

No. _____

IN THE
**Supreme Court of the
United States**

ATM SHAFIQUL KHALID
Petitioner,

v.

MICROSOFT CORPORATION
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

APPENDIX

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**Appendix A - Order Regarding Petitioner's appeal to
the Court of Appeals for the Ninth Circuit, Filed
March 14, 2023**

**NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

**ATM SHAFIQUL KHALID, Esquire, an individual
and on behalf of similarly situated,
Plaintiff-Appellant,**

v.

**MICROSOFT CORPORATION, a Washington
corporation; JOHN DOE, 1 -n,
Defendants-Appellees.**

**No. 20-35921
D.C. No. 2:19-cv-00130-RSM**

MEMORANDUM¹

**Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding
Submitted March 10, 2023²
San Francisco, California**

**Before: HAWKINS, S.R. THOMAS, and McKEOWN,
Circuit Judges.**

¹ This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

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ATM Shafiqul Khalid appeals pro se the district court's dismissal of his action against Microsoft Corporation. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Curry v. Yelp, Inc., 875 F.3d 1219, 1224 (9th Cir. 2017). We affirm the district court's judgment.

The district court properly concluded that the second amended complaint failed to state an antitrust claim under § 1 of the Sherman Act because it failed to allege an actionable conspiracy or agreement. See Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 20 F.4th 466, 479 (9th Cir. 2021) (elements of an antitrust claim under § 1). Khalid's allegations regarding an employee agreement concerned only Microsoft's unilateral conduct. See Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984) ("[O]fficers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy."). As to any conspiracy between Microsoft and Citrix Systems, Inc., Khalid did not allege antitrust injury as required under a rule of reason analysis and did not allege sufficient facts to support application of a per se or quick look analysis. See FTC v. Qualcomm, Inc., 969 F.3d 974, 989 (9th Cir. 2020) (rule of reason analysis); California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1133-34 (9th Cir. 2011) (en banc) (per se and quick look analysis). The second amended complaint also failed to state an attempted

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monopolization claim under Sherman Act § 2. See Optronic Techs., Inc., 20 F.4th at 481-82 (elements of claim).

The second amended complaint failed to state a RICO claim under 18 U.S.C. § 1962(c) because it failed to sufficiently allege an enterprise or predicate acts of extortion or wire fraud. See United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, AFL-CIO, 770 F.3d 834,837 (9th Cir. 2014) (elements of a civil RICO claim); United States v. McFall, 558 F.3d 951, 956 (9th Cir. 2009) (extortion under Hobbs Act, 18 U.S.C. § 1951(b)(2)); Wilkie v. Robbins, 551 U.S. 537, 566-67 (2007) (extortion generally); Eclectic Props. E., LLCv. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014) (wire fraud under 18 U.S.C. § 1343). Because Khalid failed to state a RICO claim under§ 1962(c), he also failed to state a RICO conspiracy claim under§ 1962(d). See Howard v. Am. Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000).

Khalid failed to state a forced labor claim under the Trafficking Victims Protection Act because he did not plausibly allege Microsoft attempted to coerce him into providing labor. 18 U.S.C. § 1589.

Khalid failed to state a civil rights claim under 42 U.S.C. § 1983 because he did not sufficiently allege state action. See Ballinger v. City of Oakland, 24 F .4th 1287, 1300-01 (9th Cir. 2022). He failed to state a claim under 42 U.S.C. § 1985(3) because he failed to allege that racial or class-based discriminatory

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animus motivated Microsoft's actions. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-69 (1993). Khalid did not state a claim under § 1985(2) as he did not allege witness intimidation. See *Kush v. Rutledge*, 460 U.S. 719, 723 (1983).

The district court properly dismissed Khalid's claim for declaratory relief for lack of an "actual controversy" under the Declaratory Judgment Act, 28 U.S.C.

§ 2201(a), and failure to clearly explain the claim. See *Bell At!. Corp. v. Twombly*, 550 U.S. 544, 555 & n.3 (2007) (to survive a Rule 12(b)(6) dismissal, a complaint must allege enough facts to provide both "fair notice" of the particular claim being asserted and "the grounds upon which it rests").

AFFIRMED.

**Appendix B - Order Regarding Petitioner's amended
Complaint in the Dist. Court, WD Washington, Filed
April 6, 2020**

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

**ATM SHAFIQUL KHALID, an individual
and on behalf of similarly situated,
XENCARE SOFTWARE, INC.,
Plaintiff,**

v.

**MICROSOFT CORP., a Washington
Corporation, and JOHN DOE *n*,
Defendants.**

CASE NO. C19-130-RSM

**ORDER GRANTING
DEFENDANT MICROSOFT
CORPORATION'S MOTION TO
DISMISS**

I. INTRODUCTION

This matter comes before the Court on Defendant Microsoft Corporation (“Microsoft”)’s Motion to Dismiss Plaintiff ATM Shafiqul Khalid’s Second Amended Complaint. Dkt. #32. The Court finds oral argument unnecessary to resolve the

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underlying issues. Having reviewed Defendant's Motion, Plaintiff's Response, Defendant's Reply, and the remainder of the record, the Court GRANTS Defendant's Motion to Dismiss and dismisses Plaintiff's claims with prejudice and without leave to amend.

II. BACKGROUND

On September 4, 2019, this Court dismissed Plaintiff's First Amended Complaint. Dkt. #20. The Court granted Plaintiff leave to amend three of his claims: Counts 1 and 2 under the Sherman Act, and Count 3 under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Id.* at 22. The Court also granted Plaintiff leave to amend two of his requests for declaratory relief, Counts 9 and 10. The remainder of Plaintiff's claims were dismissed with prejudice and without leave to amend. *Id.* On November 29, 2019, Plaintiff filed the Second Amended Complaint. Dkt. #29. Microsoft's Motion to Dismiss seeks dismissal of Plaintiff's remaining claims with prejudice. Dkt. #32 at 17.

Plaintiff's Second Amended Complaint ("SAC") provides many of the same facts asserted in his First Amended Complaint. After accepting a position with Microsoft as a Senior Program Manager in its Bing division, Plaintiff signed Microsoft's Employee Agreement (the "Employee Agreement"). Dkt. #29 at ¶¶ 14-16. This agreement included a provision under Section 5 that assigned to Microsoft all rights, title and interest in all inventions that the employee "may conceive, develop, reduce to practice or otherwise produce" during his employment with Microsoft. Dkt. #29-1 at 2-3. Section 6 of the Employee Agreement

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asked Plaintiff to attach a list “describing all Inventions belonging to me and made by me prior to my employment with MICROSOFT that I wish to have excluded from this Agreement. If no such list is attached, I represent that there are no such Inventions.” Dkt. #29 at ¶ 16. The Employment Agreement further noted on its first page: “If you wish to attach a list of inventions, per paragraph 6, below, please contact your recruiter.” *Id.* at ¶ 14.

Plaintiff signed the Employee Agreement on December 19, 2011 and sent a separate email to his recruiter, Shannon Carlsen, attaching an invention exclusion list (the “Exclusion List”) that listed nine patentable items. *Id.* at ¶¶ 17-19. This Exclusion List included inventions for a minicloud subscription service (“the ‘637 patent”) and a framework to protect computer systems from viruses and spyware (“the ‘219 patent”) that he had filed prior to starting work at Microsoft. *Id.* at ¶¶ 19-20; Dkt. #29-5. At his Microsoft employee orientation program in January 2012, Plaintiff signed a hard copy of the Employee Agreement, submitted his Exclusion List for the second time and noted by hand in the hard copy Employee Agreement that he submitted additional pages. *Id.* at ¶ 18. Plaintiff worked at Microsoft from January 9, 2012 until his termination in early February 2015. *Id.* at ¶ 22.

On February 19, 2015, Microsoft’s in-house counsel notified Plaintiff that he had not listed any inventions under Section 6 of the Employment Agreement. *Id.* at ¶¶ 44-45. For that reason, in-house counsel stated, Microsoft retained an assignment

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right in the patents for the '637 and '219 patents. Plaintiff claims that Microsoft continued to deny receipt of his Exclusion List, despite Plaintiff's requests to various employees for hard copies of his signed Employee Agreement. *Id.* at ¶¶ 46-51. On July 9, 2015, Microsoft offered to put together an agreement if Plaintiff "agreed to give Microsoft royalty free access to all present and future patents related to the Mini-cloud systems in exchange for resolving all disputes." *Id.* at ¶ 50. Plaintiff declined this offer on the basis that it was unfair and anti-competitive.

On May 27, 2016, Plaintiff received a letter from Microsoft's outside counsel, Merchant & Gold. This 2016 letter ("the M&G letter") re-stated Microsoft's position that Plaintiff had granted Microsoft a "royalty-free license, irrevocable, worldwide license" to those inventions. *Id.* at ¶ 53 (quoting Dkt. #29-7 at 4). Outside counsel offered to transfer to Plaintiff all of Microsoft's ownership interest in the '219 and '637 patent families in exchange for his granting Microsoft a non-exclusive, royalty-free license to the disputed patent families and fully releasing Microsoft from all claims and liability. *Id.*

Plaintiff claims that Citrix Systems, Inc. ("Citrix"), a Microsoft vendor that employed Plaintiff before he began working at Microsoft, took part in issuing the May 2016 M&G letter. Dkt. #29 at ¶ 178. Plaintiff had sued Citrix in state court in October 2015 in an effort to clear title to the '219 and '637 patents, which Citrix had also attempted to claim. *Id.* at ¶ 56.

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On August 1, 2018, the state court entered a \$5.8 million judgement in favor of Plaintiff against Citrix. *Id.* at ¶ 62. Plaintiff maintains that during the state court trial, a chief architect of Citrix “testified and suggested that Citrix wanted to protect its partner and suggested that Khalid’s patent could have been hostile to those partners. [The chief architect] also testified that Citrix never sold anti-virus kind of products, an area 219 patent targeted to solve.” *Id.* at ¶ 60.

Plaintiff’s Second Amended Complaint alleges that Microsoft, acting in concert with its vendor, Citrix, engaged and continues to engage in a patent-grabbing scheme through its patent rights assignment provision in the Employee Agreement. *Id.* at ¶¶ 69-79. He maintains that Microsoft fraudulently denied the existence of his exclusion list, *id.*, and that Citrix acted in concert with Microsoft to cloud Plaintiff’s patent title and threaten him with baseless litigation. *Id.* at ¶¶ 111-112, 131, 178. Plaintiff claims that Microsoft’s scheme violates antitrust laws under Sections 1 and 2 of the Sherman Act and the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”). *Id.* at ¶¶ 96-114. He also seeks declaratory relief that the Employee Agreement violated RCW 49.44.140 and that Microsoft engaged in inequitable conduct. *Id.* at ¶¶ 151-157.

III. DISCUSSION

A. Legal Standard

In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as true and makes all inferences in the light most favorable to the

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non-moving party. *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted). However, the court is not required to accept as true a “legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met when the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The complaint need not include detailed allegations, but it must have “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Absent facial plausibility, a plaintiff’s claims must be dismissed. *Id.* at 570. Because Plaintiff is proceeding pro se, his pleadings must be liberally construed. *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).

B. Claims Previously Dismissed with Prejudice and Surreply

As an initial matter, Plaintiff has improperly used his Second Amended Complaint to replead claims dismissed with prejudice and without leave to amend. See Dkt. #29 at ¶¶ 120-124 (RICO claim predicated on forced labor); ¶¶ 125-132 (civil rights claims); ¶¶ 141-150 (fraud); and ¶¶ 158-179 (declaratory relief for Fourteenth Amendment violations). The Court instructed Plaintiff in its initial order of dismissal, Dkt. #20, and again in its order denying Plaintiff’s motion for reconsideration, Dkt.

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#28, that he was not granted leave to amend these claims. The Court will not reconsider them here. Similarly, Plaintiff has renewed his request that he represent a class of all Microsoft employees who signed an employment contract with Microsoft similar to the Employee Agreement that he signed. Dkt. #29 at ¶¶ 133-140. The Court has already addressed this issue and will not reconsider it here. *See* Dkt. #20 at 6-7.

Plaintiff also filed a surreply, Dkt. #36, but provided no notice to the Court as required by this district's Local Rules. *See* Local Rules W.D. Wash. LCR 7(g)(1). While pro se parties are generally held to less stringent standards, a pro se litigant must follow the same rules of procedure that govern other litigants. *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995). Moreover, Plaintiff has improperly used the surreply to pose the same or additional arguments in opposition to the Motion to Dismiss. Microsoft's reply brief does not raise new arguments, but merely reiterates the grounds for dismissal asserted in its opening brief. Therefore, the court will not consider the surreply in resolving the motion and hereby strikes it.

C. Sherman Act Section 1 Claims

Section 1 of the Sherman Act prohibits “[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. To state a claim under Section 1, a plaintiff must allege (1) a contract, combination, or conspiracy between two or more entities; (2) in unreasonable restraint of trade; that (3)

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affects interstate commerce. *See id.; Am. Ad. Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996). Here, Plaintiff identifies three “agreements” entered into by Microsoft that allegedly violated Section 1: (a) the Employee Agreement; (b) the vendor agreement with Citrix; and (c) the 2016 M&G letter from Microsoft’s outside counsel, either on its own or in combination with the Citrix vendor agreement. Dkt. #29 at ¶¶ 98-102.

1. Actionable Conspiracy

Microsoft contends that Plaintiff has failed to state an actionable conspiracy with respect to the Employee Agreement because there can be no conspiracy between the parties to the agreement—here, Plaintiff and Microsoft. Dkt. #32 at 10-11. The Court agrees. The Court has previously considered and dismissed Plaintiff’s theory that the Employee Agreement may violate Section 1. Dkt. #20 at 7 (“It is well-established that Section 1 of the Sherman Act does not reach “wholly unilateral” conduct by a single entity) (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (internal quotations omitted)). Plaintiff responds that the Employee Agreement is not subject to the single entity rule because, as a potential competitor of Microsoft, he “didn’t have economic unity” with his employer. Dkt. #34 at 10 (citing *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003), *as amended on denial of reh’g* (Apr. 24, 2003)).

Plaintiff’s argument to preserve his Section 1 claim as to the Employee Agreement is difficult to follow and appears to contradict the gravamen of his complaint. Although courts recognize exceptions to

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the “single entity” principle generally applied to intra-company agreements, such an exception applies to situations where an individual is acting as a coconspirator with the corporation because of his “independent personal stake” in the conspiracy’s success. *American Needle, Inc. v. National Football League*, 560 U.S. 183, 200 (2010) (“Agreements within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.”). Setting aside the logical fallacy of Plaintiff’s argument, the SAC makes clear that he does not intend to claim that he was in conspiracy with Microsoft nor that he derived any benefit from the Employee Agreement— indeed, he alleges the very opposite. *See, e.g.*, Dkt. #29 at ¶¶ 99-100. Accordingly, Plaintiff’s Section 1 claim as to the Employee Agreement again fails to state an actionable conspiracy.

2. Unreasonable Restraint of Trade

Turning to the remaining two “agreements,” the Citrix vendor agreement and the May 2016 M&G letter, Microsoft argues that Plaintiff has failed to allege an unreasonable restraint of trade as to any agreements between Microsoft and Citrix. Dkt. #32 at 12. A Section 1 plaintiff must sufficiently plead a restraint of trade that falls under one of three rules of analysis: rule of reason, *per se*, or quick look. While courts typically need not decide which standard to apply at the pleading stage, they must still determine whether the complaint has alleged sufficient facts to state a claim under at least one of these three rules.

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See In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (“Indeed, that decision is more appropriate on a motion for summary judgment.”).

The rule of reason is the presumptive, default standard and “requires the antitrust plaintiff to demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive.” *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011). This rule requires a court to examine a variety of factors such as information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history and effect. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Next, a small category of restraints are considered illegal *per se* because “they always or almost always tend to restrict competition and decrease output.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). Because *per se* agreements are so “manifestly anticompetitive” and lacking in “any redeeming virtue,” the detailed industry analysis required under the rule of reason is not required for *per se* restraints. Finally, the “quick look” analysis applies to a certain class of restraints that is “not unambiguously in the *per se* category” but “may require no more than cursory examination to establish that their principle or only effect is anticompetitive.” *Safeway, Inc.*, 651 F.3d at 1133. Under the quick look analysis, courts conduct a “truncated rule of reason” analysis if the anticompetitive effects on customers and markets are clear in the absence of a detailed market analysis. *Id.*

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Microsoft argues that the rule of reason applies and that Plaintiff has failed to allege restraint of trade under this standard. Dkt. #32 at 12. Plaintiff responds that both agreements are either *per se* Section 1 violations or restraints of trade under the quick look approach, and he is therefore relieved from having to plead injury to competition. Dkt. #34 at 16. It is well-established that a plaintiff is not required to plead under all three possible rules. *United States v. eBay, Inc.*, 968 F.Supp.2d at 1030, 1037–38 (2013) (“A plaintiff is the master of its complaint and may choose which claims to allege. The strategy of alleging only *per se* and quick look violations is not an unprecedented one.”). However, a plaintiff must be prepared to “abide by the consequences of its pleading decisions,” which includes risk of dismissal. *Id.* at 1038.

To the extent Plaintiff attempts to assert “*per se*” violations of the Sherman Act, he fails to allege sufficient facts to support this theory. It is not apparent that either the vendor agreement or the M&G letter have “manifestly anticompetitive effects,” or that they “lack any redeeming virtue.” *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011). The M&G letter applies to Plaintiff alone without any application to other competitors in the market. The vendor agreement’s “anticompetitive effect” is likewise unclear. This agreement claims all intellectual property produced by Citrix’s employees during their employment with Citrix and transfers it to Microsoft. Dkt. #29 at ¶ 54. Plaintiff has failed to direct the Court to any cognizable *per se* restraint of trade contained therein. Cf. *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018) (per *se* violations

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include horizontal agreements among competitors to fix prices or divide markets, group boycotts, tying arrangements, and output limitations).

Plaintiff responds that Citrix and Microsoft's intellectual property agreements equate to "naked price-fixing" because their claims clouded title to his patents and reduced their value to zero. Dkt. #29 at ¶ 99; Dkt #34 at 8. Accepting these claims as true, the Court still finds no support for Plaintiff's theory that clouding his patent title—even in bad faith—equates to one of the four price-fixing arrangements recognized under antitrust law. *Cf. Knevelbaard Dairies v. Kraft Foods, Inc.* 232 F.3d 979. 988 (9th Cir. 2000) (Describing the four types of price-fixing arrangements: horizontal minimum price-fixing, horizontal maximum price-fixing, vertical minimum price-fixing, and vertical maximum price-fixing).

Similarly, Plaintiff has alleged insufficient facts to support a "quick look" analysis of his claims. Under quick look, a court must be able to determine that an agreement has anticompetitive effects from the perspective of an observer "with even a rudimentary understanding of economics." *Harris*, 651 F.3d at 1138. Without any attempt by Plaintiff to provide market analysis, the Court cannot find that an intellectual property transfer agreement between Citrix and Microsoft has obvious anticompetitive effects. *Safeway, Inc.*, 651 F.3d at 1133. In addition to Plaintiff's "naked price-fixing" argument considered and rejected above, he contends that these agreements are subject to quick look because they violate the "constitutional policy" under Article 1, Section 8, Clause 8 "to provide an incentive to

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inventors to promote the Progress of Science and useful Arts.” Dkt. #34 at 16. This constitutional argument offers no explanation for why the vendor agreement or the M&G letter should be subject to quick look rather than rule of reason.

In sum, Plaintiff has failed to sufficiently plead the existence of restraints that are subject to either *per se* or quick look analysis. More fatally, because he attempted to avoid pleading anticompetitive effects, he failed to plead these restraints under the rule of reason. *See* Dkt. #34 at 16-17. To state a Section 1 claim under the rule of reason, plaintiffs must plead facts which, if true, will prove “(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.” *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012). Additionally, plaintiffs must plead that they were harmed by the defendant’s anti-competitive contract, combination, or conspiracy, and that this harm flowed from an “anti-competitive aspect of the practice under scrutiny.” *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). This fourth element is generally referred to as “antitrust injury” or “antitrust standing.” *See, e.g., id.*

Plaintiff has failed to plead actual injury to competition and antitrust standing. To allege actual injury to competition, a plaintiff must plead facts that, if true, would show that the agreement adversely affects competition in the relevant market as a whole—not just the plaintiff. *Twombly*, 550 U.S. at 556. To sufficiently allege antitrust injury, the

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plaintiff must not only allege that the defendant's behavior is anticompetitive, but that his injury is *because of* the anti-competitive aspect of the practice. *Brantley*, 675 F.3d at 1200 (citing *Atl. Richfield Co.*, 495 U.S. at 334). Plaintiff's complaint only describes injuries to himself with no mention of actual harm to competition. See Dkt. #29 at ¶ 102 ("The restraint restricted Khalid from developing his patents furthers causing damage to his IP licensing and incubation business in 2015/2016 and negatively impacted Khalid's recovery from Microsoft partner Citrix along with added litigation cost."). Because Plaintiff has failed to sufficiently plead injury to competition, he cannot show that his injury is because of any anticompetitive conduct. For that reason, he has likewise failed to plead antitrust standing.

Accordingly, Plaintiff has failed to state a claim under Section 1 as to the Employee Agreement, the vendor agreement with Citrix, or the M&G letter.

3. *Walker Process* Claim

Plaintiff also claims that Microsoft threatened baseless litigation in violation of Section 1. *Id.* at ¶ 101. It is "well-established" in antitrust law that using baseless litigation to drive out competition may amount to an antitrust violation. *Int'l Techs. Consultants, Inc. v. Pilkington PLC*, 137 F.3d 1382, 1390 (9th Cir. 1998) (citing *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985)). Microsoft acknowledges that this type of claim, known as a *Walker Process* claim, is cognizable, but counters that Plaintiff "makes no plausible allegation that Microsoft sent its

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letter in bad faith, or that it knew its claim was baseless.” Dkt. #35 at 7.

The Court agrees. Plaintiff has undermined his bad faith claim by acknowledging that Microsoft may have misplaced his Disclosure List due to negligent bookkeeping rather than as part of an intentional, fraudulent scheme. *See* Dkt. #29 at ¶ 83 (“The M&G letter and Miki’s case show either irreparable and costly neglect in Microsoft’s applicant/new employee document bookkeeping, or show a blatant cover-up”). Moreover, nothing in the M&G letter suggests a threat of litigation—it notifies Plaintiff that Microsoft disputes his patent claims, it asserts Microsoft’s patent rights, and it offers settlement. *See* Dkt. #29-7 at 2-5. On this basis, Plaintiff has failed to state a *Walker Process* claim. *See K-Lath, Div. of Tree Island Wire (USA), Inc. v. Davis Wire Corp.*, 15 F. Supp. 2d 952, 956-57, 964 (C.D. Cal. 1998) (dismissing *Walker Process* claim where defendants reserved their rights but did not actually threaten suit).

D. Section 2 Sherman Act Claims

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, or with foreign nations . . . [commits a felony].” 15 U.S.C. § 2. To state a claim for monopolization under this provision, a plaintiff must allege that the defendant (1) possessed monopoly power in the relevant markets; (2) willfully acquired or maintained its monopoly power through exclusionary conduct; and (3) caused antitrust injury. *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace*

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Jovanovich Legal & Prof'l Publications, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997). To state a claim for attempted monopolization, a plaintiff must allege (1) specific intent to control process or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power" and (4) causal antitrust injury. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432-1433 (9th Cir. 1995).

Here, Plaintiff claims that through Microsoft's Employee Agreement, its vendor agreement with Citrix, and its ability to pay no development cost of the '637 patent to Plaintiff, Microsoft attempted to gain or maintain its monopoly in the patent submarket attached to the '637 patent. He specifies that Microsoft sought to retain "100% market power within the \$4 billion sub-market attached to the '637 patent." Dkt. #29 at ¶ 105. Microsoft argues that dismissal of Plaintiff's Section 2 claim is warranted because he has again failed to adequately allege maintenance of or a dangerous probability of Microsoft achieving monopoly power. Dkt. #32 at 12-13. Microsoft also argues that obtaining Plaintiff's patent does not equate to Microsoft obtaining power *in the relevant market*. *Id.* at 13.

The Court agrees that the SAC's added references to a \$4 billion market for the '637 patent within a broader \$400 billion cloud/gaming market fail to remedy the defects the Court identified in his previous complaint. See Dkt. #29 at ¶¶ 104-105. Plaintiff has again only alleged market share without providing market analysis (e.g., barriers to entry or

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hyper-competitive pricing) or allegations that Microsoft willfully acquired or maintained monopoly power within the submarket rather than as a consequence of superior product, business acumen, or historical accident. *See* Dkt. #20 at 8. Plaintiff responds that ownership of the '637 patent equates to a monopoly within the patent's submarket. Dkt. #34 at 12 (citing *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2011)). However, nothing in *Actavis* contradicts the well-recognized principle that economic market power cannot be inferred from the mere fact that one holds a patent. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 43, n.4 (2006). For this reason, even though Plaintiff alleged Microsoft's intent to acquire his patent rights, an intent to acquire patent rights does not automatically equate to an intent to monopolize or attempt to monopolize a particular market. *See id.* at 45–46 (“[A] patent does not necessarily confer market power upon the patentee.”)

Lastly, Plaintiff has failed to allege injuries within the scope of antitrust injury contemplated by Section 2. *See* Dkt. #20 at 9 (citing *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999) (“[T]he antitrust laws are only intended to preserve competition *for the benefit of consumers.*”) (emphasis added)). Similar to his First Amended Complaint, Plaintiff describes how Microsoft's conduct has reduced the value of *his* patents and prevented *him* from entering the market, *see* Dkt. #29 at ¶ 105, but he has failed to plausibly link Microsoft's conduct or *his own* injury to an injury to competition *within* the identified markets or to consumer welfare. For these reasons, dismissal is warranted.

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E. Racketeering Claims under 18 U.S.C. § 1962

Plaintiff also alleges civil RICO violations through extortion. See Dkt. #29 at ¶¶ 106-114. To plead a RICO claim under 18 U.S.C. § 1962(c), a plaintiff must allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Howard v. America Online, Inc.*, 208 F.3d 741 (9th Cir. 2000). A “pattern of racketeering activity” requires at least two predicate acts to constitute racketeering activity. See 18 U.S.C. §1961(5). Microsoft challenges Plaintiff’s RICO claim for failure to sufficiently allege an enterprise and predicate acts as well as a failure to meet the heightened pleading requirements for wire fraud. Dkt. #32 at 13-15. The Court will first address enterprise.

1. Enterprise

Section 1962(c) targets conduct by “any person employed by or associated with any enterprise” “This expansive definition is ‘not very demanding.’ *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) (quoting *Odom v. Microsoft*, 486 F.3d 541, 548 (9th Cir. 2007)). An enterprise that is not a legal entity is commonly known as an “association-in- fact” enterprise and does not require “any particular organizational structure, separate or otherwise.” *Odom*, 486 F.3d at 551. To plead the existence of an association-in-fact enterprise, a plaintiff must allege (1) a purpose; (2) relationships among those associated with the enterprise; and (3) longevity sufficient to permit these associates to pursue the enterprise’s purpose. *Boyle*, 556 U.S. at 946. Microsoft

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argues that the Second Amended Complaint fails to allege the first and third factors. Dkt. #32 at 13-15.

Here, Plaintiff claims that Citrix and Microsoft associated together for the common purpose of “taking ownership” of Plaintiff’s ‘219 and ‘637 patents through a racketeering scheme. Dkt. #29 at ¶ 108. Microsoft counters that such allegations are “paper-thin” and insufficient to plausibly allege an association for the purpose of appropriating the Mini-Cloud and Safe and Secure patents. Dkt. #32 at 14. While the Court acknowledges the thin allegations in Plaintiff’s Complaint, the Court disagrees that Plaintiff has failed to allege a common purpose. Construed liberally, the Complaint sets forth Plaintiff’s theory that Citrix and Microsoft associated to obtain employees’ patents through fraudulent means, which is sufficient to state a common purpose. *Odom*, 486 F.3d at 552 (finding associated-in-fact enterprise where “Microsoft and Best Buy had a common purpose of increasing the number of people using Microsoft’s Internet service through fraudulent means.”).

However, the Court agrees that Plaintiff has failed to sufficiently plead the ongoing relationship between Citrix and Microsoft that is necessary to establish an “association-in-fact.” The Complaint provides no facts on when Microsoft and Citrix formed the vendor relationship, how long they have maintained this relationship, nor how this timeline corresponds to the alleged predicate acts. Because the alleged predicate acts span a nine-year period from 2009 to 2018, *see* Dkt. #29 at ¶ 109, the dearth of information as to the alleged Citrix-Microsoft enterprise relationship make it impossible for the

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Court to determine whether the relationship was in place at the time any or all of the alleged predicate acts occurred. Plaintiff has likewise failed to provide specific facts as to its organization, such as how one company may control, direct, or manage the other, thus leaving the Court to guess the structure of the alleged enterprise. *See Ellis v. J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062, 1089 (N.D. Cal. 2013) (“No specific factual allegations explain how [the scheme] occurs, and without this information, the Court cannot ascertain the structure of the alleged enterprise.”). For these reasons, Plaintiff has failed to sufficiently allege an enterprise.

2. Predicate Acts

Plaintiff has also failed to allege the predicate acts necessary to sustain a RICO claim. Plaintiff claims that several of Microsoft’s actions constitute extortion under either the Hobbs Act or extortion in the second degree under the Washington Racketeering Act, RCW 9A.56.130. Dkt. #29 at ¶¶ 3-4. The Hobbs Act defines extortion as “obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. § 1951(b). The “obtaining” element “requires a showing that a defendant received something of value from the victim of the alleged extortion and that the “thing of value can be exercised, transferred, or sold.” *United States v. McFall*, 558 F.3d 951, 956 (9th Cir. 2009). Washington law defines “extortion” as “knowingly to obtain or attempt to obtain by threat [the] property or services of the owner . . .” RCW 9A.56.110. Extortion

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in the second degree means “extortion by means of a wrongful threat” RCW 9A.56.130.

None of the six predicate acts listed in the complaint state a claim for extortion under either the Hobbs Act or Washington law. These acts include (1) Microsoft initiating a lawsuit against Miki Mullor, which ended in settlement; (2) the May 27, 2016 M&G letter asserting Microsoft’s patent rights; (3) Citrix withholding severance money; (4) Citrix threatening litigation; (5) objections to discovery requests; and (6) Citrix refusing Plaintiff’s \$50,000 patent licensing offer. Dkt. #29 at ¶ 109. Plaintiff argues that the “property” the enterprise sought to obtain was his (and Mullor’s) patent rights. Yet none of these alleged actions entail Microsoft or Citrix obtaining Plaintiff’s patent rights with his consent through force, fear, or threats as required under 18 U.S.C. § 1951(b); *see also McFall*, 558 F.3d at 956.

Plaintiff argues that these actions constitute “wrongful threats” under the Washington Racketeering Act because Microsoft and/or Citrix sought to use these threats to substantially harm his business or financial condition in order to procure his patent rights. Dkt. #34 at 18-19. However, regardless of what Washington law labels “extortion,” an act “cannot qualify as a predicate offense for a RICO suit unless it is capable of being generically classified as extortionate.” *Wilkie v. Robbins*, 551 U.S. 537, 567 (2007) (internal quotation marks and citation omitted). Under both the Hobbs Act and the generic definition, actual or threatened fear of financial loss must be “wrongful” to be extortionate. *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep’t, AFL-CIO*, 770 F.3d 834, 843 (9th Cir. 2014).

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Here, the SAC makes clear that Microsoft's asserted rights over the '219 and '637 patents, including those stated in the M&G letter, were based on its understanding of the Employee Agreement. Dkt. #29 at ¶ 53. The SAC likewise makes clear that Plaintiff signed this agreement when he began working at Microsoft. *See id.* at ¶¶ 14-18. The gravamen of Plaintiff's lawsuit is that he submitted an Exclusion List under this legal agreement and that Microsoft now falsely denies its existence. This issue, which concerns the interpretation and application of the Employee Agreement to Plaintiff's patent rights, amounts to a contract dispute—particularly given Plaintiff's acknowledgement that Microsoft may have lost his Disclosure List due to negligent bookkeeping, not because of intentional fraud. *See, e.g., Union Nat'l Bank of Little Rock v. Federal Nat'l Mortgage Association*, 860 F.2d 847, 857 (8th Cir.1988) (holding that regardless of whether the defendant actually had a right to monies claimed, defendant's demands "were motivated by [the defendant's] interpretation of the agreement" and therefore not extortion). Regardless of whether Microsoft actually had a right to the patents, its demands were based on its understanding of its rights under the Employee Agreement and therefore cannot amount to a "wrongful threat" for purposes of a RICO claim.

This leaves wire fraud as the only remaining predicate act. Plaintiff contends that Microsoft committed wire fraud by falsely representing that he could submit the Exclusion List and by sending the M&G letter, which falsely claimed that he never submitted an Exclusion List. Dkt. #29 at ¶ 112. Wire fraud under 18 U.S.C. § 1343 requires (1) the

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formation of a scheme to defraud; (2) the use of the mails or wires in furtherance of that scheme; and (3) the specific intent to defraud. *Eclectic Props. E. v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Plaintiff must also satisfy the heightened pleading standards for fraud under Rule 9(b). *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

Because Plaintiff has conceded that the missing Disclosure List may be the product of negligent bookkeeping, *id.* at ¶ 83, he cannot plausibly allege that Microsoft had a specific intent to defraud him—let alone every employee who signs the agreement. Moreover, Plaintiff has failed to allege formation of a scheme to defraud its employees. While he states with particularity the events leading to Microsoft's denial of his own Exclusion List, *see id.* at ¶¶ 17-18, 53-54, the only facts he provides beyond his own dispute with Microsoft are vague allegations related to another former Microsoft employee, Miki Mullor. *See id.* at ¶¶ 82-84. The Court finds these claims insufficient to reasonably infer that Plaintiff's and (possibly) Mullor's disputes with Microsoft comprise part of a larger scheme by Microsoft to defraud any employee who submits a Disclosure List with their Employee Agreement.

Plaintiff also brings claims under Section 1962(d) for conspiring to violate RICO. Dkt.

#29 at ¶ 114. Section 1962(d) provides that “[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” “To establish a violation of section 1962(d), a plaintiff must allege either an agreement that is a

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substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses.” *Howard v. America Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). Because Plaintiff has failed to allege the requisite substantive elements of RICO under Section 1962(c), his claim for conspiracy under Section 1962(d) also fails. *See id.* (A plaintiff’s failure to adequately plead substantive violation of RICO precludes a claim for conspiracy).

F. Declaratory Relief

Finally, Plaintiff seeks two declaratory judgments: (1) that the “right of first refusal” clause in Section 5 of the Employee Agreement violates RCW 49.44.140(1); and (2) that Microsoft engaged in “inequitable conduct” through its ambiguous and indefinite patent assignment provision.

The Declaratory Judgment Act (“DJA”) authorizes a district court to “declare the rights and other legal relations of any interested party seeking such declaration” when there is an “actual controversy.” 28 U.S.C. § 2201(a). To have subject matter jurisdiction over a claim brought under the DJA, there must be an “actual controversy.” *See Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1338. An “actual controversy” under the DJA is the same as an Article III case or controversy. *See id.* A party bringing a declaratory judgment claim must therefore show “that under ‘all the circumstances,’ there is an actual or imminent injury that was caused by the opposing party, is redressable by judicial action, and is of ‘sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” *Multimedia Patent Tr. v. Microsoft Corp.*,

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525 F. Supp. 2d 1200, 1218 (S.D. Cal. 2007) (internal citation omitted). Even if an actual controversy exists, the Court may decline to issue a declaratory judgment. *Weyerhaeuser Co. v. Novae Syndicate 2007*, No. C18-0585-JLR, 2019 WL 3287893, at *1 (W.D. Wash. July 22, 2019).

The Court previously found that Plaintiff failed to allege an actual case or controversy arising from Microsoft attempting to enforce the “right of first refusal” clause. *See* Dkt. #20 at 21. Nothing in Plaintiff’s Second Amended complaint remedies this deficiency. Plaintiff argues that Microsoft invoked the right of first refusal when he approached them first before he tendered his patents to Google. Dkt. #34 at 22. However, his complaint makes clear that Microsoft never invoked the right of first refusal—instead, it claimed ownership of his patents because of the missing Exclusion List under Section 6. Dkt. #29 at ¶ 154 (“Microsoft countered that offer by claiming free exclusive license leading to this litigation.”). Accordingly, Plaintiff’s facial challenge to the legality of the “right of first refusal” clause under Section 5 is not tied to any actual dispute, does not rest on any concrete injury, and is not ripe for adjudication. *See Lee v. Capital One Bank*, No. C07-4599-MHP, 2008 WL 648177, at *4 (N.D. Cal. Mar. 5, 2008) (Claim does not present a “case or controversy” because “the allegedly unconscionable provisions in the Agreement have not been implicated in an actual dispute.”). Plaintiff invokes previously rejected constitutional arguments and the fact that Microsoft’s demand letter is public record, Dkt. #34 at 22-26, but neither of these arguments address the issue that Microsoft never invoked the right of first refusal.

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Finally, Plaintiff's request for a declaratory judgment that Microsoft engaged in "inequitable conduct" remains too broad and vague to warrant declaratory relief. The Court previously cautioned Plaintiff that "broad and vague declaratory relief" that "does not 'admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts' is unripe. Dkt. #20 at 21 (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937) (internal quotations omitted)). The Court likewise cautioned Plaintiff that his amended complaint "must request specific relief from the Court based on his own dispute with Microsoft—not broad relief based on hypothetical injuries to other Microsoft employees." *Id.* at 22.

Plaintiff's Second Amended Complaint fails to remedy these defects. Plaintiff again requests broad-based relief, claiming "Microsoft action is inequitable in nature" and that the "[p]ublic has tremendous interest in patent rights including how patent rights propagate[] among parties." Dkt. #29 at ¶¶ 170, 172. The Court remains unclear what, within Plaintiff's broad request, he seeks to declare inequitable—Microsoft's use and enforcement of its Employment Agreement in general, its denial of Plaintiff's disclosure list, its transmission of the M&G letter, and/or other allegations referenced throughout the complaint. *See* Dkt. #29 at ¶¶ 167-172. Accordingly, the Court again finds dismissal appropriate.

G. Leave to Amend

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Where claims are dismissed for failure to state a claim on which relief can be granted, permission to file an amended complaint is typically granted. *See Fed. R. Civ. P. 15(a)* (“[L]eave to amend shall be freely given when justice so requires”). However, where amendment would be futile, a claim is properly dismissed with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996); *see also DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (“A district court does not err in denying leave to amend where the amendment would be futile”) (internal citation omitted).

The court recognizes that “a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)) (internal quotation marks omitted). However, “federal courts are far less charitable when one or more amended pleadings already have been filed with no measurable increase in clarity.” 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1217 (3d ed. 2004); *see also Schmidt v. Herrmann*, 614 F.2d 1221, 1224 (9th Cir. 1980).

Here, Plaintiff’s Second Amended Complaint is largely identical to his First Amended Complaint and suffers from similar pitfalls. For the second time, Plaintiff has alleged what appears to be, in essence, a contract dispute with Microsoft over the missing Disclosure List. To fit his claims into the framework of the Sherman Act and RICO, Plaintiff has attempted to extrapolate from his own dispute various large-scale antitrust and racketeering schemes against

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Microsoft employees. However, without offering specific facts beyond his singular case, he has twice failed to plausibly establish a broader scheme or conspiracy. Furthermore, with respect to his missing Disclosure List, he has now twice contradicted his own claims of intentional fraud or conspiracy by acknowledging the possibility of negligent—rather than fraudulent—bookkeeping. Finally, regarding his requests for declaratory relief, he has failed to remedy the deficiencies the Court identified in its order dismissing Plaintiff's First Amended Complaint. Considering all the above, the Court concludes that permitting further amendment here would be futile.

IV. CONCLUSION

Having reviewed Defendant's Motion, Plaintiff's Response, Defendant's Reply, and the remainder of the record, it is hereby ORDERED that Defendant's Motion to Dismiss, Dkt. #32, is GRANTED. Plaintiff's claims are hereby DISMISSED with prejudice and without leave to amend.

DATED this 6th day of April, 2020.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT
JUDGE

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

**ATM SHAFIQUL KHALID, an individual
and on behalf of similarly situated,
XENCARE SOFTWARE, INC.,
Plaintiff,**

v.

**MICROSOFT CORP., a Washington
Corporation, and JOHN DOE *n*,
Defendants.**

**CASE NO. C19-130-RSM
ORDER GRANTING
DEFENDANT MICROSOFT
CORPORATION'S MOTION TO
DISMISS**

I. INTRODUCTION

This matter comes before the Court on Defendant Microsoft Corporation (“Microsoft”)’s Motion to Dismiss Plaintiff ATM Shafiqul Khalid’s amended complaint for failure to state a claim. Dkt. #14. Plaintiff opposes the motion in entirety. Dkt. #17. The Court finds oral argument unnecessary to resolve the underlying issues. Having reviewed Defendant’s

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Motion, Plaintiff's Response, Defendant's Reply, and the remainder of the record, the Court GRANTS Defendant's Motion to Dismiss with leave to amend certain claims as set forth below.

II. BACKGROUND

On December 16, 2011, Plaintiff received a job offer from Microsoft as a Senior Program Manager in its Bing division. Dkt. #7 at ¶ 13. Upon accepting the position, Plaintiff was required by Microsoft recruiter Shannon Carlsen to sign a Microsoft Employee Agreement (the "Employee Agreement") which included a provision under Section 5 regarding assignment of certain intellectual property rights:

5. **Inventions.** I will promptly and fully disclose to MICROSOFT any and all inventions . . . whether or not patentable (collectively "Inventions") that I solely or jointly may conceive, develop, reduce to practice or otherwise produce during my employment with MICROSOFT, including those Inventions I contend that

MICROSOFT does not own. Subject to the NOTICE below, I agree to grant and I hereby grant, transfer and assign to MICROSOFT or its designee all my rights, title and interest in and to such Inventions. . . .

NOTICE: My obligation to assign shall not apply to any Invention that I can establish:

a) was developed entirely on my own time without using any equipment, supplies, facilities, or trade secret information owned or supplied to me by

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Microsoft;

b) does not relate (i) directly to the business of MICROSOFT or (ii) to the actual or demonstrably anticipated research or development of MICROSOFT; and
c) does not result, in whole or in part, from any work performed by me for MICROSOFT.

.... In addition to the rights provided to MICROSOFT under paragraph 6 below, as to any Invention complying with 5(a)-(c) above that results in any product, service or development with potential commercial application, MICROSOFT shall be given the right of first refusal to obtain exclusive rights to the Invention and such product, service or development....

Dkt. #7-1 at 2-3. Section 6 of the Employee Agreement asked Plaintiff to attach a list "describing all Inventions belonging to me and made by me prior to my employment with MICROSOFT that I wish to have excluded from this Agreement. If no such list is attached, I represent that there are no such Inventions." *Id.* at 3. The Employment Agreement further noted on its first page: "If you wish to attach a list of inventions, per paragraph 6, below, please contact your recruiter." *Id.* at 2.

On December 19, 2011, Plaintiff accepted Microsoft's employment offer and signed the Employment Agreement. Dkt. #7 at ¶ 16. Plaintiff claims that because there was no way to attach a list of inventions to the online agreement pursuant to

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Section 6, he sent a separate email to Ms. Carlsen attaching an invention exclusion list (the “Exclusion List”) denoting nine patentable items. *Id.* at ¶¶ 13, 16, 18. This Exclusion List included inventions for a mini-cloud subscription service (“the Mini Cloud”) and a framework to protect computer systems from viruses and spyware (“the Safe and Secure”) that he had filed prior to starting work at Microsoft. *Id.* at ¶¶ 18-19. At his Microsoft employee orientation program in January 2012, Plaintiff claims he signed a hard copy of the Employee Agreement, submitted his Exclusion List for the second time and noted by hand in the hard copy Employee Agreement that he submitted additional pages. *Id.* at ¶ 17.

Plaintiff worked at Microsoft from January 9, 2012 until February 2015. *Id.* at ¶¶ 17, 21. Plaintiff claims that during his employment, the United States Patent and Trademark Office issued patents for the Mini Cloud (patent number 8,782,637) and the Safe and Secure (patent number 8,286,219) on July 15, 2014 and October 9, 2012, respectively. *Id.* at ¶¶ 19, 28. Plaintiff further claims that during his employment, he met with various Microsoft executives who declined Plaintiff's proposals for business models based on his invention ideas. *Id.* at ¶¶ 32-37. In early February 2015, Microsoft terminated Plaintiff's employment. *Id.* at ¶ 38.

On February 19, 2015, Microsoft's in-house counsel notified Plaintiff that he had not listed any inventions under Section 6 of the Employment Agreement. *Id.* at ¶ 40-41. For that reason, in-house counsel stated, Microsoft retained an assignment right in the patents for the Mini Cloud and the Safe and Secure. Plaintiff claims that Microsoft continued

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to deny receipt of his Exclusion List, despite Plaintiff's requests to various employees for hard copies of his signed Employee Agreement. *Id.* at ¶¶ 42-45. On July 9, 2015, in response to Plaintiff's correspondence regarding his Mini Cloud and Safe and Secure patents, in-house counsel for Microsoft allegedly offered to put together an agreement if Plaintiff "agreed to give Microsoft royalty free access to all present and future patents related to the Mini-cloud systems in exchange for resolving all disputes." *Id.* at ¶ 46. Plaintiff claims he declined this offer.

On May 27, 2016, Plaintiff received a letter from Microsoft's outside counsel re-stating Microsoft's position that Plaintiff had granted Microsoft a "royalty-free license, irrevocable, worldwide license" to those inventions. *Id.* at ¶ 49 (quoting Dkt. #7-7 at 4). Outside counsel offered to transfer to Plaintiff all of Microsoft's ownership interest in the Safe and Secure and Mini Cloud patent families in exchange for his granting Microsoft a non-exclusive, royalty-free license to the disputed patent families and fully releasing Microsoft from all claims and liability. Dkt. #7-7 at 4.

On January 28, 2019, Plaintiff filed this action against Microsoft. Dkt. #1. In addition to alleging fraud in his particular case, Plaintiff seeks to challenge the general legality of Microsoft's Employee Agreement on behalf of all Microsoft employees who signed similar agreements with Microsoft. Under Plaintiff's theory, Microsoft obtains an employee's patent rights through an overly-broad patent rights assignment provision under Section 5. Dkt. #7 at ¶ 65-67. When the employee leaves Microsoft, Plaintiff claims that Microsoft then disregards or destroys

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their exclusion list submitted under Section 6, thereby “contaminating” the employee’s patent and requiring the employee to invest tremendous financial resources to clear their patent right through court. *Id.* at ¶¶ 71-72. As a result, Microsoft employees—who cannot afford to litigate Microsoft, nor want to abandon their patent work—hand over their patent rights from the time they sign their employment agreements yet continue working to develop their patents. *Id.* at ¶¶ 75, 85-89. Plaintiff claims that Microsoft’s scheme specifically violates laws under antitrust, forced labor, racketeering, civil rights, and fraud. *Id.* at ¶ 64.

III. DISCUSSION

A. Relevant Legal Standards

1. Motion to Dismiss

In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as true and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted). However, the court is not required to accept as true a “legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met when the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The complaint need not include detailed allegations, but it must have “more than labels and conclusions, and a formulaic

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recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Absent facial plausibility, a plaintiff's claims must be dismissed. *Id.* at 570.

2. Pro Se Considerations

The Court must also remain mindful that Plaintiff is proceeding pro se. "The Supreme Court has instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants." *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) (citing *Boag v. MacDougall*, 454 U.S. 364, 365 (1982)). Pro se plaintiffs are ultimately held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Nevertheless, "courts should not have to serve as advocates for pro se litigants." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Indeed, "[h]e who proceeds pro se with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to ... assist and guide the pro se layman[.]" *Jacobsen v. Filler*, 790 F.2d 1362, 1365, n. 5 (9th Cir. 1986) (quoting *United States v. Pinkey*, 548 F.2d 305 (10th Cir. 1977)).

3. Leave to Amend

Ordinarily, leave to amend a complaint should be freely given following an order of dismissal, "unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987); *see also DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) ("A district

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court does not err in denying leave to amend where the amendment would be futile)." (citing *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990)). Where claims are dismissed for failure to state a claim on which relief can be granted, permission to file an amended complaint is typically granted. *See Fed. R. Civ. P. 15(a)* ("[L]eave to amend shall be freely given when justice so requires"). However, where amendment would be futile, a claim is properly dismissed with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996). *Johnson v. American Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir.1987) ("[F]utility includes the inevitability of a claim's defeat on summary judgment.").

Microsoft seeks to dismiss all twelve of Plaintiff's alleged causes of action. The Court will address each claim in turn.

B. Certification of a Class

As an initial matter, Plaintiff seeks to certify as a class all Microsoft employees who signed an employment contract with Microsoft similar to the Employee Agreement signed by Plaintiff. Dkt. #7 at ¶¶ 134-141 (presented as "Count 7"). A pro se litigant may not serve as the representative of a class in a class action lawsuit under Fed. R. Civ. P. 23. *See Keyter v. Boeing Co.*, No. C13-982-RSM, 2013 WL 4458975, at *1 (W.D. Wash. Aug. 16, 2013). Accordingly, the Court will not consider the question of class certification at this time.

C. Anti-Trust Claims (Counts 1-2)

To survive a motion to dismiss, an antitrust complaint "need only allege sufficient facts from which

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the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws.” *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir.1987), *cert. denied*, 486 U.S. 1059 (1988). Plaintiff claims that Microsoft’s actions violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Under Plaintiff’s theory, Microsoft’s Employee Agreement—which allows patent assignment rights to an employee’s future inventions—enables Microsoft to fix the price of an employee’s patent in its favor and to procure patents at a much cheaper cost while reducing the supply of patents in the marketplace. Dkt. #7 at ¶¶ 93-97. In doing so, Plaintiff argues, Microsoft claims employee’s patents on bad faith or fraud in restraint of trade. *Id.* at ¶¶ 98-100.

Section 1 of the Sherman Act prohibits “[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. An antitrust claim under Section 1 requires a plaintiff to plead evidentiary facts which would prove a contract or conspiracy among two or more persons or entities, with the intent to harm or restrain trade, and which actually injures competition. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

Plaintiff has not alleged a contract or conspiracy among multiple entities—instead, his complaint only names Microsoft and employees of Microsoft as the bad actors. See Dkt. #7 at ¶¶ 92-100. It is well-established that Section 1 of the Sherman Act does not reach “wholly unilateral” conduct by a single entity. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (citing *Albrecht v. Herald Co.*,

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390 U.S. 145, 149 (1968). While Plaintiff argues that a contract between an employer and employee of the same company may fall within the scope of Section 1, Dkt. #17 at 11-12, the case law cited does not support this proposition. On the contrary, *Copperweld* recognized that a company cannot conspire with itself. *Id.* at 769; *see also Freeman*

v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1147 (9th Cir. 2003) ("The single-entity rule is relevant in a variety of contexts. It applies to a company and its officers, employees and wholly owned subsidiaries."). Accordingly, Plaintiff's claim under 15 U.S.C. § 1 is properly dismissed without prejudice.

Plaintiff has likewise failed to state a claim under 15 U.S.C. § 2. Section 2 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, or with foreign nations . . . [commits a felony]." 15 U.S.C. § 2. To state a claim for monopolization under this provision, a plaintiff must allege that the defendant (1) possessed monopoly power in the relevant markets; (2) willfully acquired or maintained its monopoly power through exclusionary conduct; and (3) caused antitrust injury. *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 108 F.3d 1147, 1151 (9th Cir. 1997). To state a claim for attempted monopolization, a plaintiff must allege (1) specific intent to control process or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power" and (4) causal antitrust injury. *Rebel Oil Co. v. Atl.*

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Richfield Co., 51 F.3d 1421, 1432–1433 (9th Cir. 1995).

Plaintiff alleges both monopolization and attempted monopolization by Microsoft. See Dkt. #7 at ¶ 104. Under either theory, Plaintiff has failed to state a claim under Section 2. Monopoly power is defined as “the power to control prices or exclude competition.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Plaintiff claims that Microsoft maintains monopoly power in technology areas such as office productivity software, desktop operating systems, and cloud computing. *Id.* at ¶ 101. In particular, he states that Microsoft enjoys an “88% market share” in the Desktop and Office365 cloud application market. Dkt. #17 at 14. However, “market share standing alone does not automatically equate to monopoly power.” *Cost Mgmt. Servs., Inc. v. Washington Nat. Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996). Dominant market share alone only supports a finding of market power “if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing.” *Rebel Oil Co.*, 51 F.3d at 1438. Here, Plaintiff has provided no market analysis such as barriers to entry or hyper-competitive pricing that inhibits competitors from expanding their output in the cloud application market or the other identified markets. Moreover, Plaintiff has not asserted that Microsoft “willfully” acquired or maintained its monopoly power as opposed to “as a consequence of a superior product, business acumen or historical accident[.]” *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 855 (9th Cir. 1995) (internal citations omitted). Likewise, with respect to his “attempted monopolization” claim, Plaintiff has not

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alleged that Microsoft acted with a “specific intent” to destroy its competition in the cloud application market—only that Microsoft intentionally sought to acquire its employees’ patents. *Id.* Microsoft’s alleged intent to acquire employees’ patents does not automatically equate to an intent to monopolize or attempt to monopolize a particular market.

Finally, the injuries alleged by Plaintiff are not within the scope of “antitrust injury” contemplated by Section 2. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999) (“[T]he antitrust laws are only intended to preserve competition *for the benefit of consumers.*”) (emphasis added). Although Plaintiff claims that Microsoft’s conduct injures employees by reducing the value of their patents and preventing them from entering the market, Dkt. #7 at ¶¶ 96-97, individual injury to Microsoft’s employees is not equivalent to injury to competition in the marketplace. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (“The antitrust laws . . . were enacted for the protection of competition not competitors.”). Plaintiff’s contention that the injury is “the value of option Microsoft didn’t pay,” *id.* at 13, does not explain how Microsoft’s conduct specifically injured competition within the identified markets nor how that injury ultimately harmed consumer welfare.

Plaintiff responds that he is not required to provide a market analysis or allege anti-trust injury because Microsoft’s actions constitute a “per se violation.” Dkt. #17 at 12. Yet “per se” Sherman Act violations only apply to those categories that are “manifestly anticompetitive” such as price-fixing, market division, group boycotts, and tying

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arrangements. *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 900 (9th Cir. 1983). Plaintiff argues that Microsoft's alleged scheme amounts to a "tying arrangement" on the basis that Microsoft combines its illegal patent assignment agreement with thousands of job offers. Dkt. #17 at 15. However, Microsoft's alleged scheme does not involve "tying"—Microsoft is not conditioning the purchase of one product on the purchase of a separate "tied" product. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461(1992) ("A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.") (internal quotations omitted). Without any basis for why Microsoft's alleged scheme amounts to a "per se" violation of antitrust laws, Plaintiff must provide the required market analysis and alleged antitrust injury to state a claim under Section 2.

For the foregoing reasons, Plaintiff's claims under 15 U.S.C. §§1, 2 (Counts 1 and 2) are properly dismissed without prejudice.

**D. Claims for Actual or Attempted Forced Labor
(Count 4)**

Plaintiff also claims that Microsoft's alleged scheme comprises actual or attempted forced labor. By requiring him to sign the Employment Agreement, Plaintiff argues, Microsoft "created a situation where Plaintiff will continue working on his patent family, add labor to perfect and prosecute his patents, and Defendant(s) Microsoft will get free access to those patents." Dkt. #7 at ¶ 119. Plaintiff argues that this

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arrangement constitutes exploitation of Plaintiff's "free labor" that he "would never offer to Defendant(s) Microsoft voluntarily" in violation of the Thirteenth Amendment of the U.S. Constitution and the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1589 et seq. *Id.* at ¶ 120.

The Thirteenth Amendment abolished slavery and involuntary servitude in the United States. U.S. CONST. art. XIII. The TVPRA was passed by Congress to reach cases of modern-day human trafficking, where victims may be "held in a condition of servitude through nonviolent coercion." *United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011) (quoting Victims of Trafficking and Violence Protection Act of 2000 § 102(b)(13)) (internal quotations omitted). The statute provides a cause of action for individuals who are coerced to work against their will because of serious harm or threat of serious harm—even if that harm is non-physical. See 18 U.S.C. 1589(a)-(b).

Here, Plaintiff's claims cannot conceivably amount to "forced labor." Microsoft allegedly created a "serious threat of claiming the exclusive right to Khalid's patent" given that "no buyer will buy Khalid's patent to face litigation with Microsoft." Dkt. #17 at 16. In doing so, Plaintiff argues, Microsoft has left him three options: (1) continue working to prosecute his patent family; (2) stop working on his patent and destroy his patent portfolio; or (3) wage a costly legal battle against Microsoft. *Id.* Victims of forced labor are coerced to work against their will because of serious harm or threat of serious harm. Plaintiff has not been coerced to continue working on his patents. On the contrary, he *wants* to continue working on his patent

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family because of the time and money already invested but may voluntarily choose *not* to do so because of Microsoft's alleged scheme that contaminated his patents. By definition of "forced labor," Plaintiff has not been coerced into working against his will and has therefore failed to state a claim under the Thirteenth Amendment and § 1589. This deficiency cannot be cured through amendment and warrants dismissal of Count 4 with prejudice.

**E. Racketeering Claims under 18 U.S.C. § 1964
(Counts 3, 5)**

Plaintiff also brings two claims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff alleges civil RICO violations through extortion and forced labor. *See* Dkt. #7 at ¶¶ 105-115 (extortion count); ¶¶ 121-125 (forced labor count). The Court has already determined that Plaintiff cannot assert a viable forced labor claim under 18 U.S.C. § 1589. For that reason, Plaintiff's racketeering claim predicated on forced labor, Count 5, is properly dismissed with prejudice. The Court will now address Plaintiff's remaining RICO claim predicated on extortion.

Plaintiff has not alleged sufficient facts to plausibly lead to his asserted RICO claim. To plead a RICO claim under 18 U.S.C. § 1962, a plaintiff must allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Howard v. America Online, Inc.*, 208 F.3d 741 (9th Cir. 2000). A "pattern of racketeering activity" requires at least two predicate acts to constitute racketeering activity. *See* 18 U.S.C. §1961(5). While Plaintiff makes a passing reference to fraud in discussing his claim, Dkt. #7 at

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¶ 108, an earlier section of his complaint indicates that he claims extortion as the predicate act for his RICO claim. *See id.* at ¶¶ 3-4.

In support of its RICO claim, Plaintiff alleges two predicate acts: (1) extortion under the Hobbs Act and; (2) extortion in the second degree under the Washington Racketeering Act, RCW 9A.56.130. *Id.* The Hobbs Act defines extortion as “obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. § 1951(b). The “obtaining” element “requires a showing that a defendant received something of value from the victim of the alleged extortion and that the “thing of value can be exercised, transferred, or sold.” *United States v. McFall*, 558 F.3d 951, 956 (9th Cir. 2009). Washington law defines “extortion” as “knowingly to obtain or attempt to obtain by threat [the] property or services of the owner” RCW 9A.56.110. Extortion in the second degree means “extortion by means of a wrongful threat” RCW 9A.56.130.

Plaintiff's complaint does not allege conduct by Microsoft that constitutes extortion under the Hobbs Act or Washington state law. Plaintiff claims that Microsoft wrongfully acquired or attempted to acquire his patent rights through enforcing its Employment Agreement, but nowhere does he identify any wrongful “threat” or other proscribed misconduct sufficient to plead extortion. On the contrary, the only alleged conduct by Microsoft—phone calls with in-house counsel and a letter to Plaintiff from outside counsel summarizing the terms of the Employee Agreement and describing a proposed agreement—do not amount to threats of violence, force, or fear within

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the scope of RICO. Plaintiff's Response only offers the conclusory statement that Microsoft's enforcement of its "illegal" contract "rose to the level of extortion[.]" *See* Dkt. #17 at 23. He has not explained how particular actions by Microsoft amounted to extortionate acts as defined under either the Hobbs Act or RCW 9A.56.130. The complaint therefore fails to sufficiently allege a predicate act. *See ICT Law PLLC v. SeaTree PLLC*, No. C17-1681-TSZ, 2018 WL 4951942, at *3 (W.D. Wash. Oct. 12, 2018) ("Plaintiff cannot rely on mere labels and conclusions to support its RICO theory").

Furthermore, Plaintiff has failed to adequately allege an "enterprise" under RICO. Plaintiff claims that several entities within and outside of Microsoft constitute either an enterprise or an associate-in-fact enterprise under RICO: Microsoft itself, Microsoft's offshore operations, Microsoft's intellectual property licensing program, associates such as Appleby law firm, and other "partners and vendors" that receive benefits through an intellectual property-sharing partnership. Dkt. #7 at ¶¶ 107-111. Vague terms such as "offshore operations," "associates" and "partners and vendors," *see* Dkt. #7 at ¶¶ 108-111, do not provide Microsoft or the Court with sufficient notice of the individuals or entities, inside or outside of Microsoft, that form the alleged "enterprise" engaged in racketeering. Plaintiff has also not articulated a common purpose of the alleged "enterprises" beyond a typical business relationship. *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) ("To show the existence of an enterprise under the second element, plaintiffs must plead that the enterprise has (A) a common purpose,

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(B) a structure or organization, and (C) longevity necessary to accomplish the purpose.") (citing *Boyle v. United States*, 556 U.S. 938, 946 (2009)). Instead, Plaintiff alleges that these various entities enjoy mutual benefits through their partnerships and explains how money flows between the various entities. See Dkt. #7 at ¶¶ 105-115. These allegations do not set forth a viable RICO claim.

Accordingly, Plaintiff's RICO claims predicated on extortion, Count 3, are dismissed without prejudice for failure to state a claim.

F. Civil Rights Violations (Counts 6, 12)

Plaintiff also alleges violations of his civil rights under 42 U.S.C. § 1983 and § 1985. Specifically, Plaintiff claims that Microsoft received billions of dollars from the federal government in the form of tax credits for its research and development expenses that paid Plaintiff's salary. Dkt. #7 at ¶ 179. By using this federal benefit to pay his salary, Plaintiff argues, Microsoft "acted under the color of state [law] while infringing on Khalid's constitutional rights" in violation of 42 U.S.C. § 1983. Plaintiff's claim under Section 1985 follows a similar logic that receipt of the federal benefit equates to acting under the color of state law. *Id.* at ¶ 133. The §1985 claim also adds Plaintiff's contention that Microsoft employed multiple employees, recruiters, and attorneys who conspired to have Plaintiff sign an overbroad employee agreement through the false pretense of an "inventive disclosure," thereby engaging in fraud and conspiracy giving rise to a violation of 42 U.S.C. § 1985. *Id.* at ¶¶ 127-129.

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Even if Plaintiff timely filed these claims within the three-year statute of limitations period, his allegations fail to satisfy the required elements of civil rights claims under §§ 1983 and 1985. A claim under § 1983 requires that a person or entity be acting “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory” when depriving a party of his rights, privileges or immunities. 42 U.S.C. § 1983. “Only in rare circumstances” will a court view a private party as a state actor for § 1983 purposes. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). For private conduct to constitute governmental action, there must be a “close nexus between the State and the challenged action that seemingly private behavior may be treated as that of the State itself.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotations omitted).

Here, Microsoft using government tax credits to pay employees’ salaries cannot conceivably establish the “close nexus” necessary for Microsoft to comprise a state actor. Given that the *federal* government provided these tax credits, *see* Dkt. #7 at ¶ 179, Plaintiff fails to explain how the credits create any nexus between Microsoft and a *state* actor as required under § 1983. *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997) (“[B]y its very terms, § 1983 precludes liability in federal government actors.”). Moreover, merely receiving tax credits does not intertwine Microsoft and the public sector to the point where Microsoft’s actions are effectively the government’s. Even in cases where the government has heavily funded a private entity, mere

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funding is not sufficient to create a “close nexus”—the government must somehow profit from the private actor’s violations. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841–42 (1982) (Heavily financed and regulated school not a state actor absent a showing that government profited from school’s alleged constitutional violations). None of Plaintiff’s allegations explain how Microsoft’s actions constitute “state action,” nor is there any conceivable basis for why they might be attributed to a state actor. Plaintiff’s Response does not address this issue. *See* Dkt. #17 at 17-18. The Court finds these deficiencies cannot be remedied through amendment. Accordingly, Plaintiff’s § 1983 claims are properly dismissed with prejudice.

Plaintiff has likewise failed to state a claim under § 1985. Plaintiff alleges that personnel within Microsoft conspired to acquire employees’ patents using the “false pretense” of employment agreements, which would entice employees to submit an Exclusion List ultimately disregarded by Microsoft. To state a cause of action under § 1985, Plaintiff must show that (1) “some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action,” and (2) the conspiracy was “aimed at interfering with rights that are protected against private, as well as official encroachment.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 267–68 (1993) (internal citations omitted).

Plaintiff’s claims provide no basis on which the Court may conclude that Microsoft’s actions were motivated racial or class-based discriminatory animus. In fact, Plaintiff’s complaint is devoid of *any* reference to racial or class-based discriminatory

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animus. *See generally* Dkt. #7. Instead, Plaintiff's allegations suggest that Microsoft's actions harm certain "types" of individuals: (i) employees engaged in creative services; (ii) employees with inventions subject to disclosure under the exclusion list; and/or (iii) employees aged forty and older, since older employees "likely will have more patents than the younger counterpart simply because inventions takes [sic] years to build." Dkt. #7 at ¶ 129. Plaintiff fails to explain how these groups of individuals constitute a "class" protected under § 1985. Moreover, his complaint makes clear that these groups of people are harmed simply because they have more patents for Microsoft to claim—they are not targeted by Microsoft because of a specific animus against (i) creative people; (ii) people who attached inventions under the exclusion list; or (iii) employees over the age of forty.

In his Response, Plaintiff argues that he may assert an equal protection claim against Microsoft as a "class of one." Dkt. #17 at 19 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). However, *Olech* extended the Equal Protection Clause to instances where a plaintiff claims he was intentionally treated differently from others similarly situated and there was no rational basis for the disparate treatment. Nothing in Plaintiff's complaint supports a disparate treatment claim—on the contrary, he seeks certification of a class on the basis that his mistreatment is neither unique nor exceptional, but part of a broader patent-grabbing scheme by Microsoft against all of its employees with patents. *See* Dkt. #7 at ¶¶ 134-141. This deficiency makes amendment futile. *See Cordell v. Greater Columbia Reg'l Support Network*, No. CV-05-5119,

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2006 WL 2354342, at *4 (E.D. Wash. Aug. 15, 2006) (Dismissing § 1985 claim with prejudice where Plaintiff “failed to make even the barest of allegations that the defendants’ actions . . . are the offspring of a ‘class-based invidiously discriminatory animus.’”) Accordingly, Plaintiff’s § 1985 claim is properly dismissed with prejudice.

G. Fraud (Count 8)

Plaintiff alleges that Microsoft either attempted or committed fraud by representing that employees may provide a written exclusion list of prior inventions and later informing Plaintiff that it could not find his Exclusion List. Dkt. #7 at ¶¶ 142-144.

Plaintiff’s fraud claim is barred by the statute of limitations. In the state of Washington, an action claiming fraud must be commenced within three years upon “discovery by the aggrieved party of the facts constituting the fraud;” RCW 4.16.080(4). However, where a literal application of the statute of limitations “could result in grave injustice,” courts apply a discovery rule of accrual. *David v. Smith*, No. C19-898 MJP, 2019 WL 3842661, at *2 (W.D. Wash. Aug. 15, 2019) (quoting *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn. 2d 566, 575 (2006), as corrected (Nov. 15, 2006) (internal quotations omitted)). Under this discovery rule, the cause of action accrues either “when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action.” *Id.* (emphasis added).

Even if this Court liberally applies the discovery rule, Plaintiff’s claims are untimely. Plaintiff asserts that May 27, 2016 was the first time

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that Microsoft provided a signed letter from outside counsel denying that Plaintiff had ever provided a list of inventions made by or belonging to him. Dkt. #7 at ¶ 49; *see also* Dkt. #17 at 20. Yet Plaintiff's complaint makes clear that by July 9, 2015 at the latest, he was aware of Microsoft's intention to deny existence of the Exclusion List. Plaintiff was first provided notice of Microsoft's alleged fraud as early as February 19, 2015 when Microsoft's in-house patent attorney notified him that "no inventions were listed by you [Mr. Khalid] for exclusion." Dkt. #7 at ¶ 40 (citing Dkt. #7-6 at 2). Over the next several months, Plaintiff continued to email Microsoft's in-house counsel regarding the Employment Agreement, including requests on April 14, 2015 and April 16, 2015 that Microsoft provide Plaintiff with a copy of the signed Employment Agreement. *Id.* at ¶ 43. Three months later, on July 9, 2015, Plaintiff claims that he declined an offer by Microsoft's in-house counsel to put together an agreement granting Microsoft a royalty-free license to the Mini-Cloud systems in exchange for resolving all disputes. *Id.* at ¶ 46. By this point, at the very latest, Microsoft had clearly indicated to Plaintiff its intention to deny the existence of the Exclusion List. Because Plaintiff did not file this action until January 28, 2019, the three-year limitations period had already expired.

Although the interests of justice require the pleadings of a pro se plaintiff to be liberally construed and held to less stringent standards, *Eldridge*, 832 F.2d at 1137, such interests also require plaintiffs to demonstrate diligence in pursuing their claims. *David*, 2019 WL 3842661, at *3. Here, Plaintiff was aware of the fraud nearly four years before he filed his

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complaint in January 2019. Moreover, Plaintiff has provided no reason for the Court to further toll his fraud claim. He contends that Microsoft “put no evidence on record that by February 2015, Khalid had a viable fraud claim”, Dkt. #17 at 21, but the limitations period starts to run once the plaintiff “discovers the salient facts underlying the elements of the cause of action”—not when the plaintiff “learns that he or she has a legal cause of action” *David*, 2019 WL 3842661, at *2. Microsoft’s letter dated May 27, 2016 simply reiterated the company’s previously-stated position that no Exclusion List existed. Dkt. #7 at ¶ 49 (citing Dkt. #7-7 at 2). The fact that this May 27, 2016 notice took the form of a signed letter from outside counsel—as opposed to an email from in-house counsel—added no facts to Plaintiff’s fraud claim from what he already knew on February 19, 2015. Because he has not demonstrated diligence in pursuing his claims, or that he was not at fault for the delay, his fraud claims are time-barred and dismissed with prejudice.

H. Declaratory Relief (Counts 9, 10, 11)

Finally, Plaintiff seeks three declaratory judgments: (1) that the “right of first refusal” clause in Section 5 of the Employee Agreement violates RCW 49.44.140(1); (2) that the Employee Agreement violates the due process clause of the Fourteenth Amendment; and (3) that Microsoft engaged in “inequitable conduct” through its ambiguous and indefinite patent assignment provision. As explained above with respect to Plaintiff’s § 1983 claim, the Fourteenth Amendment only guards against *state* action—not private action. *See Jackson v.*

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Metropolitan, 419 U.S. 345, 353 (1974). In his response, Plaintiff misapplies the holding in *Tsao v. Desert Palace, Inc.* See Dkt. #17 at 22 (citing 698 F.3d 1128, 1138 (9th Cir. 2012)) (affirming private entities may be sued under § 1983). *Tsao* in no way removed the fundamental requirement that a private party's actions somehow be attributable to the state. See *id.* at 1139 (“§ 1983 makes liable only those who act under color of state law”) (internal quotations omitted). Because Plaintiff's complaint fails to allege a viable Fourteenth Amendment claim, Plaintiff's claim for declaratory judgment under Count 10 is properly dismissed with prejudice. The Court will address the remaining two claims regarding RCW 49.44.140(1) and the general inequitable conduct of Microsoft.

The Declaratory Judgment Act (“DJA”) authorizes a district court to “declare the rights and other legal relations of any interested party seeking such declaration” when there is an “actual controversy.” 28 U.S.C. § 2201(a). To have subject matter jurisdiction over a claim brought under the DJA, there must be an “actual controversy.” See *Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1338. An “actual controversy” under the DJA is the same as an Article III case or controversy. See *id.* A party bringing a declaratory judgment claim must therefore show “that under ‘all the circumstances,’ there is an actual or imminent injury that was caused by the opposing party, is redressable by judicial action, and is of ‘sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” *Multimedia Patent Tr. v. Microsoft Corp.*, 525 F. Supp. 2d 1200, 1218 (S.D. Cal. 2007) (internal

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citation omitted). Even if an actual controversy exists, the Court may decline to issue a declaratory judgment. *Weyerhaeuser Co. v. Novae Syndicate 2007*, No. C18-0585-JLR, 2019 WL 3287893, at *1 (W.D. Wash. July 22, 2019) ("Even where the Article III requirement of an actual controversy is satisfied, the district court's exercise of its declaratory judgment authority is discretionary.") (Citing *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1222-23 (9th Cir. 1998)).

Plaintiffs remaining claims for declaratory relief are properly dismissed without prejudice. First, Plaintiff's request for declaratory judgment that the "right of first refusal" clause in Section 5 violates RCW 49.44.140 is not ripe for adjudication. This clause provides as follows:

In addition to the rights provided to MICROSOFT under paragraph 6 below, as to any Invention complying with 5(a)-(c) above that results in any product, service or development with potential commercial application, MICROSOFT shall be given the right of first refusal to obtain exclusive rights to the Invention and such product, service or development....

Dkt. #7-1 at 2-3. The Court agrees with Microsoft that Plaintiff has not alleged an actual case or controversy arising from Microsoft attempting to enforce the "right of first refusal" clause. See Dkt. #14 at 21. Instead, Plaintiff's dispute with Microsoft appears to arise from parties' disagreement over whether he submitted an Exclusion List under Section 6 of the Employee Agreement. *Id.* at ¶ 151; *see also id.* at ¶¶ 182-199 (damages sought by Plaintiff). Because

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Plaintiff's facial challenge to the legality of the "right of first refusal" clause under Section 5 is not tied to any actual dispute between the parties and does not rest on any concrete injury that is cognizable, it is not ripe for adjudication. *See Lee v. Capital One Bank*, No. C07-4599-MHP, 2008 WL 648177, at *4 (N.D. Cal. Mar. 5, 2008) ("Plaintiff's claim does not present a "Case" or "Controversy" because the allegedly unconscionable provisions in the Agreement have not been implicated in an actual dispute."); *see also Lee v. Am. Express Travel Related Servs.*, No. C 07-04765-CRB, 2007 WL 4287557, at *5 (N.D. Cal. Dec. 6, 2007) (Denying standing where plaintiffs claimed injury by mere existence of unconscionable terms in contract, but terms not implicated in actual dispute).

Finally, Plaintiff's request for declaratory judgment that Microsoft engaged in "inequitable conduct" is also unripe for adjudication. The broad and vague declaratory relief sought by Plaintiff does not "admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (internal quotations omitted). Even if the Court narrows the broad language of Plaintiff's request to apply to Microsoft's use and enforcement of its Employment Agreement, Plaintiff has failed to sufficiently allege an actual dispute suitable for declaratory relief for the same reasons set forth above. On amendment, Plaintiff's complaint must request specific relief from the Court based on his own dispute with Microsoft—

**Appendix C - Order Regarding Petitioner's
Complaint in the Dist. Court, WD Washington, Filed
November 21, 2019**

not broad relief based on hypothetical injuries to other Microsoft employees.

I. Leave to Amend

Plaintiff shall be granted leave to amend his complaint so that he may be afforded an additional opportunity to plead a viable claim under the Sherman Act (Counts 1, 2), RICO (Count 3) and/or declaratory relief under Counts 9 and 11. The claims shall be made on his own behalf and not on behalf of a putative class of plaintiffs. The amended complaint shall contain a concise statement of his claims setting forth the specific facts giving rise to a plausible inference that Microsoft is liable for the alleged violations. Plaintiff shall file an amended complaint within thirty (30) days from the date of this Order. Failure to comply with this Order will result in dismissal of the action.

IV. CONCLUSION

Having reviewed Defendant's Motion, Plaintiff's Response, Defendant's Reply, and the remainder of the record, it is hereby ORDERED:

(1) Defendant's Motion to Dismiss, Dkt. #14, is GRANTED;

(2) Counts 1 and 2 (Sherman Act claims) and Count 3 (RICO claim for extortion) are DISMISSED without prejudice and with leave to amend;

(3) Count 4 (forced labor), Count 5 (RICO claim for forced labor), Counts 6 and 12 (civil rights claims), and Count 8 (fraud) are DISMISSED with prejudice;

(4) Plaintiff's claim for declaratory relief on Fourteenth Amendment violation (Count 10) is

**Appendix C - Order Regarding Petitioner's
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DISMISSED with prejudice. Plaintiff's remaining claims for declaratory relief (Counts 9 and 11) are DISMISSED without prejudice and with leave to amend;

(5) Plaintiff is ORDERED to file a Second Amended Complaint within thirty (30) days of this Order for Counts 1-3, 9 and 11.

DATED this 4 day of September, 2019.

**RICARDO S. MARTINEZ
CHIEF UNITED STATES
DISTRICT JUDGE**

**Appendix D - Order Regarding Petitioner's motion
for rehearing to the Court of Appeals for the Ninth
Circuit, Filed April 21, 2023**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ATM SHAFIQUL KHALID, Esquire, an
individual and on behalf of similarly
situated,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION, a
Washington corporation; JOHN DOE, 1 -
n,

Defendants-Appellees.

No. 20-35921

D.C. No. 2:19-cv-00130-RSM
Western District of Washington,
Seattle

ORDER

Before: HAWKINS, S.R. THOMAS, and McKEOWN,
Circuit Judges.

Judge S.R. Thomas has voted to deny the petition for rehearing en banc, and Judges Hawkins and McKeown so recommend. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

Appendix E – Statutory Provisions and Federalist Papers

15 U.S. Code§ 1 - Trusts, etc., in restraint of trade illegal; penalty

Every 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, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S. Code§ 2 - Monopolizing trade a felony; penalty

Every 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, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

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and Federalist Papers**

**42 U.S. Code§ 1983 - Civil action for deprivation
of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**42 U.S. Code § 1985 - Conspiracy to interfere
with civil rights**

(1)Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

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(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or

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threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

**Appendix E – Statutory Provisions
and Federalist Papers**

Declaration of Independence: A Transcription

In Congress, July 4, 1776

The unanimous Declaration of the thirteen united States of America, When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. --That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design

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to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.-- Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative

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powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

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For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country,

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to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United

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Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

Note: The following text is a transcription of the Stone Engraving of the parchment Declaration of Independence (the document on display in the Rotunda at the National Archives Museum.) The spelling and punctuation reflects the original.

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FEDERALIST NO. 43

The Same Subject Continued: The Powers Conferred
by the Constitution Further Considered
For the *Independent Journal*.

Author: James Madison

To the People of the State of New York:

THE FOURTH class comprises the following
miscellaneous powers:

A power "to promote the progress of science and useful
arts, by securing, for a limited time, to authors and
inventors, the exclusive right to their respective
writings and discoveries. "The utility of this power
will scarcely be questioned. The copyright of authors
has been solemnly adjudged, in Great Britain, to be a
right of common law. The right to useful inventions
seems with equal reason to belong to the inventors.
The public good fully coincides in both cases with the
claims of individuals. The States cannot separately
make effectual provisions for either of the cases, and
most of them have anticipated the decision of this
point, by laws passed at the instance of Congress.

"To exercise exclusive legislation, in all cases
whatsoever, over such district (not exceeding ten
miles square) as may, by cession of particular States
and the acceptance of Congress, become the seat of the
government of the United States; and to exercise like
authority over all places purchased by the consent of
the legislatures of the States in which the same shall
be, for the erection of forts, magazines, arsenals,
dockyards, and other needful buildings.

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"The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the

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ceded part of it, to concur in the cession, will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated. The necessity of a like authority over forts, magazines, etc. , established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, requires that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment.

"To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained. "As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

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"To admit new States into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress. "In the articles of Confederation, no provision is found on this important subject. Canada was to be admitted of right, on her joining in the measures of the United States; and the other COLONIES, by which were evidently meant the other British colonies, at the discretion of nine States. The eventual establishment of NEW STATES seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the new system supplied the defect. The general precaution, that no new States shall be formed, without the concurrence of the federal authority, and that of the States concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution, against a junction of States without their consent.

"To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with a proviso, that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State. "This is a power of very great

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importance, and required by considerations similar to those which show the propriety of the former. The proviso annexed is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.

"To guarantee to every State in the Union a republican form of government; to protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

"In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be SUBSTANTIALLY maintained. But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. "As the confederate republic of Germany," says Montesquieu, "consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland. " "Greece was undone," he adds, "as soon as the king of Macedon obtained a seat among the

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Amphictyons." In the latter case, no doubt, the disproportionate force, as well as the monarchical form, of the new confederate, had its share of influence on the events. It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves.

These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a GUARANTY of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for antirepublican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

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A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors. The history, both of ancient and modern confederacies, proves that the weaker members of the union ought not to be insensible to the policy of this article. Protection against domestic violence is added with equal propriety. It has been remarked, that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature. At first view, it might seem not to square with the republican theory, to suppose, either that a majority have not the right, or that a minority will have the force, to subvert a government; and consequently, that the federal interposition can never be required, but when it would be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations, for purposes of violence, be formed as well by a majority of a State, especially a small State as by a majority of a county, or a district of the same State; and if the authority of the State ought, in the latter case, to protect the local magistracy, ought not the federal authority, in the former, to support the State

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authority? Besides, there are certain parts of the State constitutions which are so interwoven with the federal Constitution, that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose, will generally prevent the necessity of exerting it.

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side, against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen, in fine, that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not

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admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves. In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms, and tearing a State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends. Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind! Should it be asked, what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right? the answer must be, that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the federal Constitution, that it diminishes the risk of a calamity for which no possible constitution can provide a cure. Among the advantages of a confederate republic enumerated by Montesquieu, an important one is, "that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound."

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"To consider all debts contracted, and engagements entered into, before the adoption of this Constitution, as being no less valid against the United States, under this Constitution, than under the Confederation. "This can only be considered as a declaratory proposition; and may have been inserted, among other reasons, for the satisfaction of the foreign creditors of the United States, who cannot be strangers to the pretended doctrine, that a change in the political form of civil society has the magical effect of dissolving its moral obligations. Among the lesser criticisms which have been exercised on the Constitution, it has been remarked that the validity of engagements ought to have been asserted in favor of the United States, as well as against them; and in the spirit which usually characterizes little critics, the omission has been transformed and magnified into a plot against the national rights. The authors of this discovery may be told, what few others need to be informed of, that as engagements are in their nature reciprocal, an assertion of their validity on one side, necessarily involves a validity on the other side; and that as the article is merely declaratory, the establishment of the principle in one case is sufficient for every case. They may be further told, that every constitution must limit its precautions to dangers that are not altogether imaginary; and that no real danger can exist that the government would DARE, with, or even without, this constitutional declaration before it, to remit the debts justly due to the public, on the pretext here condemned.

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"To provide for amendments to be ratified by three fourths of the States under two exceptions only. "That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.

"The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States, ratifying the same. "This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention,

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which our own experience would have rendered inexcusable. Two questions of a very delicate nature present themselves on this occasion:

On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it?

What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it? The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.

PERHAPS, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation, that in many of the States it had received no higher sanction than a mere legislative ratification. The principle of reciprocity seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the

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parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the MULTIPLIED and IMPORTANT infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate.

The second question is not less delicate; and the flattering prospect of its being merely hypothetical forbids an overcurious discussion of it. It is one of those cases which must be left to provide for itself. In general, it may be observed, that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncancelled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and, above all, the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain MODERATION on one side, and PRUDEENCE on the other.

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FEDERALIST NO. 69

The Real Character of the Executive
From the *New York Packet*

Friday, March 14, 1788.

Author: Alexander Hamilton

To the People of the State of New York:

I PROCEED now to trace the real characters of the proposed Executive, as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.

That magistrate is to be elected for FOUR years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between HIM and a king of Great Britain, who is an HEREDITARY monarch, possessing the crown as a

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patrimony descendible to his heirs forever; but there is a close analogy between HIM and a governor of New York, who is elected for THREE years, and is re-eligible without limitation or intermission. If we consider how much less time would be requisite for establishing a dangerous influence in a single State, than for establishing a like influence throughout the United States, we must conclude that a duration of FOUR years for the Chief Magistrate of the Union is a degree of permanency far less to be dreaded in that office, than a duration of THREE years for a corresponding office in a single State.

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill, which shall have passed the two

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branches of the legislature, for reconsideration; and the bill so returned is to become a law, if, upon that reconsideration, it be approved by two thirds of both houses. The king of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the President differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of this State, of which the governor is a constituent part. In this respect the power of the President would exceed that of the governor of New York, because the former would possess, singly, what the latter shares with the chancellor and judges; but it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the convention have copied.

The President is to be the "commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offenses against the United States, EXCEPT IN CASES OF

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IMPEACHMENT; to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene, on extraordinary occasions, both houses of the legislature, or either of them, and, in case of disagreement between them **WITH RESPECT TO THE TIME OF ADJOURNMENT**, to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed; and to commission all officers of the United States." In most of these particulars, the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these:

First. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor.

Secondly. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and

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admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.¹ The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States.

Thirdly. The power of the President, in respect to pardons, would extend to all cases, EXCEPT THOSE OF IMPEACHMENT. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President? All conspiracies and plots against the government, which have not been matured into actual treason, may be screened from punishment of every kind, by the interposition of the prerogative of pardoning. If a governor of New York, therefore, should be at the head of any such conspiracy, until the design had been ripened into actual hostility he could insure his accomplices and adherents an entire impunity. A President of the Union, on the other hand, though he

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may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed, that the person who was to afford that exemption might himself be involved in the consequences of the measure, and might be incapacitated by his agency in it from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect, that, by the proposed Constitution, the offense of treason is limited "to levying war upon the United States, and adhering to their enemies, giving them aid and comfort"; and that by the laws of New York it is confined within similar bounds.

Fourthly. The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue or even dissolve the Parliament. The governor of New York may also prorogue the legislature of this State for a limited time; a power which, in certain situations, may be employed to very important purposes.

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The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated, that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament. But I believe this doctrine was never heard of, until it was broached upon the present occasion. Every jurist² of that kingdom, and every other man acquainted with its Constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination, that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the

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President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature. It must be admitted, that, in this instance, the power of the federal Executive would exceed that of any State Executive. But this arises naturally from the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question, whether the Executives of the several States were not solely invested with that delicate and important prerogative.

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

The President is to nominate, and, WITH THE ADVICE AND CONSENT OF THE SENATE, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution. The king of Great Britain is

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emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king; nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it. The power of appointment is with us lodged in a council, composed of the governor and four members of the Senate, chosen by the Assembly. The governor CLAIMS, and has frequently EXERCISED, the right of nomination, and is ENTITLED to a casting vote in the appointment. If he really has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote. In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale, and confirm his own nomination.³ If we compare the publicity which must necessarily attend the mode of appointment by the President and an entire branch of the national legislature, with the privacy in the mode of appointment by the governor of New York, closeted in a secret apartment with at most four, and frequently with only two persons; and if we at the same time consider how much more easy it must be to influence the small number of which a council of appointment consists, than the considerable number of which the national Senate would consist, we cannot

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hesitate to pronounce that the power of the chief magistrate of this State, in the disposition of offices, must, in practice, be greatly superior to that of the Chief Magistrate of the Union.

Hence it appears that, except as to the concurrent authority of the President in the article of treaties, it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the Governor of New York. And it appears yet more unequivocally, that there is no pretense for the parallel which has been attempted between him and the king of Great Britain. But to render the contrast in this respect still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer group.

The President of the United States would be an officer elected by the people for FOUR years; the king of Great Britain is a perpetual and HEREDITARY prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a QUALIFIED negative upon the acts of the legislative body; the other has an ABSOLUTE negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of DECLARING war, and of RAISING and REGULATING fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of

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treaties; the other is the SOLE POSSESSOR of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments. The one can confer no privileges whatever; the other can make denizens of aliens, noblemen of commoners; can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation; the other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

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Patent Act of 1790

United States Statutes at Large/Volume 1/1st Congress/2nd Session/Chapter 7

< United States Statutes at Large Volume 1 I 1st Congress I 2nd Session

CHAP. VII.-An Act to promote the progress of useful Arts

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That upon the petition of any person or persons to the Secretary of State, the Secretary

for the department of war, and the Attorney General of the United States, setting forth, that he, she, or they, hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used, and praying that a patent may be granted therefor, it shall and may be lawful to and for the said Secretary of State, the Secretary for the department of war, and the Attorney General, or any two of them, if they shall deem the invention or discovery sufficiently useful and important, to cause letters patent to be made out in the name of the United States, to bear teste by the President of the United States, reciting the allegations and suggestions of the said petition, and describing the said invention or discovery, clearly, truly and fully, and thereupon granting to such petitioner or petitioners, his, her or their heirs, administrators or assigns for any term not exceeding fourteen years, the sole and exclusive right and liberty

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of making, constructing, using and vending to others to be used, the said invention or discovery; which letters patent shall be delivered to the Attorney General of the United States to be examined, who shall, within fifteen days next after the delivery to him, if he shall find the same conformable to this Act, certify it to be so at the foot thereof, and present the letters patent so certified to the President, who shall cause the seal of the United States to be thereto affixed, and the same shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained, and shall be recorded in a book to be kept for that purpose in the office of the Secretary of State, and delivered to the patentee or his agent, and the delivery thereof shall be entered on the record and endorsed on the patent by the said Secretary at the time of granting the same.

SEC. 2. And be it further enacted, That the grantee or grantees of each patent shall, at the time of granting the same, deliver to the Secretary of State a specification in writing, containing a description, accompanied with drafts or models, and explanations and models (if the nature of the invention or discovery will admit of a model) of the thing or things, by him or them invented or discovered, and described as aforesaid, in the said patents; which specification shall be so particular, and said models so exact, as not only to distinguish the invention or discovery from other things before known and used, but also to enable a workman or other person skilled in the art or manufacture, whereof it is a branch, or wherewith it may be nearest connected, to make, construct, or use the same, to the end that the public may have the full

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benefit thereof, after the expiration of the patent term; which specification shall be filed in the office of the said Secretary, and certified copies

thereof, shall be competent evidence in all courts and before all jurisdictions, where any matter or thing, touching or concerning such patent, right, or privilege, shall come in question.

SEC. 3. And be it further enacted, That upon the application of any person to the Secretary of State, for a copy of any such specification, and for permission to have similar model or models made, it shall be the duty of the Secretary to give such copy, and to permit the person so applying for a similar model or models, to take, or make, or cause the same to be taken or made, at the expense of such applicant.

SEC. 4. And be it further enacted, That if any person or persons shall devise, make, construct, use, employ, or vend within these United States, any art, manufacture, engine, machine or device, or any invention or improvement upon, or in any art, manufacture, engine, machine or device, the sole and exclusive right of which shall be so as aforesaid granted by patent to any person or persons, by virtue and in pursuance of this act, without the consent of the patentee or patentees, their executors, administrators or assigns, first had and obtained in writing, every person so offending, shall forfeit and pay to the said patentee or patentees, his, her or their executors, administrators or assigns such damages as shall be assessed by a jury, and moreover shall forfeit to the person aggrieved, the thing or things so devised, made, constructed, used, employed or vended,

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contrary to the true intent of this act, which may be recovered in an action on the case founded on this act.

SEC. 5. And be it further enacted, That upon oath or affirmation made before the judge of the district court, where the defendant resides, that any patent which shall be issued in pursuance of this act, was obtained surreptitiously by, or upon false suggestion, and motion made to the said court, within one year after issuing the said patent, but not afterwards, it shall and may be lawful to and for the judge of the said district court, if the matter alleged shall appear to him to be sufficient, to grant a rule that the patentee or patentees, his, her, or their executors, administrators or assigns, show cause why process should not issue against him, her, or them, to repeal such patents; and if sufficient cause shall not be shown to the contrary, the rule shall be made absolute, and thereupon the said judge shall order process to be issued as aforesaid, against such patentee or patentees, his, her, or their executors, administrators, or assigns. And in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the first and true inventor or discoverer, judgment shall be rendered by such court for the repeal of such patent or patents; and if the party at whose complaint the process issued, shall have judgment given against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed by the court, and recovered in such manner as costs expended by defendants, shall be recovered in due course of law.

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SEC. 6. And be it further enacted, That in all actions to be brought by such patentee or patentees, his, her, or their executors, administrators or assigns, for any penalty incurred by virtue of this act, the said patents or specifications shall be *prima facie* evidence, that the said patentee or patentees was or were the first and true inventor or inventors, discoverer or discoverers of the thing so specified, and that the same is truly specified; but that nevertheless the defendant or defendants may plead the general issue, and give this act, and any special matter whereof notice in writing shall have been given to the plaintiff, or his attorney, thirty days before the trial, in evidence, tending to prove that the specification filed by the plaintiff does not contain the whole of the truth concerning his invention or discovery; or that it contains more than is necessary to produce the effect described; and if the concealment of part, or the addition of more than is necessary, shall appear to have been intended to mislead, or shall actually mislead the public, so as the effect described cannot be produced by the means specified, then, and in such cases, the verdict and judgment shall be for the defendant.

SEC. 7. And be it further enacted, That such patentee as aforesaid, shall, before he receives his patent, pay the following fees to the several officers employed in making out and perfecting the same, to wit: For receiving and filing the petition, fifty cents; for filing specifications, per copy-sheet containing one hundred words, ten cents; for making out patent, two dollars; for affixing great seal, one dollar; for indorsing the day of delivering the same to the patentee, including all intermediate services, twenty cents.

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APPROVED, April 10, 1790.

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Copyright Act of 1790

1 Statutes At Large, 124

An Act for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, his or their executors, administrators or assigns, who hale or have not transferred to any other person the copyright of such map, chart, book or books, share or shares thereof; and any other person or persons, being a citizen or citizens of these United States, or residents therein, his or their executors, administrators or assigns, who hale or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk's office, as is herein after directed: And that the author and authors of any map, chart, book or books already made and composed, and not printed or published, or that shall hereafter be made and composed, being a citizen or citizens of these United States, or resident therein, and his or their executors, administrators or assigns, shall have the

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sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years from the time of recording the title thereof in the clerk's office as aforesaid. And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years; Provided, He or they shall cause the title thereof to be a second time recorded and published in the same manner as is herein after directed, and that within six months before the expiration of the first term of fourteen years aforesaid.

Sec. 2 And be it further enacted, That if any other person or persons, from and after the recording the title of any map, chart, book or books, and publishing the same as aforesaid, and within the times limited and granted by this act, shall print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported from any foreign Kingdom or State, any copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof, first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed, reprinted, or imported, shall publish, sell, or expose to sale, or cause to be published, sold or exposed to sale, any copy of such map, chart, book or books, without such consent first had and obtained in writing as aforesaid, then such offender or offenders shall forfeit all and every sheet and sheets, being part of the same, or either of

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them, to the author or proprietor of such map, chart, book or books, who shall forthwith destroy the same: And every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported or exposed to sale, contrary to the true intent and meaning of this act, the one moiety thereof to the author or proprietor of such map, chart, book or books, who shall sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered by action of debt in any court of record in the United States, wherein the same is cognizable. Provided always, That such action be commenced within one year after the cause of action shall arise, and not afterwards.

Sec. 3 And be it further enacted, That no person shall be entitled to the benefit of this act, in cases where any map, chart, book or books, hath or have been already printed and published, unless he shall first deposit, and in all other cases, unless he shall before publication deposit a printed copy of the title of such map, chart, book or books, in the clerk's office of the district court where the author or proprietor shall reside: And the clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose, in the words following, (giving a copy thereof to the said author or proprietor, under the seal of the court, if he shall require the same)."District of _____ to wit: Be it remembered, that on the _____ day of

in the _____ year of the independence of the United States of America, A. B. of the said district, hath

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deposited in this office the title of a map, chart, book or books, (as the case may be) the right whereof he claims as author or proprietor. (as the case may be) in the words following to wit: [here insert the title] in conformity to the act of the Congress of the United States, intituled ‘ An act for the encouragement of learning, by securing the copies of maps, chart, and book, to the authors and proprietors of such copies, during the time therein mentioned.’ C. D. clerk of the district of .” For which the said clerk shall be entitled to receive sixty cents from the said author or proprietor, and sixty cents for every copy under seal actually given to such author or proprietor as aforesaid. And such author or proprietor shall, within two months from the date thereof cause a copy of the said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks.

Sec. 4 And be it further enacted, That the author or proprietor of any such map, chart, book or books, shall, within six months after the publishing thereof, deliver, or cause to be delivered to the Secretary of State a copy of the same, to be preserved

Sec. 5 And be it further enacted, That nothing in this act shall be construed to extend to prohibit the importation or vending, Reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

Sec. 6 And be it further enacted, That any person or persons who shall print or publish any manuscript,

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without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid, (if such author or proprietor be a citizen of or resident in these United States) shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof.

Sec. 7 And be it further enacted, That if any person or persons shall be sued or prosecuted for any matter, act or thing done under or by virtue of this act, he or they may plead the general issue, and give the special matter in evidence.

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