

APPENDIX

APPENDIX

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App. 1

APPENDIX A

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 15-55778

D.C. No. 2:10-cv-05830- JGB-AJB

[Filed August 21, 2017]

AFMS LLC,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNITED PARCEL SERVICE, INC.;	)
FEDEX CORPORATION,	)
	)
Defendants-Appellees.	)

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted March 8, 2017
Pasadena, California

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

App. 2

Before: REINHARDT, TASHIMA, and NGUYEN,
Circuit Judges.

AFMS LLC (“AFMS”) appeals the grant of summary judgment in favor of Appellees United Parcel Service, Inc. (“UPS”) and FedEx Corporation (“FedEx”) on AFMS’ antitrust suit under § 1 of the Sherman Act, 15 U.S.C. § 1. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Summary judgment in an antitrust case is appropriate where the plaintiff fails to define a cognizable market. *See, e.g., Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1489 (9th Cir. 1991). AFMS proffers two market definitions: a market for “shipping consultation services” and a market for “rate negotiation.” AFMS has attempted to construct markets that include solely itself, other third party rate consultants, UPS, and FedEx. They cannot, however, explain their exclusion of in-house shipping advisors, the U.S. Postal Service, regional carriers, or other types of shipping consultants. Further, it is highly questionable whether UPS and FedEx are participants in the market for “rate negotiation.”¹ To establish antitrust standing, an antitrust plaintiff must participate in “the same market as the alleged malefactors.” *Amarel v. Connell*, 102 F.3d 1494, 1508 (9th Cir. 1996) (quoting *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)).

¹ It seems highly implausible that a shipping company, such as UPS or FedEx, could “negotiate” with itself about the rates it would charge shippers.

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AFMS has failed to define a cognizable market or to show that both it and Appellees are participants in that market.

The district court's grant of summary judgment is

AFFIRMED.

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NGUYEN, Circuit Judge, concurring in the result:

The market definitions that AFMS advances are cognizable for antitrust purposes. *See Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991). However, AFMS failed to support its legal theories with sufficient evidence to survive summary judgment.

AFMS was not required, as the district court suggested, to provide expert testimony regarding the relevant market. *Cf. United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966) (“Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant ‘economic’ or ‘geographic’ market is not an adequate ground on which to dismiss a [Clayton Act § 7] case.”). The district court was within its discretion, however, in excluding Stuart Brotman’s proffered expert testimony, *see* Fed. R. Evid. 702; *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1001–04 (9th Cir. 2001), and had no obligation to consider inadequately cited evidence in the voluminous record before it. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988).

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REINHARDT, Circuit Judge, dissenting:

I respectfully disagree. I am not persuaded that plaintiff has failed to raise a genuine issue of fact as to the existence of a market regarding shipping consultation services, rate negotiations, and/or a combination of the two. *See Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991); *Telecor Communications, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1129, 1131 (10th Cir. 2002).

APPENDIX B

PAUL T. FRIEDMAN (CA SBN 98381)
PFriedman@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

GREGORY B. KOLTUN (CA SBN 130454)
GKoltun@mofo.com
SEAN P. GATES (CA SBN 186247)
SGates@mofo.com
MORRISON & FOERSTER LLP
707 Wilshire Blvd., Suite 6000
Los Angeles, California 90018-3543
Telephone: 213.892.5200
Facsimile: 213.892.5454

Attorneys for Defendant
UNITED PARCEL SERVICE CO.

COLLEEN HITCH WILSON (*Pro Hac Vice*)
chitchwilson@fedex.com
M. KIMBERLY HODGES (*Pro Hac Vice*)
kim.hodges@fedex.com
3620 Hacks Cross Road, Building B, Third Floor
Memphis, Tennessee 38125
Telephone: (901) 434-8600
Facsimile: (901) 434-4523

CLOSED

Attorneys for Defendant
FEDEX CORPORATION

App. 7

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

**Case No. CV10-05830 JGB (AJW)
Hon. Jesus G. Bernal**

[Filed May 12, 2015]

AFMS LLC,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED PARCEL SERVICE CO.	)
and FEDEX CORPORATION,	)
	)
Defendants.	)
	)

JUDGMENT

For the reasons set forth in the Court's Order Granting Defendants' Motions for Summary Judgment (Doc. No. 296), the Court hereby enters judgment in favor of Defendants United Parcel Service Co. ("UPS") and FedEx Corporation (FedEx) and against Plaintiff AFMS LLC.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that AFMS take nothing from its claims against UPS and against FedEx, that the action be dismissed with prejudice as to UPS and as to FedEx, and that UPS and FedEx recover their respective costs pursuant to Federal Rule of Civil Procedure 54(d)(1).

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Dated: May 12, 2015

/s/Hon. Jesus G. Bernal
Hon. Jesus G. Bernal
United States District Judge

Approved as to form:

BLECHER COLLINS
PEPPERMAN & JOYE, P.C.

By:
Maxwell M. Blecher
Attorneys for Plaintiff AFMS LLC

la-1285878

APPENDIX C

J S - 6 O

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**Case No. CV 10-5830 JGB
(AJWx)**

[Filed April 30, 2015]

AFMS LLC,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED PARCEL SERVICE	)
CO.; FEDEX CORPORATION,	)
	)
Defendants.	)
	)

**ORDER GRANTING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT**

Before the Court are two motions for summary judgment filed by Defendants United Parcel Service Co. and FedEx Corporation. After considering all of the papers filed in support of and in opposition to the motions, as well as the arguments presented at the October 2, 2014, hearing, the Court GRANTS the motions.

I. BACKGROUND

Plaintiff AFMS LLC (“AFMS”) commenced this antitrust action against United Parcel Service Co. (“UPS”) and FedEx Corporation (“FedEx”) (collectively, “Defendants”) on August 5, 2010. (Doc. No. 1.) After AFMS filed a First Amended Complaint, (“FAC,” Doc. No. 31), Defendants moved to dismiss, and, on May 27, 2011, the Court (Morrow, J.) granted their motions on the grounds that AFMS failed to plead sufficient facts to show that it had antitrust standing and failed to allege the type of anticompetitive conduct that would support a monopolization claim, (“MTD 1 Order,” Doc. No. 55). The FAC alleged that AFMS suffered injury in the relevant market for the business of delivering time sensitive letters, documents, and packages within the United States and to and from foreign countries. (FAC ¶ 16.) The Court held that AFMS lacked standing because it is not a participant in the alleged market, since it is not “in the chain of distribution’ for shipping and delivery services,” “rather it offer[s] advice and assistance to one side of the purchase/sale transaction.” (MTD 1 Order at 17-18 (internal quotation omitted).) Consequently, the Court found AFMS had not adequately alleged that it suffered antitrust injury and dismissed, with leave to amend, AFMS’s claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. (*Id.* at 23-24.)¹

¹ The Court also dismissed AFMS’s claim for monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, for failing to allege the type of anticompetitive conduct that will support such a claim. (MTD 1 Order at 29-31.)

AFMS filed a Second Amended Complaint on June 24, 2011. (“SAC,” Doc. No. 56.) Defendants again moved to dismiss, and this time, the Court (Morrow, J.) found that AFMS adequately alleged antitrust standing but dismissed the claims under Sections 1 and 2 of the Sherman Act on the grounds that they were conclusory and stated insufficient facts. (“MTD 2 Order,” Doc. No. 74.) In the SAC, AFMS alleged that the parties are all “participants in the market for shipping consultation services, which is comprised of those business entities which advise shippers regarding the delivery of time sensitive letters, documents and packages by air or by ground within the United States and to and from the United States to foreign countries.” (SAC ¶ 11.) The Court found that AFMS adequately alleged that it competes with Defendants in this market and that it was directly injured by Defendants’ decision to cease dealing with third-party shipping consultants like Plaintiff. (MTD 2 Order at 33-34.) The Court nonetheless dismissed AFMS’s Section 1 claim because its allegations of injury to competition were “wholly conclusory and [were] unsupported by specific facts.” (MTD 2 Order at 34-37.) Once again, the Court granted AFMS leave to amend its pleading. (*Id.* at 48.)²

On December 12, 2011, AFMS filed the operative Third Amended Complaint. (“TAC,” Doc. No. 76.) The TAC states three claims under Section 1 of the

² For a second time, the Court dismissed AFMS’s claim for monopolization or attempted monopolization under Section 2 of the Sherman Act because AFMS failed to allege the existence of viable, single-brand submarkets. (MTD 2 Order at 38-48.) AFMS did not replead this claim in its Third Amended Complaint. (*See* Doc. No. 76.)

Sherman Act, 15 U.S.C. § 1. The first claim alleges that, since the fall of 2009, FedEx and UPS “combined and conspired to unreasonably restrain trade and commerce in the market for shipping consultation services for the delivery of time sensitive letters, documents and packages by air or ground.” (TAC ¶ 24.) Claim one alleges that Defendants refuse to deal with any third-party consultants (“TPCs”) and refuse to negotiate or discuss discounts with shippers who share data with or retain TPCs. (*Id.*) As a result, the TAC contends that prices for the delivery of time sensitive materials increased, TPCs’ businesses suffered, and competition between shipping consultants and Defendants’ diminished. (*Id.* ¶¶ 24-27.) The second and third claims contend that UPS and FedEx, individually, have, “by a series of non-disclosure agreements and customer/carrier contracts . . . , unreasonably restrained competition, trade, and commerce in the market for shipping consultation services for the delivery of time sensitive letters, documents and packages by air or ground.” (*Id.* ¶¶ 30, 36.) According to AFMS, these agreements and contracts restrict or revoke the shippers’ ability to share information with TPCs, thereby directly threatening the TPCs’ business. (*Id.* ¶¶ 31, 37.) Due to Defendants’ conduct, AFMS estimates that its damages are in the range of \$15 to \$20 million. (*Id.* ¶¶ 28, 34, 40.) Defendants answered the TAC on January 16, 2012. (Doc. Nos. 81, 82.)

On May 1, 2013, UPS and FedEx each filed a motion for summary judgment. (Doc. Nos. 130, 140.) While the motions were pending, UPS filed two motions in limine to exclude AFMS experts Stuart Brotman (“Brotman”) and David Campbell

(“Campbell”). (Doc. Nos. 167, 168.) FedEx joined UPS’s motions in limine. (Doc. Nos. 172, 173.) The Court heard oral argument on the in limine motions on January 27, 2014, and issued an order granting them on February 5, 2014. (“MiL Order,” Doc. No. 252.) The Court held that it would not consider the reports and testimony of Brotman and Campbell in deciding Defendants’ motions for summary judgment. (*Id.* at 12.) Accordingly, in this Order, the Court does not rely on any exhibits or testimony from Brotman or Campbell.

On March 5, 2014, UPS applied for leave to file a supplemental brief addressing the impact of the Court’s order excluding Brotman on its pending motion for summary judgment. (“Appl.,” Doc. No. 257.) AFMS opposed the application on March 14, 2014. (Doc. No. 258.) If the Court granted UPS’s application, the parties stipulated to allow AFMS to file a ten-page response to UPS’s supplemental brief. (Doc. No. 256.) In its proposed supplemental brief, UPS contends that the exclusion of Brotman “further highlights the insufficiency of AFMS’s factual showing regarding necessary elements of its claims.” (Appl., Exh. A at 1 (emphasis omitted).) Given the enormity of the summary judgment record in this action, the Court cannot fathom why any additional briefing to “further highlight[]” arguments previously made is necessary or useful. Because supplemental briefing pertaining to Brotman’s exclusion is not helpful or desirable, the Court DENIES UPS’s application. (Doc. No. 257.) In accordance with this ruling, the Court DENIES the parties’ stipulation setting a supplemental briefing schedule. (Doc. No. 256.)

The parties initially applied to seal a substantial portion of the summary judgment briefing and evidence. (See Doc. Nos. 139, 142, 146, 150, 161, 186, 197, 199, 203.) On January 15, 2014, the Court denied the parties' applications and stipulation to file the documents under seal because they failed to identify or meet the compelling reasons standard required for sealing documents connected to a dispositive motion. (Doc. No. 211.) The Court permitted the parties to renew their applications to seal. (*Id.* at 2-3.)

On February 4 and 5, 2014, the parties refiled their summary judgment documents, redacting significantly less material from their public filings and applying to seal limited portions of the record to prevent prejudice or harm from disclosure. (Doc. Nos. 217, 228, 235.) After reviewing the renewed applications to seal, the Court provisionally granted the majority of the parties' proposed redactions. (Doc. No. 263.) In its sealing order, the Court noted that its rulings were provisional because it "may reconsider its decision to seal in its ruling on summary judgment" in order to preserve the public's right to know the basis for the Court's decision on the merits of the action. (*Id.* at 6, 9.) Because none of the sealed documents were necessary to the Court's decision herein, the Court confirms its decision to seal the parties proposed redactions and removes their provisional status. The documents remain sealed.

The Court has reviewed and considered all publicly filed and sealed documents submitted in support of and in opposition to the motions.³ UPS moves for summary

³ Because the sealed versions are not available to the public and do not include any material necessary to this Order, the Court cites

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judgment on all claims AFMS brings against it. (“UMSJ,” Doc. No. 246.) In support of its motion, UPS filed the following documents:

- Statement of Uncontroverted Facts and Conclusions of Law (“USUF,” Doc. No. 247);
- Declaration of Sean P. Gates (“Gates Decl.,” Doc. No. 246-1), attaching 148 exhibits, (Doc. Nos. 246-2 to -9, 251);⁴
- Declaration of Donald Faby (“Faby Decl.,” Doc. No. 246-10), attaching twenty exhibits, (Doc. No. 246-11);
- Declaration of Kathleen Gutmann (“Gutmann Decl.,” Doc. No. 246-12), attaching twenty-two exhibits, (Doc. No. 246-13 to -14);
- Declaration of Robert Harris (“Harris Decl.,” Doc. Nos. 246-15), attaching one exhibit, (Doc. No. 246-16);

to the publicly filed versions of the summary judgment filings. However, in deciding the motions, the Court has considered all evidence manually filed and submitted under seal.

Because the Court denied the parties’ initial applications to seal and denied in part the parties’ renewed applications to seal, the parties amended and refiled their summary judgment documents several times in an effort to limit the number of redactions from the public record. For simplicity and ease of location, the Court cites to the most recent version of each document in this Order.

⁴ Due to the volume of evidence filed in support of and in opposition to the motions, the Court does not enumerate each attached exhibit, but describes the documents in subsequent evidentiary citations as needed.

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- Declaration of Joseph Kalt (“Kalt Decl.,” Doc. No. 246-17), attaching one exhibit, (Doc. No. 246-18);
- Declaration of Clifford Kupperberg (“Kupperberg Decl.,” Doc. No. 246-19), attaching one exhibit, (Doc. No. 246-20); and
- Declaration of Darrell Williams (“Williams Decl.,” Doc. No. 246-21), attaching one exhibit, (Doc. No. 246-22).

FedEx separately moved for summary judgment, asserting its own arguments for dismissal and joining those made by UPS. (“FMSJ,” Doc. No. 229.) FedEx attached a Statement of Uncontroverted Facts and Conclusions of Law, (“FSUF,” Doc. No. 230), and an Appendix of Exhibits, (“App.,” Doc. Nos. 233-234, 236-239, 241), which includes seventy-four exhibits.⁵

AFMS filed an omnibus opposition to Defendants’ motions. (Opp’n, Doc. No. 218.) AFMS’s Statement of Genuine Disputes of Material Fact responds to the facts propounded in the USUF, (“AUSGI,” Doc. No. 231 at 1-99), and in the FSUF, (“AFSGI,” Doc. No. 231 at 108-207), and also sets forth its own undisputed material facts, (“ASUF,” Doc. No. 231 at 220-261). In support of the Opposition, AFMS includes ninety-nine

⁵ Several of the exhibits in FedEx’s Appendix include numerous, numbered subexhibits. For example, attached to Exhibit 24, the Declaration of Michelle Burtis, are five numbered subexhibits. The Court cites to the subexhibits either by subexhibit number, for example (App., Exh. 24, Subexh. 3), or by page number, as in (App., Exh. 24 at 24-72).

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exhibits as attachments to the Declaration of Alyson C. Decker. (“Decker Decl.,” Doc. Nos. 219-227, 232.)⁶

Defendants filed separate replies. UPS filed the following documents with its Reply, (“UPS Reply,” Doc. No. 248):

- Reply to the AUSGI, (“Reply AUSGI,” Doc. No. 249 at 4-142);
- Statement of Genuine Disputes of Material Fact, (“USGI,” Doc. No. 249 at 143-243), responding to AFMS’s undisputed facts;
- Objections to and Requests to Strike Evidence Offered in Opposition, (“UPS Obj.,” Doc. No. 250); and
- Reply Declaration of Sean P. Gates, (“Reply Gates Decl.,” Doc. No. 248-1), attaching Exhibits 149 to 187, (Doc. Nos. 248-2 to -3).

FedEx replied, (“FedEx Reply,” Doc. No. 242), attaching the following documents:

- Reply to the AFSGI, (“Reply AFSGI,” Doc. No. 245 at 4-78);
- Statement of Genuine Disputes of Material Fact, (“FSGI,” Doc. No. 245 at 79-187), responding to AFMS’s undisputed facts;
- Evidentiary Objections to AFMS’s Evidence, (“FedEx Obj.,” Doc. No. 244); and

⁶ Just as with FedEx’s Appendix, the Decker Declaration includes numerous subexhibits, which are cited either by subexhibit number or page number.

- Supplemental Appendix, (“Supp. App.,” Doc. No. 243), including thirty additional exhibits, (Doc. Nos. 243-1 to -30).

Because UPS and FedEx incorporate the arguments made in the other’s motion, (UMSJ at 38 n.45; FMSJ at 1), the Court addresses Defendants’ motions together.

II. LEGAL STANDARD⁷

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Tarin v. Cnty. of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986). The moving party may satisfy its Rule 56(c) burden by “showing”—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. See id. at 323–24; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact. Addisu v. Fred Meyer,

⁷ Unless otherwise noted, all references to “Rule” refer to the Federal Rules of Civil Procedure.

Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes over facts that might affect the outcome of the suit under the governing law, i.e., “where the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 248.

Under Local Rules 56–2 and 56–3, these triable issues of fact must be identified in the non-moving party’s “Statement of Genuine Issues” and supported by “declaration or other written evidence.” See also Sullivan v. Dollar Tree Stores, Inc., 623 F.3d 770, 779 (9th Cir. 2010) (“Federal Rule of Civil Procedure 56(e)(2) requires a party to “set out specific facts showing a genuine issue for trial.”). If the non-moving party fails to identify the triable issues of fact, the court may treat the moving party’s evidence as uncontroverted, so long as the facts are “adequately supported” by the moving party. L.R. 56–3; see also Int’l Longshoremen’s Ass’n, AFL–CIO v. Davis, 476 U.S. 380, 398 n.14 (1986) (“[I]t is not [the Court’s] task *sua sponte* to search the record for evidence to support the [parties’] claim[s].”). Neither will the Court *sua sponte* raise legal arguments which were not raised in the parties’ summary judgment briefs. See Cambridge Elecs. Corp. v. MGA Elecs., Inc., 227 F.R.D. 313, 336 (C.D. Cal. 2004) (“There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment. Rather, the onus is upon the Parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.”) (quoting Resolution Trust Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995)); see also Samica Enters. LLC v. Mail Boxes Etc., Inc., 460

F. App'x 664, 666 (9th Cir. 2011) (“Arguments not raised in opposition to summary judgment . . . are waived.”).

III. FACTS

A. Evidentiary Issues

The Court has already remarked upon the volume of evidence submitted in conjunction with these motions. Given the breadth of the record, a well-organized record with clear and specific citations is paramount.⁸ The Court’s Standing Order directs parties to “cite to specific page and line numbers” when offering evidence to support or oppose summary judgment. (“Standing Order” at 5, Doc. No. 127.) The Order also warns that, “If either party fails to provide a pincite to the supporting evidence, the Court will deem the proffered fact (or dispute) unsupported.” (*Id.* at 8.)

Despite these clear instructions, the evidence cited in AFMS’s Statements of Genuine Disputes (AUSGI; AFSGI) and Statement of Undisputed Facts (ASUF) consists of unwieldy string cites omitting crucial information necessary to locate the purported evidence. For example, instead of separately tabbing each exhibit, as required by page 5 of the Standing Order, AFMS includes entire deposition transcripts as well as

⁸ AFMS submitted nine volumes of evidence in support of its omnibus opposition, consisting of 3,831 pages of exhibits. These figures undervalue the enormity of the record because AFMS prints four pages of a deposition transcript on each 8 1/2 by 11 sheet, in violation of Local Rules 11-3.1.1 and 11-3.2.

all deposition exhibits within a single exhibit tab.⁹ (See, e.g., Decker Decl., Exh. 45 (including the Deposition of Mike Moriarty and twenty-nine non-consecutively numbered subexhibits used at the deposition).) Further compounding the disorder, the AUSGI, AFSGI, and ASUF cite to whole subexhibits without page numbers or pincites. (See, e.g., ASUF ¶¶ 2, 3, 6, 8.) Insofar as it is able, the Court relies on the exhibits and subexhibits cited by AFMS. However, where AFMS provides no pincite, the Court deems the proffered fact or dispute unsupported. See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 774-75 (9th Cir. 2002) (“Orr’s Statement of Undisputed Facts fails to cite the page and line numbers when referring to the deposition contained in Exhibit D. [footnote omitted] This defect alone warrants exclusion of the evidence.”). (Standing Order at 8.)

FedEx objects to numerous subexhibits offered by AFMS due to lack of authentication. (See FedEx Obj. ¶¶ 8, 15, 31, 34, 42, 44, 47, 62.) These objections pertain to exhibits attached to deposition transcripts offered in support of the Opposition. In many instances, the deposition testimony authenticates the exhibit because it provides testimony from a person with knowledge that the document is what AFMS claims it to be. (See, e.g., Decker Decl., Exh. 42 14:1-15 (testimony from deponent sufficient to authenticate

⁹ The Court notes that FedEx similarly did not separately tab each subexhibit. However, all subexhibits were consecutively numbered or lettered in accordance with the authenticating declaration and included a footer on each page indicating its tab number or letter. Thus, the Court was able to easily locate subexhibits in FedEx’s filings.

Subexhibit 2198).) Moreover, most of the objected-to exhibits were produced by Defendants in discovery and are deemed authentic when offered by AFMS. See Orr, 285 F.3d at 777 n.20; Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 889 n.12 (9th Cir. 1996) (documents produced by a party in discovery were deemed authentic when offered by the party-opponent). Thus, the Court OVERRULES FedEx's authentication objections.

Defendants also submit several hearsay objections to AFMS's evidence. First, UPS and FedEx object to several articles from online and print industry journals and publications as hearsay. (FedEx Obj. ¶¶ 42, 46; UPS Obj. ¶¶ 9, 12, 42-43, 46 (objecting to Decker Decl., Exhs. 78, 82-83, 85-89).) "It is axiomatic to state that newspaper articles are by their very nature hearsay evidence and are thus inadmissible if offered to prove the truth of the matter asserted[.]" In re Dual-Deck Video Cassette Recorder Antitrust Litig., No. MDL 765, 1990 WL 126500, at *3 (D. Ariz. July 25, 1990); see also Larez v. City of Los Angeles, 946 F.2d 630, 642 (9th Cir. 1991); Sacramento Cnty. Retired Employees Ass'n v. Cnty. of Sacramento, 975 F. Supp. 2d 1150, 1154 (E.D. Cal. 2013). Here, Plaintiff offers these articles and surveys to prove the content contained therein, namely, that Defendants raised their prices and increased their revenues. Accordingly, the exhibits constitute hearsay, and the Court SUSTAINS the objections and will not consider them as evidence when deciding this Motion.¹⁰ See Vannatta v. Keisling, 899 F.

¹⁰ However, the Court finds that several portions of the surveys (Decker Decl., Exhs. 86-88) are admissible under the hearsay exceptions in Federal Rules of Evidence 803(1), 803(3) and 807. See

Supp. 488, 491 (D. Or. 1995) aff'd, 151 F.3d 1215 (9th Cir. 1998) (striking newspaper articles as inadmissible hearsay and refusing to consider them on a motion for summary judgment where “[t]he articles discuss the amounts and effects of special interest contributions, and were offered by Defendants to show that out-of-district donors in fact pose a real threat to the campaign system.”).

FedEx makes a hearsay objection to five exhibits, all of which contain the same email between several FedEx employees concerning a conference call involving several FedEx vice presidents. (FedEx Obj. ¶ 34; Decker Decl., Exh. 39, Subexh. 2030; Exh. 41, Subexh. 2138; Exh. 42, Subexh. 2218; Exh. 45, Subexh. 2177; Exh. 46, Subexh. 2277.) The email is admissible as a statement of a party opponent under Federal Rule of Evidence 801(d)(2). Moreover, at the summary judgment stage, the Court does “not focus on the admissibility of the evidence’s form,” but rather on the admissibility of its contents. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003). Because the email could be presented in an admissible form at trial, the Court may consider it in deciding the summary judgment motions. Id. at 1037. The Court **OVERRULES** FedEx’s objections to Subexhibits 2030, 2138, 2218, 2177, and 2277.

Finally, UPS argues that the Court should disregard a Reply Expert Report of Robert Wunderlich

Potts v. Zettel, 220 F. App’x 559, 561 (9th Cir. 2007); Schering Corp. v. Pfizer, Inc., 189 F.3d 218, 225-238 (2d Cir. 1999) (Sotomayor, J.). Notably, all parties rely on the undisputed survey results. (See ASUF ¶ 9; USGI ¶ 9; FSGI ¶ 9.)

offered by AFMS. (UPS Obj. ¶ 67; Decker Decl., Exh. 59.) The Report is attached to the declaration of counsel, and, although it is signed, it is not sworn under penalty of perjury to be true and correct. “[It] is well established, that an unsworn expert report is inadmissible” under Rule 56(e) to support or oppose summary judgment. Shuffle Master, Inc. v. MP Games LLC, 553 F. Supp. 2d 1202, 1210 (D. Nev. 2008) (citing cases); see Harris v. Extendicare Homes, Inc., 829 F. Supp. 2d 1023, 1027 (W.D. Wash. 2011) (striking expert reports because they were attached to a declaration of counsel, who “is not competent to testify about the matters therein,” and were unsworn). The Court therefore SUSTAINS UPS’s objections to the Wunderlich Reply Report and does not consider it on summary judgment.

The Court previously ruled that all testimony and reports of experts Campbell and Brotman are excluded from the Court’s consideration of the summary judgment motions. (See MiL Order.) Therefore, the parties’ objections to this evidence are SUSTAINED.

The Court addresses any remaining evidentiary objections in footnotes, as needed.

B. Disputed and Undisputed Facts

Contrary to the responses offered in the SGIs, after inspection of the cited evidence, the majority of material facts are undisputed. Rather than offering conflicting evidence, the parties merely dispute the characterization of the facts as presented in the SUFs and SGIs. In deciding the motions for summary judgment, the Court examines the underlying evidence, not the summary statements or, in Plaintiff’s case,

compound paragraphs¹¹ offered in the parties' statements of undisputed facts. See Dalton v. Straumann Co. USA Inc., No. C-99-4579 VRW, 2001 WL 590038, at *4 (N.D. Cal. May 18, 2001) ("Statements of undisputed facts, as in this case, are generally unhelpful. It is on the underlying declarations, depositions and exhibits that the court will rely.").

Unless specifically noted, the following material facts are sufficiently supported by admissible evidence and are uncontroverted; they are "admitted to exist without controversy" for purposes of the motions. L.R. 56-3. All disputed facts are explicitly noted.

1. Defendants

Defendants UPS and FedEx are in the business of transporting and delivering packages. The parties refer to Defendants as "carriers" and their customers as "shippers." Defendants enter into complex term contracts with shippers. They charge shippers for their services, including any tailored supply chain services, via structured package delivery rates and other accessorial charges.

Defendants sell their services to customers through thousands of sales employees. The sales staff may attract new customers by responding to a Request for Proposals ("RFP") or approaching the shipper directly.

¹¹ In violation of Paragraph 11(a) of the Court's Standing Order, a majority of the "facts" offered in Plaintiff's ASUF are compound and include numerous factual statements, making it nearly impossible for the Court to locate Plaintiff's supporting evidence. (See, e.g., ASUF ¶¶ 1, 3, 8-9.)

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The sales staff will also work with existing customers to retain the business when the shipper's contract expires or terminates. First, the sales staff gathers and analyzes data from the shipper or the carrier's internal records regarding their shipping history, including, for example, the volume of packages, types of products, destinations, timeliness of delivery, and dimensional weights. Next, they provide shippers with information regarding their carrier's delivery services and prices and offer the customer carrier-specific solutions and products to meet the customer's needs. Before signing a contract with a shipper, the carrier may negotiate price discounts on a customer-by-customer basis, based on the shipper's volume, types of packages, and market conditions. Once finalized, the carrier presents the contract to the shipper, explaining the services, rates, prices, and discounts. In its presentation to the customer, the carrier occasionally compares its rates and services to those of competing carriers, but only if the shipper provides the sales representative with the competitor's offer.

In their communications and negotiations with customers, FedEx and UPS do not recommend that shippers use the services of another carrier for their shipping needs.¹² (FSUF ¶ 119; AFSGI ¶ 119.)

In conjunction with their package delivery services, Defendants provide shippers with supply chain services to help customers increase efficiency and profitability. These services, which are tailed to the shipper's needs,

¹² The only identified exception is that, when the carrier does not offer a specific service requested or needed by the shipper, the carrier may suggest another entity to provide that service.

can include flexible pick up times, technology integration, electronic billing, customized reports, network optimization, and parcel insurance. Defendants do not charge separately for these services; instead, the cost is included in the shipper's package delivery rates. Defendants prefer to work directly with their shipping customers in order to better understand their supply chain needs and develop customized solutions.

2. Plaintiff

Plaintiff is a third-party consultant ("TPC")¹³ who advises shippers regarding their delivery needs and represents shippers in negotiating competitive small parcel and freight contracts. (TAC ¶ 3; USUF ¶ 1; AUSGI ¶ 1.) Most of AFMS's employees are former employees of carriers, including Defendants and DHL. Although AFMS provides other services to shippers, approximately ninety-five percent of its revenue comes from its price negotiation services for shippers trying to lower their shipping costs.

In the first step of its parcel contract optimization services, AFMS gathers the customer's historical shipping data, including invoices, parcel dimensions, weights and destinations, prior agreements with shippers, and rate charts. Next, AFMS analyzes this data to identify opportunities for savings. AFMS creates a shipper profile breaking down the shipment characteristics and associated charges and presents the customer with a distribution and opportunity analysis.

¹³ Defendants also refer to Plaintiff as a third-party negotiator, shortened to "TPN" or "3PN", or as a transportation consultant.

The analysis primarily highlights savings in the form of potential rate discounts the shipper may be able to achieve through negotiations with carriers, also known as “targets.” In addition to identifying targeted discounts from FedEx and UPS, AFMS also determines if the shipper could save money by using alternate carriers, such as the United States Postal Service (“USPS”), specialized carriers, or regional carriers. AFMS may also make recommendations to the shipper regarding parcel insurance, customs procedures and compliance, tariff payments, site location, which involves identifying the prime warehouse from which to ship goods, mode optimization, for example, transitioning from express to ground shipments, regulations covering the shipping of hazardous materials, and selecting packaging for products.

AFMS then develops a negotiation strategy based on its analysis and identified targets. At this point, AFMS may act as the shipper’s representative in negotiations with the carrier, or it may provide advice and analysis behind the scenes. In conjunction with the shipper, AFMS may create an RFP, inviting the carriers to bid on the shipper’s business.¹⁴ The RFP package includes the target incentives sought via the RFP process, which a carrier should meet to stay competitive in the process. AFMS sets a timeline for the carrier’s bids and the negotiation process. AFMS and/or the shipper may meet with the carrier to present the RFP and negotiate discounts and rates. The carriers then submit bids for the customer’s shipping business.

¹⁴ In select circumstances, a shipper may not issue an RFP and instead may negotiate with only one carrier.

Subsequently, AFMS analyzes the proposals submitted by the carriers and provides the shipper with a comparison of the rates, incentives, products, and service-levels offered by the carriers and a juxtaposition of the proposals with the customer's existing carrier contract. Further rounds of negotiations and bidding are held, as necessary. The shipper selects its preferred carrier and signs a new carrier contract.

Once the final agreement is in place, AFMS assists with implementation by verifying that invoices reflect the new contract rates and that the shipper is meeting volume requirements, by monitoring carrier pricing trends and new service offerings, and by annually measuring the savings realized from the new contract.

Shippers generally compensate AFMS for its contract optimization services via a gain share arrangement, whereby the customer pays AFMS a percentage of the package delivery rate savings achieved by negotiating a new carrier contract. In the majority of its agreements, AFMS's fee is forty to fifty percent of the savings achieved for the shipper for a term of three years. Occasionally, AFMS enters into a fixed fee arrangement for its contract optimization services or portions thereof.

AFMS also offers shippers other post-contract services. For example, R.A.D.A.R., AFMS's proprietary software, provides auditing tools which monitor contract compliance and track shipments to compare actual delivery time with the carrier's guaranteed delivery time. The technology also assists shippers with recovering and obtaining refunds for lost, delayed, or nonexistent packages. AFMS also can assist the

shipper with running various reports to monitor shipping costs and develop cost avoidance strategies. Shippers generally pay AFMS for post-agreement audit, contract compliance, and reporting services at a flat rate outside of the agreement for contract optimization services. These services represent a small share of AFMS's revenues.

3. Third Party Consultants

Third Party Consultants include numerous entities which provide consulting services to shippers to assist them with their delivery needs. Like AFMS, these entities provide various services to shippers, including carrier contract negotiation, bill auditing, mode optimization, warehouse advice, and parcel insurance. Other TPCs provide advice regarding additional delivery issues such as inventory management, technology integration, tariff and customs issues, product returns, hazardous materials, packaging, and obtaining service refunds when carriers deliver packages late. TPCs mix and match these consulting services depending on a shipper's needs.

From 2006 to 2008, eleven percent of surveyed shippers reported that they used TPCs to negotiate rates with their parcel carrier. The same survey conducted in October 2011 reports that twelve percent of shippers used TPCs to assist with carrier negotiations, while eighty-five percent approached carriers on their own.

Shippers that do not use TPCs to negotiate their shipping contracts rely on in-house personnel and resources to engage in negotiations with carriers. Plaintiff does not provide any evidence to dispute this

fact, but argues that in-house negotiators are “not adequate substitutes” for TPCs. (See AFSGI ¶ 127.)

4. TPC Policy

In general, the parties agree that Defendants changed their policies with regard to interacting with select TPCs in 2009 and 2010. As is usually the case in antitrust cases, there is a fundamental disagreement as to whether the TPC Policy was adopted jointly or independently, but the Court need not reach these facts to dispose of the present motions. There is also substantial dispute regarding the timeline of enactment of Defendants’ policy changes regarding TPCs. These disputes are similarly immaterial to the outcome of these motions and are not discussed.

For about seventeen years prior to 2009, Defendants generally permitted TPCs to participate directly in the negotiation of shipper contracts and to have access to shipper parcel data and carrier contracts. Between 2009 and 2010, Defendants reconsidered their relationship with TPCs who assist with negotiations and took steps to refuse to deal with these entities.

The minutes of a FedEx VP conference call on December 20, 2009, indicate that there was a “decision . . . for all of Sales to adopt the . . . hard line on not engaging with third party consultants negotiating [RFPs] for customers. Each VP will be responsible for exceptions in their region.” (“Dec. 20, 2009, Mins.,” Decker Decl., Exh. 45, Subexh. 2177.) A FedEx document entitled “Third Party Consultant Rules of Engagement for Field Sales,” dated April 23, 2010, makes clear that in all three sales divisions the new TPC approach applied only to third parties that “focus

strictly on rate negotiations”; in other words, entities which help shippers negotiate the pricing contained in their contracts with FedEx. (“Field Sales ROE,” App., Exh. 26, Subexh. E at 7.) Excluded from the TPC policy were third party firms providing shippers with supply chain services, including warehouse and distribution improvements, fulfillment services, inventory and order management, and transportation management. (Id. at 8.) Also excluded were third parties that performed invoice auditing services, mode or network optimization services, advice on customs and international shipments, and contract negotiation services for freight, truckload, and ocean transport shipments. (Decker Decl., Exh. 40 at 210:11 to 211:15.) As to TPCs engaged solely in price negotiation, VPs had the “ability to exercise limited exceptions” to the TPC policy. (Field Sales ROE at 4.) VPs in each division addressed exceptions individually. (FSUF ¶ 166.)

UPS sent an email to “Managers” on September 17, 2009, which “introduced some new contractual terms and conditions . . . on a case by case basis” to “avoid improper Third Party interference with our customer relationships.” (Faby Decl., Exh. 4 at 1.) The changes included (1) issuing a thirty-day cancellation notice once UPS is notified of a shipper’s “intent to authorize a Third party to act on behalf of the customer in the negotiations of their existing UPS agreement” and (2) including language in new contracts negotiated by a third party that allows UPS to assess a fee in the event a shipper terminated the agreement early or fails to meet minimum volume or revenue requirements. (Id.) UPS provided updated procedures to its sales force in an April 23, 2010, newsletter. (Gutmann Decl., Exh.

22.) If a sales representative has a customer that is “going to use a [Third Party Negotiator] in any capacity,” the representative “MUST notify” the Strategy Room “to discuss next steps before taking any other action with the customer related to the [Third Party Negotiator].” (Decker Decl., Exh. 24, Subexh. 2573; Gutmann Decl. ¶ 46.) The Strategy Room decides how to proceed with the customer on a case-by-case basis, but UPS “generally say[s] ‘NO’ to [Third Party Negotiators] unless there is an unusual circumstance.” (Decker Decl., Exh. 24, Subexh. 2576 at 1376.) In most cases, the Strategy Room advised the sales representative to not engage in negotiations with anyone other than the customer. (Decker Decl., Exh. 24, Subexh. 2596 at 1392; cf. Kalt Decl., Exh. 1 ¶ 136 (stating that UPS proceeded with the negotiator involved with the customer in between six and thirty-eight percent of interactions from April 2010 to April 2012).) Other options offered by the Strategy Room included presenting the shipper who has engaged a negotiator with a nonnegotiable proposal to do business, known as a “last-best-and-final offer.” (USUF ¶ 54; AUSGI ¶ 54.)

Prior to the TPC Policy, Defendants used 2-way or 3-way nondisclosure agreements (“NDA”) with shippers. The former is a contract between the shipper and carrier in which the parties agree not to share pricing information or contract terms with third parties. The latter, 3-way NDA permits a third-party to access pricing and contract information and binds the third-party to the confidentiality terms.

As part of the TPC Policy, FedEx implemented a more robust 3-way NDA for use with all TPCs, which

included a \$100,000 liquidated damages provision and gave FedEx the right to audit the third-party's use of the data. (AFSGI ¶¶ 48, 64; Declaration of Jimmy Russell Phillips, Jr. ¶¶ 11-12, App., Ex. 43.) UPS also modified its NDA policy. At times, the Strategy Room required a shipper to sign a strict 2-way NDA, which "require[d] that the information shared between UPS and [the shipper] is treated as confidential and may not be shared outside of our two companies." (Decker Decl., Exh. 22, Subexh. 2634 at 1149; USUF ¶ 52.) Another form of the 2-way NDA utilized by UPS had a limited exception which permitted TPCs to use UPS's confidential information to conduct contract analytics or bill auditing, but not to engage in negotiations. (USUF ¶ 53; AUSGI ¶ 53.) UPS also permitted 3-way NDAs in some circumstances, which allowed negotiators to access confidential pricing information. (USUF ¶ 55; USGI ¶ 55.)

Defendants offered several reasons for modifying their policies toward TPCs. Due to the recession, Defendants noted an increase in the number of TPCs and the number of shippers engaging TPCs in 2008 and 2009. During the same period, Defendants noticed that TPCs increasingly encouraged shippers to renegotiate their carrier contracts before the end of the contract term, costing Defendants money and time to renegotiate and undermining their ability to recover the cost of their services. Both Defendants state that TPCs interfered with their ability to provide specialized supply chain, also known as "value-added," services to shippers. (USUF ¶¶ 25-27; FSUF ¶ 30.) Numerous witnesses testified that TPCs obstructed Defendants' relationships with their customers and prevented them from working directly with the shippers, insisting that

all communications go through the TPC. Defendants also sought to prevent TPCs from violating shipper NDAs by engaging in “benchmarking,”¹⁵ a practice whereby a TPC uses confidential shipping rate information from one shipper to assess and negotiate the rates of another. (AUSUF ¶¶ 29-30; FSUF ¶ 37.) FedEx was uniquely concerned that the TPCs had a bias in favor of UPS and frequently lost or failed to gain new business when the RFP process was run by a TPC.

Plaintiff contends that Defendants’ modified approach toward TPCs, which was allegedly created after DHL departed from the market in 2009, was implemented in order to strengthen their purported duopoly in the delivery services market and to increase their revenues by forcing TPCs out of the market. (ASUF ¶ 43; AUSGI ¶ 36.)

IV. DISCUSSION

Plaintiff cannot survive summary judgment because it fails to provide any evidence of the existence and boundaries of a legally cognizable relevant market for “shipping consultation services.” (Opp’n at 3.) Because Plaintiff has not presented evidence to support crucial elements of its case, the Court finds summary judgment is proper.

1. Relevant Market

The “validity of the ‘relevant market’” is “subject to factual testing by summary judgment or trial.” Newcal

¹⁵ It is undisputed that some TPCs engaged in benchmarking and improperly used confidential shipping rates. (AUSGI ¶ 29.)

Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008). In a Section 1 claim, “[t]he plaintiff bears the initial burden of showing that the restraint produces ‘significant anticompetitive effects’ within a ‘relevant market.’” Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (“Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.”) (citing Big Bear Lodging Ass’n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999)). The existence of a relevant market is crucial to ensure that Plaintiff possesses antitrust standing and an essential element of each of Plaintiff’s causes of action. See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983) (emphasizing, for purposes of antitrust standing, the “central interest in protecting the economic freedom of participants in the relevant market”); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991) (“To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must . . . delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.”); Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381, 1392 (9th Cir. 1984) (“The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. [citations omitted] Such evidence is essential in a section 1 case.”). When a plaintiff produces “insufficient evidence to show either the geographic or the product market,” summary judgment is appropriate. Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1489 (9th Cir. 1991).

Plaintiff defines the relevant market as one for “shipping consultation services,” which includes those business entities which advise shippers regarding the delivery of time sensitive letters, documents, and packages by air or by ground within the United States and to and from the United States to foreign countries. (Opp’n at 23; ASUF ¶ 53.) Defendants define the relevant market as the market for contract price negotiation services. (UMSJ at 16; FMSJ at 14-15.) The Court need not determine which characterization of the market is proper, as Plaintiff has not produced any evidence to demonstrate that its purported market is legally cognizable.

Plaintiff provides no expert evidence to support its market definition. The Court previously excluded Mr. Brotman’s testimony under Federal Rule of Evidence 702 and does not consider it here. (See generally MiL Order.) Without any expert testimony to opine on the scope of the relevant market, it is difficult to see how Plaintiff could meet its evidentiary burden. See Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev. Inc., 371 F. App’x 719, 721 (9th Cir. 2010) (“With large portions of the Katavic and Pressman declarations stricken, Plush had insufficient evidence to sustain a jury verdict on its proposed market definition.”); In re Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 1000 (C.D. Cal. 2012) (concluding that there is an “[in]adequate evidentiary basis in the record, absent Dr. Phillips’ testimony, for a jury to find that Plaintiffs have defined an economically significant product market”); Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905 RMW, 2008 WL 73689, at *10 (N.D. Cal. Jan. 5, 2008) (“Establishing market definition in this case likely requires expert testimony. . . . Given

the complexity of the task, a jury likely cannot conclude that two technologies are ‘close substitutes’ and hence comprise a relevant technology market without expert testimony.”).

a. Services

A relevant market “must encompass the product at issue as well as all economic substitutes for the product.” Newcal Indus., 513 F.3d at 1045. “As the Supreme Court has instructed, ‘The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.’” Id. (quoting Brown Shoe v. United States, 370 U.S. 294, 325 (1962)).

Plaintiff evasively and confusingly avoids stating exactly what services are sold in the relevant market. Initially, Plaintiff contended that its market was simply for shipping advice. (ASUF ¶ 53.) It is unclear to the Court exactly what “advice” Plaintiff intended to include in the market. Perhaps recognizing the vagueness of its market definition, Plaintiff further contends that the market for shipping consultation services primarily includes gathering and analyzing a shipper’s past shipping history and developing a strategy to help a shipper match its needs to a carrier’s services and obtain maximum profit. (ASUF ¶ 3.) Even with this narrowing, the Court cannot define the products or services Plaintiff seeks to include in its selected market, which is fatal to Plaintiff’s claims. See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177–78 (1965) (“Without a definition of [the] market, there is no way to measure [Defendants’] ability to lessen or destroy competition.”);

Kaplan v. Burroughs Corp., 611 F.2d 286, 295 (9th Cir. 1979) (affirming judgment notwithstanding the verdict because plaintiff presented only “vague references to the overall data processing market” and “the record [was] silent” as to the “question of market definition”).

As best as it can be understood by the Court, Plaintiff’s market definition represents only a subset of the services Plaintiff offers. Plaintiff admits its primary service is representing shippers in negotiating competitive shipping contracts with carriers, which represents ninety-five percent of its business. (USUF ¶ 1; AUSGI ¶ 1.) Plaintiff also analyzes carrier proposals, implements new agreements, and does an ongoing review of carrier pricing trends to monitor savings and contract compliance. (Gates Decl., Exh. 5 at 74.) However, these services are noticeably absent from Plaintiff’s description of the shipping consultation services market.

The Court must “properly follow[] precedent in this area by restricting the relevant market to one in wherein commercial reality exists.” Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982). Plaintiff has produced no evidence to demonstrate that the arbitrary subset of Plaintiff’s services selected for inclusion in the “shipping consultation services” market is a commercially cognizable market. In fact, Plaintiff has provided no evidence that its customers purchase only the “advice” component of its services. Defendants’ evidence – the only evidence on this point in the record – demonstrates that the standalone “advice” component of Plaintiff’s services represents approximately 0.51% of Plaintiff’s revenue. (Harris Decl., Exh. 1 ¶ 21.) There

is no evidence as to which additional TPCs, if any, sell this “advice,” that Defendants sell this advice, or that there are any consumers who are in the market to buy this advice and what they will pay. Despite a requirement to do so, Plaintiff has not produced “market data, figures or other relevant material adequately describing the nature, cost, usage, or other features of competing products” to determine the bounds of the relevant market. Bhan v. NME Hosps., Inc., 669 F. Supp. 998, 1018 (E.D. Cal. 1987), aff’d, 929 F.2d 1404 (9th Cir. 1991). Plaintiff has not demonstrated that there is a market for this marginal subset of Plaintiff’s services or that there are any other participants in this market, let alone that there is a “relationship between changes in price and responsive changes in demand.” United States v. LSL Biotechnologies, 379 F.3d 672, 697 (9th Cir. 2004) (defining “elasticity of demand”). Plaintiff’s failure to produce such evidence prevents it from defining the relevant service market and precludes it, as a matter of law, from establishing its claims.

Further, Plaintiff admits that trade was only restrained in the market for negotiation services. (ASUF ¶¶ 54-55; AUSGI ¶ 86; Opp’n at 2 (defining the TPC Policy as Defendants’ agreement “not to deal with a TPC that the other had declined to allow[] to participate in negotiations”).) Yet, contrary to established Ninth Circuit precedent, Plaintiff’s definition of the relevant market includes services far beyond those it admits were restrained, including any advice based on a shipper’s past history that helps it select carrier services and maximize profit. (ASUF ¶ 53.) See Exhibitors’ Serv., Inc. v. Am. Multi-Cinema, Inc., 788 F.2d 574, 579 (9th Cir. 1986) (“[T]he

requirement laid down in Associated General Contractors is that the plaintiff and conspirators compete in the ‘market in which trade was *restrained.*’”(emphasis in original) (quoting Associated Gen. Contractors, 459 U.S. at 539). Plaintiff has not demonstrated that the additional services included in the market beyond those restrained are reasonably interchangeable therewith. See In re Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443, 1457 (C.D. Cal. 1988), aff’d sub nom. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991) (“[P]roducts and services which are ‘reasonably interchangeable’ for the same or similar uses normally should be included in the same product market for antitrust purposes.”) (citing Kaplan, 611 F.2d at 291).

b. Participants

The relevant market must include “the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.” Thurman Indus., Inc. v. Pay ‘N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989). Plaintiff contends that itself, Defendants, and “other similar TPCs” are participants in the market for shipping consultation services. (Opp’n at 23.) Plaintiff seeks to further define these “other TPCs” as entities which gather and analyze data, including shippers’ past transactions, to develop a strategy, to advise and help a shipper negotiate or otherwise obtain maximum savings for their shipping needs, and to match the shipper’s needs to a carrier’s delivery services. (Opp’n at 3.)

“[M]arket definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.” Kaplan, 611 F.2d at 292 (citations omitted). As Defendants point out, there are numerous other consultants that provide advice to shippers to help them select carrier services and save money on shipping costs, including entities that assist with warehouse location, inventory management, technology solutions, product returns, packaging, and auditing carrier bills. (USUF ¶¶ 70-81.) Plaintiff contends that none of these entities or services is included in its market. (Opp’n at 34-36.) Plaintiff provides no factual basis for excluding the services provided by these shipping consultants from its alleged market and engages in no analysis to determine whether these services are substitutes for the services Plaintiff includes in its market. See Newcal Indus., 513 F.3d at 1045 (stating that field of competition is not limited to producers of particular “product at issue” but also includes producers of “all economic substitutes for the product”). Instead, Plaintiff offers an entirely circular argument, asserting that these services must be excluded from the market because the TPC Policy was not targeted at them. (See ASUF ¶¶ 54-55; Opp’n at 36.) Limiting the market solely based on Defendants’ policies is erroneous. Rather, the market must be defined by looking at the “goods and services that sellers or producers offer.” Thurman Indus., 875 F.2d at 1374. In other words, the services that were allegedly restrained must comprise a legally and commercially cognizable market. Plaintiff has produced no evidence tending to support the boundaries of its selected market.

In addition, Plaintiff arbitrarily excludes shippers' in-house employees who similarly gather and analyze shipper data to advise a shipper on methods of saving money on its carrier contracts. (See USUF ¶¶ 83-84; Opp'n at 37-38.) "[A] product market is typically defined to include the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand." Thurman Indus., 875 F.2d at 1374. Supreme Court precedent indicates that the demands of all consumers must be analyzed and the relevant market must include all suppliers and consumers of the particular product. See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 393-95 (1956). Over eighty percent of shippers do not hire TPCs to advise them on their shipping needs, yet they enter shipping contracts with carriers. Plaintiff provides no evidence or explanation for why these in-house advisors are not economic substitutes for TPCs. Plaintiff instead argues that TPCs are better at providing advice than in-house employees, thus in-house employees must be excluded. (See Opp'n at 37.) This is not a proper basis for exclusion. See In re Super Premium Ice Cream Distrib. Antitrust Litig., 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) ("Courts have repeatedly rejected efforts to define markets by price variances or product quality variances. Such distinctions are economically meaningless where the differences are actually a *spectrum* of price and quality differences."). Plaintiff also argues that Defendants, not shippers' in-house employees, provide advice when a TPC is not hired. (Opp'n at 37.) However, Plaintiff

provides no evidence to support this asserted fact.¹⁶ (AUSGI ¶¶ 83-84.) See Morgan, Strand, Wheeler & Biggs, 924 F.2d at 1489 (granting summary judgment where there was “insufficient evidence for a jury to conclude that University and osteopathic radiologists cannot compete with private medical radiologists”). The Court finds it implausible that there would be no cross-elasticity between in-house employees providing shipping advice and negotiation services and the same services provided by TPCs.

Without factual support, Plaintiff excludes USPS and regional carriers from its “shipping consultation services market.” There is undisputed evidence in the record that TPCs provide advice regarding carriers other than UPS and FedEx. (Reply Gates Decl., Exh. 175 at 188:6-23; Exh. 176 at 30:13-22; Exh. 183 at 71:20 to 72:9; Exh. 157.) Plaintiff provides no explanation for excluding these alternate participants from the market. Plaintiff appears to argue that USPS and regional carrier should be excluded because they do not provide “time sensitive” delivery services. (ASUF ¶ 15.) However, Plaintiff presents no evidence to support this fact. In fact, the evidence in the record supports the conclusion that USPS and regional carriers actually do offer time-sensitive delivery services. (USGI ¶ 15.) Once again, and without analysis, explanation, or evidence, Plaintiff illogically

¹⁶ Even if Defendants supplied advice in the absence of a TPC, there is no explanation for why a shipper’s in-house employees could not also do so. There are no facts from which one can draw a reasonable inference that the advice offered by shippers’ employees may be excluded from the market, assuming one exists.

excludes carriers from the market about which it uncontrovertedly supplies advice.

Plaintiff attempts to construct a market for “shipping consultation services” that includes only Defendants, Plaintiff, and TPCs affected by the TPC Policy. The primary problem with Plaintiff’s market is that there is no evidence that such a market exists or that it includes the participants or services Plaintiff identifies. “Plaintiff cannot artificially create antitrust claims by narrowly defining the market to create the appearance of an antitrust injury.” Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1512 (D. Colo. 1992), aff’d, 13 F.3d 366 (10th Cir. 1993); see also Gough v. Rossmoor Corp., 585 F.2d 381, 389 (9th Cir. 1978) (“[I]n determining the relevant market the courts are not free to accept whatever market is suggested by the plaintiff as fitting most persuasively with his contention that his power to compete effectively has suffered injury.”). Plaintiff has ignored its own business model and the realities of the services it provides. Plaintiff cannot avoid summary judgment by declaring that the “defining the market ‘is a factual inquiry for the jury.’” (Opp’n at 34 (citation omitted).) It remains Plaintiff’s burden to present a factual question as to the relevant market in order to survive summary judgment. See Int’l Healthcare Mgmt. v. Haw. Coal. for Health, 332 F.3d 600, 604 (9th Cir. 2003) (“Although antitrust cases are sometimes difficult to resolve on summary judgment because of their factual complexity, summary judgment is still appropriate in certain cases.”) (internal quotation omitted); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1435 (9th Cir. 1995) (“If Rebel’s evidence cannot sustain a jury verdict on the issue of market definition, summary judgment is

appropriate.”). Plaintiff has not done so; therefore summary judgment is appropriate.¹⁷

Plaintiff relies heavily on the cases of Amarel v. Connell, 102 F.3d 1494 (9th Cir. 1997), and Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 (9th Cir. 1991). (Opp’n at 23-26.) Both cases address the question of standing where the plaintiff offered evidence of a clearly defined cognizable market. See Amarel, 102 F.3d at 1509 (“Plaintiffs introduced evidence that they are ‘competitors’ in the market for milled rice because they tender paddy rice to the independent mills under ‘participation contracts’ which entitle them to a share of profits from the sale of milled rice.”); Yellow Pages, 951 F.2d at 1161 (“Consultants offer considerable evidence that they compete in the service market of advising advertisers regarding the form, cost, content and location of yellow pages advertisements”). Here, Plaintiff has not surpassed the crucial hurdle of presenting evidence

¹⁷ In opposition to summary judgment, Plaintiff alleges an alternative market for “delivery services.” (Opp’n at 23.) The Court previously ruled that Plaintiff is not “a participant in the market for shipping services,” and thus it “cannot have suffered antitrust injury” in that market. (MTD 1 Order at 17-18.) Moreover, Plaintiff did not reallege the delivery services market in the TAC. (See TAC ¶ 6 (alleging only a market for “shipping consultation services”).) Plaintiff “may not effectively amend its Complaint by raising a new theory of standing in its response to a motion for summary judgment.” La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest, 624 F.3d 1083, 1089 (9th Cir. 2010); see also Coleman v. Quaker Oats Co., 232 F.3d 1271, 1292-93 (9th Cir. 2000) (refusing to allow plaintiff to raise a new theory in opposition to summary judgment which was not pled in the complaint). The Court therefore does not consider Plaintiff’s arguments regarding the “delivery services” market.

that Plaintiff and Defendants offer services within a commercially cognizable relevant market where the services are reasonably interchangeable and where there is cross-elasticity of demand. See Rebel Oil, 51 F.3d at 1436. Without a clear understanding of the services or participants in the alleged market, Amarel and Yellow Pages cannot help Plaintiff avoid summary judgment.

2. *Per Se*

In order to avoid having to put forth a rational and supported market definition, Plaintiff argues that the Court should find that Defendants have committed *per se* violations of the Sherman Act. (Opp’n at 7-8 (citing Big Bear Lodging Ass’n v. Snow Summit, Inc., 182 F.3d 1096, 1101-02 (9th Cir. 1999) (“Elaborate market analysis and case-by-case evaluation are unnecessary in cases involving *per se* antitrust violations because the anticompetitive effects of the practice are presumed.”).) “Resort to *per se* rules is confined to restraints . . . that would always or almost always tend to restrict competition and decrease output. To justify a *per se* prohibition a restraint must have manifestly anticompetitive effects, and lack . . . any redeeming virtue.” Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (second alteration in original) (internal citations and quotations omitted).

Fatal to Plaintiff’s argument is the clear requirement that “the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.” Id. at 886-87 (internal citations omitted). In order to fit it

within *per se* treatment, Plaintiff characterizes the TPC Policy as an “illegal boycott.” (Opp’n at 8.) However, Plaintiff has not pointed to a single case applying *per se* treatment which resembles the factual scenario here or characterizes facts similar to these as a group boycott.

The Supreme Court in FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986), refused to apply the *per se* designation to an agreement by competing dentists to deny patient X-rays to insurance companies. The dentists did not want to share the X-rays because they wanted to prevent the insurance companies from reviewing the propriety of the dentists’ charges. *Id.* at 455. The Court declined to invoke the *per se* rule, reasoning that “the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott *suppliers or customers* in order to discourage them from doing business with a competitor.” *Id.* at 458 (emphasis added). This definition does not fit the facts presented here. Plaintiff contends that Defendants “refus[ed] to deal with TPCs,” but there is no dispute that Plaintiff and other TPCs are not “suppliers or customers” of Defendants. (Opp’n at 7.) Thus, the factual scenario presented here does not satisfy the Supreme Court’s definition of a boycott that merits *per se* treatment.

The Ninth Circuit’s test for the applicability of the *per se* standard to a group boycott confirms this conclusion. Three characteristics indicate the existence of a *per se* illegal boycott:

- (1) the boycott cuts off access to a supply, facility, or market necessary to enable the

victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition.

Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 950 (9th Cir. 1998) (quoting Hahn v. Or. Physicians' Serv., 868 F.2d 1022, 1030 (9th Cir. 1988)).

Plaintiff has produced no evidence as to the second element. The record is devoid of proof that FedEx and UPS possess a dominant position in the market for “shipping consultation services.” Moreover, although the Court does not evaluate the propriety of the TPC Policy, Defendants present a plausible argument that it is procompetitive because it allowed them to deal directly with their shipping customers, thereby increasing efficiency. (Williams Decl., Exh. 1 ¶¶ 96-97.) Accordingly, the TPC Policy does not trigger the *per se* rule of a group boycott, and Plaintiff must prove the existence of the relevant market and anticompetitive effects.

3. Quick Look

In a footnote, Plaintiff also argues that “quick look” analysis should apply. (Opp’n at 8 n.5.) “[T]his truncated rule of reason or ‘quick look’ antitrust analysis may be appropriately used where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” California ex rel. Harris v. Safeway, Inc., 651

F.3d 1118, 1134 (9th Cir. 2011) (internal quotation omitted). “Full rule of reason treatment is unnecessary where the anticompetitive effects are clear even in the absence of a detailed market analysis. But if an arrangement might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition, then a ‘quick look’ form of analysis is inappropriate.” Id. (internal citation and quotation omitted). As noted above, Plaintiff has presented a plausible procompetitive justification for the TPC Policy, thus a quick look will not suffice. See id. at 1138 (“Because we cannot reach a confident conclusion that the principal tendency of the [provision] is to restrict competition, truncated review is inappropriate.”); Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006) (“But for the same reasons that *per se* liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine.”).

Under rule of reason analysis, “the plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market.” Tanaka, 252 F.3d at 1063. Plaintiff has produced no evidence from which a reasonable jury could find that its market for “shipping consultation services” is the relevant market. See, e.g., Pacifica Kidney Ctr., Inc. v. Nat’l Med. Care, Inc., 995 F.2d 232 (9th Cir. 1993) (granting summary judgment to defendant because “Pacifica has not adequately defined the relevant geographic market”); Morgan, Strand, Wheeler & Biggs, 924 F.2d at 1489 (granting summary judgment in favor of defendants based on plaintiffs’ failure to “show the relevant market” because “[o]ne simply cannot conclude from the evidence who

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competes to supply radiology services to patients”). Accordingly, summary judgment is appropriate.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants’ motions for summary judgment, (Doc. Nos. 130, 140, 229, 246), and DISMISSES all causes of action in the Third Amended Complaint WITH PREJUDICE.

As stated above, UPS’s application for leave to file a supplemental brief is DENIED. (Doc. No. 257.)

Dated: April 30, 2015

/s/Jesus G. Bernal

Jesus G. Bernal

United States District Judge

APPENDIX D

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**No. 15-55778
DC No. 2:10 cv-5830 JGB-AJW
CD Cal., Los Angeles**

[Filed October 31, 2017]

AFMS LLC,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNITED PARCEL SERVICE, INC.;	)
FEDEX CORPORATION,	)
	)
Defendants-Appellees.	)
	)

O R D E R

Before: REINHARDT, TASHIMA, and NGUYEN,
Circuit Judges.

The panel has voted to deny the petition for panel rehearing, with Judge Reinhardt voting to grant it. Judges Reinhardt and Nguyen vote to deny the petition for rehearing en banc and Judge Tashima so recommends. The full court has been advised of the

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petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

ER 2675-2678

PARCEL TRENDS REVEALED

Part 1: Results of the Annual Best Practices Survey

By Marll Thiede

A long with Morgan Stanley, a global financial services firm and a market leader in securities, investment management and credit services, we at *PARCEL* and sister publication *B2C Express* surveyed our readers on the state of their parcel operations. We analyzed over 250 operations that collectively ship 90 million parcels and receive over 30 million parcels a year. In part one of the survey results, we delve into the transportation side of operations, while Part 2 will take a look at technology, packaging, measurements and management. *PARCEL* has conducted this Best Practices Survey for nine years, and this year, we see shifting trends through the demise of consolidators, rising surcharges as gas prices climb and a host of other developments, all of which can help you see if your operation is on pace with the industry standards revealed in these results.

>> Shippers Rate Carriers Less Favorably — Only FedEx Express increased its scores, improving in four out of six performance questions. DHL, FedEx Ground, UPS and USPS all saw either lower ratings or the same ratings as last year. When asked, “What was the biggest complaint about your primary carrier,” the majority of respondents stated pricing. The next four

most common complaints were surcharges, on-time delivery, in-transit damage and difficulty working with the carrier.

>> Projecting Future Rate Increases Causes Concern — Other than the charges from FedEx Ground, shippers expect the next increases to be bigger than this past year, with DHL Ground leading the “charge” with an anticipated 4.1% increase, followed by UPS Air at 3.7%. As Morgan Stanley points out, this is important as DHL has historically set domestic prices five percent to 15% below FedEx and UPS.

>> On-time Delivery Becoming Critical — While delivery pricing is a top concern, our survey respondents are more concerned this year with on-time delivery while negotiating with carriers. There is escalating pressure on shippers to set and meet delivery standards in an ever-increasing competitive marketplace. The demand for on-time delivery is greater for B2B shippers than B2C shippers. Pricing is the number one negotiating motivator for B2C shippers.

>> UPS Volume Discounts Don’t Vary Much — For shippers giving UPS 90% or more of their ground volume, the average discount is 26%; while those giving less than 50% receive, on average, a 25% discount. For companies shipping between 50% and 90%, the discount averages 23%.

>> Regional Carriers Are Becoming Viable Competition — Survey respondents reported they give, on average, 1.5% of their next-day volume, 0.02% of their second-day volume and 0.9% of their ground

volume to regional carriers. For our survey respondents alone, that represents over two million parcels.

>> **B2C Shipments on the Rise** — Overall, our readers deliver 65% of their parcels to domestic businesses, 27% to domestic residential/consumer addresses, five percent to international businesses and three percent to international consumers. The jump from 22% (last year) to 27% domestic consumer volume coincides with ever-increasing Internet sales.

Watch for More Results

Don't forget to check out the next issue for more survey results. And thanks to all of our readers who took the time to complete the survey. Your contribution has helped set industry standards and reveal trends which, in turn, can help you improve your operations.

Rate Your Carriers					
Scale of 1 to 10 (10 being the best)					
		FedEx	FedEx		U.S.
		DHL Express	Ground	UPS	Postal Service
CUSTOMER SERVICE	5.1	7.6	6.4	7.5	5.4
ON-TIME SERVICE	5.3	8.2	7.0	8.0	5.7
PERFORMANCE					
DELIVERY PERFORMANCE	6.1	8.1	7.3	8.2	6.5

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CLAIMS PROCESS- ING	4.5	6.9	6.3	6.7	4.2
REFUNDS FOR LATE DELIVERY	4.7	6.8	5.9	6.3	3.3
PRICING	5.7	6.9	6.6	6.6	6.0

10 September 2006

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[Fold-out Exhibits, see next 3 pages]

Graphs and Charts

ER 2676

Carrier Negotiations

Discounted Transportation Rates

ER 2677

Expected Changes

ER 2678

Surcharges

Returns

Consolidate

Parcel Transportation Cost

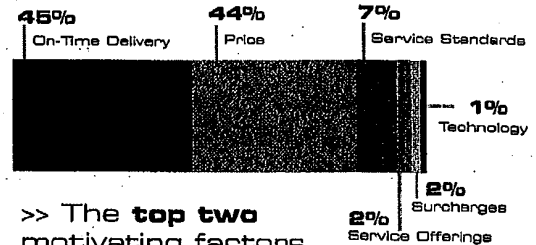
Carrier Negotiations

11%

>> **11 percent** of survey respondents use consultants to negotiate rates.

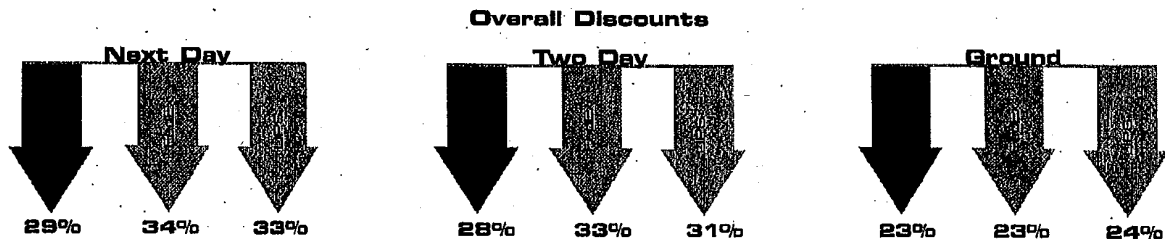


>> Consultants negotiate more favorable rates, driving discounts **49% lower** than if the company negotiates.



>> The **top two** motivating factors for shippers when negotiating with carriers are **on-time delivery** and **price**. Technology is least likely to motivate negotiations.

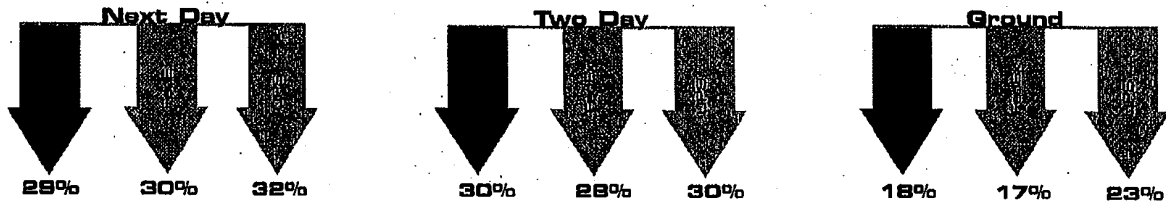
Discounted Transportation Rates



>> Carriers continue to discount expedited shipments more deeply.

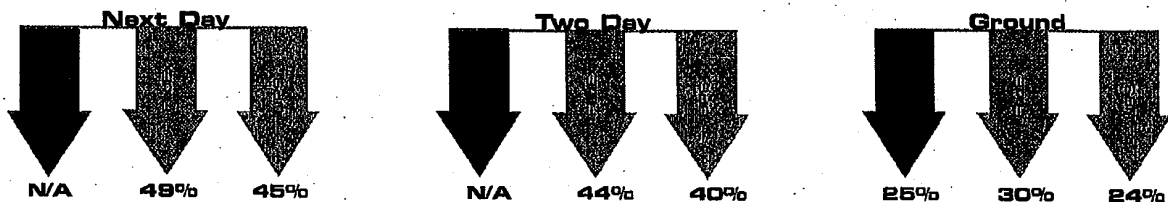
>> Discounts off of ground rates are about the same for all carriers.

B2B Discounts (Businesses Shipping 50% to Business Addresses)



>> Survey respondents indicate UPS is most willing to discount B2B rates.

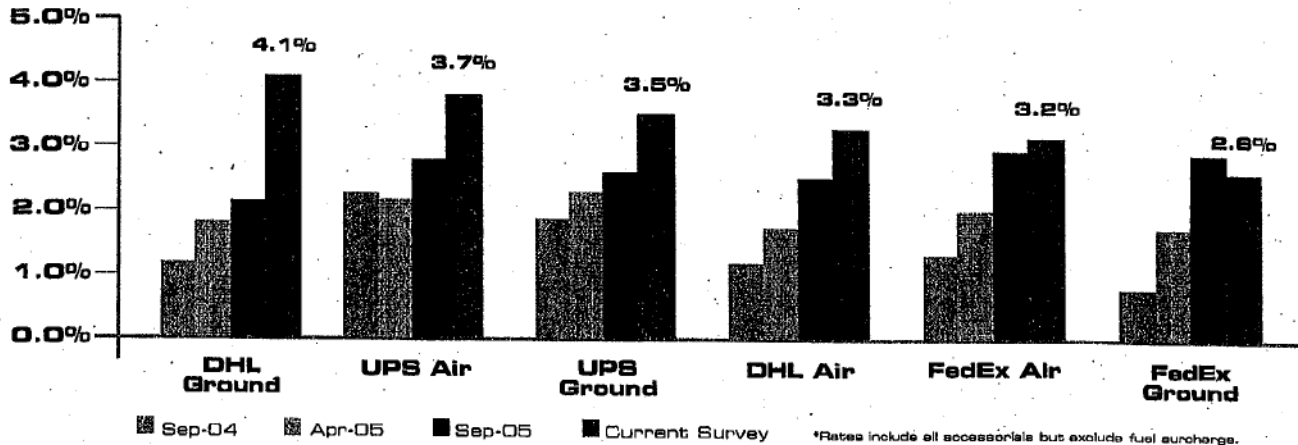
B2C Discounts (Businesses Shipping 50% to Residential Addresses)



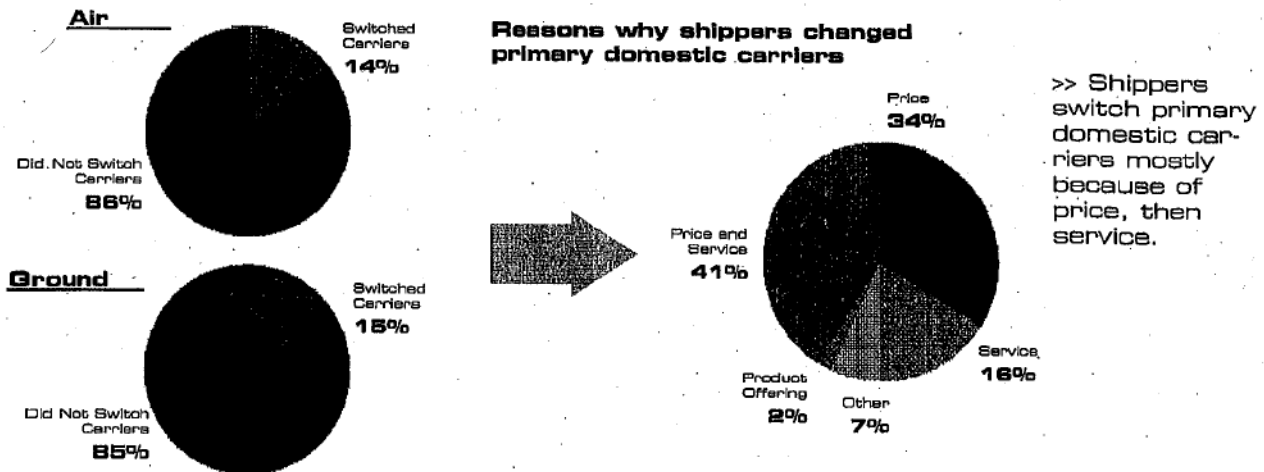
>> Deepest discounts go to businesses that ship most of their volume to consumers. N/A - Data not available

Expected Changes

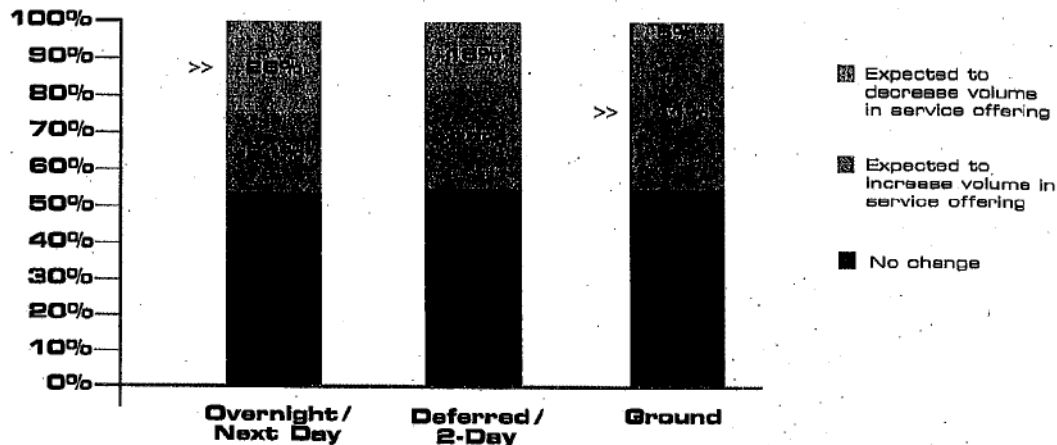
(Charts provided by Morgan Stanley)



>> Shippers anticipate the biggest rate increases in the next 12 months to be in DHL Ground, while FedEx Ground is expected to be the lowest.



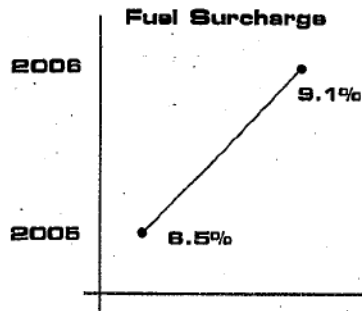
Shippers continue to state they will move more volume to ground



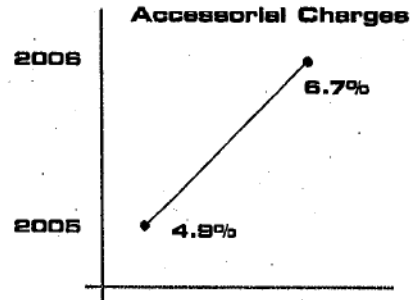
12 September 2006

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Surcharges



>> Fuel surcharges continue to climb as this year they represent 9.1% of transportation costs.



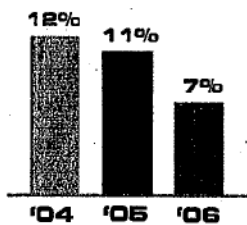
>> Other surcharges also on the rise with 6.7% of transportation costs going to cover accessorial fees.

Returns

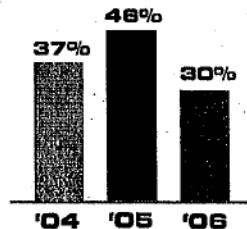
Overall average of who is delivering returns



Consolidate

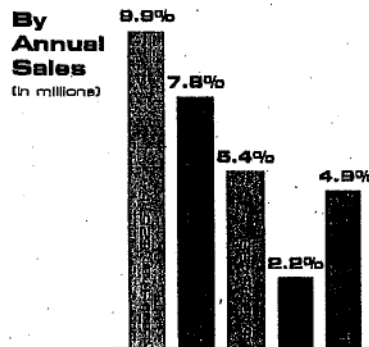
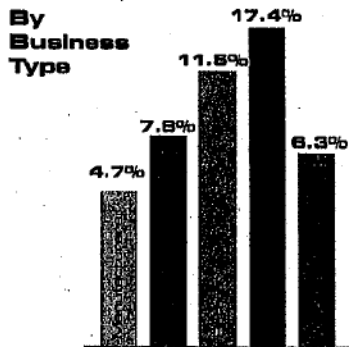


>> Companies using consolidators dropped significantly with the closing of two major consolidators and previous year's buy-ups.



>> For companies that consolidate, 30% of their volume goes to consolidators, which is a large decrease from last year.

Parcel Transportation Cost



>> Overall, businesses spend, on average, 8% of total sales/revenue on transportation.

APPENDIX F

ER 3741

Exhibit NO. 2565

K. Gutmann

11-7-12

From: "Gutmann Kate (SER1KXG)"
</O=UPS/OU=CORPREXCHANGE/CN=RECIPIENT
S/CN=SER1KXG>

To: "Faby Don (NTX1DXF)" <dfaby@ups.com>;
"RACANELLI JOSEPH (SER1JJR)"
<jracanelli@ups.com>

Subject: FW: Fred Carl, Viking

Date: 03/25/2010 18:12:18 UTC

Fyi - do not forward

From: Gutman Kate (SER1KXG)
Sent: Thursday, March 25, 2010 1:03 PM
To: Abney David (dm1dxa)
Cc: Gershenhorn Alan (MAR2AXG); Herring
Wayne (nbd1wch)
Subject: Fred Carl, Viking

David, In support of the profit strategy, we have been executing on specific steps tied to a Third Party strategy given the amount of dilution we have seen across all segments over the last two years. As you know, these third party negotiators (3PN) create a wedge between us and our customers and dilute revenue significantly. A one year study of 520

engagements in the middle and strategic/enterprise segments showed dilution of \$57 M.

Our strategy has been to send a message that we will continue to interact directly with customers but not engage with the 3PNs. This has, to date, not resulted in loss and we have many examples in our repository where the customers agree with the approach. We just extended the approach to the private equity group as 3PNs are now targeting these to impact more broadly through the portfolio companies. We have received very good feedback this week (we are two weeks into taking the approach with this group).

Today, we communicated to The Stephen's Group (private equity) who have hired Insight (3PN) that we will not participate in the RFQ. We then directly and proactively reached out to the portfolio companies under The Stephen's Group to reinforce the value proposition and that we will address the direct relationship with them but not participate with the 3PN. Again, positive feedback with one exception. Today, Fred Carl, CEO, of Viking indicated through his VP of Procurement that he was displeased with our position and asked specifically if you were aware of it. The sales team reinforced our position as an organization. Fred told his VP that he intends to call for you and may request a call with he and the 3PN. Related to the overall strategy, Insight has received multiple calls from us about our position as they have many engagements they are pursuing. We are not sure of the relationship Fred may have with Insight.

I called the executive assistants to explain that Fred may be reaching out to you and to say that you are

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traveling. Please let me know if you would like to discuss this further.

Thanks, Kate

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APPENDIX G

ER 3733-3739

**Business Case 3PN “Structure & Control
Initiative**

Customer Strategy Team

December 18, 2009

Introduction

Third party negotiators have many different functions and roles to play in developing a negotiation strategy. They may act as agents, intermediaries, translators, consultants, or other specialists who have an expertise that a shipper requires in a negotiation.

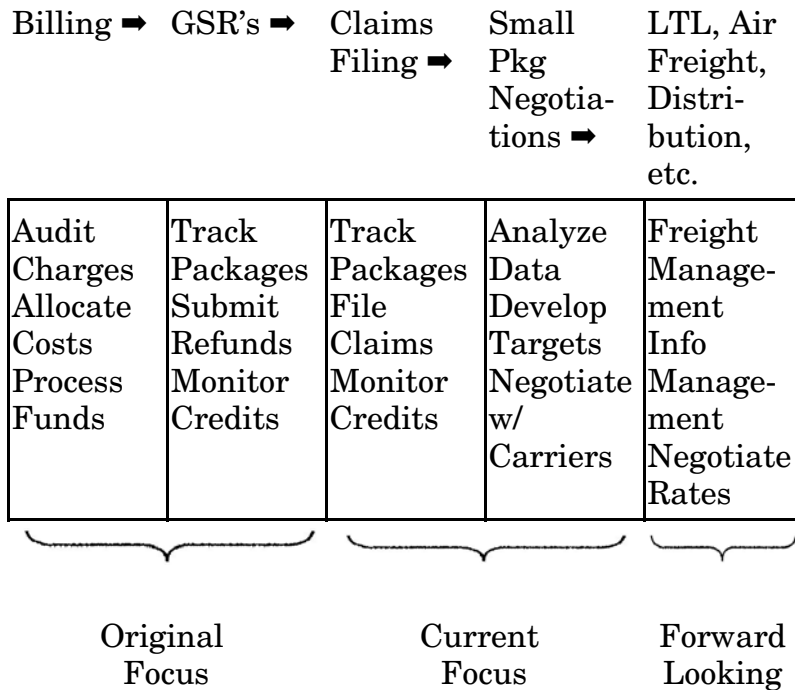
The number of Third Party Negotiators (3PNs) is on the rise as is the number of companies that are engaging 3PNs.

In addition to the recent economic challenges faced by many companies the growth in this space is a function of the 3PNs proven ability to negotiate improved pricing for their customers.

Shippers are actively seeking the services of expert negotiators (3PNs) in an effort to reduce their small package spend.

Many of the 3PNs are also involved in filing GSRs and Claims on behalf of their clients. In addition 3PNs are actively exploring options to extend their offerings.

Evolution of Third Parties



3PNs are continuing to expand their service offerings at our expense

Based on our research we are not sufficiently managing interactions with 3PNs.

Current Situation

The approximate number of unique 3PN engagements over the 12 month period ended June 2009 was 520. The number of unique 3PNs engaged was 121. Many of the 3PNs are former UPSers.

The number of engagements has increased to an average of 90 per month.

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3PNs are encouraging customers to open up and/or to break existing agreements with UPS.

Poor operating performance, due to the recession, has forced many companies to focus on reducing expenses. Cost reduction programs are seen as essential for companies that want to maintain and/or further market leadership in the current economic environment.

As the economy improves shippers will continue to use 3PNs as a way of reducing costs given the success of such engagements.

Common areas of cost reduction focus:

- Merit increases
- Employee benefits
- R&D
- Capital Expenditures
- Staffing Reductions
- Logistics

The reduction in staffing coupled with the complexities associated with negotiation small package contracts are further fueling the increase in the number of companies that are outsourcing the procurement of transportation.

Front line sales resources are often inexperienced when challenged by the tactics that are employed by the 3PNs.

The 3PNs are, in many cases, negatively impacting long-term UPS relationships with our customers.

Challenges

3 PNs are having a material impact on our profitability.

We do not have a standardized process in place to deal with the increase in 3 PN activities.

We do not maintain a repository specific to 3PN engagements, outcomes, best practices, etc.

In many cases 3PNs are out negotiating UPS sales resources given the access that the 3PNS have to data, target pricing matrixes' (which are based on previous engagements), their ability to leverage FDX, etc...

3PNs are beginning to expand their reach beyond small package to include LTL, Air Freight, Distribution, etc.

Recommendations

Develop a structured process that will centralize the management of every 3PN engagement making strategy room involvement mandatory.

Utilize the following customized strategies and tactics that were reviewed in December 8, 2009 meeting:

Appoint Centralized Subject Matter Experts

- *Mandatory Strategy Room Involvement*
- *Creation of Winning Strategy to Preserve & Grow Top / Bottom-line*
- *Rationalize offers and incentives - Reinforce and Quantify Value Proposition*
- *Develop Repository*

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Train Sales Force to Understand 3rd Party Sales Pitch

- *Third Party Contract Language and Customer Commitments/Obligations*
- *Out-Clauses & Implications*
- *Financial Impacts to Customer and to UPS*

Develop Contract Language to Protect our Interest

- *Create Termination Language and Enforce It (underway)*
- *Explore out options*

Customize Proposals for When 3rd Party is brought in to Negotiate against UPS

- *Immediate Customer Contact / Review of Options*
- *One Market-Based Offer Given*
- *Time-Bound Offers Which Encourage Early Agreement*

Region / District / Sector Specific Options

- *Reduce features of service when price is at issue*
- *Decline Engagement, Strict Adherence to Existing Agreement, Modified Language, Out-Clause, Termination*

Additional Consideration

- *Create a Cross-functional negotiating team*
- *Develop/Enhance non-compete language as appropriate*
- *Litigate – Example: Tortious Interference*
- *Explore the development of new service offerings. Example: Invoice/bill reconciliation and payment*

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Create a cross-functional negotiating team that would engage in every single negotiation that is valued at \$1.0M+.

This cross-functional team would include three regionally based Sales Managers, one dedicated Revenue Management resource and two dedicated Solutions Resources.

The cross-functional sales team would manage the negotiation directly with the 3PN thus extracting the UPS sales resource from the engagement. At the successful conclusion of each negotiation a sales resource will be assigned to cover the account.

The combination of the structured/centralized management process coupled with a cross-functional professional negotiating team would better position us to drive business growth while protecting/improving profitability when negotiating with 3PNs.

Timeline

Immediately assemble the resources that will be responsible for coordinating all 3PN activity – Strategy Room

Identify and assign resources to the Professional Negotiating Team – January 2010

Use the month of January to refine the structure and to train the team.

Evaluate and begin first engagement February 1, 2010.

Duration of this Initiative should be at least one year.

Goals of Initiative

Develop best practices that will enable us to reduce the current trend of disintermediation that is becoming more mainstream.

Increase Conversion, Penetration and Retention rates through the improvement of negotiating skills of the overall sales forces.

A ■ improvement in profit retention would add approximately ■ to our bottom line.

A ■ improvement in profit retention would add approximately ■ to our bottom line.

Cost

Proposing 3 Director level Sales Managers (Grade 16) -
All in cost per FTE \$182K

Note: Proposing regionally based coverage - i.e. West,
Central, East

Proposing three two unit managers (Grade 16) – All in
cost per FTE \$143K

Note: Proposing one dedicated Revenue Manager
based in Atlanta

Proposing two dedicated Solutions Managers –
West & East

Estimated Annual Travel Expense - \$200K

FTE all in cost per Corporate \$975K

Estimated Travel Expense \$200K

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Projected Cost to Deploy \$1.175M

ROI

A ■ improvement in profit retention would add approx: ■ to our bottom line.

ROI @ ■ improvement: Payback period 9.9 days or 36.7 times investment

A ■ improvement in profit retention would add approx: ■ to our bottom line.

ROI @ ■ improvement: Payback period 16.1 days or 22 times investment

Summary

The number of 3PNs is on the rise as is the number of companies engaging 3PNs. We do not have a structured process in place. The 3PNs will continue to expand their service offerings which will put even more business at risk beyond small package. We must deploy a strategy that will allow us to better manage the outcomes of these types of negotiations. The recommendation is to take a multi-faceted approach (as outlined under Recommendations heading) that would address the current/potential exposure. The development of a Professional Negotiating Team would ensure that we are properly represented when negotiating against the professional teams that are deployed by the 3PNs. In addition, our Professional Team could be utilized to negotiate deals outside of the 3PN space when necessary.

Proposed Responsibilities

Sales Resource

- Primary point of contact with the 3PN
- Negotiates the terms of the NDA and Data requirements
- Coordinates the account strategy with dedicated team members
- Negotiates contract
- Re-engages primary sales resource as appropriate

Revenue Management

- Pricing strategy development and execution
- Direct responsibility for PQR/PQA
- Liaison to Legal
- Contract compliance oversight
- Post profitability analysis

Solutions Resource

- Utilize expertise to reduce the likelihood that the outcome of the negotiation is based overwhelmingly on price
- Analyzes value of existing solutions within the account
- Proposes additional solutions that provide quantifiable value beyond price
- Performs supply chain assessments to identify alternative solutions