Cap was “now on hold because [Meadow Burke was] letting someone else into Florida,” that someone else being ACS. Dykes closed the email by strongly expressing her thoughts about what this meant for Meadow Burke: “Please confirm we will NO Longer allow anyone other than W[hite]C[ap] to sell Tilt in Florida. Please call to discuss how we can move forward and fix what we have done.” In other words, Dykes thought Meadow Burke must terminate future business with ACS.

After the Dykes email, Meadow Burke internally made the decision to stop any future business with ACS. Arnett and Wolstenholme took the information they had learned from Dykes to their boss, Doug Crawford, Vice President of Sales at Meadow Burke. In turn, Crawford informed his superior, Meadow Burke’s President Eoin Lehane, that it was decided Meadow Burke should not add ACS to its Florida distribution.

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As noted above, the internal Meadow Burke emails between Lehane, Crawford, Arnett, and Wolstenholme indicate that decision was finalized on July 20. Crawford testified that the decision about ACS was made because White Cap had performed well for Meadow Burke in Florida, White Cap had bought a lot of equipment from and invested in other ways in Meadow Burke, and it would not be fair to allow ACS to take advantage of these efforts on the back of White Cap. Meadow Burke did decide to supply the one project that it had agreed to supply—the project that led to White Cap’s learning of ACS’s work with Meadow Burke in Florida—but not others. As a result, Arnett and Wolstenholme informed their White Cap and ACS contacts of the same.

At this point, the evidence demonstrates that Meadow Burke had made an independent decision to terminate ACS. There is no evidence that Dykes and Bartle made an agreement on the phone on July 13. There is also no evidence that Wolstenholme and Bartle made an agreement during their subsequent phone call on that same day. There is no other evidence suggesting a conspiracy at this point in the sequence of events. Certainly, the evidence demonstrates that White Cap expressed its unhappiness, through Bartle, with Meadow Burke using ACS as a distributor and had at least suggested that White Cap would engage a different supplier if ACS continued to distribute Meadow Burke. But evidence of a complaint, even a strong one, like this is not anticompetitive conduct.

ACS also relies on other evidence of subsequent events to argue that an agreement was in fact made

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when viewed with the developments on July 13, 2016. On July 25, Meadow Burke's Wolstenholme and Arnett met with White Cap's Bartle and others at White Cap's Tampa, Florida offices; Meadow Burke conveyed to White Cap its decision to honor the single Florida project and to not use ACS for future projects in the state. There is no evidence of the discussion involving an agreement for Meadow Burke to terminate ACS (a decision that had already been made and reported to White Cap) or for White Cap in return to promise to buy from Meadow Burke, or any other agreement.

Later that day, Wolstenholme and Arnett communicated Meadow Burke's decision to brothers Jason and Jacob Reuter, principals of ACS. ACS emphasizes three facts that it learned at this meeting. First, ACS says Wolstenholme "admitted" that there had been pressure from White Cap, which precipitated the termination decision. Second, Wolstenholme referenced projects outside of Florida, those in the northeast, suggesting that no one had taken issue with those projects so ACS should just let Florida go. And third, Wolstenholme said that he and one of the Reuters had done everything they ever said they would do until that point.

As a final piece of evidence of conspiracy, ACS relies upon a later statement by White Cap's Bartle that he told an employee of Flagship: "We sent him packing. We do millions a year with Meadow Burke."

Although the foregoing evidence raises an inference that there might have been an agreement between Meadow Burke and White Cap—Meadow Burke agreeing to use White Cap only and terminate ACS in

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Florida in exchange for White Cap continuing to purchase from Meadow Burke—it is evidence of “conduct which is as equally consistent with permissible competition as it is with an illegal conspiracy” and “does not, without more, support . . . an inference of conspiracy.” See Helicopter, 818 F.2d at 1533. Several reasons persuade us.

The chronology of events suggests that Meadow Burke independently decided that it was in its best interest to sell its product in Florida exclusively through the White Cap distributorship and not ACS anymore. Prompted by the threat from White Cap to move its business from Meadow Burke to Dayton Superior—another manufacturer that was Meadow Burke’s main competitor—Crawford, Arnett, and Wolstenholme internally conferred and decided that it was in the best interest of Meadow Burke to maintain the status quo, which had existed before Wolstenholme authorized ACS to supply the Flagship project. Although the decision was prompted by White Cap’s threat to divert its business to Dayton Superior, that decision was made without consulting White Cap, and was not finalized until July 20. From July 13 and through July 20, there had been no contact between Meadow Burke and White Cap, except Bartle’s call to Dykes on July 13, and Wolstenholme’s call back to Bartle that same day, but there is no evidence that either call involved any agreement between Meadow Burke and White Cap; indeed, Meadow Burke’s decision was not finalized until July 20, a week after those calls on July 13. And Meadow Burke’s decision was not communicated to White Cap until July 25.

ACS emphasizes Wolstenholme's perceived flip-flop—he agreed to have Meadow Burke supply ACS in Florida and then suddenly changed his mind only after White Cap's threats—and argues that it was his decision alone, as Director of Tilt Up, to terminate ACS. ACS asserts that Wolstenholme felt the pressure, evidencing an agreement. Although the contemporaneous emails between Crawford, Arnett, and Wolstenholme strongly point to the decision having been made by the sales manager of the region that included Florida (Arnett) and a superior (Crawford), or at least jointly by the three of them, it is not significant which of them, or all of them jointly, made the decision. The significant fact is the evidence points to its being a decision that was made independently by Meadow Burke, rather than being an agreement with White Cap. In other words, the evidence is at least equally consistent with the decision being an independent one, without agreement, conspiracy, or combination. That Wolstenholme, or anyone else, knew of White Cap's "threats" when making the decision is not enough under the antitrust law. See Winn v. Edna Hibel Corp., 858 F.2d 1517, 1520 (11th Cir. 1988) (holding that threats from a competitor "by itself [is] not sufficient to establish a case for the jury; a manufacturer may legitimately respond to pressure from a [distributor] in order to avoid losing that particular dealer's business.").

The same was true in Dunnivant; Spence complained to Auto Electric, threatening to take his business elsewhere if Auto Electric remained in business with Dunnivant. 851 F.2d at 1580. Despite there being evidence that Auto Electric felt "pressure" from Spence, the conclusion on summary judgment was

that Auto Electric made the independent decision to terminate business relations with Dunnivant and go back to Spence. Id. at 1581. White Cap's pressure in this case is almost identical. In this case, as in Dunnivant, ACS has failed to establish concerted action.

Supporting our conclusion is the fact that Meadow Burke's decision was clearly in its best interest. For a considerable period, White Cap had operated as Meadow Burke's near-sole and exclusive distributor in Florida, although there was no written distributorship agreement. White Cap had hired over 100 employees with at least 10 years of experience with Meadow Burke products. White Cap had substantially invested and spent considerable effort in promoting the Meadow Burke product, and resulting in part from White Cap's efforts, the Meadow Burke product had captured 65% of the Florida market and was able to sell through a distributor with its own 75% share of the market. If White Cap carried through on its threat to transfer its business to Dayton Superior, Meadow Burke would have had an uphill battle to maintain its market share. Moreover, Meadow Burke believed that White Cap had performed well, and Meadow Burke was satisfied with the amount of business it already had in Florida and wanted to avoid burdening its engineering department.⁷ And considering White Cap's investment

⁷ ACS argues that Meadow Burke contrived the engineering department concern as a post hoc and pretextual business reason for ACS's termination to protect White Cap. Whether or not ACS is correct on this point is of little moment given the other evidence and the fact that such evidence would not tend to exclude the

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and promotion of Meadow Burke's product, letting ACS "piggyback" on White Cap's efforts and built-up goodwill could discourage distributors from making similar investments in the future.

ACS has merely adduced some evidence of anticompetitive conduct on the part of Meadow Burke. But ACS has failed to establish facts that exclude the possibility that Meadow Burke acted independently. The evidence is at least as consistent with the fact that Meadow Burke, with the benefit of White Cap's concerns, independently made the decision to stop any more business with ACS. Labelling the comments of White Cap as "pressure" or "threats" alone does not rise to its own level of anticompetitive conduct for a § 1 claim.

On the White Cap side of the coin, the conclusion is the same. The evidence is at least equally consistent with White Cap having made an independent decision as with the possibility of an illegal agreement with Meadow Burke. There is no evidence that White Cap expressly agreed to continue distributing Meadow Burke's product after learning that Meadow Burke would not use ACS for future projects. And White Cap had every incentive to do so for its own business reasons. White Cap had invested substantially in promoting the Meadow Burke product in Florida, had captured about 75% of the Florida market, and clearly believed—as ACS does—that the Meadow Burke product was the superior product. If White Cap transferred its business to competitor Dayton Superior,

possibility of independent action on the part of Meadow Burke and White Cap.

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abandoning the Meadow Burke product, it would be in the position of having to undo the substantial work it had done previously in promoting Meadow Burke. For example, if it abandoned the Meadow Burke product, it could expect ACS (or some other distributor) to distribute the Meadow Burke product in Florida in its stead, which would take advantage of all the goodwill and promotion work that White Cap had done in the past and without the need to do all the legwork. And White Cap would be in the awkward position of telling its general contractor customers that—notwithstanding its many years of promoting the Meadow Burke product as the superior product—it now thought that the Dayton Superior product was best. White Cap would be paddling upstream against the presumptive 65% of the market then being served by the Meadow Burke product.

Again, our decision in Dunnivant involves almost identical facts and persuasively supports our decision in this case. Auto Electric had enjoyed a long-term relationship with Spence and decided to return to the status quo after trying out some business with Dunnivant. Of course, Auto Electric's decision was informed by some time of working with Dunnivant, unlike in our case. In one sense, however, the evidence in our case points more forcefully to independent action. The business reasons for Meadow Burke to stick with its exclusive distributorship arrangement with White Cap were so clear that it immediately chose White Cap over ACS when first presented with White Cap's threat to move its purchases to Dayton, Meadow Burke's competitor. Thus, Meadow Burke's business reasons were probably stronger than Auto Electric's in

Dunnivant. And the other facts are almost identical, including the pressure from White Cap in this case and Spence in Dunnivant.

The lack of evidence of a conspiracy in this case contrasts with DeLong v. Washington Mills Abrasive Co., on which ACS relies to argue that even without direct evidence of a discussion to terminate the plaintiff between the alleged conspirators, the case must be sent to a factfinder for a finding of conspiracy. 887 F.2d 1499, 1508 (11th Cir. 1989). Of course, ACS's argument misses the point; in sharp contrast to the ample evidence of concerted action in DeLong, see id. at 1508–12, there is no evidence of an express agreement between Meadow Burke and White Cap, and no evidence of any kind “that tends to exclude the possibility of independent action,” Monsanto, 465 U.S. at 768, 104 S. Ct. at 1473, on the part of Meadow Burke and White Cap. Without enough evidence—direct or circumstantial—of facts that “tend to exclude the inference of independent action,” ACS cannot avoid summary judgment. DeLong, 887 F.2d at 1509 (quoting Helicopter, 818 F.2d at 1534 n.4) (emphasis removed). ACS has not presented direct evidence of an agreement, and ACS's circumstantial evidence, as outlined above, does not tend to exclude the conclusion that White Cap and Meadow Burke acted independently.

Therefore, we hold that the evidence is at least equally consistent with Meadow Burke having made an independent decision to terminate ACS as it is with an inference of concerted action. And we conclude the evidence is at least equally consistent with White Cap

having made an independent decision to continue distributing the Meadow Burke product as it is with it having engaged in concerted action. Thus, we cannot conclude that White Cap acted in a manner rising to the level of anticompetitive conduct necessary for a § 1 claim. Summary judgment was appropriately granted.

B. Section 2 Claims⁸

The district court also granted summary judgment on ACS's monopolization and attempted monopolization claims against White Cap pursuant to

⁸ We concluded in Part II.A above that ACS failed to establish its allegation of the agreement or conspiracy between Meadow Burke and White Cap, and thus we concluded that ACS's § 1 claim fails. In Part II.B below, we note that ACS must prove some anticompetitive conduct to establish its § 2 claims, and we note that the only anticompetitive conduct that ACS asserts to satisfy that requirement is the same alleged agreement or conspiracy between Meadow Burke and White Cap. Thus, we conclude in Part II.B that ACS's § 2 claims fail for failure to establish the only anticompetitive conduct it asserts. In light of these conclusions, we need not address White Cap's suggestion that—even if such concerted action between Meadow Burke and White Cap were established—ACS's claims would nevertheless fail because a manufacturer is free to enter into an exclusive distributorship arrangement with a distributor, and because the antitrust law looks with favor on such exclusive arrangements, at least in the absence of substantial harm to competition. See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1653c (4th ed. 2017); Elec. Commc'n Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 245 (2d Cir. 1997); Paddock Publ'ns, Inc. v. Chi. Trib. Co., 103 F.3d 42, 44–47 (7th Cir. 1996); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 735 (9th Cir. 1987); H & B Equip. Co. v. Int'l Harvester Co., 577 F.2d 239, 245–46 (5th Cir. 1978); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir. 1957); see also McWane, Inc. v. F.T.C., 783 F.3d 814, 835 (11th Cir. 2015).

section 2 of the Sherman Antitrust Act. We hold that district court did not err in doing so.

Section 2 deems it illegal to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce.” 15 U.S.C. § 2. A § 2 monopolization claim “has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power.” Morris Commc’ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1293–94 (11th Cir. 2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)). “The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market.” Id. at 1294 (citing United States v. Microsoft, 253 F.3d 34, 58 (D.C. Cir. 2001)).

Similarly, “a claim for attempted monopolization under § 2” requires proof of “three things: ‘(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.’” Duty Free Ams., Inc. v. Estee Lauder Cos., 797 F.3d 1248, 1263 (11th Cir. 2015) (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890–91, 122 L. Ed. 2d 247 (1993)).

Section 2, in contrast to § 1, “covers both concerted and independent action, but only if that action ‘monopolize[s],’ 15 U.S.C. § 2, or ‘threatens actual monopolization,’ which is “a category that is narrower than restraint of trade” in § 1. Am. Needle, Inc. v. Nat’l

Football League, 560 U.S. 183, 190, 130 S. Ct. 2201, 2208–09, 176 L. Ed. 2d 947 (2010). “Monopoly power may be equally harmful whether it is the product of joint action or individual action.” Id.

Despite this difference, ACS based both of its § 2 claims, as conceded in its briefs and at oral argument, on the same exact anticompetitive conduct as its § 1 claim—i.e., the alleged concerted action between Meadow Burke and White Cap to refuse to have Meadow Burke supply ACS in Florida. Although concerted action is not required for a § 2 claim, some “predatory or exclusionary act[],” Morris, 364 F.3d at 1294—i.e., some anticompetitive conduct—is required. Because the only anticompetitive conduct asserted by ACS to support its § 2 claims is that same alleged concerted action and because we have already concluded that ACS has failed to establish that concerted action, it follows that ACS has failed to prove conduct to establish either of its § 2 claims. Therefore, because the evidence does not support the only anticompetitive conduct asserted, as we have explained in analyzing the § 1 claim, we conclude that the district court did not err in granting summary judgment on ACS’s monopolization and attempted monopolization claims pursuant to § 2.⁹

⁹ ACS argued that the district court ruled sua sponte, in violation of Federal Rule of Civil Procedure 56(f), on the issue of specific intent to monopolize for ACS’s attempted monopolization claim. We reject this argument because the district court’s ruling was not sua sponte. Although White Cap’s briefing to the district court focused only on the § 1 claim, the motion for summary judgment itself sought judgment on all of ACS’s claims. In any event, given that all of ACS’s antitrust claims relied upon the same alleged anticompetitive conduct, without the establishment of such

C. Tortious Interference with a Business Relationship

ACS's final claim was for tortious interference with a business relationship. Such a claim requires proof of the following elements:

- (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Trico Env't Servs., Inc. v. Knight Petroleum Co., 849 S.E.2d 538, 545 (Ga. Ct. App. 2020) (quoting Dalton Diversified, Inc. v. AmSouth Bank, 270 Ga. App. 203, 208–09, 605 S.E.2d 892, 897–98 (2004)). Georgia law recognizes a privilege of “fair competition.” Orkin Exterminating Co. v. Martin Co., 240 Ga. 662, 666, 242 S.E.2d 135, 139 (1978). “The competitor’s privilege is lost,” for the purposes of the first element of a tortious interference claim, “when an illegal restraint of trade or competition under federal or state statutes is created

conduct, ACS's attempt claim fails regardless of the intent element. Cf. Morris, 364 F.3d at 1293 n.10 (“[T]he elements of the two offenses [monopolization and attempt to monopolize] differ in only one material respect: attempt to monopolize requires specific intent to achieve monopoly power. Therefore, the attempt claim in this case is more difficult to maintain and prove. Because Morris does not withstand summary judgment on its monopolization claim, it cannot maintain its attempt claim.” (citation omitted)).

or continued.” Am. Bldgs. Co. v. Pascoe Bldg. Sys., Inc., 260 Ga. 346, 349, 392 S.E.2d 860, 863 (1990).

ACS conceded in its brief and at oral argument that its tortious interference claim relies on the same theory of conduct as its other claims—the alleged concerted action of White Cap and Meadow Burke. ACS argues that the district court erred in holding that there was no genuine issue of material fact that White Cap acted properly and with the privilege afforded to legal competition. Having failed to prove its only theory—the concerted action as “an illegal restraint of trade or competition under federal . . . statutes”—ACS cannot establish a tortious interference claim. Therefore, summary judgment was appropriately granted on the tortious interference claim.

III. CONCLUSION

For the foregoing reasons, we affirm the district court’s grant of summary judgment in favor of White Cap.¹⁰

AFFIRMED.¹¹

¹⁰ Because we affirm the entry of summary judgment and dismissal of ACS’s case, ACS’s argument regarding reassignment is moot. Moreover, the argument is without merit.

¹¹ On October 29, 2020, ACS filed a motion for this Court to take judicial notice of a merger involving White Cap in October 2020. White Cap filed a response to this motion and simultaneously moved for sanctions against ACS. Because, as we explain, all of ACS’s claims rely on the theory of anticompetitive conduct comprised of the alleged agreement between White Cap and Meadow Burke in 2016, and because ACS failed to prove such an agreement, we deny as moot ACS’s motion for judicial notice. White Cap’s motion for sanctions is also denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:16-cv-03595

[Filed February 26, 2020]

American Contractors Supply, LLC,)
)
Plaintiff,)
)
v.)
)
HD Supply Construction Supply, Ltd.,)
)
Defendant.)
)

Michael L. Brown
United States District Judge

ORDER

Plaintiff American Contractors Supply, LLC (“ACS”) claims Defendant HD Supply Construction Supply, Ltd. (“White Cap”)¹ conspired with another company to

¹ Plaintiff first named White Cap Construction Supply, Inc. as the defendant in this matter but then filed an amended complaint to correct the name to HD Supply Construction, Ltd., d/b/a HD Supply Construction & Industrial—White Cap. The Court refers to Defendant as White Cap throughout this order.

freeze it out of the Florida market for tilt construction. ACS sued White Cap for violating federal antitrust laws and tortious interference under Georgia law. White Cap moved for summary judgment on all counts.

I. Factual Background

This case arises from Plaintiff ACS's contention that it was pushed out of the Florida market for tilt-up construction when manufacturer Meadow Burke refused to support it and instead chose to maintain its otherwise exclusive relationship with Defendant White Cap. Despite alleging concerted action to restrain trade, ACS sued only White Cap (its direct competitor) without including Meadow Burke (the company that decided not to do business with it).

Tilt-wall construction, allows contractors to cast wall panels at the jobsite, leading to the use of fewer panels, less equipment, and cheaper, larger, and more rapidly erected buildings. (Dkts. 55-2 ¶ 1; 73-1 ¶ 1.) Tilt-wall buildings insulate more easily, better resist normal wear-and-tear, and endure extreme weather. (Dkts. 55-2 ¶ 2; 73-1 ¶ 2.) The Florida geographic market, the construction market at issue, offers a healthy growth trajectory for tilt-wall construction. (Dkts. 55-2 ¶ 3; 73-1 ¶ 3.) Three manufacturers supply tilt-wall-specific equipment in Florida: Meadow Burke, Dayton Superior, and SureBuiT. (Dkts. 55-2 ¶ 4; 73-1 ¶ 4.) Each manufacturer works with specific distributors in the state. Meadow Burke, for example, distributes only through White Cap — the business relationship prompting this antitrust lawsuit; Dayton Superior distributes mainly through Construction Materials, Inc.; and SureBuiT distributes through

ACS² and Construction Materials. (Dkts. 55-2 ¶ 5; 73-1 ¶ 5.) ACS alleges these manufacturers typically require a distributor to have a physical office in Florida before selling to customers in that state. ACS also alleges they closely control entry into the Florida market by limiting distributors to which they will sell. (Dkt. 73-1 ¶ 6.)

Meadow Burke and Dayton Superior are the most established manufacturers. (Dkts. 73-3 ¶ 2; 78-1 ¶ 2.) Meadow Burke is the manufacturer with a “position of power” in the tilt-up industry, because of its superior engineering department and industry veterans. (Dkts. 55-2 ¶¶ 9–10; 73-1 ¶¶ 9–10; 78-1 ¶ 23.) It controls much of the market through its partnership with White Cap, which has “invested heavily in the Meadow Burke brand” according to Meadow Burke’s Vice President for Sales and Marketing. (Dkts. 55-2 ¶ 14; 73-1 ¶ 14.)

White Cap has a substantial presence in Florida. It maintains fourteen locations, operates three rental yards, employs twenty-nine tilt-specialist account managers, and employs over one hundred people with extensive experience in Meadow Burke tilt-up construction. (Dkts. 55-2 ¶ 15; 73-1 ¶ 15.) White Cap also keeps working to develop its relationship with Meadow Burke, including cosponsoring events with

² In September 2018, well after the filing of this lawsuit, ACS closed its Florida location because of poor sales performance with SureBuilT. (Dkts. 73-1 ¶ 5; 78-1 ¶ 93.) Many customers chose not to use SureBuilT, a less well-established tilt construction manufacturer. (Dkts. 73-3 ¶ 86; 78-1 ¶ 86.) In its statement of facts, ACS also includes various facts about its unsuccessful performance in Florida, but those facts are immaterial to the Court’s determination. (See, e.g., Dkt. 73-3 ¶¶ 79–92.)

Meadow Burke and working with the manufacturer to identify new business opportunities. (Dkts. 55-2 ¶ 16; 73-1 ¶ 16.)

ACS, in contrast, conducts most of its business from its office in Atlanta, Georgia. (Dkts. 73-3 ¶ 1; 78-1 ¶ 1.) It has limited presence in Florida. (Dkts. 73-1 ¶ 17; 73-3 ¶ 10; 78-1 ¶ 10.) ACS and Meadow Burke had discussed ACS opening a location in Florida. (Dkts. 73-3 ¶ 28; 78-1 ¶ 28.) ACS claims that, during a meeting in April 2016, its main contact at Meadow Burke, Mike Wolstenholme, committed to supplying ACS with Meadow Burke-branded tilt products in Florida. (Dkts. 73-3 ¶ 27; 78-1 ¶ 27.) The record contains no definitive evidence memorializing this meeting or the agreement, however. ACS and Meadow Burke never had a written distributor agreement. (Dkts. 73-3 ¶ 5; 78-1 ¶ 5.) Meadow Burke likewise had no written agreement to distribute exclusively with White Cap in Florida. (Dkts. 73-3 ¶ 19; 78-1 ¶ 19.)

At some point after this meeting, ACS sent Meadow Burke's engineering department drawings for a Florida project. (Dkts. 55-2 ¶ 21; 73-1 ¶ 21.) White Cap claims this was a "backdoor submission" by ACS because ACS did not properly inform its contacts at Meadow Burke about the project before submitting the drawings directly to the engineering department. (Dkt. 55-2 ¶ 21.) As a result of how ACS submitted its drawings, they were given priority in Meadow Burke's engineering department over projects that White Cap and other distributors had already submitted. White Cap refers to this as ACS appearing to have jumped the line. (Dkts. 55-2 ¶ 23; 67-1 at 31:11–14, 33:20–24.)

Meadow Burke's Sales Manager for Florida then inadvertently sent White Cap paperwork related to ACS project, alerting White Cap to ACS's work with Meadow Burke. (Dkts. 55-2 ¶ 22; 73-1 ¶ 22.) Doug Bartle, White Cap's Director of Tilt Sales, saw the ACS documents and called Meadow Burke. He was "very upset" and "totally disappointed" that Meadow Burke had decided to sell to ACS. (Dkt. 78-1 ¶ 52.) He placed a Meadow Burke order on hold and said he would be meeting with Dayton Superior the next day. ACS says this was a threat by White Cap to switch suppliers away from Meadow Burke. (Dkts. 55-2 ¶ 23; 73-1 ¶ 23.)

About a week later, Meadow Burke decided it would not supply ACS on future tilt projects in Florida. (Dkts. 55-2 ¶ 25; 73-1 ¶ 25.) The parties dispute who at Meadow Burke made that decision. ACS claims Mike Wolstenholme (its contact) made the decision because of pressure from White Cap. (Dkt. 73-1 ¶¶ 25–26.) But ACS cites no admissible evidence to support its contention.³ White Cap says Doug Crawford, Meadow Burke's Vice President of Sales and Marketing, made the decision. (Dkt. 55-2 ¶ 25.) Crawford testified that he recalled "no pressure" from White Cap to stop dealing with ACS. (Dkts. 55-2 ¶ 26; 73-1 ¶ 26.) Crawford testified that he decided not to add ACS as another distributor in Florida because:

³ ACS often cites deposition testimony and declarations from two of its employees to support its statement of facts. Much of this hearsay support comes from what ACS's employees claim another person told them, however. The Court disregards these unsupported hearsay statements. In any case, "self-serving hearsay . . . has no probative value on summary judgment." Kirkland v. Tamplin, 645 S.E.2d 653, 656 (Ga. Ct. App. 2007).

- White Cap had “performed well” for Meadow Burke in Florida;
- White Cap had “bought a lot of equipment” and invested in its relationship with Meadow Burke in other ways, so it would not be “fair” to allow ACS to “piggyback” on White Cap’s efforts;
- Meadow Burke was “satisfied with the amount of business it was getting” in Florida; and
- Meadow Burke had a backlog in its engineering department and feared additional orders from ACS would exacerbate that backlog for current customers, like White Cap.

(Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.)⁴

ACS claims that there are “no internal records of why Meadow Burke cut off ACS.” (Dkt. 73-1 ¶ 27.) The Court, however, has Crawford’s testimony about his decision. Again, ACS does not dispute Crawford’s testimony or directly refute that he was the decisionmaker.

Instead, ACS focuses on the specific timing of communications between Doug Bartle of White Cap and various Meadow Burke salespeople. For instance, ACS asserts that “Mr. Bartle left a voice mail with Ms. Dykes [Meadow Burke’s sales manager who mistakenly

⁴ Because ACS claims (without record evidence) Wolstenholme made the decision, it does not directly address White Cap’s facts about Crawford’s reasons for ending the relationship.

sent the email] on July 13, 2016 at 9:53 a.m.” (Dkts. 73-3 ¶ 48; 78-1 ¶ 48.) “Ms. Dykes called Mr. Bartle back by cell phone at 2:04 p.m.” (Dkts. 73-3 ¶ 49; 78-1 ¶ 49.) “Mr. Bartle and Ms. Dykes were on the call for 13 minutes.” (Dkts. 73-3 ¶ 50; 78-1 ¶ 50.) And then “[l]ess than an hour later, Ms. Dykes sent an email to Mr. Wolstenholme and Mr. Arnett reporting her telephone conversation with Mr. Bartle.” (Dkts. 73-3 ¶ 51; 78-1 ¶ 51.)

In the email, Ms. Dykes explained that White Cap was very upset about Meadow Burke’s decision to “let someone else into Florida,” that White Cap had cancelled an order, and that she wanted Mr. Wolstenholme and Mr. Arnett to “confirm [Meadow Burke] will NO longer allow anyone other than [White Cap] to sell Tilt in Florida.” (Dkts. 73-3 ¶¶ 51–55; 73-4 at 245.) Mr. Bartle admitted he was trying to get Meadow Burke to reconsider its decision to supply ACS in Florida. (Dkt. 73-3 ¶ 56.) Mr. Arnett then called Mr. Crawford after receiving the email from Ms. Dykes and “told him about ‘what had taken place.’ ” (Dkts. 73-3 ¶ 58; 78-1 ¶ 58.)

As discussed below, these facts do not suggest any unlawful agreement in violation of the antitrust laws. Instead, they point to essentially a game of telephone up the chain of command that one of Meadow Burke’s major customers was unhappy. They point to an unhappy customer and its attempt to pressure its supplier. But again, ACS presents nothing to dispute Mr. Crawford’s testimony that he decided to stop doing business with ACS and was not influenced by improper pressure from White Cap to do so.

After Meadow Burke informed ACS of its decision not to supply further projects, Meadow Burke fulfilled its commitment on the existing project. (Dkts. 55-2 ¶ 28; 73-1 ¶ 28.) ACS then partnered with SureBuLT to sell tilt supplies for projects in Florida, which supplied ACS on at least nine tilt projects there. (Dkt. 55-2 ¶ 30.) It is undisputed that White Cap did nothing to interfere with that business relationship. (Dkts. 55-2 ¶ 31; 73-1 ¶ 31.) After these events transpired — with ACS partnering with SureBuLT — the Florida market included three tilt-wall manufacturers rather than two, and three statewide distributors rather than two.⁵ (Dkts. 55-2 ¶ 33; 73-1 ¶ 33.)

In September 2016, however, ACS sued White Cap, alleging claims of unlawful restraint on trade and monopolization in violation of the Sherman Act and tortious interference under Georgia law. (Dkt. 7 at 14–16.) White Cap moved for summary judgment on all of ACS’s claims while ACS moved for partial summary judgment as to the relevant market. (Dkts. 55; 56.) Also pending are ACS’s motions to exclude and to seal. (Dkts. 57; 69; 75.)

II. Legal Standard

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that a court “shall grant summary judgment if the movant shows there is no genuine dispute as to

⁵ Since the filing of the complaint, ACS has “quietly” shuttered its Florida office. The Florida market now includes two statewide tilt distributors, White Cap and Construction Materials. (Dkt. 73-1 ¶ 33.)

any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A factual dispute is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is “material” if it is “a legal element of the claim under the applicable substantive law which might affect the outcome of the case.” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

The party moving for summary judgment bears the initial burden of showing a court, by reference to materials in the record, that there is no genuine dispute as to any material fact that should be decided at trial. *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). A moving party meets this burden merely by “‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. The movant, however, need not negate the other party’s claim. *Id.* at 323. In determining whether the moving party has met this burden, a court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11th Cir. 1996).

Once the movant has adequately supported its motion, the nonmoving party then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Ultimately, there is no

“genuine [dispute] for trial” when the record as a whole could not lead a rational trier of fact to find for the nonmoving party. *Id.* But “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson*, 477 U.S. at 247–48. The court, however, resolves all reasonable doubts in favor of the non-movant. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993).

B. Motions to Seal

Federal Rule of Civil Procedure 26(c) provides that a court, for good cause, may issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way. Fed. R. Civ. P. 26(c)(1)(H). Courts determine whether there is good cause to seal by balancing the public’s “interest in obtaining access” against the “party’s interest in keeping the information confidential.” *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001). “[D]iscovery material filed in connection with pretrial motions that require judicial resolution of the merits” is subject to the common-law right of access to judicial proceedings, which includes the right to inspect and copy public records and documents. *Id.* at 1311–12. The common-law right of access “requires the court to balance the respective interests of the parties.” *Id.* at 1313.

C. Motions to Exclude under Rule 702

Trial courts serve a critical gate-keeping function concerning the admissibility of expert testimony. *Daubert v. Merrell Dow Pharmas., Inc.*, 509 U.S. 579, 589 (1993). Expert testimony can be particularly persuasive, and as such, the role of the trial court is to keep speculative and unreliable testimony from reaching the jury. *Id.* at 595; see *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002).

Federal Rule of Evidence 702 allows a qualified expert to give opinion testimony when it is necessary to help the trier of fact understand the issues, the opinion is based on sufficient facts or data, the expert produced it using reliable principles and methods, and those principles and methods were reliably applied to the facts of the case. Fed. R. Evid. 702. The Eleventh Circuit employs a “rigorous” three-part inquiry to determine whether these admissibility criteria are met. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998). Expert testimony is admissible when

- (1) the expert is qualified to testify competently regarding the matters he intends to address;
- (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
- (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Id. (internal footnote omitted). Thus, the admissibility of an expert's opinion turns on three things: qualifications, reliability, and helpfulness. See *United States v. Frazier*, 387 F.3d 1244, 1260–62 (11th Cir. 2004).

While the trial court's role is critical, it "is not intended to supplant the adversary system or the role of the jury." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311 (11th Cir. 1999). When the accuracy of evidence is the issue — as opposed to its admissibility — the trial court should allow the judicial process to resolve the matter. *Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

III. Analysis & Discussion

A. Defendant White Cap's Motion for Summary Judgment (Dkt. 55)

ACS asserts claims for restraint of trade, monopolization, and attempted monopolization, under Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1–2. (Dkt. 7 ¶¶ 48–53.) It also asserts a claim against White Cap under Georgia law for tortious interference with its business relationship with Meadow Burke. (Id. ¶¶ 57–65.) White Cap moves for summary judgment on all counts.

1. Count One – Monopolization

Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize,

or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony.” 15 U.S.C. § 2. As an offense then, monopolization requires two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (internal quotation marks omitted).

The first element, monopoly power, is the power to control prices in or to exclude competition from the relevant market. *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004). The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition. *Id.* For a practice to be unlawfully exclusionary, however, “a defendant must harm the competitive process, and thereby harm consumers. In contrast, harm to one or more competitors will not suffice” under Section 2. *McWane, Inc. v. F.T.C.*, 783 F.3d 814, 835–36 (11th Cir. 2015) (internal quotation marks omitted). This is because the Sherman Act does not require a company with monopoly power to alter its way of doing business in order to promote competition. Section 2 of the Sherman Act merely prohibits the unlawful monopolization and the unlawful refusal to deal. See *Morris Commc’ns*, 364 F.3d at 1295 (internal quotation marks omitted). “Unlawful monopoly power requires anticompetitive conduct, which is conduct without a legitimate business purpose that makes

sense only because it eliminates competition.” Id. (internal quotation marks omitted).

ACS alleges that White Cap “acquired and maintained” its monopoly power causing Meadow Burke to stop doing business with ACS. (Dkt. 7 ¶ 49.) ACS’s alleged exclusion from the market and resulting injury thus arose, if at all, from Meadow Burke’s decision to stop doing business with it and to continue its (functionally) exclusive relationship with White Cap. But, ACS chose to sue only White Cap while leaving Meadow Burke, the company that refused to deal with it, out of the litigation. By doing so, ACS seeks to divorce the alleged anticompetitive decision from the bedrock principle that “[i]n the absence of any purpose to create or maintain a monopoly . . . a company may deal or refuse to deal with whomever it pleases.” Morris Commc’ns, 364 F.3d at 1294–95 (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601–02 (1985)).

ACS cannot plead around this legitimate business practice. A company’s refusal to deal with another company in order to protect or further its own legitimate business purposes does not violate the antitrust laws, even if its refusal to deal injures competition or a competitor. Id. at 1295 (“Likewise, refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition.”). Ordinarily, once a defendant establishes its valid business justification for its conduct, the burden shifts to the plaintiff to show that the proffered business justification is pretextual. Id. A defendant in

the position of White Cap — that is, a company who receives the benefit of another company's legitimate decision not to deal with a plaintiff — should be permitted the benefit of this same principal. That company does not violate the Sherman Act simply by being the beneficiary of another company's legitimate decision to refuse to deal with a competitor.

And the undisputed evidence in the record shows that is exactly what happened here. The employees of Meadow Burke testified as to their legitimate decision to stop doing business with ACS. They said White Cap had “performed well” for Meadow Burke in Florida. (Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.) It had “bought a lot of equipment” and invested in its relationship with Meadow Burke in other ways, so it would not be “fair” to allow ACS to “piggyback” on White Cap’s efforts. (Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.) Meadow Burke was thus “satisfied with the amount of business it was getting” in Florida and did not feel the need to expand. (Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.) Meadow Burke also had a backlog in its engineering department and feared that additional orders from ACS could further lengthen the backlog, upsetting and alienating current customers, like White Cap. (Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.) Again, White Cap presented evidence that Meadow Burke had “long lead times for engineering,” was at full capacity, and “already maxed out with what [its engineers] could handle.” (Dkt. 62-1 at 27:15–28:2.) It was taking Meadow Burke too long to do the work it already had. It feared that, if it added another supplier, their lead times would get even longer, causing it to lose business. (Id.; Dkt. 67-1 at 34:11–17.) There is evidence in the

record that White Cap was also concerned about delivery times from Meadow Burke's engineering department and complained to Meadow Burke about it. For instance, Meadow Burke employees testified that they had heard "consistently throughout [the] year . . . concern over lead times" and had reached capacity in their engineering department. (Dkt. 66-1 at 19:17–19, 32:19–20 ("Typically, the lead time that we shoot for is about two weeks and at that time we were at about four weeks.").)

White Cap also presented evidence that, when ACS submitted plans directly to Meadow Burke's engineering department rather than following proper channels, ACS "jumped the line," thus getting its plans in front of plans that White Cap and other distributors had previously submitted. (Dkt. 67-1 at 31:5–14.) White Cap was understandably upset and concerned that the backlog in the engineering department would get worse. (See *id.* at 34:11–19.)

White Cap has met its burden of showing that Meadow Burke had a valid business justification for its decision to stop doing business with White Cap. The burden thus shifts to ACS to allege facts to support an inference that the proffered justification is merely pretextual, thereby establishing a genuine issue of material fact. *Morris Commc'ns*, 364 F.3d at 1296. ACS has not done that. Instead, ACS argues that Meadow Burke could have and should have increased its engineering capacity in order to support both ACS and White Cap. It says Meadow Burke should have added more engineers or outsourced engineering. (Dkt. 73 at 22 n.8.) That is not how the antitrust laws work. That

ACS can imagine steps Meadow Burke could have taken to change its business and work with ACS does not suggest its business justification for deciding to stop doing business with ACS was pretextual. Because ACS has not raised any issue of material fact challenging Meadow Burke's valid business justification, White Cap is entitled to summary judgment.⁶

Implicit in Meadow Burke's "freedom to deal exclusively" with White Cap "is the freedom to refuse to deal with" ACS. See *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1581 (11th Cir. 1988). The virtually exclusive dealing between White Cap and Meadow Burke is thus "free from scrutiny in the absence of proof of competitive harm, or other underlying illegal behavior." See *Constr. Aggregate Transp., Inc. v. Fla. Rock Indus., Inc.*, 710 F.2d 752, 773 (11th Cir. 1983). Exclusive distributorships are common and are pro-competitive because they can foster competition, not because they guarantee the success of competitors. See *McWane, Inc.*, 783 F.3d at 827.

Even putting aside Meadow Burke's legitimate reason for refusing to supply ACS on future projects in Florida, ACS's monopolization claim fails because it

⁶ A court assessing a claim under § 2 of the Sherman Act must first determine the relevant market and whether the defendant possessed monopoly power in that market. The Court has not done so here because, even assuming White Cap possessed that power in the relevant market, ACS cannot prevail on its claim because White Cap (and Meadow Burke) have proffered a valid business justification for their actions and ACS has not shown that reason to be a pretext for illegal activity.

has presented no evidence from which a jury could conclude that White Cap's (or Meadow Burke's) actions had the effect of preventing or excluding competition. It might have excluded ACS from Meadow Burke products but it did not prevent, harm, or even lessen competition. Indeed, the fact that ACS introduced SureBuiT products into Florida shows the pro-competitive effect of White Cap's actions, not an anticompetitive effect. White Cap's conduct caused an increase in the number of tilt-equipment brands from which Florida contractors could choose. (See Dkts. 55-2 ¶ 33; 73-1 ¶ 33.)

The record contains ample evidence that interbrand competition in tilt construction increased following White Cap's conduct in May 2016. For instance, "[o]ver the last two years, Construction Materials, Dayton Superior's exclusive tilt-supplies distributor in Florida, has increased its investment in Florida in competition with White Cap and Meadow Burke" by: (a) hiring a former White Cap tilt specialist to reach new customers in Florida and elsewhere in the Southeast; (b) spending about a million dollars on tilt braces for use in Florida and the Southeast; (c) employing a full-time estimator who works out of Construction Materials' Tampa office; and (d) replacing or adding three or four trucks in Florida. (Dkt. 73-1 ¶ 34.)

That ACS could not successfully maintain its business in Florida is immaterial.⁷ Likewise, the fact

⁷ ACS does not blame White Cap for its decision to close its Florida office and concedes that White Cap has done nothing to prevent ACS from selling the SureBuiT brand in Florida. (Dkts. 55-2 ¶ 31; 73-1 ¶ 31.)

that SureBuiT was not ACS's first-choice partner is immaterial. The antitrust laws do not ensure that every competitor receives its first choice and gets what it wants. "The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458–59 (1993). The antitrust laws were intended to protect competition for the benefit of consumers, not the preferences of competitors. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); see *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1249 (5th Cir. 1979) ("Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to . . . terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.").⁸

Much of what the parties present as evidence of an adverse or beneficial effect on competition is pure speculation. For instance, White Cap claims that, if Meadow Burke had continued to supply ACS, Meadow Burke's share of the market would have increased even more. But ACS counters that, had Meadow Burke continued their business relationship, White Cap instead would have taken its business elsewhere and thus Meadow Burke's share would not have increased. But each of these proffered outcomes are speculative.

⁸ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

The Court considers the facts in front of it, as the parties have presented them, and as they have actually transpired. See K.M.B Warehouse Distrib., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128 (2d Cir. 1995) (granting summary judgment because rejected distributor “continued to compete” by selling alternative brand and “offering superior pricing and service to counteract what it considers the higher quality” of the incumbent brand).

In antitrust cases such as this one, the chilling effect on procompetitive behavior and the extraordinary incentives to sue — automatic treble damages and “the cost of suit, including a reasonable attorney’s fee” — “endorse[] the use of summary judgment.” 15 U.S.C. § 15(a); see Tidmore Oil Co., Inc. v. BP Oil Co., 932 F.2d 1384, 1388 (11th Cir. 1991) (affirming award of summary judgment to the defendant). And the Court finds summary judgment warranted, concluding that ACS has failed to point to evidence creating a genuine issue of material fact about the crucial prerequisite of harm to competition in general, as opposed to harm to a particular competitor. See Star Discount Pharmacy, Inc. v. MedImpact Healthcare Sys., Inc., 614 F. App’x 988, 990 (11th Cir. 2015) (per curiam) (“[T]his indication of harm is harm only to a single competitor (i.e., plaintiffs) and not harm to competition in general.”) As the Supreme Court has explained, “[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.” Brooke Grp. Ltd., 509 U.S. at 225. Because ACS has failed to show that Meadow Burke’s conduct prevented or excluded competition (other than

preventing it from using its preferred manufacturer), the Court grants summary judgment to White Cap on ACS's Section 2 monopolization claim.

2. Count Two – Attempted Monopolization

Attempt to monopolize requires specific intent to achieve monopoly power. See *Spectrum Sports, Inc.*, 506 U.S. at 456. “[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” *Id.* The attempted monopolization claim is thus harder to maintain and prove that the monopolization claim.

The Court has already determined that neither White Cap nor Meadow Burke engaged in predatory or anticompetitive conduct, “which is conduct without a legitimate business purpose that makes sense only because it eliminates competition.” See *Morris Commc’ns*, 364 F.3d at 1295. Meadow Burke and White Cap have both presented legitimate, non-pretextual reasons for their conduct. Meadow Burke was concerned that it was “maxed out” in its engineering department and could not effectively increase its capacities without lengthening its already “backlogged” turnaround times. White Cap was concerned that its wait-times would increase even further. Without a showing of predatory or anticompetitive conduct, ACS thus cannot succeed on an attempted monopolization claim, which requires the same elements of a monopolization claim plus a specific intent. Further still, ACS has presented nothing — either direct evidence or circumstantial evidence — demonstrating

a “specific intent to monopolize” on the part of White Cap or Meadow Burke. The Court thus grants summary judgment to White Cap on ACS’s attempted monopolization claim in Count Two.

3. Count Three – Restraint of Trade

Section 1 of the Sherman Act “does not prohibit every act that has the effect of restraining trade . . . [it] prohibits only a ‘contract, combination[,] . . . or conspiracy in restraint of trade.’” *Tidmore Oil Co.*, 932 F.2d at 1388 (affirming grant of summary judgment to defendant because no identifiable agreement to restrain trade). Whether the challenged anticompetitive conduct “stem[s] from independent decision or from an agreement, tacit or express” forms the “critical question” in Section 1 cases. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (reversing circuit court and remanding for dismissal because pleading alleged “merely parallel conduct that could just as well be independent action”); *Tidmore Oil Co.*, 932 F.2d at 1388 (reversing circuit court’s denial of summary judgment because “the first inquiry . . . is to locate the agreement that restrains trade”).

ACS thus must provide either direct or circumstantial evidence of an unlawful agreement. ACS has failed to do so. The record contains no direct evidence of an agreement. Indeed, ACS admits this. (See Dkt. 73-1 ¶ 27 (admitting that there are “no internal records of why Meadow Burke cut off ACS”).)

ACS has also pointed to no circumstantial evidence, which “is by its nature ambiguous, and necessarily requires the drawing of one or more inferences in order to substantiate claims of illegal conspiracy.” Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1300 (11th Cir. 2003). To be sure, the evidence shows that White Cap complained to Meadow Burke about Meadow Burke’s decision to supply ACS. And, further, the evidence shows Meadow Burke thereafter decided to stop supplying ACS. From this, a jury could infer that Meadow Burke did so in response to White Cap’s complaint about ACS. But that is not enough. The Supreme Court has explained that permitting an illegal agreement to be inferred “merely from the existence of complaints, or even from the fact that termination came about ‘in response to’ complaints, could deter or penalize perfectly legitimate conduct.” See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763–64 (1984). Something more is needed. “There must be evidence that tends to exclude the possibility that the manufacturer and nonterminating distributors were acting independently.” *Id.*; see also U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 1001–02 (11th Cir. 1993) (“Federal antitrust law requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately.”).

ACS claims it has “abundant evidence of concerted action,” “overwhelming direct and circumstantial evidence,” and “extensive evidence showing a genuine issue of material fact that Meadow Burke did not act independently in cutting off ACS in Florida.” (Dkt. 73 at 2, 12, 15.) ACS argues in a brief: “White Cap

threatened Meadow Burke. Meadow Burke acquiesced to the threats from White Cap. Furthermore, Meadow Burke and White Cap both admitted that ACS was terminated in response to the pressure from White Cap.” (Dkt. 73 at 16.) These conclusory assertions are not enough to withstand summary judgment. This is precisely the evidence the Supreme Court found lacking in Monsanto. See also Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1080 (11th Cir. 2016) (holding argument unavailing when plaintiff “wholly failed to establish concerted action”); cf. City of Tuscaloosa v. Harcos Chemicals, Inc., 158 F.3d 548, 570 (11th Cir. 1998) (finding “no shortage of evidence” of concerted action and denying summary judgment).

ACS’s brief in opposition to White Cap’s motion for summary judgment is untethered from the law. It admonishes the Court to “look beyond a bald denial of concerted action and analyze the substance of the evidence.” (Dkt. 73 at 15.) The Court has done so and found ACS’s evidence lacking. As explained above, the record shows that White Cap had a legitimate reason to complain to Meadow Burke about its decision to supply ACS — specifically, its frustration with already long lead times within Meadow Burke’s engineering department, its fear that adding ACS would exacerbate the situation, and its further irritation that ACS jumped the line on its Florida project. (Dkts. 55-2 ¶ 21; 78-1 ¶ 52.) And the undisputed record evidence also shows that Meadow Burke had a legitimate reason for deciding not to add ACS as a competitor — specifically, its loyalty to White Cap for the investment it had made in Florida, its concern about the capacity of its

engineering department, and its overall satisfaction with its level of business.

This evidence does not provide the “something more” the Supreme Court said was required in Monsanto. The Supreme Court recognized that manufacturers often obtain information from distributors about the market and use that information to guide their actions. The Supreme Court focused on information about the manufacturer’s “prices and the reception of their products in the market” — often arising from a distributor’s complaints about prices. Monsanto, 465 U.S. at 726. The Supreme Court further noted that, to prevent manufacturers from reacting to these complaints (or to attach antitrust liability from its decision to do so) would inhibit a company’s ability to respond to market conditions. See *id.* at 764 (“To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.”).

The same is true here. The evidence shows that Meadow Burke came to realize — from White Cap’s complaint about ACS’s “jumping in line” with engineering — that it did not have enough production capacity to meet those expanded needs. (Dkt. 67-1 at 34:11–19.) Crawford testified that at the time, Meadow Burke had “quite a bit of backlog” in their engineering department and “were behind where [they] wanted to be.” (Dkt. 66-1 at 19:14–17.) He also testified that White Cap had “invested heavily” in the Meadow Burke brand and they had “collectively enjoyed a strong business in Florida,” which was a “strong stable

market.” (Id. at 18:25–19:6.) Because Meadow Burke was already behind on their lead times at this point, Crawford testified that “[t]here was no compelling reason to make an adjustment to” what was otherwise a “strong stable market.” (Id. at 19:6–8.) To prevent Meadow Burke from taking this action (or to attach antitrust liability to it) simply because the analysis arose from White Cap’s complaint would upset natural market conditions and prevent Meadow Burke from independently acting in its own best interests. That is exactly why the Supreme Court held “there must be evidence that tends to exclude the possibility that the manufacturer [Meadow Burke] and nonterminated distributors [White Cap] were acting independently.” Monsanto, 465 U.S. at 764.

There is no such evidence of “a conscious commitment to a common scheme designed to achieve an unlawful objective” here. Id. “[C]onclusory statement[s] by [ACS] that a conspiracy existed, without more, do[] not support ‘even an inference of conspiracy’ and cannot survive a motion for summary judgment.” Baker’s Carpet Gallery, Inc. v. Mohawk Indus., Inc., 942 F. Supp. 1464, 1476 (N.D. Ga. 1996) (quoting Dunnivant, 851 F.2d at 1579). The Court grants summary judgment to White Cap on ACS’s Section 1 restraint of trade claim.

4. Count Four – Claim for Tortious Interference

ACS asserts a claim against White Cap that it improperly interfered with ACS’s business relationship with Meadow Burke. (Dkt. 7 ¶¶ 57–65.) White Cap moves for summary judgment, arguing that ACS

cannot satisfy the necessary elements. Under Georgia law, to avoid summary judgment on its tortious-interference claim, ACS must provide evidence that

- 1) White Cap was a stranger to the business relations between Meadow Burke and ACS;
- 2) White Cap acted improperly or without privilege;
- 3) White Cap acted purposefully with malice and with the intent to injure the business relationship between ACS and Meadow Burke;
- 4) White Cap caused Meadow Burke to discontinue or fail to enter into an anticipated business relationship with ACS.

See *Barnwell v. Barnette & Co.*, 476 S.E.2d 1, 2 (Ga. Ct. App. 1996) (holding defendant entitled to summary judgment on the plaintiff's claim for tortious interference); *Servicetrends, Inc. v. Siemens Med. Sys., Inc.*, 870 F. Supp. 1042, 1068–69 (N.D. Ga. 1994) (granting summary judgment to defendant after plaintiff's failure to show element of tortious interference claim). ACS has failed to provide evidence every element.

First, acting “improperly or without privilege” requires behavior wrongful by itself, such as “physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions.” *Kirkland*, 645 S.E.2d at 656 (affirming summary judgment when plaintiff could not show defendant acted “improperly or

without privilege"). There is none of that here. Competitive business practices, including advocating and persuading a supplier not to do business with a rival, cannot satisfy this requirement. See *id.* at 656 (finding insufficient to show tortious interference "bare evidence" that one party persuaded another to breach a contract); *Elder v. Cardoso*, 421 S.E.2d 753, 757 (Ga. Ct. App. 1992) (reversing trial court and granting summary judgment because "dissuad[ing]" or "discourage[ing]" statements could not support tortious interference claim).

So, White Cap's complaint to Meadow Burke (based on its belief that it would be hurt by Meadow Burke's decision to supply ACS) is insufficient to state a claim.⁹ Even viewing the evidence in the light most favorable to ACS, as the Court must, it can offer no evidence that White Cap acted improperly and without privilege. As stated above, there is also no evidence in the record to suggest that White Cap in fact caused Meadow Burke to stop working with ACS. The undisputed evidence shows that

- Made aware of an unauthorized future shipment of supplies by Meadow Burke to ACS, Doug Crawford, Meadow Burke's Vice President for Sales and Marketing, considered whether Meadow Burke would support ACS in Florida;

⁹ The record also contains no evidence sufficient to survive summary judgment. Interestingly, the Court notes that White Cap did not file a dispositive motion to dismiss before the start of discovery.

- Mr. Crawford decided not to supply ACS for reasons having to do with Meadow Burke’s “best interests”; and
- Mr. Crawford was unaware of or uninfluenced by any “pressure” from White Cap to decide as he did.

ACS points to no evidence that White Cap’s supposed “pressure” caused Mr. Crawford to act as he did, particularly when Mr. Crawford testified it did not. (Dkt. 73-1 ¶¶ 25, 27.)

To demonstrate causation, ACS must provide affirmative evidence that tends to exclude the possibility of Meadow Burke’s independent action. See *Smith v. Morris, Manning & Martin, LLP*, 666 S.E.2d 683, 694–95 (Ga. Ct. App. 2008) (affirming summary judgment where decisionmaker asserted that defendant’s actions did not affect his decision to terminate the contract). And ACS has not done so. The Court grants summary judgment to White Cap on Count Four of ACS’s complaint for tortious interference.

B. Plaintiff ACS’s Motion for Partial Summary Judgment (Dkt. 56)

Plaintiff ACS moves for partial summary judgment on the relevant market for its Section 2 antitrust claims. Because the Court decides the monopolization claims on other grounds in White Cap’s favor, the Court denies as moot Plaintiff ACS’s motion for partial summary judgment. (Dkt. 56.)

C. Plaintiff ACS's Motion to Exclude White Cap's Experts' Regression Analysis (Dkt. 57)

ACS moves to exclude the regression analysis offered by Dr. Kristin Terris, White Cap's expert, under Rules 702 and 403 of the Federal Rules of Evidence. (Dkt. 57.) The Court agrees with White Cap, however, that the role of the Court is to serve as gatekeeper, not as an arbiter of probative value. (Dkt. 71 at 10.)

ACS takes issue with Dr. Terris's choice of variable in her regression analyses. (Dkt. 57 at 2.) But the Court finds that this dispute goes to the probative nature of the expert's report, not its admissibility. As a gatekeeper, the Court does not make ultimate conclusions about the persuasiveness of the proffered evidence. An expert's selection of independent variables "affect[s] the analysis' probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

The Court notes that ACS's reply brief highlights the correctness of this conclusion. Its reply brief essentially amasses what would be a proper cross-examination. The Court thus denies ACS's motion to exclude Dr. Terris's regressions. (Dkt. 57.)

D. Plaintiff ACS's Motions to Seal (Dkts. 69; 75)

Plaintiff ACS has moved to retain under seal certain documents marked as confidential by Defendant White Cap. The documents contain White Cap's proprietary and competitively sensitive pricing information and detailed customer information. (Dkt.

74-1 at 1.) Given the narrow scope of the information sought to be kept under seal, the Court finds good cause to seal the documents under Federal Rule of Civil Procedure 26. FED.R.CIV.P. 26(c). The Court grants ACS's motions for leave to file under seal. (Dkts. 69; 75.)

IV. Conclusion

The Court GRANTS Defendant White Cap's Motion for Summary Judgment (Dkt. 55) on all counts of Plaintiff ACS's amended complaint and DENIES Plaintiff ACS's motion for partial summary judgment (Dkt. 56).

The Court DENIES Plaintiff ACS's Motion to Exclude (Dkt. 57).

The Court GRANTS Plaintiff ACS's motions for leave to file under seal (Dkts. 69; 75) and DIRECTS the Clerk to SEAL Plaintiff ACS's filings at Docket numbers 63 and 74.

SO ORDERED this 26th day of February, 2020.

s/_____
MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE