No. 25-

IN THE

Supreme Court of the United States

LEGITSCRIPT LLC,

Petitioner,

v.

PHARMACYCHECKER.COM LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 4 of the Clayton Act provides for a private right of action and treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). Despite that broad language, this Court has recognized that Congress did not intend antitrust law to provide damages for all injuries that might conceivably be traced to an antitrust violation.

Consequently, federal courts have developed limitations, including those contemplated by the concept of "antitrust standing," on the right to pursue a private action for treble damages. One such limitation is the requirement that a private plaintiff must suffer an "antitrust injury"—that is, an injury of the type the antitrust laws were intended to prevent. The question presented by this case, which is critically important to the development and administration of federal antitrust law, is:

> Does a private plaintiff have standing to enforce antitrust laws when the primary purpose of its business is to facilitate unlawful activity by others?

PARTIES TO THE PROCEEDING BELOW

Petitioner (defendant-appellant in the court of appeals) is LegitScript LLC.

Respondent (plaintiff-appellee in the court of appeals) is PharmacyChecker.com LLC.

CORPORATE DISCLOSURE STATEMENT

Petitioner LegitScript LLC has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *PharmacyChecker.com LLC v. LegitScript LLC*, No. 24-2697 (9th Cir.) (opinion issued May 23, 2025);

- *PharmacyChecker.com LLC v. LegitScript LLC*, No. 3:22-cv-252-SI (D. Or. 2024) (decision issued Jan. 3, 2024);

- *PharmacyChecker.com, LLC v. Nat'l Ass'n of Boards of Pharmacy*, No. 19-CV-7577 (S.D.N.Y. 2021) (decision issued Mar. 28, 2023).

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INTRODUCTION

Every year, millions of Americans—roughly one in nine adults in the United States—fill a prescription online.[1] This number grows each year, making regulation of online pharmacies crucial to protect the public's health and safety. Unregulated online pharmacies can and do sell counterfeit or substandard medications, deceiving consumers and potentially leading to serious health risks or even death. Regulating these pharmacies is essential to maintaining a safe and reliable environment for purchasing medications online, as well as protecting the public from the dangers of substandard online pharmacies.

Government regulators of online markets have scrambled to keep up with innovation, and enforcement efforts are often disjointed. At times, rather than pursue the online seller of potentially unsafe or adulterated drugs (the seller could easily shut down and relocate to a new webpage), the U.S. Department of Justice has pursued internet search engines and other providers for allowing such sellers to target U.S. consumers in the first place. In one notable example from 2011, Google agreed to forfeit $500 million for allowing Canadian pharmacies to place advertisements through Google's paid search program.[2]

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1. Yang, L., Lyons, J., Erickson, S. & Wu, C-H., *Trends and Characteristics of the U.S. Adult Population's Behavioral Patterns in Web-Based Prescription Filling: National Survey Study*, National Library of Medicine, https://pmc.ncbi.nlm.nih.gov/articles/PMC8074868/#ref6 (last visited Aug. 19, 2025).

2. United States Department of Justice, *Google Forfeits $500 Million Generated by Online Ads & Prescription Drug Sales by Canadian Online Pharmacies*, Archives, United States

Because internet search providers face substantial sanctions if they allow bad actors to advertise on their platforms, they have a vested interest in making sure that only legitimate companies can maximize paid searches. Consumers, too, have a vested interest in ensuring that they are actually purchasing the prescription drugs that they believe they are purchasing, and that those prescription drugs are safe.

Petitioner LegitScript LLC ("Petitioner"), a company based in Oregon, stepped in to help fill this need. Part of its business is working with the world's leading internet platforms to help confirm which potential advertisers and merchants of pharmaceutical drugs online are, in fact, legitimate companies that advertise the sale of legal and safe products. In other words, Petitioner's "customers" are internet platforms to which Petitioner sells its services. Those internet platforms then choose which pharmaceutical manufacturers and merchants may sell or advertise their wares on the respective platform's services.

The plaintiff and respondent in this case, PharmacyChecker.com ("PharmacyChecker"), operates a website that advertises the price of prescription drugs sold outside the United States. PharmacyChecker allows foreign retailers of drugs to post links on PharmacyChecker's website, and then PharmacyChecker derives income when individual consumers "click through" directly to the extranational drug supplier. American

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Department of Justice, https://www.justice.gov/archives/opa/pr/google-forfeits-500-million-generated-online-ads-prescription-drug-sales-canadian-online (last visited Aug. 19, 2025).

consumers are presented with an opportunity to purchase these foreign drugs and have them shipped to the United States, and PharmacyChecker is given a kickback or payment based on these "click throughs."

Because the importation of drugs into the United States is generally illegal, Petitioner flagged PharmacyChecker's website. PharmacyChecker responded by suing Petitioner and several pharmaceutical industry organizations in New York district court, accusing them of a group boycott that allegedly curtailed PharmacyChecker's ability to advertise on the internet—despite the fact that anyone can access PharmacyChecker's website if they so desire.

After PharmacyChecker's claim against Petitioner was severed and transferred to Oregon for lack of personal jurisdiction, the New York court ruled (as to the remaining defendants) that PharmacyChecker lacked a legally cognizable antitrust injury, and therefore lacked standing to pursue its antitrust claim. But when Petitioner raised the same argument in Oregon district court—*i.e.*, that PharmacyChecker lacked antitrust standing because its business facilitates illegal importation of foreign drugs by U.S. consumers—the Oregon court reached the opposite conclusion under Ninth Circuit law. The Ninth Circuit affirmed on interlocutory review.

Review should be granted because this case presents an important question of law: Whether a private plaintiff is entitled to enforce antitrust laws and seek treble damages when the primary purpose of its business is to facilitate unlawful activity by others. This Court has long recognized that a plaintiff's own violation of antitrust law does not

preclude it from seeking to recover for antitrust violations perpetrated against it by others—in other words, one antitrust wrong does not make another antitrust wrong a right. But this Court has yet to address whether that principle extends to a situation where a plaintiff seeks to use antitrust laws as a tool for furthering business interests which are themselves unlawful or primarily aimed at facilitating unlawful conduct by others. Absent such guidance, courts in different circuits have reached conflicting decisions on this issue. And, in this case, the conflict resulted in diametrically opposing outcomes on the same antitrust claim, alleged by the same antitrust plaintiff, based on the same alleged misconduct. This Court should accept review to provide definitive guidance and resolve the split of authority on this issue.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at 137 F.4th 1031 and reproduced in Petitioner's Appendix ("Pet. App.") at 1a-30a.

JURISDICTION

The court of appeals entered judgment on May 23, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act provides, in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

> or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1.

Section 4 of the Clayton Act provides, in part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . , and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys fee.

15 U.S.C. § 15(a).

The Federal Food, Drug, and Cosmetic Act provides, in part, that the following acts are prohibited:

> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.
>
> . . .
>
> (d) The introduction or delivery for introduction into interstate commerce of any article in violation of section . . . 355[] . . . of this title.

21 U.S.C. §§ 331(a), (d); *see also* 21 U.S.C. § 355(a) ("No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) or (j) is effective with respect to such drug.").

STATEMENT OF THE CASE

I. Legal Framework

The importation of prescription drugs is governed by the Federal Food, Drug & Cosmetic Act ("FFDCA"). The FFDCA prohibits "the introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded[,]" as well as the introduction of any new drug that is not manufactured pursuant to the United States Food and Drug Administration's ("FDA") approval. 21 U.S.C. §§ 331(a), (d); *see also* 21 U.S.C. § 355(a). In fact, the FDA "repeatedly has expressed the view that virtually all importation of drugs into the United States by individual consumers violates the FFDCA because the drugs are not approved in accordance with 21 U.S.C. § 355, are not labeled as required by 21 U.S.C. § 352, or are dispensed without a valid prescription in contravention of 21 U.S.C. §353 (b)(1)." *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 788–89 (8th Cir. 2006).

These laws "work in conjunction with the other statutory standards and FDA regulations to create a system that excludes noncompliant and potentially unsafe pharmaceuticals." *Id.* at 790. And drugs that are manufactured and distributed abroad and then imported into the United States are considered "unapproved" under 21 U.S.C. § 355. *Vermont v. Leavitt*, 405 F. Supp. 2d 466, 473 (D. Vt. 2005) ("Any drug, even a foreign version of an FDA approved drug, will be an unapproved drug unless it meets all United States packaging, labeling and dosage requirements."). The FDA's stance is clear—personal importation of drugs is not allowed:

> In most circumstances, it is illegal for individuals to import drugs or devices into the U.S. for personal use because these products purchased from other countries often have not been approved by the FDA for use and sale in the U.S. If a drug is approved for use in another country but is an unapproved new drug in the U.S. it is illegal to import.
>
> The FDA cannot ensure the safety and effectiveness of medicine purchased over the Internet from foreign sources, storefront businesses that offer to buy foreign medicine for you, or during trips outside the U.S. For these reasons, the FDA recommends only obtaining medicines from legal sources in the U.S.

U.S. Food and Drug Administration, *Personal Importation*, FDA.gov, https://www.fda.gov/industry/import-basics/personal-importation (last visited Aug. 19, 2025).

II. Factual Background

Respondent PharmacyChecker operates a website, PharmacyChecker.com, which does not itself buy, sell, or process orders for pharmaceutical drugs. Pet. App. 4a. Instead, PharmacyChecker accredits online pharmacies across the globe for their safety standards and compares the prices of the drugs offered by those pharmacies for its website users. *Id.*

PharmacyChecker's business model depends on charging online pharmacies verification fees and pay-per-

click fees. Pet. App. 4a–5a. From January 2015 through August 2021, approximately 85% of PharmacyChecker's revenue came from pay-per-click fees, which PharmacyChecker charged its "accredited" pharmacies whenever their hyperlinks on the PharmacyChecker.com website were clicked. Pet. App. 5a. Moreover, 95% of PharmacyChecker's pay-per-click revenue came from online pharmacies located outside the United States, and approximately 69% of that revenue resulted from users located within the United States. *Id.* Consequently, about 56% of PharmacyChecker's total revenue during this time was generated from clicks made by users inside the United States on hyperlinks for online pharmacies outside the country. *Id.*[3]

PharmacyChecker's website contains a "Consumer Support" page which lists frequently asked questions, including questions and answers about the safety and legality of importing drugs from foreign pharmacies. Pet. App. 6a, 104a–108a. PharmacyChecker also provides assistance to U.S. consumers in connection with issues that arise from their purchases, including assisting consumers who receive incorrect or unmarked medications from foreign pharmacies. Pet. App. 108a–109a.

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3. PharmacyChecker collects pay-per-click fees from foreign pharmacies based on clicks made by users of its website, irrespective of whether those users ultimately make a purchase. Pet. App. 5a–6a. Moreover, PharmacyChecker does not track its users' activities after they click through to foreign pharmacy websites, and therefore does not know how many U.S. users ultimately purchase foreign drugs and have them shipped to the United States. Pet. App. 6a.

III. Procedural History

In August 2019, PharmacyChecker sued Petitioner and several pharmacy industry organizations[4] in the U.S. District Court for the Southern District of New York, alleging violations of the Sherman Act based on a group boycott ("SDNY Action"). Pet. App. 6a–7a.[5]

Specifically, PharmacyChecker alleged that the parties engaged in coordinated misinformation campaigns and other exclusionary conduct with the objective of preventing PharmacyChecker from competing effectively in the global markets for online pharmacy verification and comparative drug price information. Pet. App. 7a. Among other things, PharmacyChecker claimed that the organizations (1) worked with Petitioner to have "published articles disparaging" PharmacyChecker; (2) colluded with Petitioner to have "created the '.pharmacy' [internet] domain to serve a gatekeeping function," a domain which PharmacyChecker is presumably ineligible to use; (3) added PharmacyChecker.com to their "Not Recommended Sites list"; and (4) "ran targeted online ads against" PharmacyChecker. Pet. App. 7a. PharmacyChecker claimed it was injured because, after the alleged anticompetitive conduct, it experienced a significant reduction in website traffic and monthly clickthrough revenue. Pet. App. 42a.

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4. Those organizations were the National Association of Boards of Pharmacy, Alliance for Safe Online Pharmacies, Center for Safe Internet Pharmacies, and Partnership for Safe Medicines.

5. PharmacyChecker also alleged a claim for false advertising under the Lanham Act against one of the organizations.

In March 2021, the New York court ruled that it lacked personal jurisdiction over Petitioner, an Oregon company. Pet. App. 7a. PharmacyChecker then moved to sever its antitrust claim against Petitioner and to transfer that claim to the U.S. District Court for the District of Oregon ("Oregon Action"). *Id.* The New York court granted that request. Pet. App. 8a.

A. The district court in New York concludes that PharmacyChecker lacks antitrust standing.

In the interim, the defendants in the SDNY Action moved to dismiss PharmacyChecker's claim for lack of antitrust standing. They argued that PharmacyChecker could not suffer "antitrust injury"—that is, injury of the sort the antitrust laws were intended to prevent—because its asserted harm arose out of the defendants' alleged anticompetitive acts to suppress unlawful drug importation. *See PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds. of Pharmacy*, 530 F. Supp. 3d 301, 328 (S.D.N.Y. 2021).

The New York court denied the motion to dismiss. *Id.* at 330–31. In doing so, the court considered a line of cases, beginning with the Seventh Circuit's decision in *Maltz v. Sax*, 134 F.2d 2 (7th Cir. 1943), which found antitrust standing lacking where the plaintiff's business was illegal or enabled illegal behavior. *PharmacyChecker.com, LLC*, 530 F. Supp. 3d at 329–30 (surveying opinions of courts across the country at various stages of litigation). From those cases, the New York court distilled the following principle: "where the plaintiff's enterprise is completely or almost completely illegal, or completely or almost completely geared towards facilitating illegality, that plaintiff cannot plead an antitrust injury." *Id.*

Applying that principle to PharmacyChecker's complaint, the New York court concluded that, at the motion to dismiss stage, the allegations failed to establish that PharmacyChecker's business "is completely or almost completely illegal or geared towards illegality." *Id.* at 330. The court noted that defendants were free to raise the issue of standing again at summary judgment, at which point PharmacyChecker would "no longer be sheltered" by its complaint. *Id.* at 330–331.

Following discovery, the remaining defendants in the SDNY Action did just that—moved for summary judgment based on the lack of standing. Defendants argued that it is illegal for U.S. consumers to import drugs from foreign pharmacies, that almost all of PharmacyChecker's revenue is derived from international online pharmacies that sell to U.S. consumers, and that PharmacyChecker's primary mission is to facilitate U.S. consumers' unlawful importation of foreign pharmaceuticals. Pet. App. 116a. In view of that illegality, the defendants argued that PharmacyChecker lacked the requisite antitrust injury to maintain its claim.

The New York court agreed. Pet. App. 139a–167a. Based on its review of federal law pertaining to drug importation and the evidentiary record, the court found it "clear" that PharmacyChecker directed "U.S. consumers to foreign pharmacies where they [could] purchase prescription medication in violation of federal law," and that PharmacyChecker "described this facilitation as its mission 'to help consumers afford medication they need[ed].'" Pet. App. 166a. Because PharmacyChecker is "completely or almost completely geared towards facilitating illegality," the New York court ruled that PharmacyChecker lacked a legally cognizable antitrust

injury and granted summary judgment in the defendants' favor. Pet. App. 166a–167a.[6]

B. The district court in Oregon reaches the opposite conclusion.

In June 2023, Petitioner moved for summary judgment in the Oregon Action, arguing that PharmacyChecker lacked antitrust standing. Like the defendants in the SDNY Action, Petitioner argued that PharmacyChecker lacked a legally cognizable antitrust injury because its business facilitates illegal importation of foreign drugs. Pet. App. 33a.[7] The Oregon court denied summary judgment after concluding that "Ninth Circuit precedent provides a different legal standard." Pet. App. 56a.

Based on the same evidentiary record, the Oregon court first concluded that PharmacyChecker's business *is* legal because PharmacyChecker does not itself import foreign drugs. Pet. App. 60a. Instead, the Oregon court reasoned that PharmacyChecker facilitates that illegal activity by others—namely, U.S. consumers who visit PharmacyChecker's website to purchase and

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6. Pursuant to Federal Rule of Civil Procedure 54(b), the parties in the SDNY Action jointly requested entry of a partial final judgment so that PharmacyChecker could appeal. The New York court denied that request, and the SDNY Action proceeded to discovery on PharmacyChecker's remaining Lanham Act claim. Pet. App. 8a–9a.

7. Petitioner also argued that PharmacyChecker's antitrust claim was barred by issue preclusion based on the standing ruling issued in the SDNY Action. Pet. App. 33a. The Oregon court rejected that argument, based in part on the differences in Second and Ninth Circuit precedents on that issue. Pet. App. 56a.

import prescription drugs for personal use from foreign pharmacies. Pet. App. 60a–61a. Consequently, the Oregon court framed the operative question as: "whether an antitrust plaintiff, which does not itself engage in illegal activity, lacks antitrust standing merely because that plaintiff's website facilitates illegal activity by others and the plaintiff receives revenue as an indirect result of that activity." Pet. App. 61a.

The Oregon court denied summary judgment after answering that question in the negative. In doing so, the court observed that "[n]o case from the United States Supreme Court or the Ninth Circuit" provided a direct answer. *Id.* With the obvious tension between the decision in the SDNY Action and the opposite outcome on the same facts in the Oregon Action, the Oregon court certified an interlocutory appeal pursuant to 28 U.S.C § 1292(b), and the Court of Appeals for the Ninth Circuit accepted review. Pet. App. 119.

C. The Ninth Circuit concludes that PharmacyChecker has antitrust standing.

The Ninth Circuit affirmed. *See PharmacyChecker.com LLC v. LegitScript LLC*, 137 F.4th 1031, 1038 (9th Cir. 2025); *see also* Pet. App. 2a. It did so after concluding that Petitioner's standing argument was "foreclosed by this Circuit's binding precedents" in two cases—*Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976) ("*Calnetics*") and *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379 (9th Cir. 1977) ("*Memorex*")—that "closely followed the Supreme Court's teachings." Pet. App. 12a.

The court began by discussing the broad public policy in favor of private enforcement of antitrust law reflected in this Court's seminal decisions in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) ("*Kiefer-Stewart*") and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) ("*Perma Life*"). Pet. App. 13a–14a. The court interpreted those decisions as establishing a general rule that "neither the equitable defense of *in pari delicto* nor that of unclean hands can act as a complete bar to lawsuits brought under Section 4 of the Clayton Act." Pet. App. 13a.

Turning next to its own precedents, the court noted that it had "applied these teachings" in *Calnetics*, a 1976 decision that "established that an injury to the fruits of a plaintiff's illegal conduct can confer antitrust standing under Section 4 of the Clayton Act." Pet. App. 14a, 16a. And the following year, in *Memorex*, the court "confirmed that, under Section 4 of the Clayton Act, a plaintiff can suffer a legally cognizable injury when competing in a legitimate market, even if the injury is inflicted upon a business or property interest that has been obtained through the plaintiff's unlawful conduct." Pet. App. 18a.[8]

Based on those precedents, the Ninth Circuit concluded that it "must hold" that:

> to further the public policy in favor of vigorous antitrust enforcement, a plaintiff may have

8. The court also discussed and either distinguished or declined to follow contrary decisions reached by courts in other circuits. *See* Pet. App. 24a–30a (declining to follow *Maltz*, 134 F.2d 2 and distinguishing *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, among others).

> antitrust standing under Section 4 of the Clayton Act to sue for injuries suffered by its business or property interest when competing in a legitimate market, even if such business or property interest has been attained by unlawful means.

Pet. App. 2a. The court noted that, by affirming the denial of summary judgment on standing grounds, it made no decision as to "whether PharmacyChecker may recover the damages suffered solely by the portion of its business interest that may later be proven illegal." Pet. App. 20a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit reached the wrong conclusion on an important question of antitrust standing.

This Court should accept review because the Ninth Circuit reached the wrong conclusion on a significant issue of antitrust law, and its decision directly conflicts with the outcome in the SDNY Action. In other words, in a case involving the same parties and the same facts, opposite conclusions were drawn based on nothing other than differences in circuit law. As explained below, the Ninth Circuit's error stems from an erroneous extension of this Court's precedents regarding the right of a private plaintiff to enforce antitrust laws.

A. This Court's precedents.

Nearly 74 years ago, this Court ruled that unrelated antitrust violations by a plaintiff cannot immunize defendants from liability for their own antitrust violations.

In *Kiefer-Stewart*, the plaintiff was a wholesaler of liquor who sued its supplier for antitrust violations. 340 U.S. at 212. As a defense, the supplier introduced evidence designed to show that the plaintiff wholesaler had itself committed a separate violation of antitrust law by entering an agreement with a third party to set minimum prices for the sale of liquor. *Id.* at 214. The trial court instructed the jury that, even if proved, the plaintiff wholesaler's role in that separate conspiracy was no defense to the cause of action brought against the supplier. *Id.*

This Court affirmed the use of that instruction, explaining:

> [T]he Sherman Act makes it an offense for [defendants] to agree among themselves to stop selling to particular customers. If [plaintiff] and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of [plaintiff], however, could not legalize the unlawful combination by [defendants] nor immunize them against liability to those they injured.

Id. Kiefer-Stewart thus teaches that a private plaintiff is not barred from bringing an antitrust claim solely because it engaged in unrelated violations of the same law.

After *Kiefer-Stewart*, this Court decided *Simpson v. Union Oil Co.*, where it held that a plaintiff whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust

laws, even though by signing the agreement, the plaintiff had become a participant in the competition-destroying scheme. 377 U.S. 13 (1964). This Court reiterated that

> Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public.

Id. at 16 (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 453–54 (1957)).

Against that background, in 1968, this Court issued the decision in *Perma Life*, rejecting the doctrine of *in pari delicto* as a blanket defense to antitrust actions—at least where the plaintiff is in some way involved in, or benefitted from, the alleged conspiracy.

In *Perma Life*, franchisee-operators of Midas Muffler Shops entered into sales agreements with Midas, Inc. ("Midas") and later brought an antitrust suit against Midas challenging restrictions in those same agreements. 392 U.S. at 136–37. The court of appeals concluded that the franchisees' claim was barred by the doctrine of *in pari delicto* because they "had enthusiastically sought to acquire a Midas franchise with full knowledge" of the restrictive provisions in the agreements—*i.e.*, because of their own involvement in the antitrust violations alleged against Midas. *Id.* at 137–38.

This Court disagreed. Writing for the Court, Justice Black explained:

> Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

Id. at 139. Accordingly, Justice Black concluded that "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." *Id.* at 140. Notwithstanding that seemingly broad pronouncement, this Court expressly declined to answer the question of whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action." *Id.*[9]

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9. Both *Kiefer-Stewart* and *Perma Life* were partially overruled on other grounds by the decision in *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984).

The majority conclusion spawned four concurring and dissenting opinions, either rejecting Justice Black's view or accepting it with significant qualifications.

While agreeing with the majority, Justice White wrote that *in pari delicto* was "not a useful concept for sorting out those situations in which the plaintiff might be barred because of his own conduct from those in which he may have been a party to an illegal venture but is still entitled to damages from other participants." *Id.* at 143 (White, J., concurring). Justice White's primary concern was the blanket application of a common law doctrine, which had evolved in a different context, to the many and varied types of conduct of antitrust plaintiffs. Justice White suggested that the correct focus was not on common law doctrines, but, rather, on whether the defendant's conduct caused the damages alleged.

Justice Fortas's concurrence noted that application of the doctrine was appropriate where "the 'delictum' is approximately 'par'"—*i.e.*, where the parties were equally culpable in the scheme, such as co-adventurers or partners. *Id.* at 147 (Fortas, J., concurring).

Justice Marshall, also concurring in the result, opposed the adoption of a broad rule completely eliminating the doctrine of *in pari delicto*. *Id.* at 151 ("The principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our jurisprudence.") (Marshall, J., concurring). He was particularly concerned about the majority's conclusion that "an offset approach on the issue of damages" would be "an adequate means of preventing unjust enrichment" by a culpable private plaintiff. *Id.* at 152–53. Instead, Justice Marshall favored

a limited application of the principle, such that recovery would be denied to a plaintiff where the defendant could show that the plaintiff was an active participant in the formation and implementation of an illegal scheme and was substantially equally at fault. *Id.* at 149.

Justice Harlan, concurring in part and dissenting in part, explained that plaintiffs who are truly *in pari delicto* are "those who have themselves violated the law in cooperation with the defendant." *Id.* at 153 (Harlan, J., concurring and dissenting). In his view,

> When a person suffers losses as a result of activities the law forbade him to engage in, I see no reason why the law should award him treble damages from his fellow offenders. It seems to me a bizarre way to "further the overriding public policy in favor of competition," . . . to pay violators three times their losses in doing what public policy seeks to deter them from doing. Even if the threat of intra-conspiracy treble damages had some deterrent effect, however, I should not think it a too "fastidious regard for the relative moral worth of the parties," . . . to decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves.

Id. at 154.

Thus, when read in context—including the fact that the plaintiffs in *Perma Life* had participated in a conspiracy formulated by others, and perhaps out of necessity—the majority's broad pronouncement in *Perma Life* condemns

the application of the *in pari delicto* doctrine only as a complete defense to an antitrust action (and perhaps only in cases where the "delicto" in question involves the plaintiff's own anticompetitive acts).

* * *

Following the decisions in *Kiefer-Stewart* and *Perma Life*, appellate courts struggled to determine what role, if any, the common law doctrines of "unclean hands" and *in pari delicto* continued to have in antitrust law. Some concluded that this Court's decision in *Kiefer-Stewart*—which sanctioned a plaintiff's antitrust lawsuit despite the plaintiff's unrelated violations of the same law—precludes the use of "unclean hands" as a defense in antitrust proceedings.[10] *See, e.g.*, *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 388 (4th Cir. 1982) ("It is well settled that unclean hands is no bar to antitrust recovery."). Likewise, some construed *Perma Life*—which barred the use of a plaintiff's alleged participation in the same conspiracy as a complete defense to the plaintiff's antitrust claims against alleged co-conspirators—as a complete ban

10. Whether this Court actually rejected the unclean hands defense is not without question, as the majority opinion in *Kiefer-Stewart* does not refer to unclean hands and is arguably limited to a plaintiff's unrelated *antitrust violations*. Likewise, the majority opinion in *Perma Life* makes no reference to unclean hands. Instead, the phrase appears only in Justice Marshall's concurrence and Justice Harlan's partial concurrence and partial dissent. *See Perma Life*, 392 U.S. at 151 (Marshall, J., concurring); *id.* at 153 n.1 (Harlan, J., concurring in part and dissenting in part). Nevertheless, some courts have interpreted those decisions as categorically barring any argument that a plaintiff's bad acts could preclude it from maintaining an antitrust claim.

on any "illegality" defense. *See, e.g.*, *Glasofer Motors v. Osterlund, Inc.*, 180 N.J. Super. 6, 17, 433 A.2d 780 (App. Div. 1981) ("The federal courts have uniformly interpreted *Kiefer-Stewart* and *Perma Life* as abolishing the defense of illegality where the plaintiff's wrongdoing is unrelated to antitrust policy, since requiring that enforcement of federal antitrust law yield to unrelated state or federal policy would be inappropriate in view of the fact that a violation of the antitrust laws is a public wrong."). Others appeared to take a middle approach or remained undecided. *See, e.g.*, *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976) (continuing to recognize the doctrine of *in pari delicto* when a plaintiff and a defendant are equally at fault for the alleged antitrust conspiracy, such that "the illegal conspiracy would not have been formed but for the plaintiff's participation"); *Rebotix Repair, LLC v. Intuitive Surgical, Inc.*, No. 8:20-CV-2274-VMC-TGW, 2022 WL 3272538, at *6 n.6 (M.D. Fla. Aug. 10, 2022) (noting that "[t]he Eleventh Circuit's prior opinions have not been clear as to whether the doctrine of 'unclean hands' can independently bar an antitrust suit").

B. The Ninth Circuit's precedents.

In the 1970s, the Ninth Circuit applied and expanded on this Court's precedents in two cases.

First, in *Calnetics*, the Ninth Circuit considered an evidentiary dispute regarding the admissibility of sales practices to demonstrate a private plaintiff's damages in an antitrust action. 532 F.2d at 688. Calnetics (a manufacturer of automobile air-conditioners) alleged that the defendants engaged in a conspiracy that displaced it from the market. *Id.* at 679–80. At trial, Calnetics sought

to introduce evidence of its historic sales to demonstrate that the defendants' conspiracy diminished its anticipated profits. The district court excluded that evidence on the grounds that the sales stemmed from an unlawful kickback agreement between Calnetics and an automobile dealer. The district court granted summary judgment in favor of the defendants on Calnetics' antitrust claim because, without that evidence, Calnetics was unable to show that it suffered damages as a result of the conspiracy. *Id.* at 688.

Citing this Court's decisions in *Kiefer-Stewart* and *Perma Life*, the Ninth Circuit concluded that the defendants' evidentiary challenge was "in effect an *in pari delicto* or 'unclean hands' defense, which is not a defense in an action for treble damages." *Calnetics*, 532 F.2d at 688. Consequently, the Ninth Circuit held that the evidence was admissible, even if the sales resulted from Calnetics' unlawful kickback agreement, because Calnetics was entitled to recover for defendants' anticompetitive conduct "even though the market position from which Calnetics was displaced had been attained only through illegal conduct." *Id.* at 689. To rule otherwise, the Ninth Circuit concluded, "would effectively frustrate the important public policy underlining the antitrust laws: encouragement of private antitrust suits in order to deter the illegal exercise of market power." *Id.*[11]

Thus, in *Calnetics*, the Ninth Circuit applied the principles from *Kiefer-Stewart* and *Perma Life* to a case

11. The Ninth Circuit stated that it was "not giving a green light to companies to violate the law," in part because Calnetics was subject to prosecution for its own antitrust violations, and because it was subject to a counterclaim for damages which could force it to disgorge any gains shown to be ill-gotten. *Calnetics*, 532 F.2d at 689.

involving a plaintiff's antitrust violations—there, the plaintiff's entry into an unlawful agreement from which the plaintiff derived profits that were allegedly injured by the defendant's anticompetitive acts.

The following year, the Ninth Circuit decided *Memorex*, where it concluded that a violation of antitrust law is "all that is required to maintain a private antitrust suit." *Memorex*, 555 F.2d at 1382. *Memorex* involved an antitrust suit by a producer of disk storage devices (Memorex) against International Business Machines Corporation (IBM). IBM countered by arguing that Memorex had acquired its position in the market for such devices only by stealing trade secrets—a non-antitrust violation—directly from IBM. *Id.* at 1381. Because Memorex had no business of its own (separate from that alleged theft), IBM argued that Memorex could not be injured in its business for purposes of an antitrust claim. *Id.*

The Ninth Circuit disagreed. Building on its decision in *Calnetics*, the court rejected the notion that a private plaintiff's misconduct towards the defendant (in that case, Memorex's theft of trade secrets from IBM) precluded it from suffering an antitrust injury:

> Were it not for Calnetics' allegedly illegal conduct, it would not have suffered any injury because it would not have sold any products to Volkswagen distributors. All sales were the result of commercial bribery. . . . The "rights" of Calnetics were no greater than those of Memorex, even assuming Memorex stole the patents from which its products were made.

Id. at 1381–82. Accordingly, the *Memorex* court held that "illegality is not to be recognized as a defense to an antitrust action when the illegal acts by the plaintiff are directed against the defendant." *Id.* at 1382.

In so doing the Ninth Circuit expanded the decisions in Kiefer-Stewart and Perma Life—this time holding that an antitrust plaintiff does not lose standing despite its own violations of *non-antitrust laws* perpetrated against the defendant in an antitrust action.

C. The Ninth Circuit's decision in this case.

The Ninth Circuit derived two guiding principles from its decisions in *Calnetics* and *Memorex*.

First, the notion that "an injury to the fruits of a plaintiff's illegal conduct can confer antitrust standing under Section 4 of the Clayton Act" (*Calnetics*). Pet. App. 16a. Second, the idea that "a plaintiff can suffer a legally cognizable injury when competing in a legitimate market, even if the injury is inflicted upon a business or property interest that has been obtained through the plaintiff's unlawful conduct" (*Memorex*). Pet. App. 18a.

It is unclear whether these principles are consistent with this Court's teachings in *Kiefer-Stewart* and *Perma Life*—cases that considered only a plaintiff's violations of *antitrust law*, and whether those violations rendered the plaintiff unfit to enforce that same law against others. This Court's cases make clear that one wrong (*i.e.*, plaintiff's anticompetitive conduct towards a defendant or third party) does not make another wrong (*i.e.*, defendant's anticompetitive conduct towards plaintiff) a "right." But

absent from that jurisprudence is any indication that the antitrust statutes may be used as a tool *to facilitate illegal activity*, particularly when the illegality in question is ongoing and directed not at the defendant, but at the public writ large.

Yet in this case, the Ninth Circuit expanded its prior precedents to do just that. It held that a business whose primary purpose is facilitating ongoing unlawful activity by others—as opposed to a business that engaged in prior anticompetitive acts, or a business that came into existence as a result of prior violations of other laws—is nevertheless entitled to "represent[] the public interest" by acting as a "private attorney general" to enforce antitrust law. *See Javelin Corp.*, 546 F.2d at 279–80 (citation omitted).

The Ninth Circuit's decision is wrong. In effect, it establishes a per se rule in the Ninth Circuit whereby a plaintiff is entitled to maintain a claim for treble damages so long as it can demonstrate any anticompetitive activity whatsoever—regardless of what the plaintiff's business entails, who the business harms, or whether the plaintiff is reasonably susceptible to any counterclaims or damages-offset by virtue of its unlawful activity. By doing so, the Ninth Circuit departs from the decisions of multiple district courts, which previously held that, in the Ninth Circuit, a plaintiff suffers no antitrust injury where the plaintiff's business is itself illegal. *See, e.g.*, *Modesto Irrigation Dist. v. Pac. Gas & Elec. Co.*, 309 F. Supp. 2d 1156, 1170 (N.D. Cal. 2004) (plaintiff lacked antitrust injury because its conduct was "unlawful by its own terms"), *aff'd sub nom. Modesto Irrigation Dist. (MID) v. Pac. Gas & Elec. Co.*, 158 F. App'x 807 (9th Cir. 2005); *Pearl Music Co. v. Recording Indus. Ass'n of Am., Inc.*,

460 F. Supp. 1060, 1067–68 (C.D. Cal. 1978) (because the plaintiff's business was "totally illegal" under the laws of 49 states, it lacked "standing or capacity" to bring antitrust suit).

More fundamentally, the Ninth Circuit's decision elevates antitrust policy above all others—including policies directed at ensuring public safety, such as the policies behind the prohibition on importation of foreign drugs—with little to no justification.[12] To borrow the words of Justice Harlan, allowing a plaintiff whose profits depend on illegal activity by others to maintain an action for treble damages would be "a bizarre way to 'further the overriding public policy in favor of competition.'" *Perma Life*, 392 U.S. at 154. To the extent the majority decision in *Perma Life* can be construed as sanctioning such an approach, this Court should accept review to recognize a necessary exception for businesses that are themselves illegal or whose business models depend on facilitating illegal activity by others—particularly where, as here, the illegal activity in question subjects the public to harm.

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12. This is no small concern. For example, on October 4, 2024, the U.S. Drug Enforcement Agency issued a Public Safety Alert about illegal online pharmacies "selling and shipping counterfeit pills made with fentanyl and methamphetamine to unsuspecting customers in the United States who believe they are purchasing real pharmaceutical drugs such as Oxycodone, Adderall, Xanax, and other drugs from legitimate pharmacies" and "to warn of an increase in illegal online, often foreign-based websites that are deceptively targeting American consumers." *See* United States Drug Enforcement Administration, *DEA Issues Warning About Illegal Online Pharmacies*, DEA.gov, https://www.dea.gov/alert/dea-issues-warning-about-illegal-online-pharmacies (last visited on Aug. 19, 2025).

* * *

This Court should accept review to correct the erroneous and unwarranted extension of antitrust standing in the name of protecting policy, far beyond what Congress could reasonably have intended when enacting the antitrust laws.

II. The Ninth Circuit's decision conflicts with decisions by courts in the Sixth, Seventh, and Eighth circuits.

Review should also be granted because courts in multiple circuits have reached conflicting decisions on the question of when, if ever, a private plaintiff's illegal activities deprive it of standing to enforce antitrust laws.

A. The Sixth, Seventh, and Eighth Circuits.

On the one hand, some courts have held that a plaintiff whose business interests are illegal cannot seek redress for a defendant's alleged anticompetitive acts—either because there is no cognizable antitrust injury to an illegal business interest, or due to a lack of causation.[13]

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13. Courts in this latter category have ruled that some other force, such as a regulatory regime prohibiting that which the plaintiff seeks to do, accounts for the plaintiff's injury instead of any anticompetitive acts by defendants. *See*, *e.g.*, *RSA Media, Inc. v. AK Media Grp., Inc.*, 260 F.3d 10, 15 (1st Cir. 2001) (plaintiff lacked antitrust standing where it "was not excluded from the market for outdoor billboards because of [defendant's] threats," but, rather, "because of the Massachusetts regulatory scheme that prevents new billboards from being built"); *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998) (city suffered no antitrust injury and had no antitrust standing

The earliest example of such a ruling (and the most factually analogous to this case) is the Seventh Circuit's decision in *Maltz*. In that case, a manufacturer of gambling devices sued his competitors for antitrust violations. *Maltz*, 134 F.2d at 3–4. Although gambling was illegal under federal law, the *manufacturing* of gambling equipment was not—much like the maintenance of a website that allows others to illegally import foreign drugs. The defendants succeeded in dismissing the case on the grounds that the plaintiff's "sole business [was] the manufacture and sale of gambling devices, the use and sale of which [were] against public policy and unlawful." *Id.* at 3. The Seventh Circuit affirmed on two separate grounds. First, it ruled that Maltz's claim was barred because he came to the court with "unclean hands." *Id.* at 5.[14] Second, the Seventh Circuit concluded that Maltz's business was "the making and selling of goods which could only be used by purchasers in furtherance of the business of gambling." *Id.* Because Maltz "had no legal rights to protect," the defendants "could not invade them." *Id.*

Similarly, in *Bubis v. Blanton*, 885 F.2d 317 (6th Cir. 1989), the Sixth Circuit affirmed the dismissal of a Sherman Act claim due to the plaintiff's violation of state

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because any injury suffered by the city "did not flow from the defendants' conduct, but, rather, from the realities of the regulated environment in which all three were actors").

14. Courts have questioned whether that portion of the holding survived this Court's later decision in *Kiefer-Stewart*. *See PharmacyChecker.com LLC*, 137 F.4th at 1044 n.12 (noting that it "probably" did not survive). As discussed above, the majority opinion in *Kiefer-Stewart* made no reference to "unclean hands." Nor did the majority opinion in *Perma Life*.

law in connection with its business. The plaintiff in that case alleged that he was harmed by a conspiracy that resulted in the denial of a transfer of a liquor license for his store. *Id.* at 318. The district court ruled that the plaintiff lacked standing because his ownership interest in the liquor store was illegal under Tennessee state law, which required applicants for such licenses to make certain disclosures which the plaintiff had failed to make on his application. The Sixth Circuit noted the case turned on "the issue of whether [plaintiff] had a legitimate business interest which was injured by [defendants'] unlawful acts." *Id.* at 319–20. After reviewing applicable state law, the Sixth Circuit ruled that the plaintiff's interest in the store was unlawful "at the time of the attempted transfer of the liquor license." *Id.* at 320. Consequently, the plaintiff "did not have a lawful interest in [the store] that was harmed by [defendants'] unlawful actions." *Id.*[15]

The Eighth Circuit, too, has held that private plaintiffs lack standing to assert antitrust claims for allegedly anticompetitive acts that prevent them from engaging in illegal activities. *See In re Canadian Imp. Antitrust Litig.*, 470 F.3d at 791. In that case, the plaintiffs were U.S. consumers who purchased prescription drugs from the defendant drug companies. The plaintiffs alleged that the defendants unlawfully conspired to suppress the importation of certain prescription drugs from Canadian

15. In the dissent's view, antitrust laws "do not require a plaintiff's business interest to be licit for purposes of standing to sue under § 4." *Bubis*, 885 F.2d at 320 (Ryan, J., dissenting). The dissent reasoned that relying on the illegality of a plaintiff's business to deny standing to sue "effectively recognized the defense of unclean hands," which had been rejected by federal courts after *Kiefer-Stewart*. *Id.* at 321.

pharmacies, thereby resulting in increased prices for prescription drugs sold in the United States. *Id.* at 787–88. The district court "concluded that the plaintiffs lacked standing to pursue their federal antitrust claims because the allegedly anticompetitive behavior discouraged only unlawful importation of drugs and not lawful activity that the Sherman Act was designed to protect." *Id.* at 788. The Eighth Circuit affirmed:

> [T]he importation of drugs from Canada is prohibited by federal law. The absence of competition from Canadian sources in the domestic prescription drug market, therefore, is caused by the federal statutory and regulatory scheme adopted by the United States government, not by the conduct of the defendants. Consequently, the alleged conduct of the defendants did not cause an injury of the type that the antitrust laws were designed to remedy.

Id. at 791.

Thus, courts in multiple circuits have concluded that illegality of a private plaintiff's business endeavors—and in *Maltz*, the plaintiff's facilitation of illegal conduct by others—is relevant to, and can deprive a private plaintiff of, antitrust standing.[16]

16. *See also Pearl Music Co.*, 460 F. Supp. at 1068 ("The plaintiffs in this action are engaged in wholly illegal enterprises which are directed against the public in violation of clear federal and state statutory criminal prohibitions, and as such, should not be able to assert or claim that they have rights protected by the anti-trust laws."); *Modesto Irrigation Dist.*, 309 F. Supp. 2d at

B. The Third, Ninth, and Tenth Circuits.

Courts in other circuits have reached the opposite conclusion: namely, that a private plaintiff *does* have antitrust standing, regardless of whether its business interests are unlawful. The common thread between these cases appears to be the refusal to recognize any circumstance in which federal antitrust policy should yield to another.

The Tenth Circuit's decision in *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972)—which has been endorsed by the Ninth Circuit—champions this view. In *Semke*, the plaintiff was an unlicensed new car dealer who sued an automobile dealers' association for interfering with his business efforts. *Id.* at 1363. The dealers' association argued that the plaintiff's whole business operation violated state licensing statutes which served an important public interest in weeding out unscrupulous automobile dealers. *Id.* at 1367–68. Based on its interpretation of *Perma Life*, the Tenth Circuit rejected the defense as violative of the "superior public interest" in enforcing antitrust laws:

> As the Court put it, the weighing of the relative moral worth of the parties would seriously

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1169–70 ("Courts have long recognized that an action under the antitrust laws will not lie where the business conducted by the plaintiff, and alleged to have been restrained by the defendant, was itself unlawful. This is so . . . because a party cannot prove a cognizable antitrust injury when it itself engaged in unlawful conduct *ex ante*. . . . Because [plaintiff's] conduct was unlawful by its own terms, [defendant's] response—however anti-competitive or seemingly monopolistic—could not inflict a[] cognizable antitrust injury.") (cleaned up).

> undermine the value of the private action in antitrust enforcement. If participation by a plaintiff in an illegal conspiracy in restraint of trade is not to bar him, it follows that his violation of a state statute which is unrelated to the antitrust laws would carry even less moral impact and would assume even less applicability as a barrier to an antitrust suit.

Id. at 1369–70. Because the policies behind the antitrust statutes "even more clearly out-weigh any social value flowing from a state licensing statute," giving effect to state law would "have the effect of disregarding the public policy objectives of the antitrust laws." *Id.* at 1370. Thus, the Tenth Circuit held that a plaintiff whose business is unlawful under state laws designed to protect the public does not lose standing to enforce antitrust law. *Id.*; *see also Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425, 431 (10th Cir. 1977) (relying on *Semke* to conclude that "the assertion of illegality or *in pari delicto* is wholly unrelated to the lawsuit filed by the plaintiff-appellant and, therefore, it is not properly asserted even under the guise of lack of standing").

Likewise, the Third Circuit held that it would be "inappropriate[]" to require federal antitrust enforcement policy to "yield to unrelated regulatory policies, state or federal." *Consol. Exp., Inc. v. N.Y. Shipping Ass'n, Inc.*, 602 F.2d 494, 526 (3d Cir. 1979), *vacated on other grounds sub nom. Int'l Longshoremen's Ass'n, AFL-CIO v. Consol. Exp., Inc.*, 448 U.S. 902 (1980). In that case, the plaintiffs were non-vessel owning common carriers engaged in the business of consolidating cargo for shipment between Puerto Rico and New York City. *Id.* at 498. The plaintiffs sued the longshoremen's union, vessel owners, and others

for alleged federal antitrust violations. The defendants raised an illegality defense, arguing that, because the plaintiffs lacked certain permits, they could not have been damaged by the alleged anticompetitive activities. The Third Circuit concluded that, after *Perma Life*, "the case for application of an illegality defense" to claims under the Clayton Act is even weaker when the illegality in question does not involve a plaintiff's participation in antitrust violations. *Id.* at 525; *see also id.* at 525–26 (noting that, "[w]hile *Perma Life* dealt only with illegality alleged to be a concurrent violation of the antitrust laws, it has been understood to have abolished the defense of illegality even when the plaintiff's wrongdoing is unrelated to antitrust policy," and collecting cases for that proposition). Because the permits in question had "nothing to do with the procompetitive policies of the antitrust laws," the Third Circuit rejected the defendants' illegality defense. *Id.* at 526.[17]

Thus, the Third and Tenth Circuits—and now the Ninth Circuit—have in effect concluded that antitrust policy trumps all others. *See generally id.* ("The authorities rejecting illegality defenses not directly related to the antitrust policy . . . recognize the inappropriateness of requiring that the federal antitrust enforcement policy yield to unrelated regulatory policies, state or federal.").

17. Other court have followed suit. *See, e.g.*, *Glasofer Motors*, 180 N.J. Super. at 16–19; *Restore Robotics, LLC v. Intuitive Surgical, Inc.*, No. 5:19CV55-TKW-MJF, 2022 WL 2784436, at *3 (N.D. Fla. May 31, 2022).

C. The conflicting decisions in this case demonstrate a need for controlling guidance.

The split of authority is best demonstrated by the conflicting decisions reached by the courts in this case.

In the SDNY Action, the district court held that PharmacyChecker lacked standing to pursue its antitrust claim due to the absence of any legally cognizable antitrust injury. The court reached that conclusion after surveying many of the decisions described above, from which it derived the following legal principle: "[W]here the plaintiff's enterprise is completely or almost completely illegal, or completely or almost completely geared towards facilitating illegality, that plaintiff cannot plead an antitrust injury." *PharmacyChecker.com, LLC*, 530 F. Supp. 3d at 229–30. Applying that standard to the summary judgment record, the court in the SDNY Action concluded that PharmacyChecker is "completely or almost completely geared towards facilitating illegality," and, thus, lacks a legally cognizable antitrust injury as required to maintain its claim. Pet. App. 166a. Yet in the Oregon Action, the district court reached the opposite conclusion based on its review and analysis of largely the same legal authorities and evidence, which conclusion the Ninth Circuit affirmed after applying (and extending) its own precedents. Pet. App. 73a–82a.

The difference in outcome is explained by the lack of controlling guidance on the following question: Whether a private plaintiff has standing to pursue an antitrust claim, regardless of whether its business is unlawful or directed at facilitating unlawful conduct by others, so long as the plaintiff can demonstrate anticompetitive acts

by defendants. As is evident from the cases described above, a definitive answer to that question is not found in this Court's existing jurisprudence regarding what role, if any, the concept of unclean hands or the doctrine of *in pari delicto* continue to play in modern antitrust law. This Court should accept review to answer that question and to clarify whether there is a limit to when the antitrust laws may be enforced by private parties.

III. This case is an appropriate vehicle for the Court to resolve the split of authority on an important and timely question in antitrust law.

Review should also be granted because this case is an appropriate vehicle for providing that guidance.

This case presents the Court with a rare opportunity to resolve a disputed question of federal law based on two directly conflicting decisions issued by courts considering identical antitrust claims, brought by the same plaintiff, based on the same evidentiary record. This court should accept review both to correct the outcome in this particular case and to provide definitive guidance for future litigants who, at present, are left to discern a patchwork of contradictory decisions on the question of when, if at all, a private plaintiff may lose standing to assert its antitrust claim.

As discussed above, the courts' fractured approach stems from diverging interpretations of this Court's 74-year-old decision in *Kiefer-Stewart* and the 57-year-old decision in *Perma Life*. Although the basic policy considerations underlying those cases (including Congress's policy of fostering private enforcement of

antitrust law) remain salient, the circumstances that give rise to modern antitrust litigation have changed—particularly with the progression of the internet and e-commerce. In simple terms, this Court could not have anticipated that, in deciding whether a plaintiff was precluded from bringing an antitrust claim based on its own anticompetitive conduct, the same logic would one day be used to sanction an antitrust lawsuit by a plaintiff who operates an electronic business whose primary purpose is to encourage violations of federal laws designed to protect individual members of the public against the potentially dire consequences of importing drugs from foreign countries. In view of such unprecedented developments, the time is ripe for this Court to provide guidance as to whether private enforcement of the antitrust statutes remains the sole policy that matters in the eyes of the law.

CONCLUSION

Based on the foregoing, Petitioner requests that the Court grant this petition.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 23, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2697
D.C. No. 3:22-cv-00252-SI

PHARMACYCHECKER.COM LLC,

Plaintiff-Appellee,

v.

LEGITSCRIPT LLC,

Defendant-Appellant.

Argued and Submitted February 3, 2025
Portland, Oregon

Filed May 23, 2025

OPINION

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Before: Carlos T. Bea, Lucy H. Koh,
and Jennifer Sung, Circuit Judges.

Opinion by Judge Bea

BEA, Circuit Judge.

Two wrongs don't make a right. Nor do they necessarily cancel each other out. In this case, PharmacyChecker.com LLC ("PharmacyChecker") sued its competitor LegitScript LLC ("LegitScript") for engaging in a group boycott in violation of antitrust laws. LegitScript moved for summary judgment, contending that PharmacyChecker lacked antitrust standing because PharmacyChecker's business facilitated illegal activities and, accordingly, it could not suffer any legally cognizable injury under Section 4 of the Clayton Act. The district court denied LegitScript's motion and certified an interlocutory appeal under 28 U.S.C. § 1292(b). We affirm. Following the Supreme Court's teachings and the precedents in this Circuit, we must hold that, to further the public policy in favor of vigorous antitrust enforcement, a plaintiff may have antitrust standing under Section 4 of the Clayton Act to sue for injuries suffered by its business or property interest when competing in a legitimate market, even if such business or property interest has been attained by unlawful means.

Appendix A

I.

A.[1]

The Federal Food, Drug, and Cosmetic Act ("FFDCA") prohibits the "introduction or delivery for introduction into interstate commerce" of any drug that is adulterated, misbranded, or not approved by the Food and Drug Administration ("FDA"). 21 U.S.C. §§ 331(a), 331(d), 355(a); *see also In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 788-89 (8th Cir. 2006) (noting that personal importation of foreign drugs into the United States can violate the FFDCA either "because the drugs are not approved in accordance with 21 U.S.C. § 355, are not labeled as required by 21 U.S.C. § 352, or are dispensed without a valid prescription in contravention of 21 U.S.C. § 353(b)(1)").

It is illegal in "most circumstances" "for individuals to import drugs" into the United States "for personal use because these products purchased from other countries often have not been approved by the FDA for use and sale in" the United States. *Personal Importation,* U.S. FOOD & DRUG ADMIN., https://www.fda.gov/industry/import-

1. The parties here did not independently produce below any evidence regarding PharmacyChecker's antitrust standing; instead, they submitted and relied on certain filings from a related case before the U.S. District Court for the Southern District of New York. The district court in this case accepted these filings, upon which we base the factual recitation here concerning PharmacyChecker. We view the facts stated in these filings in the light most favorable to PharmacyChecker, the nonmovant.

basics/personal-importation (last updated Oct. 8, 2024). The FDA "may consider a more permissive decision" in "allowing the importation of medications for personal use" if, for instance, the drug "is not for treatment of a serious condition and there is no known significant health risk," or if the drug "is for a serious condition for which effective treatment may not be available domestically either through commercial or clinical means." *Id.* And foreign nationals who vacation, study, or work in the United States may also ship to themselves as much as a 90-day supply of drugs for personal use; if they stay in the United States for more than 90 days, they may have additional medications shipped to them.[2] *Id.*

Against this backdrop, PharmacyChecker operates the PharmacyChecker.com website. The website is not a pharmacy; it does not "buy, sell, distribute, dispense, or process orders for" any drugs. Rather, it accredits online pharmacies across the globe for their safety standards, and it compares the prices of the drugs offered by those pharmacies for its website users from around the world. According to PharmacyChecker, its "central objective has been to examine the qualifications (i.e., practice and safety standards) of online pharmacies wherever they might be to provide worldwide visitors with information to make good choices, to be safe, and to get medication most affordably."

PharmacyChecker's business model depends on charging online pharmacies verification fees and

2. The parties dispute whether other exceptions may apply. We need not address this dispute because our decision here does not rest on its resolution.

click-through fees.[3] From January 2015 through August 2021 ("Relevant Period"), approximately 14% of PharmacyChecker's revenue came from verification fees, which were charged to online pharmacies for services that PharmacyChecker provided in accrediting those pharmacies and listing them on its website. About 84% of the verification fees that PharmacyChecker collected were paid by foreign pharmacies.

In the Relevant Period, approximately 85% of PharmacyChecker's revenue came from click-through fees, which PharmacyChecker charged its accredited pharmacies whenever their hyperlinks on the PharmacyChecker.com website were clicked. About 95% of PharmacyChecker's click-through revenue in the Relevant Period came from online pharmacies located outside the United States; approximately 69% of that revenue resulted from clicks made by PharmacyChecker.com users located inside the United States. This means around 56% of PharmacyChecker's total revenue in the Relevant Period was generated from clicks made by PharmacyChecker.com users inside the United States on hyperlinks for online pharmacies outside the United States.

These click-through fees were charged to the pharmacies solely based on the clicks made by PharmacyChecker.com users. PharmacyChecker collected these fees irrespective of whether its users ended

3. PharmacyChecker also provides discount cards for U.S. consumers to purchase U.S. prescription drugs at U.S. pharmacies. However, the record suggests that these discount cards accounted for only about 0.2% of PharmacyChecker's revenue.

up purchasing any drugs. Accordingly, PharmacyChecker did not track its website users' activities after they clicked through to those pharmacies' websites and did not know how many of its U.S. users purchased drugs from foreign pharmacies and had them shipped into the United States. On this point, the record consists of one online pharmacy's deposition testimony that only about 3.47% of the clicks from PharmacyChecker.com resulted in a drug transaction.[4]

B.

In August 2019, PharmacyChecker sued its competitor LegitScript and other industry organizations (excluding LegitScript, hereinafter "SDNY Defendants") in the U.S. District Court for the Southern District of New York ("New York court") for their alleged group boycott against PharmacyChecker in violation of the Sherman Act and for alleged false advertising by one of the SDNY Defendants

4. LegitScript has proffered evidence that the "frequently asked questions" section on PharmacyChecker.com explained how its U.S. users could purchase medications from foreign pharmacies. PharmacyChecker responds that, in that section, it answered questions most frequently asked by its website users located worldwide. There is also evidence suggesting that PharmacyChecker assisted U.S. consumers with their purchases of drugs from its accredited foreign pharmacies. But PharmacyChecker received only about 20 inquiries per year for assistance with an issue involving its accredited pharmacies. By way of comparison, LegitScript's expert concluded that PharmacyChecker collected click-through fees "from approximately 7.5 million clicks" over the Relevant Period.

in violation of the Lanham Act ("SDNY Action").[5] Specifically, PharmacyChecker alleged, *inter alia,* that the SDNY Defendants (1) worked with LegitScript to have "published articles disparaging" PharmacyChecker; (2) colluded with LegitScript to have "created the '.pharmacy' [internet] domain to serve a gatekeeping function," a domain which PharmacyChecker is presumably ineligible to use; (3) added PharmacyChecker.com to their "Not Recommended Sites list" or the like; and (4) "ran targeted online ads against" PharmacyChecker. Further, according to PharmacyChecker, one of the SDNY Defendants caused Microsoft, a corporate member of that SDNY Defendant, to set up a warning box on its search engine which would appear whenever its users click on the search results for webpages from PharmacyChecker.com. Defendants' conduct allegedly prevented PharmacyChecker from competing effectively "in the global markets for online pharmacy verification and comparative drug price information."

In March 2021, the New York court found that it lacked personal jurisdiction over LegitScript, a limited liability company organized under the laws of Oregon. PharmacyChecker thus moved to sever its claim against LegitScript and to transfer that claim to the U.S. District Court for the District of Oregon ("Oregon Action"), and the

5. LegitScript offers "verification and monitoring services for online pharmacies." It allegedly competes with PharmacyChecker "in the pharmacy accreditation market." SDNY Defendants include National Association of Boards of Pharmacy, Alliance for Safe Online Pharmacies, Partnership for Safe Medicines, and Center for Safe Internet Pharmacies Ltd.

New York court granted that motion. *PharmacyChecker.com LLC v. LegitScript LLC,* 614 F. Supp. 3d 796, 803 (D. Or. 2022).

Meanwhile, the New York court denied SDNY Defendants' joint motion to dismiss and formulated the following rule regarding antitrust injury: "[W]here the plaintiff's enterprise is completely or almost completely illegal, or completely or almost completely geared towards facilitating illegality, that plaintiff cannot plead an antitrust injury." Applying this rule, the New York court declined to dismiss PharmacyChecker's antitrust claim in the SDNY Action for want of antitrust standing because the pleadings did not establish PharmacyChecker's complete or almost complete involvement in illegal activities or the facilitation thereof.

The SDNY Action then moved forward. In March 2023, the New York court granted SDNY Defendants summary judgment as to PharmacyChecker's antitrust claim, holding that PharmacyChecker lacked antitrust standing. The New York court found it "clear" that PharmacyChecker directed "U.S. consumers to foreign pharmacies where they [could] purchase prescription medication in violation of federal law," and that PharmacyChecker "described this facilitation as its mission 'to help consumers afford medication they need[ed].'" As such, the court concluded that PharmacyChecker was "completely or almost completely geared towards facilitating illegality" and, accordingly, lacked a cognizable antitrust injury. Pursuant to Federal Rule of Civil Procedure 54(b), the parties in the SDNY Action jointly requested that the New York

court enter a partial final judgment on this decision so that PharmacyChecker could appeal it. *PharmacyChecker.com LLC v. Nat'l Ass'n of Bds. of Pharmacy,* No. 19-CV-7577, 2023 WL 4492148, at *1 (S.D.N.Y. June 5, 2023). The New York court denied that request. *Id.* The SDNY Action thus proceeded to discovery on PharmacyChecker's non-antitrust claim.

In June 2023, LegitScript moved for summary judgment in the Oregon Action, contending that (1) issue preclusion barred PharmacyChecker's antitrust claim because the New York court had found PharmacyChecker lacked antitrust standing; and that, even absent issue preclusion, (2) PharmacyChecker lacked antitrust standing under Ninth Circuit law.[6] In January 2024, Judge Michael H. Simon, presiding over the Oregon Action, denied LegitScript summary judgment.

Regarding issue preclusion, Judge Simon held that the New York court's decision did not bar PharmacyChecker's claim in the Oregon Action because (1) the New York court's decision was not sufficiently firm to have a preclusive effect; (2) the parties in the SDNY Action had not been given an opportunity to appeal; and (3) the Second and Ninth Circuits' precedents differ on the relevant legal question. On appeal, LegitScript does not challenge this portion of Judge Simon's ruling.

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6. PharmacyChecker did not assert a false advertising claim in the Oregon Action as it did in the SDNY Action. *PharmacyChecker,* 614 F. Supp. 3d at 802 n.1.

As to PharmacyChecker's antitrust standing, Judge Simon – viewing the evidence in the light most favorable to PharmacyChecker – concluded that "PharmacyChecker's business [was] legal." Judge Simon observed that "LegitScript ha[d] identified no federal or state law that *PharmacyChecker* ha[d] violated." "Nor ha[d] LegitScript pointed to any instance of a federal or state law enforcement agency prosecuting or even threatening to prosecute PharmacyChecker, or any instance of a federal or state regulatory body taking or even threatening to take any action against PharmacyChecker (*e.g.,* by issuing a cease-and-desist order)." "Nor, for that matter, ha[d] LegitScript shown that visitors to PharmacyChecker's website – including those visitors who click[ed] on links to non-U.S. pharmacies – engage[d] in illegal activity simply by using PharmacyChecker's website." At most, found Judge Simon, LegitScript could be said to have proffered evidence establishing "that some number of U.S. visitors to PharmacyChecker's website appear[ed] to have violated federal law through cross-border purchase and import of prescription drugs for personal use and that PharmacyChecker's website facilitate[d] that illegal activity."

Accordingly, Judge Simon framed the controlling question for LegitScript's motion for summary judgment as follows: "[W]hether an antitrust plaintiff, which does not itself engage in illegal activity, lacks antitrust standing merely because that plaintiff's website facilitates illegal activity by others and the plaintiff receives revenue as an indirect result of that activity." Judge Simon answered this question in the negative and denied LegitScript summary judgment.

LegitScript moved to certify Judge Simon's order for interlocutory appeal. Granting that motion, Judge Simon certified the following questions:

> (1) Might a plaintiff's facilitation of unlawful activity by others bar antitrust standing under some circumstances? (2) If so, is there a minimum threshold of facilitation of unlawful activity by others, measured in some appropriate fashion considering the plaintiff's entire range of business activities, for the bar to antitrust standing to be triggered?

LegitScript timely applied for this Court's permission to appeal, which application we granted.

II.

"Antitrust standing is a question of law reviewed de novo." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California,* 190 F.3d 1051, 1054 (9th Cir. 1999). We also review de novo a district court's decision denying summary judgment. *Horton by Horton v. City of Santa Maria,* 915 F.3d 592, 606 (9th Cir. 2019). "[V]iewing the evidence in the light most favorable to the non-movant," we must determine "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Soc. Techs. LLC v. Apple Inc.,* 4 F.4th 811, 816 (9th Cir. 2021) (citation omitted).

Before us is the district court's denial of summary judgment for LegitScript on two grounds: (1)

PharmacyChecker's claim in this case is not precluded by the New York court's ruling that PharmacyChecker lacked antitrust standing; and (2) antitrust standing is not lacking under the laws of the Ninth Circuit. As the parties do not challenge Judge Simon's first ruling rejecting issue preclusion as a defense to PharmacyChecker's claim, we deal only with his second ruling concerning whether PharmacyChecker has antitrust standing.

III.

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor" and "shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). Congress has thereby created a group of "private attorneys general" to incentivize the enforcement of the U.S. antitrust laws. *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 746 (1977).

LegitScript argues that PharmacyChecker has no legal right in running a business that facilitates the illegal importation of foreign drugs and, accordingly, it did not suffer any legally cognizable injury under Section 4 of the Clayton Act. This argument fails, as it is foreclosed by this Circuit's binding precedents in *Calnetics Corp. v. Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir. 1976) (per curiam), and *Memorex Corp. v. IBM,* 555 F.2d 1379 (9th Cir. 1977), which closely followed the Supreme Court's teachings in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951), and *Perma Life Mufflers,*

Inc. v. International Parts Corp., 392 U.S. 134 (1968).[7] We discuss these binding precedents below.

A.

Championing a public policy in favor of private antitrust enforcement, the Supreme Court in *Kiefer-Stewart* and *Perma Life* declared that, in general, neither the equitable defense of *in pari delicto* nor that of unclean hands can act as a complete bar to lawsuits brought under Section 4 of the Clayton Act:[8]

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7. Both *Kiefer-Stewart* and *Perma Life* were partially overruled by *Copperweld Corp. v. Independence Tube Corp.*, when the Supreme Court held that a parent company is legally incapable of conspiring with its wholly owned subsidiary in violation of Section 1 of the Sherman Act. 467 U.S. 752, 758-59, 777 (1984). In *Copperweld,* the Court overruled its prior decisions, including *Kiefer-Stewart* and *Perma Life,* "to the extent" they had suggested otherwise. *Id.* at 777. *Kiefer-Stewart* and *Perma Life* were not overruled in their entirety because the determination that a parent company and its wholly owned subsidiary could conspire in violation of antitrust laws was not necessary to the disposition of either case. *Id.* at 764-66; *see also, e.g., Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 982 (9th Cir. 2023) (citing *Perma Life*); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 426 (4th Cir. 2015) (citing *Kiefer-Stewart*).

8. The defense of *in pari delicto* provides that a plaintiff who participates in a wrongdoing may not recover damages resulting from the same wrongdoing. *See Memorex,* 555 F.2d at 1382. The defense of unclean hands deals with a "plaintiff 's wrongdoing against a third party with respect to the [same] subject matter of " the plaintiff 's suit. *Id.* Notably, the doctrine of *in pari delicto* did not disappear from private antitrust actions altogether. Courts have applied this doctrine when a plaintiff and a defendant are

> [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

Perma Life, 392 U.S. at 139; *see also Kiefer-Stewart,* 340 U.S. at 214 ("If [the plaintiff] and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of [the plaintiff], however, could not legalize the unlawful combination by [the defendants] nor immunize them against liability to those they injured."). Our Circuit applied these teachings in *Calnetics,* 532 F.2d 674, and *Memorex,* 555 F.2d 1379.

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equally at fault for the alleged antitrust conspiracy, such that "the illegal conspiracy would not have been formed but for the plaintiff 's participation." *Javelin Corp. v. Uniroyal, Inc.,* 546 F.2d 276, 279 (9th Cir. 1976).

Appendix A

In *Calnetics*, plaintiff Calnetics Corporation ("Calnetics"), an independent manufacturer of automobile air conditioning equipment, alleged that the acquisition by Volkswagen of America, Inc. ("Volkswagen") of a manufacturer of similar air conditioning equipment would enable Volkswagen to "coerce both its wholly owned and indirectly controlled distributors and dealers to satisfy their demand for automobile air conditioning equipment from [the acquiree's] supply, thus foreclosing sales opportunities of" Calnetics and other independent manufacturers. 532 F.2d at 678-80. Calnetics sued for both damages and equitable relief. *Id.* at 680. To prove damages, Calnetics sought to introduce evidence of its historical sales figures, but the district court held this evidence was inadmissible because those historical sales resulted from a kickback agreement that allegedly constituted commercial bribery in violation of federal antitrust laws and California state laws. *Id.* at 680, 688. As Calnetics could not prove damages without this evidence, the district court granted summary judgment against Calnetics as to its antitrust claim. *Id.* at 688.

On appeal, the *Calnetics* panel disagreed and vacated the summary judgment order. *Id.* at 690. The panel held that Volkswagen's evidentiary challenge to Calnetics's historical sales figures was "in effect an *in pari delicto* or 'unclean hands' defense" and thus could not bar Calnetics's antitrust suit. *Id.* at 688; *see also id.* at 689 ("[D]efendants argue that they are not challenging Calnetics'[s] right to bring an antitrust action but merely its reliance on illegal sales for proof of damages. Labels, however, are not controlling, and we find no legitimate reason for

distinguishing defendants' 'illegal sales' argument from the *in pari delicto* type of defense struck down in *Perma Life.*" (footnotes and citation omitted)). According to the panel, Calnetics could maintain its suit against Volkswagen "even though the market position from which Calnetics was displaced had been attained only through illegal conduct." *Id.* at 689. "To rule otherwise would effectively frustrate the important public policy underlining the antitrust laws: encouragement of private antitrust suits in order to deter the illegal exercise of market power." *Id.*

As such, *Calnetics* established that an injury to the fruits of a plaintiff's illegal conduct can confer antitrust standing under Section 4 of the Clayton Act. Granted, *Calnetics* involved only an evidentiary dispute and only discrete sales practices. But if there were any doubt about this principle of antitrust standing after *Calnetics,* we confirmed it in *Memorex* the following year.

In *Memorex,* plaintiffs Memorex Corporation and several affiliates ("Memorex"), originally in the business of selling magnetic recording tapes, tried to expand into the market for disk storage devices, in which market they had to compete with International Business Machines Corporation ("IBM"). 555 F.2d at 1380. Memorex sued IBM for perpetuating its purported monopoly in the disk storage device market in violation of the U.S. antitrust laws. *Id.* IBM asserted as an affirmative defense that Memorex owed its entire business presence in the disk storage device market to its unlawful misappropriation of IBM's intellectual property. *Id.* Memorex sought to strike this "unlawful market presence" defense, arguing

that it was precluded by *Calnetics.* Br. of Appellees and Cross-Appellants at 12-16, *Memorex Corp. v. IBM,* 555 F.2d 1379 (9th Cir. 1977) (Nos. 76-1887, 76-1898).

IBM responded that *Calnetics* was inapposite because the "illegal conduct in *Calnetics* involved only selling practices" and, in contrast, "Memorex would not have been a competitor [to IBM] at all" but for its theft from IBM. Reply Br. of Appellant on Antitrust Issues and Appellee's Br. on Res Judicata Issues at 3, *Memorex Corp. v. IBM,* 555 F.2d 1379 (9th Cir. 1977) (Nos. 76-1887, 76-1898). Like LegitScript here, IBM attempted to distinguish *Calnetics* on the ground that IBM's "unlawful market presence" defense was different from the defenses of *in pari delicto* and unclean hands. *Id.*; Appellant's Br. at 10-12, *Memorex Corp. v. IBM,* 555 F.2d 1379 (9th Cir. 1977) (Nos. 76-1887, 76-1898). IBM argued that the plain text of Section 4 of the Clayton Act barred Memorex from suing for injuries in a business that was not "*HIS*" but was "*stolen from*" IBM. Appellant's Br. at 9-10, 12, *Memorex Corp. v. IBM,* 555 F.2d 1379 (9th Cir. 1977) (Nos. 76-1887, 76-1898) (emphases in original).

The *Memorex* panel disagreed with IBM's arguments and instead found *Calnetics* "compelling." *Id.* at 1381-83. The panel observed IBM did not argue "that there was no injury at all, but rather that the market position which suffered injury was obtained through illegal means." *Id.* at 1383. Under *Calnetics,* such alleged illegality did not bar Memorex's claim against IBM for its alleged antitrust violations. *Id.* at 1382-83 ("Memorex's own illegal conduct did not divest it of an antitrust action. . . .

The statutory requirements for [its] suit are met. That is all that is necessary."). The *Memorex* panel reasoned that, in *Calnetics,* "[w]ere it not for Calnetics'[s] allegedly illegal conduct, it would not have suffered *any* injury because it would not have sold *any* products to Volkswagen distributors." *Id.* at 1381-82 (emphases added). "All sales" that were allegedly subject to injury resulted from commercial bribery. *Id.* at 1382. "In effect," Calnetics built "an 'illegal market presence' much as IBM suggest[ed] Memorex d[id]." *Id.* Accordingly, "[t]he 'rights' of Calnetics were no greater than those of Memorex, even assuming Memorex [had] stole[n] the patents from which its products were made." *Id.*

As such, *Memorex* confirmed that, under Section 4 of the Clayton Act, a plaintiff can suffer a legally cognizable injury when competing in a legitimate market, even if the injury is inflicted upon a business or property interest that has been obtained through the plaintiff's unlawful conduct.[9] After all, a plaintiff suing under Section 4 of the Clayton Act "is suing not only in its own behalf, but as a 'private attorney general' representing the public interest." *Javelin Corp. v. Uniroyal, Inc.,* 546 F.2d 276, 279-80 (9th Cir. 1976). "Congress established the private

9. We express no view as to whether Section 4 of the Clayton Act may or may not recognize a plaintiff 's injuries suffered while competing in an *illegitimate* market. This situation is present neither here nor in *Calnetics* or *Memorex.* Here, PharmacyChecker and LegitScript allegedly compete in the legitimate market of online pharmacy accreditation. And LegitScript does not claim the alleged market for providing comparative drug price information is illegal.

remedy to enlist the public as enforcers of the antitrust laws." *Id.* at 280. "The courts should encourage this function." *Id.*

Of course, a plaintiff who sues under Section 4 of the Clayton Act remains fully responsible for civil liabilities and, if applicable, can be subject to criminal penalties for its own illegal activities. *See Perma Life,* 392 U.S. at 139. But the plaintiff's illegality does not necessarily negate the defendant's liability to the plaintiff for antitrust violations. *Id.* Nor does it defeat the public benefits that the plaintiff's private enforcement of antitrust laws brings. *Id.* Permitting a perhaps imperfect plaintiff to sue under Section 4 of the Clayton Act serves the best interest of the public – both the plaintiff's and the defendant's wrongs can be accounted for, "instead of only one or neither." *First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co.,* 612 F.2d 1164, 1175 (9th Cir. 1980).

In this case, based on the record at this summary judgment stage, the business interests that PharmacyChecker seeks to protect are not meaningfully different from those of the plaintiffs in *Calnetics* and *Memorex,* even assuming PharmacyChecker's alleged facilitation of unlawful foreign drug importation is itself illegal. Indeed, the PharmacyChecker's businesses that LegitScript claims to be illegal are proportionally less than those claimed to be illegal in *Calnetics* and *Memorex.* Here, the parties agree that only about 56% of PharmacyChecker's total revenue was generated from clicks made by website visitors located inside the United States on hyperlinks to pharmacies located

outside the United States, from whom medications could presumably be purchased for shipment into the United States. Evidence tends to establish that only about 3.47% of these clicks resulted in actual drug transactions, which may or may not be unlawful depending on the actual circumstances underlying these transactions. For example, as mentioned *supra,* it would generally be lawful for a foreign national visiting the United States to ship himself a 90-day supply of medication for personal use. *See Personal Importation,* U.S. FOOD & DRUG ADMIN., https://www.fda.gov/industry/import-basics/personal-importation (last updated Oct. 8, 2024). LegitScript does not claim that the mere operation or the mere use of the PharmacyChecker.com website is illegal.

Based on this record, the teachings of the Supreme Court, and the binding precedents in our Circuit, we hold that PharmacyChecker is not denied antitrust standing under Section 4 of the Clayton Act simply because evidence suggests PharmacyChecker facilitated possibly unlawful importation of foreign drugs by some number of its customers. We therefore affirm the district court's denial of LegitScript's motion for summary judgment.[10]

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10. Because this appeal arises from a denial of summary judgment sought solely on the ground that PharmacyChecker lacked statutory antitrust standing, we have no occasion to decide whether PharmacyChecker may recover the damages suffered solely by the portion of its business interest that may later be proven illegal. *Cf. First Beverages,* 612 F.2d at 1174-75; *Memorex,* 555 F.2d at 1384 n.8; *Calnetics,* 532 F.2d at 689.

B.

LegitScript attacks the application of *Memorex* in this case from three angles. *First,* it contends that *Memorex* does not apply where, as here, a plaintiff's illegal conduct is not directed against the defendant. It is true that the relevant holding in *Memorex* was narrow: "[W]e hold that illegality is not to be recognized as a defense to an antitrust action when the illegal acts by the plaintiff are directed against the defendant." 555 F.2d at 1382. But we are bound not just by the holding, but also the "reasoned consideration" "germane to the eventual resolution," of our precedents. *United States v. Johnson,* 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (Kozinski, J., concurring). And, in *Memorex,* such "reasoned consideration" included the panel's discussion of why *Calnetics* was "compelling," *Memorex,* 555 F.2d at 1381-82, and how Memorex's private antitrust enforcement would benefit competition in the relevant market notwithstanding Memorex's prior conduct violative of other laws, *id.* at 1383.

To advance a narrow reading of *Memorex,* LegitScript also cites footnote five of that opinion, which stated that if "a plaintiff participates in an illegal conspiracy to restrain trade[,] an act not directed against the defendant[,] then his conduct must be evaluated under different standards." *Id.* at 1382 n.5. *Memorex* did not specify what those "different standards" might be or when illegality might serve as a defense. In our view, this footnote means that, when a plaintiff participates in an illegal conspiracy not against but alongside a defendant, the plaintiff may be divested of its antitrust standing if

the conspiracy would not have been formed but for the plaintiff's participation. *Javelin Corp.,* 546 F.2d at 279 (discussed in *Memorex,* 555 F.2d at 1383). Properly read as such, this footnote does not change our conclusion here. To the extent LegitScript argues that this footnote implicitly bars private antitrust actions brought by plaintiffs who have committed wrongdoing against third parties, this argument fails in light of *Kiefer-Stewart,* 340 U.S. at 214, in which the plaintiff wholesaler allegedly conspired with other wholesalers to fix downstream prices – conduct not necessarily directed against the defendant manufacturers – but was not therefore barred from its antitrust action against the defendants. Br. for Resp'ts at 7-8, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (2006) (No. 297), 1950 WL 78636, at *7-8.

Second, LegitScript argues that *Memorex* does not apply where, as here, a plaintiff commits a public wrong. It is true that *Memorex* referred to the public wrong of IBM's antitrust violation and contrasted it with the private wrong of Memorex's alleged illegal conduct. 555 F.2d at 1382-83. But nothing in *Memorex* indicated that the panel was somehow limiting its holding as LegitScript suggests. Nor would such a limitation be consistent with the precedents upon which *Memorex* relied. In *Kiefer-Stewart,* for example, the plaintiff was alleged to have committed price-fixing antitrust violations similar in kind but separate from those committed by the defendants. 340 U.S. at 212, 214 (describing how the defendants allegedly conspired to sell liquor only to wholesalers who would resell at prices below a fixed maximum, while the plaintiff wholesaler allegedly conspired with other

wholesalers to resell liquor only at prices above a fixed minimum). The Supreme Court in that case did not weigh whose conduct was more reprehensible before concluding that the plaintiff's alleged illegal conduct did not bar its antitrust suit against the defendants. *Id.* at 214; *see also Perma Life,* 392 U.S. at 138-39 (also involving two public wrongs); *Calnetics,* 532 F.2d at 680 (same). As the Supreme Court has cautioned, a "fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement." *Memorex,* 555 F.2d at 1383 (quoting *Perma Life,* 392 U.S. at 139).

Finally, LegitScript maintains that *Memorex* does not apply where, as here, a defendant cannot assert a counterclaim against a plaintiff's illegal conduct. Not true. The *Memorex* panel did not hinge its conclusion on the availability of a counterclaim. *See id.* at 1382 (noting that its conclusion was "particularly true when" – not true *only when* – "the defendant has other remedies available to him"); *id.* at 1382-83 (explaining that a counterclaim to offset damages and a challenge to Memorex's antitrust standing were distinct and different concepts). In fact, in *Memorex,* IBM did not – and probably could not – counterclaim against Memorex for the alleged misappropriation of intellectual property. *Id.* at 1383 & n.6 (observing that such a counterclaim might have been barred by res judicata due to IBM's previous litigation with Memorex).

IV.

Against the binding precedents of this Circuit, LegitScript relies on a Seventh Circuit decision, *Maltz v. Sax,* 134 F.2d 2 (7th Cir. 1943), and two district court decisions in the Ninth Circuit, *Modesto Irrigation Dist. v. Pac. Gas & Elec. Co.,* 309 F. Supp. 2d 1156 (N.D. Cal. 2004), *aff'd* 158 F. App'x 807 (9th Cir. 2005) (unpublished); *Pearl Music Co. v. Recording Indus. Ass'n of Am., Inc.,* 460 F. Supp. 1060 (C.D. Cal. 1978). None of them bind us, nor are they persuasive. We discuss them below.

A.

LegitScript first turns to the Seventh Circuit's 82-year old opinion in *Maltz,* 134 F.2d 2, which predated *Kiefer-Stewart* and the attendant trend against the use of unclean hands and *in pari delicto* defenses in antitrust cases, *see Calnetics,* 532 F.2d at 689 n.23.[11] In *Maltz,*

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11. *Maltz* has never been recognized by our Circuit as a persuasive authority on the dispositive issue here. It was cited by this Court only once pre-*Kiefer-Stewart* for the proposition that a treble-damage suit under Section 4 of the Clayton Act "merely redresses the private injury" rather than the "public interest," which proposition, as discussed *supra,* has been rejected by the Supreme Court in *Kiefer-Stewart* and *Perma Life. Burnham Chem. Co. v. Borax Consol.,* 170 F.2d 569, 578 & n.17 (9th Cir. 1948). Post-*Kiefer-Stewart, Maltz* was cited only three times by this Circuit. In two of those instances, we cited *Maltz* for the proposition that the right of a private party to recover damages under the Clayton Act "was intended to provoke greater respect for the Act," a proposition in line with *Kiefer-Stewart* but not dispositive of this case. *Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358, 365 (9th Cir. 1955); *see also Flintkote Co. v. Lysfjord,*

Benjamin a manufacturer of certain gambling devices, sued his competitors for antitrust violations. 134 F.2d at 3. The defendants successfully moved to dismiss the case on the ground that the plaintiff's "sole business [was] the manufacture and sale of gambling devices, the use and sale of which [were] against public policy and unlawful." *Id.* In affirming the dismissal, the Seventh Circuit found that Maltz's "business was the making and selling of goods which could only be used by purchasers in furtherance of the business of gambling." *Id.* at 5. The court thus held that Maltz had "no legal right in a business" "for which he may obtain protection either in an action at law, or by a suit in equity." *Id.* "He had no legal rights to protect," so "defendants could not invade them."[12] *Id.*

LegitScript also resorts to *Pearl Music,* 460 F. Supp. 1060, a case decided by the U.S. District Court for the

246 F.2d 368, 398 n.40 (9th Cir. 1957). The last instance in which we cited *Maltz* was in *Memorex,* where we cited *Maltz* for "the simple proposition that some injury must have occurred before the plaintiff can recover." 555 F.2d at 1383. In fact, the Seventh Circuit itself has not cited *Maltz* since 1954. The only post-Maltz, *Kiefer-Stewart* instance in which the Seventh Circuit cited *Maltz* was for the statement that private antitrust actions were authorized by the Clayton Act to further the enforcement of the U.S. antitrust laws. *Sun Theatre Corp. v. RKO Radio Pictures,* 213 F.2d 284, 289, 293 (7th Cir. 1954), *abrogated by Zenith Radio Corp. v. Hazeltine Rsch., Inc.,* 401 U.S. 321 (1971).

12. The Seventh Circuit also held that Maltz's claim was barred because he came to the court with unclean hands. *Maltz,* 134 F.2d at 5. This holding probably did not survive *Kiefer-Stewart,* 340 U.S. at 214.

Central District of California in 1978, one year after *Memorex*. The *Pearl Music* court distinguished *Memorex* and *Calnetics* because the plaintiffs in *Pearl Music*, who sold pirated tapes, "engaged in a business which [was], by its very nature, entirely illegal." *Id.* at 1067, 1068; *see also id.* at 1068 ("The almost total magnitude of this illegal conduct by plaintiffs makes their miniscule conduct that may be legal, insignificant, and, in any event, none of such miniscule and possibly legal conduct rises to the level of the legitimate activities of *Memorex* and *Calnetics*."). The court thus held that, because the plaintiffs in *Pearl Music* "engaged in wholly illegal enterprises which [were] directed against the public in violation of clear federal and state statutory criminal prohibitions," they "should not be able to assert or claim that they ha[d] rights protected by the anti-trust laws." *Id.* at 1068.

Relying on *Maltz* and *Pearl Music*, LegitScript argues that a plaintiff that engages in an entirely or almost entirely illegal business does not have antitrust standing under Section 4 of the Clayton Act. But neither case is factually apt. LegitScript fails to proffer any evidence suggesting that PharmacyChecker was not legally registered, that PharmacyChecker itself illegally imported any foreign drugs, or that PharmacyChecker's business exclusively or almost exclusively involved facilitating the illegal importation of foreign drugs. In fact, LegitScript does not dispute that PharmacyChecker engaged in legitimate businesses in many instances, acknowledging, for example, that approximately 30% of the click-through fees collected by PharmacyChecker were generated by customers outside the United States.

Hence, LegitScript's reliance on *Maltz* and *Pearl Music* is misplaced.

More fundamentally, *Maltz* and *Pearl Music* are at odds with *Calnetics.* In *Calnetics,* 532 F.2d at 689, we endorsed the reasoning of *Semke v. Enid Automobile Dealers Association,* 456 F.2d 1361 (10th Cir. 1972). In *Semke,* the Tenth Circuit allowed the plaintiff L.G. Semke, doing business as Semke Auto Mart, an unlicensed dealer in new cars, to maintain his antitrust suit, even though the defendants argued that Semke's "whole business operation" violated state licensing statutes, which served an important public interest in weeding out "unscrupulous automobile dealers." *Calnetics,* 532 F.2d at 689. More severe than Maltz, Semke did not just facilitate illegal activities; he himself engaged in a business that, like *Pearl Music* plaintiffs', was entirely illegal. Yet the Tenth Circuit recognized Semke's antitrust standing, and we relied on *Semke* in deciding *Calnetics* to encourage private antitrust enforcement.[13] *Id.*; *see also Memorex,* 555 F.2d at 1382 (citing *Semke* with approval). As such, *Maltz* and *Pearl Music* are not persuasive.

B.

LegitScript also cites *Modesto,* a case decided by the U.S. District Court for the Northern District of California, 309 F. Supp. 2d 1156, and later affirmed by us in an unpublished memorandum disposition, 158 F. App'x

13. Notably, while Semke's business, as he carried it out, was illegal, he competed in a legitimate market.

807. In that case, the plaintiff Modesto Irrigation District ("Modesto") attempted to expand its electricity services into Pittsburg, California – an area serviced by Pacific Gas and Electric Company ("PG&E") – without governmental approval, believing such approval was unnecessary. *Modesto,* 309 F. Supp. 2d at 1159-62. Modesto alleged that PG&E engaged in anticompetitive conduct to forestall its expansion into Pittsburg, and PG&E moved for summary judgment on one of its affirmative defenses: that Modesto lacked antitrust injury. *Id.* at 1161-62.

The district court found that governmental approval was required for Modesto's expansion into Pittsburg. *Id.* at 1163-69. Then, the district court reasoned that, because Modesto "possessed neither the legal right nor the necessary [governmental approval] to expand its services into Pittsburg," PG&E's alleged conduct trying to exclude Modesto from servicing Pittsburg "could not inflict a[] cognizable antitrust injury." *Id.* at 1170. On appeal, the *Modesto* panel affirmed, holding that because Modesto did not receive the necessary governmental approval, it was "not a lawful competitor of" PG&E in Pittsburg and thus "could not have suffered an antitrust injury at the hands of PG&E" there. *Modesto Irrigation Dist. v. Pac. Gas & Elec. Co.,* 158 F. App'x 807, at *1 (9th Cir. 2005) (unpublished).

Modesto stands for the unremarkable proposition that a private plaintiff does not suffer an *antitrust* injury if it would suffer the same injury in the absence of the alleged anticompetitive conduct. Simply put, antitrust standing is lacking where "a force other than the antitrust violation

fully accounts for the plaintiff's injury." 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 338, at 320 (2d ed. 2000). In *Modesto,* even absent PG&E's alleged anticompetitive conduct, Modesto would not have been able to service Pittsburg because it lacked the necessary governmental approval. Here, however, PharmacyChecker is allegedly foreclosed from the relevant markets solely on account of LegitScript's alleged anticompetitive conduct. LegitScript has identified no other forces that could fully explain PharmacyChecker's alleged injury, such as any government enforcement actions or the threat thereof to enjoin the operation of the PharmacyChecker.com website. *Modesto* is thus distinguishable.[14]

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14. Likewise distinguishable are other cases cited by LegitScript that are similar to *Modesto. See Snake River Valley Elec. Ass'n v. PacifiCorp,* 357 F.3d 1042, 1051 (9th Cir. 2004) (holding that the defendant's "refusal to give some of its current or former customers to [the plaintiff] was required by statute, [thus] shielding [the defendant]'s action from antitrust liability"); *Vinci v. Waste Mgmt., Inc.,* 80 F.3d 1372, 1375-77 (9th Cir. 1996) (holding that the plaintiff, neither a competitor nor a consumer in the relevant market, did not have antitrust standing as a dismissed employee to challenge the alleged anticompetitive conduct on the ground that his refusal to participate in that conduct caused his employment termination); *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.,* 113 F.3d 405, 418 (3d Cir. 1997) (holding that the plaintiff lacked antitrust standing because both law and contract prevented the plaintiff from competing with the defendant). The same is true for *In re Canadian Import Antitrust Litigation,* 470 F.3d 785 (8th Cir. 2006), and *Realnetworks, Inc. v. DVD Copy Control Association, Inc.,* No. C 08-4548 MHP, 2010 WL 145098 (N.D. Cal. Jan. 8, 2010), both of which Judge Simon properly distinguished. *In re Canadian Imp. Antitrust Litig.,* 470 F.3d at 791 ("The absence of competition from Canadian sources in the domestic prescription drug market,

V.

Following this Circuit's binding precedents in *Calnetics,* 532 F.2d 674, and *Memorex,* 555 F.2d 1379, we "continue to side with the goal of vigorous enforcement of our antitrust laws," *id.* at 1383, "the Magna Carta" for "the preservation of [our] economic freedom and [] free-enterprise system," *United States v. Topco Assocs., Inc.,* 405 U.S. 596, 610 (1972).

AFFIRMED.

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therefore, is caused by the federal statutory and regulatory scheme adopted by the United States government, not by the conduct of the defendants."); *Realnetworks,* 2010 WL 145098, at *5, *6 (the court did "not hold that [the plaintiff] [was] barred from maintaining an antitrust claim because it [had] engaged in illegal activity"; rather, the court held that whatever injury the plaintiff might have suffered stemmed not from the defendant's alleged anticompetitive conduct, but from injunctions issued by the court).

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, FILED JANUARY 3, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 3:22-cv-252-SI

PHARMACYCHECKER.COM LLC,

Plaintiff,

v.

LEGITSCRIPT LLC,

Defendant.

OPINION AND ORDER

Michael H. Simon, District Judge.

Plaintiff PharmacyChecker.com LLC (PharmacyChecker) brings this antitrust lawsuit under § 1 of the Sherman Act, 15 U.S.C. § 1, alleging that it is the victim of a conspiracy to restrain competition in the markets for online pharmacy verification services and comparative drug pricing information. As alleged by PharmacyChecker, the United States is in a prescription drug crisis. The cost of prescription medicine in the United States is higher than anywhere in the world, and the effect on public health is disastrous. Millions of Americans each year do not fill needed prescriptions because of cost. As a result, many become sicker or even die. Others—about

four million people annually—seek their medications from pharmacies abroad at lower cost. Yet prescription drug importation into the United States is generally forbidden by federal law.

PharmacyChecker launched PharmacyChecker.com in 2003. PharmacyChecker compares the prices of online pharmacies based inside and outside the United States. According to PharmacyChecker, it operates a rigorous accreditation program that informs visitors of online pharmacy websites whether those pharmacies have met certain safety standards and obtained certain credentials. It also provides drug price comparison information that allows visitors worldwide to find the lowest prices for their prescription medications, whether dispensed in the United States or abroad. In addition, it offers a prescription drug discount card that allows consumers to save as much as 90% at many U.S. pharmacies. PharmacyChecker also raises awareness about policy issues relating to prescription medication access and affordability in the United States. PharmacyChecker is not a pharmacy and does not itself buy, sell, import, dispense, process orders for, or distribute any drugs.

In August 2019, PharmacyChecker filed a federal lawsuit in the Southern District of New York (the New York Case). In that action, PharmacyChecker alleged violations of federal antitrust law, among other claims, and sued five alleged conspirators: (1) the National Association of Boards of Pharmacy (NABP); (2) the Alliance for Safe Online Pharmacies; (3) the Center for Safe Internet Pharmacies Ltd.; (4) the Partnership for Safe Medicines,

Inc.; and (5) the defendant here, LegitScript LLC (LegitScript).[1] The first four defendants (collectively, the New York Defendants) are business associations or organizations of pharmacy industry players. LegitScript is a for-profit, privately managed verification and monitoring service for online pharmacies. It is the only private service of that kind recognized by Defendant NABP. PharmacyChecker alleges that LegitScript directly competes with PharmacyChecker in the market for online pharmacy verification services.

Now before the Court is a motion for summary judgment filed by LegitScript. Because of issues relating to personal jurisdiction, LegitScript is the only defendant in this action in the District of Oregon. The other alleged conspirators, the New York Defendants, have since prevailed in the New York Case on their own motion for partial summary judgment against PharmacyChecker's antitrust claim. In the pending motion in this case, LegitScript argues that issue preclusion bars PharmacyChecker from continuing its antitrust claim in this Court. Alternatively, LegitScript moves for summary judgment on the same grounds that the New York Defendants argued in the New York Case, asserting that PharmacyChecker has not suffered any cognizable antitrust injury and therefore lacks standing. LegitScript

1. The Court's Opinion and Order denying LegitScript's motion to dismiss expands on the allegations against the defendants in the New York Case, their roles in the alleged conspiracy to restrain competition, and the relevant markets alleged by PharmacyChecker. *PharmacyChecker.com LLC v. LegitScript LLC*, 614 F. Supp. 3d 796, 803-08 (D. Or. 2022).

contends that the main purpose of PharmacyChecker's business is to enable U.S. consumers illegally to import for personal use prescription drugs from foreign pharmacies.

PharmacyChecker responds that issue preclusion is not applicable because the partial summary judgment opinion in the New York Case is not a sufficiently final judgment to warrant preclusive effect. PharmacyChecker also argues that LegitScript fails to meet its burden of showing that issue preclusion applies because the issues in the two cases are not identical because a different legal standard applies under Ninth Circuit law than was applied in the New York Case. PharmacyChecker further argues that its business is entirely legal and that under Supreme Court and Ninth Circuit precedent, none of PharmacyChecker's activities preclude antitrust standing. For the reasons explained below, the Court denies LegitScript's motion for summary judgment.

STANDARDS

A. Summary Judgment

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the

non-movant's favor. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). Although "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment," the "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quotation marks omitted).

B. Antitrust Standing and Antitrust Injury

A private plaintiff may sue to enforce the Sherman Act under § 4 of the Clayton Act, 15 U.S.C. § 15(a). That statute provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ., and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). A private plaintiff, however, must have "antitrust standing." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000). When deciding whether a plaintiff has antitrust standing, courts consider "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5)

the complexity in apportioning damages." *Id.* (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054-55 (9th Cir. 1999)).

The first factor for antitrust standing—the "nature of the plaintiff's alleged injury"—requires a showing of what the law calls "antitrust injury," that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)). A showing of antitrust injury is necessary, but not always sufficient, to establish standing under the antitrust laws. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986); *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 456 (9th Cir. 2021) (describing antitrust injury as "mandatory" for antitrust standing); *see also* William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1483-85 (1985) (distinguishing concepts of antitrust injury and antitrust standing).

Parsing the Supreme Court's definition from *Atlantic Richfield Co.*, the Ninth Circuit has identified "four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt*, 190 F.3d at 1055.

Appendix B

BACKGROUND[2]

A. PharmacyChecker's Products and Revenues

PharmacyChecker provides information services to its website visitors without charge. Some of these visitors

2. As noted, LegitScript's motion is based on two alternative arguments. One relies on issue preclusion, and the other is based on facts relating to PharmacyChecker's alleged antitrust injury. The parties did not provide evidence to this Court on the second issue, only briefing. LegitScript stated in its motion that it incorporated by reference the briefing and exhibits filed in the New York Case. At oral argument, LegitScript explained that it did not obtain discovery from PharmacyChecker because many exhibits in the New York Case were subject to a protective order. But this Court was unable to access the documents filed under seal in New York. Further, asking this Court to locate in the docket of the New York Case evidentiary support, whether under seal or not, for LegitScript's motion here is not an appropriate method of presenting evidence. LegitScript acknowledged that it "may have erred . . . simply to refer to the record in New York." The Court allowed the parties to submit supplemental briefing and evidence after oral argument. PharmacyChecker submitted several documents that had been filed in the New York Case: the declaration of its President and Co-founder Gabriel Levitt (ECF 282-1), and PharmacyChecker's statement of material facts submitted in the New York Case, which included the statement of material facts submitted by the New York Defendants (ECF 282-2). In response, and to "complete the record," LegitScript filed the reply to PharmacyChecker's statement of material facts filed by the New York Defendants (ECF 291). No party objected to these submissions, and the Court accepts them. The Court also construes LegitScript as having adopted the factual positions asserted by the New York Defendants. Further, the Court considers evidence submitted elsewhere in this Court's record, including the affidavits of PharmacyChecker's Chief Executive Officer and Co-founder, Tod Cooperman, MD (ECF 19, 56).

never click through to any pharmacy's website. These visitors simply use the information on PharmacyChecker's website as a comparative-price reference, for research, for use in policy advocacy, or as an educational tool. A Wall Street Journal op-ed recognized PharmacyChecker as one of just a handful of companies that provide patients and policymakers with a resource that gives transparency to prescription drug prices.[3] In addition, PharmacyChecker's online pharmacy verification and drug price comparison services are referenced in media sources, including AARP Magazine, the Wall Street Journal, NBC News, Yahoo Finance, the New York Times, Kaiser Health News, and others. Its drug price comparisons have been cited by the FDA and academic researchers. Organizations such as Medicines Sans Frontiers (Doctors Without Borders) have sought advice from PharmacyChecker on international pharmacy safety and drug pricing, and the World Health Organization has published reports citing PharmacyChecker. Its executives have testified before Congress regarding counterfeiting and other issues relating to prescription drugs. Further, a U.S. Senate staff report expressly relied on data from PharmacyChecker.[4]

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3. Joe Grogan & Casey B. Mulligan, *In Defense of Pharmacy Benefit Managers*, Wall St. J. (July 11, 2022), https://www.wsj.com/articles/in-defense-of-pharmacy-benefit-managers-drugs-rebates-patient-costs-premiums-transparency-innovation-regulation-ftc-11657571932 ("Companies such as GoodRx, Pharmacy Checker, and SaveonMeds add transparency to the system and give patients the option to access affordable medication outside their pharmacy benefits.").

4. U.S. Senate Homeland Sec. & Gov't Affs. Comm., Ranking Member's Office, *Manufactured Crisis* 4 (2018) ("Using PharmacyChecker.com, staff also reviewed price comparisons

Rather than charge visitors a fee for its information services, PharmacyChecker supports its website and programs with revenue obtained from several sources. For purposes of the pending motion, the parties agree that the bulk of PharmacyChecker's revenue from January 2015 to August 2021 derived from click-through fees (85%) and verification program fees (14%) (including fees for accreditation and listing) paid by online pharmacies. Its remaining revenue, about 1%, came from other sources, such as its prescription drug discount card, Medicare drug plans, advertising, and the sale of e-books.

Click-through fees are a common form of payment for traffic on the internet. Online pharmacies pay a fee for each click to their website routed through PharmacyChecker.com, regardless of the clicker's geographic origin or location. The parties agree that approximately 95% of PharmacyChecker's click-through revenue from January 2015 to August 2021 was paid by foreign pharmacies. The parties also agree that U.S.-based clicks generated only 69.4% of click-through revenue during that time. PharmacyChecker also provides other evidence that millions of users outside of the United States view and use its website.

PharmacyChecker agrees that between 94 to 96% of its total revenue came from foreign pharmacies. As noted above, however, not all PharmacyChecker's total revenue, which would include total revenue from foreign pharmacies, was from *click-through revenue*, let alone

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for specific brand-name drugs available through verified online pharmacies.").

U.S.-based (or U.S. origin) click-through revenue. Mr. Levitt explains in his declaration that even applying the figures assumed by the New York Defendants' expert, at most only 56.7% of PharmacyChecker's total revenue came from clicks by U.S. users (or visitors) to foreign pharmacies. Mr. Levitt multiplied PharmacyChecker's total click-through revenue by the percentage of U.S. based consumers (69.4%), then multiplied that number by the percentage of click-through revenue from foreign pharmacies (rounding up from approximately 95% to 96%), then divided that number by PharmacyChecker's total revenue, to arrive at 56.7%.

LegitScript, however, focused on the fact that 96% of click-through revenue came from foreign pharmacies and 85% of total revenue came from all click-through revenue, in asserting the percentage of total revenue based on click-throughs to foreign pharmacies. This would equal 81.6% of total revenue. This calculation, however, does not distinguish *U.S.-based* clicks (agreed by the parties to be 69.4%). Reducing the total revenue attributable to foreign pharmacy click-through income to only U.S. based click-throughs (81.6% times 69.4% equals 56.63%), the parties would have almost identical percentages for PharmacyChecker's total revenue received from foreign pharmacies based on U.S. clicks (56.63% versus 56.7%).

As noted, about 14% of PharmacyChecker's revenue came from verification program fees paid by participating online pharmacies, including initial application and annual fees for verification, and monthly listing fees for being published in PharmacyChecker's online directory. Only verified pharmacies may participate in PharmacyChecker's

drug-listing comparison program. Mr. Levitt also calculates that 13.7% of PharmacyChecker's verification program revenue came from U.S.-based pharmacies. Although the parties dispute precise percentages, they agree that about 5% of PharmacyChecker's total revenue from January 2015 to August 2021 was from verification fees paid by U.S. online pharmacies and click-through fees paid by U.S. online pharmacies.

PharmacyChecker does not track visitor activity after visitors to its website click through to a pharmacy website and thus has no data connecting clicks to purchase transactions. It also does not receive that information from pharmacies that participate in its programs. PharmacyChecker earns revenue when visitors click through to pharmacies, but none of that revenue depends on whether a purchase transaction occurs (except for revenue associated with the U.S. prescription drug discount card). Mr. Levitt explains that according to one foreign pharmacy's estimate, only 3.47% of clicks received through PharmacyChecker.com led to a purchase transaction. In addition, LegitScript has provided evidence showing that in at least three instances PharmacyChecker assisted or offered to assist U.S. consumers who purchased prescriptions from foreign pharmacies for personal use deal with issues related to their orders.

B. Purported Anticompetitive Conduct and Injury

PharmacyChecker alleges that the purported conspirators have engaged in targeted and coordinated misinformation and "scare" campaigns, group boycotts, and other exclusionary conduct, all with an objective of

destroying PharmacyChecker's reputation, suppressing its presence in consumer-accessible channels of the internet, and interfering with its business relationships. PharmacyChecker also alleges that the actions of the alleged conspirators fall into five general categories: (1) "blacklisting" PharmacyChecker and having its website designated as "unsafe"; (2) manipulating search engine results; (3) gatekeeping over the ".pharmacy" domain extension and trying to have the International Corporation for Assigned Named and Numbers require the removal of any pharmacy domain not approved by NAPB; (4) persuading pharmacies not to work with PharmacyChecker; and (5) spreading misinformation adverse to PharmacyChecker.[5]

As for injury, PharmacyChecker provides evidence that directly after the alleged anticompetitive conduct by LegitScript and the New York Defendants, PharmacyChecker's site traffic from organic search results dropped more than 78%. PharmacyChecker also provides evidence that its monthly click-through revenue dropped by more than 77% since March 2019. PharmacyChecker also offers evidence of reputational harms. Mr. Cooper and Mr. Levitt explain that fewer U.S. pharmacies have participated in PharmacyChecker's programs in recent years, allegedly because of the concerted efforts by LegitScript and the New York

5. In its pending motion, LegitScript does not argue that there is insufficient evidence of these allegations to raise a genuine issue for trial on the merits of PharmacyChecker's antitrust claim, and the Court makes no finding either way. This discussion is provided solely for background purposes.

Defendants. PharmacyChecker contends that the alleged conspirators coerced or dissuaded U.S. pharmacies from participating in PharmacyChecker's verification and listing programs.

PharmacyChecker gives as an example HealthWarehouse.com, one of the largest U.S. online pharmacies, which left PharmacyChecker's verification program in 2017. Mr. Levitt describes an email he received from HealthWarehouse.com in January 2017, stating that it would have to leave the PharmacyChecker Verification Program or risk losing its Verified Internet Pharmacy Practice Sites (VIPPS) accreditation, which is run by New York Defendant NABP. Similarly, Mr. Cooper explains that LegitScript and the New York Defendants coordinated U.S.-targeted advertisements using "pharmacychecker" as a Google AdWord to dissuade both online pharmacies and consumers from associating with it or using its services. Mr. Levitt describes that from 2015 to the present, contemporaneous with the alleged conspiracy, the number of U.S. pharmacies participating in PharmacyChecker's verification program dropped from 36 to 8.

C. The New York Case

In March 2020, LegitScript moved to dismiss in the New York Case, arguing that the federal court in New York lacked personal jurisdiction over LegitScript, an Oregon company. U.S. District Judge Kenneth M. Karas found that the federal court in New York lacked personal jurisdiction over LegitScript and dismissed

PharmacyChecker's claims against LegitScript without prejudice. *PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds. of Pharmacy* (*PharmacyChecker I*), 530 F. Supp. 3d 301, 320-27 (S.D.N.Y. 2021). Rather than filing an amended complaint in New York, PharmacyChecker moved to sever its claim against LegitScript. In February 2022, Judge Karas transferred PharmacyChecker's lawsuit against LegitScript to the District of Oregon. Shortly thereafter, LegitScript moved to dismiss under Rule 12(b)(6), which the Court denied in July 2022. *PharmacyChecker.com LLC v. LegitScript LLC* (*PharmacyChecker II*), 614 F. Supp. 3d 796 (D. Or. 2022). The Court also denied LegitScript's motion to stay discovery. *Pharmacychecker. Com LLC v. Legitscript LLC*, 2022 U.S. Dist. LEXIS 221291, 2022 WL 17496113 (D. Or. Dec. 8, 2022).

Meanwhile, in June 2022, the New York Defendants moved for partial summary judgment against PharmacyChecker's antitrust claim against them, arguing that PharmacyChecker lacked antitrust standing. The New York Defendants argued that PharmacyChecker could not show antitrust standing because the main purpose of its business is to facilitate illegal conduct by others, specifically, assisting consumers in the United States in purchasing and importing prescription drugs for their personal use from certified pharmacies located in other countries. In March 2023, Judge Karas granted that motion. *PharmacyChecker.com v. Nat'l Ass'n of Bds. of Pharmacy* (*PharmacyChecker III*), 2023 U.S. Dist. LEXIS 66888, 2023 WL 2973038 (S.D.N.Y. Mar. 28, 2023). Judge Karas ruled that PharmacyChecker lacks antitrust standing because its business is "completely or

almost completely geared toward facilitating" consumers' alleged illegal importation of non-controlled drugs for personal use with a prescription. 2023 U.S. Dist. LEXIS 66888, [WL] at *30.

DISCUSSION

A. Issue Preclusion

LegitScript first argues that the Court should grant summary judgment based on issue preclusion[6] because Judge Karas already decided antitrust standing in favor of the New York Defendants. PharmacyChecker responds that this argument should fail because there is no final judgment in the New York Case or, in the alternative, because the issues are not the same.

1. Standards for Issue Preclusion

"The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008). Claim preclusion occurs when "a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *Id.* (quotation marks omitted). "Issue preclusion, in contrast, bars successive

6. Courts previously referred to the form of issue preclusion being sought by LegitScript as "offensive nonmutual collateral estoppel."

litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Id.* (quotation marks omitted). "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, these two doctrines protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* (cleaned up).

To establish issue preclusion, formerly known as collateral estoppel, "the party asserting issue preclusion" must show that: "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040, 1041 (9th Cir. 2017) (quotation marks omitted); *see also Love v. Villacana*, 73 F.4th 751, 754 (9th Cir. 2023) (same). "A final judgment is afforded preclusive effect even if erroneous." *Love*, 73 F.4th at 754.

Courts typically evaluate the first prong—whether the issue is identical—using four factors:

> (1) is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first?
>
> (2) does the new evidence or argument involve the application of the same rule of law as that involved in the prior proceeding?

> (3) could pretrial preparation and discovery related to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second?
>
> (4) how closely related are the claims involved in the two proceedings?

Howard, 871 F.3d at 1041 (quoting *Resolution Tr. Corp. v. Keating*, 186 F.3d 1110, 1116 (9th Cir. 1999)). These factors, however, "are not applied mechanistically." *Id.*

2. Analysis

a. Finality of New York Case Decision

PharmacyChecker argues that the partial summary judgment decision by Judge Karas is not a final judgment for purposes of issue preclusion. In *Arizona v. California*, the Supreme Court stated the "general rule" that "issue preclusion attaches only '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.'" 530 U.S. 392, 414, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (alteration in original) (quoting Restatement (Second) of Judgments § 27 (1982)), *supplemented*, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000). In discussing the preclusive effect of a prior court decision for issue preclusion, courts generally reference a "judgment." *See Taylor*, 553 U.S. at 892 (stating that issue preclusion "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the

prior judgment" (quotation marks omitted)); *Howard*, 871 F.3d at 1040-41 (quoting *Taylor*).[7]

"To be 'final' for collateral estoppel purposes, a decision need not possess 'finality' in the sense of 28 U.S.C. § 1291. A final judgment for purposes of collateral estoppel can be any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) (quotation marks omitted). To determine whether a decision is "sufficiently firm," the Ninth Circuit adopted the factors from the Restatement (Second) of Judgments:

> [P]reclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, *that the decision was subject to appeal or was in fact reviewed on appeal*, are factors supporting the conclusion that the decision is final for purpose of preclusion.

Id. (emphasis and alteration added in *Luben*). The Ninth Circuit has subsequently stated in discussing the requirements for issue preclusion that the decision must be appealed or appealable. *See Env't Prot. Info.*

7. The Ninth Circuit has repeatedly stated the *Taylor* standard for issue preclusion. *See, e.g., Mull v. Motion Picture Indus. Health Plan*, 41 F.4th 1120, 1140 (9th Cir. 2022); *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019); *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 955 (9th Cir. 2017).

Ctr., Inc. v. Pac. Lumber Co., 257 F.3d 1071, 1076 (9th Cir. 2001) ("As collateral estoppel does not apply to an unappealable determination, simply holding a ruling unappealable eliminates any prospect of preclusion."); *Dixon v. Wallowa County*, 336 F.3d 1013, 1020 (9th Cir. 2003) ("Issue preclusion does not apply to an issue that is not appealable.").

"[P]artial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case." Fed. R. Civ. P. 56(d) advisory committee's note to 1946 amendment, *quoted with approval in Lahoti v. VeriCheck, Inc.*, 586 F.3d 1190, 1202 n.9 (9th Cir. 2009). The 2010 amendment to Rule 56, among other things, specifically referenced "partial summary judgment" in Rule 56(a) and moved the court's authority to issue an order adjudicating undisputed facts and granting less than full relief on a motion to Rule 56(g) but reaffirmed that partial summary judgment is "disposition of less than the whole action, whether or not the order grants all the relief requested by the motion." Fed. R. Civ. P. 56(a) advisory committee's note to 2010 amendment. A decision granting partial summary judgment generally is not appealable. *See Solis v. Jasmine Hall Care Homes, Inc.*, 610 F.3d 541, 545-46 (9th Cir. 2010).

Applying Alaska law, the Ninth Circuit considered whether a decision granting partial summary judgment could be given preclusive effect. *St. Paul Fire & Marine Ins. Co. v. F.H.*, 55 F.3d 1420 (9th Cir. 1995). The Ninth Circuit concluded that the partial summary judgment decision was not "sufficiently firm" because the decision

"could not have been appealed . . . when it was entered," "was subject to reconsideration on proper motion" under Rule 54(b) of the Alaska Rules of Civil Procedure, and "[t]he court could, on its own initiative, revise the order at any time before judgment." *Id.* at 1425 (quotation marks omitted). This reasoning is equally applicable under federal law. Decisions adjudicating motions for partial summary judgment generally can be modified under Rule 54(b) of the Federal Rules of Civil Procedure by a court either on its own initiative or on a motion by the parties. *See, e.g., Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005) ("Federal Rule of Civil Procedure 54(b) states that a district court can modify an interlocutory order 'at any time' before entry of a final judgment, and we have long recognized the well-established rule that a district judge always has power to modify or to overturn an interlocutory order or decision while it remains interlocutory." (quotation marks omitted)); *Blackburn v. Sturgeon Servs. Int'l, Inc.*, 2014 U.S. Dist. LEXIS 42259, 2014 WL 1275919, at *1 (E.D. Cal. Mar. 27, 2014) ("On its own motion, the Court here revises its prior order granting partial summary judgment."); *In re Galena Biopharma, Inc. Derivative Litig.*, 2014 U.S. Dist. LEXIS 154652, 2014 WL 5494890 (D. Or. Oct. 30, 2014) (discussing the factors district courts in the Ninth Circuit consider in evaluating a motion for reconsideration filed under Rule 54(b)). Further, such decisions generally are not appealable until a final judgment has been entered, absent the grant of mandamus. *Solis*, 610 F.3d at 545-46.

Similarly, the Ninth Circuit in *Luben* affirmed the district court's conclusion that a non-tentative, reasoned

interlocutory opinion was not entitled to collateral estoppel effect because it was not sufficiently firm. *Luben*, 707 F.2d at 1040. The Ninth Circuit agreed with the district court's explanation that the interlocutory opinion was "subject to free revision by the court on its own motion or on motion of any party at any time before judgment" and added that the opinion "could not have been the subject of an appeal at the time the instant case was decided in the District Court." *Id.* The Ninth Circuit also refused to apply issue preclusion for a reason not reached by the district court. The Ninth Circuit was "convinced that the Government did not have a 'full and fair opportunity to litigate' its claim because it could not appeal the interlocutory memorandum" at issue. *Id.* This again emphasizes the importance of the appealability requirement.

Judge Karas's decision does not appear to be tentative, the parties were fully heard, and Judge Karas issued a reasoned opinion. Nonetheless, like the opinions found lacking in *St. Paul* and *Luben*, the partial summary judgment opinion issued by Judge Karas could not be appealed at this time because Judge Karas declined to enter a Rule 54(b) partial judgment. Thus, his ruling is subject to his revision at any time before final judgment is entered in the New York Case. *See* Fed. R. Civ. P. 54(b). Thus, it is not entitled to preclusive effect.[8] *See St. Paul*,

8. LegitScript argues that a final judgment is not required and that *St. Paul* is distinguishable because it applied Alaska law. The three bases relied on by the Ninth Circuit in *St. Paul* for concluding that a partial summary judgment opinion is insufficiently firm for preclusive effect, however, are identical under federal law and Alaska law. Additionally, most of the cases cited by LegitScript

55 F.3d at 1425; *Luben*, 707 F.2d at 1040; *see also Kottom v. Walker*, 2015 U.S. Dist. LEXIS 157380, 2015 WL 7301849, at *4 (N.D. Cal. Nov. 19, 2015) (declining to apply issue preclusion to an opinion granting partial summary judgment); *Householder Grp., LLLP v. Van Mason*, 2010 U.S. Dist. LEXIS 129682, 2010 WL 5093117, at *3 (D. Ariz. Dec. 8, 2010) (declining to apply issue preclusion to partial summary judgment order, relying on *St. Paul* and stating that "[t]he Ninth Circuit's language [in *St. Paul*] concerning the non-preclusive effect of a partial summary judgment order is both forceful and general in nature, and strongly suggests that the opportunity to appeal and the finality of an order are important, if not the most important, considerations for a district court"); 2010 U.S. Dist. LEXIS 129682, [WL] at *2 ("[T]he *St. Paul* decision, while stopping short of articulating a black and white rule, strongly suggests that partial summary judgment

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involved a decision that was appealed or could have been appealed but was not. They are thus inapposite to this case, which involves an opinion that is generally not appealable and for which a Rule 54(b) partial judgment was requested but denied. LegitScript cites *Security People, Inc. v. Medeco Security Locks, Inc.*, 59 F. Supp. 2d 1040 (N.D. Cal. 1999), in which the district court stated that a disposition by summary judgment is a decision on the merits and given preclusive effect. *Id.* at 1045. That is not necessarily incorrect as a general proposition. A summary judgment decision resolving all issues in a case is appealable and not subject to the deficiencies critical to the analysis in *Luben* and *St. Paul*. It is unclear whether the summary judgment decision at issue in *Security People* was complete or partial. Regardless, *Security People* did not address the appealability issue emphasized in *Luben* and other Ninth Circuit cases. It was affirmed without any discussion by the Federal Circuit. The Court does not find *Security People* persuasive in the current context on the question now pending.

orders by their very nature are not sufficiently firm to have a preclusive effect on any future proceedings."); *DRK Photo v. McGraw-Hill Cos.*, 2014 U.S. Dist. LEXIS 78864, 2014 WL 2584811, at *5 (D. Ariz. June 10, 2014) ("The holding in *St. Paul* calls into question the preclusive effect of the partial summary judgment order in *Wiley*. Accordingly, the Court finds that collateral estoppel does not apply to the standing issue."), *aff'd sub nom. DRK Photo v. McGraw-Hill Glob. Educ. Holdings, LLC*, 870 F.3d 978 (9th Cir. 2017); 10B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2737 (4th ed. 2023) (explaining that an adjudication of less than the entire action under Rule 56(g) of the Federal Rules of Civil Procedure is not appealable and "has no preclusive impact, since the trial court retains jurisdiction to modify the order at any time prior to the entry of a final judgment" (footnote omitted)); *cf. McMillan v. Lowe's Home Ctrs., LLC*, 2016 U.S. Dist. LEXIS 6673, 2016 WL 232319, at *4 (E.D. Cal. Jan. 20, 2016) (relying primarily on *St. Paul* in declining to apply issue preclusion because the order "denying Lowe's' motion to dismiss is not currently appealable and is subject to free revision by the court on its own motion or on motion of any party at any time before judgment" and thus concluding that "the Illinois district court's order is not 'sufficiently firm' to constitute a final judgment for purposes of issue preclusion").

Further, even if the partial summary judgment opinion in the New York Case might qualify as "sufficiently firm" to warrant consideration for issue preclusion, LegitScript's argument would still fail. As discussed next, LegitScript fails its burden to show the elements required for issue preclusion.

b. Elements for Issue Preclusion

As noted, even if Judge Karas's partial summary judgment ruling is "sufficiently firm" to satisfy that requirement for preclusive effect, LegitScript still must meet its burden to show the other elements of issue preclusion. *Howard*, 871 F.3d at 1040. LegitScript fails to show both a full and fair opportunity to litigate the issues and identicality.

i. Full and Fair Opportunity to Litigate

PharmacyChecker has not been able to appeal Judge Karas's interlocutory opinion. In such circumstances, the Ninth Circuit has concluded that a party does not have a full and fair opportunity to litigate an issue, precluding application of issue preclusion. *See, e.g., Luben*, 707 F.2d at 1040 ("Moreover, we are convinced that the Government did not have a 'full and fair opportunity to litigate' its claim because it could not appeal the interlocutory memorandum in *Bristol*. Thus, we conclude that the District Court did not abuse its discretion in rejecting the application of the doctrine of collateral estoppel against the Government on the issue."). Thus, LegitScript fails to show the applicability of issue preclusion.

ii. Identicality

LegitScript also must show that the issues are identical between the proceedings for issue prelusion to apply. *Howard*, 871 F.3d at 1041. *Howard* provides four factors for courts to consider when evaluating whether an issue is identical in both proceedings. *Id.* As noted,

"these factors are not applied mechanistically." *Id.* The Court may prioritize some factors over others or omit some altogether. *See, e.g., Syverson v. Int'l Bus. Machs. Corp.*, 472 F.3d 1072, 1080-81 (9th Cir. 2007) (mentioning only three of the four factors); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002) (evaluating only factual overlap without discussing the remaining factors).

The second of these "identicality" factors is whether "the new evidence or argument involve the application of the same rule of law as that involved in the prior proceeding." *Howard*, 871 F.3d at 1041. Moreover, issue preclusion is unavailable when a different legal standard applies, even to the same facts. *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971) (per curiam) ("Issues are not identical if the second action involves the application of a different legal standard, even though the factual setting of both suits is the same."); *Sw. Pet Prods. v. Koch Indus.*, 32 F. App'x 213, 215 (9th Cir. 2002) (issues not identical where "different rule of law applies"). Thus, the Court should not grant preclusive effect to an issue decided under a legal standard inapplicable in this Circuit.

The Court agrees with LegitScript that the top-level issue is the same: whether PharmacyChecker lacks antitrust standing. The questions that Judge Karas decided, however, are whether PharmacyChecker's business is "completely or almost completely geared towards facilitating illegality" and, if so, whether that is a barrier to antitrust standing. Judge Karas derived this legal standard from his analysis of various cases.

LegitScript assumes that the same rule of law applies in the Ninth Circuit, but the standard described by Judge Karas is not the law in the Ninth Circuit. Thus, the issues are not identical if a different legal standard applies in this Court. *Peterson*, 451 F.2d at 1292. Indeed, Judge Karas noted that a decision from the Southern District of New York, or even from the Second Circuit, is not binding in the District of Oregon in the Ninth Circuit.[9] Further, this Court previously reached the same conclusion.[10]

As discussed below, because Ninth Circuit precedent provides a different legal standard than the standard

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9. *PharmacyChecker.com LLC v. Nat'l Ass'n of Bds. of Pharmacy*, 2023 U.S. Dist. LEXIS 97567, 2023 WL 4492148, at *2 (S.D.N.Y. June 5, 2023) ("The Parties fail to explain how their 'belief' that additional finality in the form of a Second Circuit appeal of the purely legal, standing-related question would 'shape' the District of Oregon proceedings. . . . [PharmacyChecker] originally brought claims against LegitScript LLC, which were severed and transferred to the District of Oregon upon LegitScript's motion. However, a Second Circuit decision regarding antitrust standing in this case would be persuasive at best, and certainly not binding upon a district court in the Ninth Circuit. As such, judicial administrative interests are not served as suggested by the Parties—both cases will likely continue in parallel due to choices made by Defendants at the outset of this case." (citations to the record omitted)).

10. *Pharmacychecker.Com LLC v. Legitscript LLC*, 2022 U.S. Dist. LEXIS 221291, 2022 WL 17496113, at *3 (D. Or. Dec. 8, 2022) (denying a motion to stay proceedings and explaining that "[e]ven if the Southern District of New York grants summary judgment, it is unclear whether Ninth Circuit precedent on this issue would yield the same result" and that "the Supreme Court has not yet resolved this question of law, and the law among the circuits may yield different conclusions").

applied by Judge Karas, the issues are not identical. Thus, even if Judge Karas's decision was the type of opinion otherwise warranting preclusive effect, LegitScript fails to show two of the required elements of issue preclusion and the Court would not apply issue preclusion. Instead, the Court independently evaluates whether the relevant antitrust precedent dictates summary judgment be granted on LegitScript's argument that PharmacyChecker has not suffered antitrust injury and therefore does not have antitrust standing, considering the record facts in this case.

B. Antitrust Standing and Illegality

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. To establish a § 1 violation, a plaintiff must prove "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012) (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008)). In addition to these three elements, a private plaintiff must also show a fourth—antitrust standing, which includes antitrust injury. *See id.; see also Am. Ad Mgmt.*, 190 F.3d at 1054-55. In its motion for summary judgment, LegitScript argues that PharmacyChecker fails to show antitrust standing. In its pending motion, PharmacyChecker does

not dispute that PharmacyChecker can otherwise satisfy the first three elements (the three substantive elements) of its § 1 claim. For purposes of ruling on LegitScript's pending motion, the Court therefore assumes that PharmacyChecker can show that LegitScript and the New York Defendants violated § 1; the Court considers below only whether LegitScript has demonstrated that PharmacyChecker cannot establish antitrust injury.

1. Background

In evaluating the New York Defendants' Rule 12(b)(6) motion to dismiss in the New York Case, Judge Karas formulated a standard from a set of cases that addressed antitrust injury when a plaintiff's business involved illegality: "[W]here the plaintiff's enterprise is completely or almost completely illegal, or completely or almost completely geared towards facilitating illegality, that plaintiff cannot plead an antitrust injury." *PharmacyChecker I*, 530 F. Supp. 3d at 329-30. Judge Karas then applied that standard when ruling on the New York Defendants' motion for summary judgment and concluded that the New York Defendants "ha[d] met their burden to prove that [PharmacyChecker's] enterprise is 'completely or almost completely geared towards facilitating illegality.'" *PharmacyChecker III*, 2023 U.S. Dist. LEXIS 66888, 2023 WL 2973038, at *30 (quoting *PharmacyChecker I*).

Invoking that standard, LegitScript now argues in its pending motion that PharmacyChecker is unable to suffer an antitrust injury as required for

antitrust standing because, according to LegitScript, PharmacyChecker's business "is completely or almost completely geared towards facilitating illegality."[11]

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11. Legitscript states that it "is arguing that PharmacyChecker has no *standing*," which "is a threshold issue, and not merely an affirmative defense." ECF 278 at 17 (emphasis in original). The Ninth Circuit has identified antitrust injury as an element of proof required for an antitrust claim. *See, e.g., Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 868 (9th Cir. 1991) ("Datagate failed to demonstrate causal 'antitrust' injury and thus failed to meet its burden of establishing standing."). The Ninth Circuit also has held that a defense that negates an element of a plaintiff's claim is not an affirmative defense—at least for purposes of Rule 8(c) of the Federal Rules of Civil Procedure. *See Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) ("Edison's attempt to prove that it provided a reasonable accommodation merely negates an element that Zivkovic was required to prove and therefore was not an affirmative defense required to be pled in Edison's answer.").

The Ninth Circuit, however, has indicated that a defendant's challenge based on the plaintiff's purported illegal activity should be brought as an affirmative defense or, depending on the circumstances, a counterclaim to offset damages. *See Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1380 (9th Cir. 1977); *Calnetics Corp. v. Volkswagen of Am.*, 532 F.2d 674, 689 (9th Cir. 1976); *cf. Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017) (stating in analyzing a claim under the Telephone Consumer Protection Act that "certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions"). For purposes of LegitScript's pending motion, it is irrelevant whether showing PharmacyChecker's purported illegal activity is an affirmative defense or showing its legal activity is a part of the element of antitrust injury. Regardless of which party has the burden of proof, the Court's conclusion would be the same because

LegitScript further argues that PharmacyChecker's "facilitation" of the unlawful importation of prescription drugs makes PharmacyChecker's business *itself* illegal. PharmacyChecker responds that the standard described by Judge Karas is inapplicable to the question of antitrust injury because Ninth Circuit precedent precludes it, and that in any event, PharmacyChecker's business is entirely legal.

2. Analysis

a. Illegality

Based on the facts and law presented by the parties, the Court concludes that PharmacyChecker's business is legal. LegitScript has identified no federal or state law that *PharmacyChecker* has violated. Nor has LegitScript pointed to any instance of a federal or state law enforcement agency prosecuting or even threatening to prosecute PharmacyChecker, or any instance of a federal or state regulatory body taking or even threatening to take any action against PharmacyChecker (*e.g.*, by issuing a cease-and-desist order). Nor, for that matter, has LegitScript shown that visitors to PharmacyChecker's website—including those visitors who click on links to non-U.S. pharmacies—engage in illegal activity simply by using PharmacyChecker's website.

LegitScript, however, has produced evidence showing that some number of U.S. visitors to PharmacyChecker's

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the facts in the record and the binding caselaw leave no doubt that PharmacyChecker has suffered a cognizable antitrust injury.

website appear to have violated federal law through cross-border purchase and import of prescription drugs for personal use and that PharmacyChecker's website facilitates that illegal activity. PharmacyChecker asserts that it does not track visitor activity after visitors to its website click through to a pharmacy's website and that it has no data connecting clicks to transactions. PharmacyChecker acknowledges, however, that some clicks do, in fact, lead to transactions and does not dispute that some of those transactions involve U.S.-based website users who unlawfully import prescription drugs after clicking through to non-U.S. online pharmacies. The agreed-upon revenue numbers show that approximately 57% of PharmacyChecker's total revenue is received from foreign pharmacies based on U.S.-origin clicks to those pharmacies. It also is reasonable to infer that the non-U.S. pharmacies continue to pay click-through fees only because there has been sufficient purchasing activity from users of PharmacyChecker's website (whether those users are based in the U.S. or elsewhere) to justify those fees.

The question before the Court, therefore, is whether an antitrust plaintiff, which does not itself engage in illegal activity, lacks antitrust standing merely because that plaintiff's website facilitates illegal activity by others and the plaintiff receives revenue as an indirect result of that activity. No case from the United States Supreme Court or the Ninth Circuit directly addresses that question.[12]

12. The most factually analogous case is a non-binding decision from the Seventh Circuit, *Maltz v. Sax*, 134 F.2d 2 (7th Cir. 1943). As discussed below, however, the facts of that case still are distinguishable and that case has since been overruled, at least in part.

The Court therefore looks to the most factually analogous cases from the Supreme Court and the Ninth Circuit for guidance to see what sort of illegal activity or facilitation of illegal activity by a private antitrust plaintiff with an otherwise valid antitrust claim will negate antitrust standing.

b. Supreme Court Cases

The Court finds guidance in two Supreme Court cases, *Kiefer-Stewart* and *Perma Life*, which abolished traditional equitable defenses as applied to antitrust claims. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951), *overruled on other grounds, Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 140, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968) (also overruled by *Copperweld*). The first of these defenses, abolished in *Kiefer-Stewart*, is "unclean hands," which "refers to the plaintiff's wrongdoing against a third party with respect to the subject matter of the suit." *Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1382 (9th Cir. 1977). In *Kiefer-Stewart*, the plaintiff, a liquor wholesaler, alleged that the defendants, who sold liquor to wholesalers, had illegally conspired to sell liquor only to those wholesalers who would resell the liquor at specified maximum prices. *Kiefer-Stewart*, 340 U.S. at 212.

At trial, the defendants introduced evidence showing that the plaintiff had illegally conspired with other wholesalers to set *minimum* prices, but the district court

instructed the jury that the plaintiff's participation in that separate conspiracy, even if proved, could not be raised as a defense. The Supreme Court agreed and explained:

> If [the plaintiff] and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of [the plaintiff], however, could not legalize the unlawful combination by [the defendants] nor immunize them against liability to those they injured.

Id. at 214. Thus, although an antitrust plaintiff that engaged in illegal activity "may be vulnerable to prosecution or held liable by a party injured as a result" of that activity, "defendants cannot avoid liability to [the plaintiff] for their own antitrust conspiracy by alleging that [the plaintiff] is culpable for a distinct infraction." *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 388 (4th Cir. 1982); *see also Memorex*, 555 F.2d at 1381 ("'Unclean hands' has not been recognized as a defense to an antitrust action for many years." (citing *Kiefer-Stewart*)).

Similarly, the equitable defense of *in pari delicto* (of equal fault), which "refers to the plaintiff's participation in the same wrongdoing as the defendant," does not bar an otherwise valid antitrust claim. *Memorex*, 555 F.2d at 1382. In *Perma Life*, franchisee-operators of Midas Muffler Shops entered into sales agreements with Midas, Inc. (Midas) and later brought an antitrust suit against

Midas challenging restrictions in those same agreements. *Perma Life*, 392 U.S. at 140. The court of appeals held that the plaintiffs' claim was barred by the doctrine of *in pari delicto* because the plaintiffs "had enthusiastically sought to acquire a Midas franchise with full knowledge" of the restrictive provisions in the agreements. *Id.* at 137-38. The Supreme Court disagreed, holding that "the doctrine of *in pari delicto* . . . is not to be recognized as a defense to an antitrust action." *Id.* at 138. In a discussion later quoted by the Ninth Circuit in several key antitrust cases, the Supreme Court explained:

> [T]he purposes of the antitrust laws are best served by [e]nsuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

Id. at 139.[13]

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13. The Supreme Court in *Perma Life* cited both *Kiefer-Stewart* and *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964). In *Simpson*, the Supreme Court held that a lessee of a retail outlet who had signed an agreement making

Echoing its decision in *Kiefer-Stewart*, the Supreme Court noted that "permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." *Id.* (citing *Kiefer-Stewart*);[14] *see also Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976) (holding that, with a narrow exception, a founding member of an antitrust conspiracy can bring an antitrust claim against co-conspirators); *Volvo N. Am. v. Men's Int'l Pro. Tennis Council*, 857 F.2d 55, 68 (2d Cir. 1988) (holding that "a cartel member has antitrust standing to challenge the cartel to which it belongs," provided that certain conditions are met (citing *Perma Life*, among other cases)). Although *Perma Life* addressed only illegality involving an antitrust plaintiff's "concurrent violation of the antitrust laws, it has been understood to have abolished the defense of illegality even when the plaintiff's wrongdoing is unrelated

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him "a participant in the illegal, competition-destroying scheme" could nonetheless bring suit under the antitrust laws. *See Perma Life*, 392 U.S. at 138-39 (construing *Simpson*).

14. The Supreme Court in *Perma Life* did not foreclose the possibility that a plaintiff's "truly complete involvement in a monopolistic scheme could ever be a basis . . . for barring a plaintiff's cause of action," but clarified that such a bar would be "wholly apart from the idea of *in pari delicto*." *Perma Life*, 392 U.S. at 140. The Ninth Circuit has since held that a defendant may be able to defend itself from an antitrust claim by showing that the plaintiff was involved in the same anticompetitive conspiracy at issue, but only if "the degree of participation of the plaintiff" had been "equal to that of any defendant and a substantial factor in the formation of the conspiracy." *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976).

to antitrust policy." *Consol. Exp., Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494, 526 (3d Cir. 1979) (collecting cases), *vacated on other grounds sub nom. Int'l Longshoremen's Ass'n v. Consol. Exp., Inc.*, 448 U.S. 902, 100 S. Ct. 3040, 65 L. Ed. 2d 1131 (1980).

c. Ninth Circuit Cases

As the Ninth Circuit has explained, the "common nucleus" of unclean hands and *in pari delicto* is "illegality on the part of the plaintiff." *Memorex*, 555 F.2d at 1381. In two key decisions, the Ninth Circuit, relying on the principles set forth in in *Kiefer-Stewart* and *Perma Life*, similarly rejected the defendants' attempts to use the plaintiffs' illegal conduct to immunize the defendants' liability.

i. *Calnetics*

In *Calnetics*, the plaintiff (a seller of automobile air-conditioners), alleged that the defendants (which included a Volkswagen subsidiary and an automobile distributor), engaged in a conspiracy that displaced Calnetics from the market. *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 679-80 (9th Cir. 1976). At trial, Calnetics sought to introduce evidence of actual sales of its products, which was necessary to show that the defendants' conspiracy diminished Calnetics' anticipated sales. The district court excluded that evidence on the ground that the sales had stemmed from an illegal agreement between Calnetics and an automobile distributor. *Id.* at 688. Without evidence of actual sales, Calnetics could not show that it had suffered

damages, and the district court therefore granted summary judgment in favor of the defendants against Calnetics' antitrust claims. The Ninth Circuit reversed.

Citing *Perma Life* and *Kiefer-Stewart*, the Ninth Circuit explained that the defendants' challenge to the evidence at issue was "in effect an *in pari delicto* or 'unclean hands' defense, which is not a defense in an action for treble damages." *Id.* The court quoted at length *Perma Life*'s discussion of the antitrust laws' purposes, including the need to ensure that a private cause of action "will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws," irrespective of the "relative moral worth of the parties." *Id.* (quoting *Perma Life*, 392 U.S. at 139.). Considering these purposes, the Ninth Circuit found "no legitimate reason for distinguishing [the] defendants' 'illegal sales' argument from the *in pari delicto* type of defense struck down in *Perma Life*." *Id.* at 689.

The question in *Calnetics* was whether the district court properly had excluded the plaintiff's evidence of damages, and not whether the plaintiff had antitrust standing. But the Ninth Circuit's emphasis on the policies effectuated by the antitrust laws and the court's supporting analysis are relevant to whether a plaintiff's involvement in illegal activity—even *direct* involvement, as was the case in *Calnetics*—should deprive that plaintiff of a private cause of action under the antitrust laws. Notably, the Ninth Circuit in *Calnetics* approvingly cited a then-recent district court decision in which that court rejected an asserted defense of illegality, even though the plaintiff

would not have had acquired an antitrust claim but for its own illegal activity:

> From a practical point of view, Calnetics is in a position no different from that of the plaintiff in *Purex Corp. v. General Foods Corp.*, 318 F. Supp. 322 (C.D. Cal. 1970), who had acquired an antitrust cause of action by virtue of an acquisition which was itself illegal. Recognizing the asserted defense of illegality as a species of *in pari delicto*, the *Purex* court rejected it.

Id. at 689. The Ninth Circuit also approved of the Tenth Circuit's decision in *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir 1972), in which that court concluded that the plaintiff "was entitled to prove damages his business suffered, even though at the time of injury [he] may have been illegally engaged in the automobile retail business." *Id.* (construing *Semke*).[15]

Relying on the overarching policies of the antitrust laws, the Ninth Circuit concluded that "even though the market position from which Calnetics was displaced had been attained only through illegal conduct" and Calnetics was thereby subject to civil and criminal penalties, Calnetics was not required to lose its antitrust action. *Id.* As the court explained, "[t]o rule otherwise would effectively frustrate the important public policy underl[y]

15. In *Semke*, the Tenth Circuit concluded that the plaintiff had, in fact, violated a state statute that provided for criminal and civil penalties, although the court also concluded that there had been "a basis for the plaintiff to question whether the statute applie[d] to his activities." 456 F.2d at 1363, 1364 n.1, 1368.

ing the antitrust laws: encouragement of private antitrust suits in order to deter the illegal exercise of market power."[16]

ii. *Memorex*

In *Memorex*, the Ninth Circuit directly addressed whether a plaintiff's illegal activity meant that it could not show antitrust standing. *Memorex*, 555 F.2d at 1381-83. The defendant (IBM) argued that the plaintiff (Memorex) had acquired its presence in the market for disk storage devices—the same market that, according to Memorex, had been injured by IBM's allegedly anti-competitive acts—only because Memorex had stolen trade secrets from IBM. Asserting a so-called "unlawful market presence" defense, *id.* at 1381, IBM argued that Memorex had no "business" of its own, as required to satisfy the Clayton Act's requirement that a plaintiff "be injured in his business." *See* 15 U.S.C. § 15(a).

The Ninth Circuit explained that IBM's defense of "unlawful market presence" and the traditional equitable defenses of unclean hands and *in pari delicto* shared a "common nucleus"—illegality. *Memorex*, 555 F.2d at 1381. In rejecting IBM's argument that Memorex did not suffer a cognizable injury because it had engaged in illegal

16. In support, the Ninth Circuit cited *Lanier Business Products v. Graymar Co.*, 355 F. Supp. 524 (D. Md. 1973), in which the court rejected an affirmative defense that was based on the unlawful antitrust activity of the plaintiff. As that court explained: "It would be intolerable to excuse the continuation of conduct detrimental to the common good because of the equally egregious actions of another." *Id.* at 526.

activity, the Ninth Circuit found compelling the reasoning in *Calnetics*, and again cited *Purex* and *Semke*:

> Were it not for Calnetics' allegedly illegal conduct, it would not have suffered any injury because it would not have sold any products to Volkswagen distributors. All sales were the result of commercial bribery. In effect, Calnetics claimed only an "illegal market presence" much as IBM suggests Memorex does here. The "rights" of Calnetics were no greater than those of Memorex, even assuming Memorex stole the patents from which its products were made.
>
> *Memorex therefore had "rights" which could be injured by the wrongdoing of IBM. This is all that is required to maintain a private antitrust suit*. Memorex's own illegal conduct did not divest it of an antitrust action. *See also Semke v. Enid Automobile Dealers Association*, 456 F.2d 1361 (10[th] Cir. 1972) (rejecting defense that plaintiff's entire business was illegal because it was unlicensed); *Purex Corp. v. General Foods Corp.*, 318 F. Supp. 322 (C.D. Cal. 1970) (recognizing asserted defense of illegality as a species of *in pari delicto*).

Id. at 1381-82 (emphasis added; footnote omitted).[17] Rejecting IBM's argument that Memorex's illegal activity

17. In a footnote, the Ninth Circuit added that "Memorex, like Calnetics, was subject to civil action and even criminal penalties for its wrongdoing." *Memorex*, 555 F.2d at 1382 n.3.

meant that it could not sustain an antitrust injury, the Court declared: "We continue to side with the goal of vigorous enforcement of our antitrust laws." *Id.* at 1383.

The holding of *Memorex* was confined to IBM's defense of "unlawful market presence," which was based on Memorex's alleged theft of trade secrets *from IBM*: the court held that "illegality is not to be recognized as a defense to an antitrust action when the illegal acts by the plaintiff are directed *against the defendant*."[18] *Id.* at

18. The fact that the alleged illegal activity at issue in *Memorex* involved a plaintiff's theft of *a defendant's* trade secrets may be why the Ninth Circuit referred to that activity as a "private wrong" even though Memorex would have been subject to criminal penalties for such wrongdoing. *See* 555 F.2d at 1382; *id.* at 1382 n.3. LegitScript argues that *Memorex* does not apply because the court held only that a "private wrong" does not eliminate antitrust injury, whereas "[PharmacyChecker's] illegal conduct is a public wrong." ECF 271 at 21 (emphasis in original). Assuming without deciding that the cross-border importation of prescription drugs engaged in by users of PharmacyChecker's website is a "public wrong," and setting aside the fact that LegitScript has not shown that PharmacyChecker's conduct itself is illegal, the Court finds no reason why the reasoning and principles in *Memorex* should apply only those defenses that are based on a plaintiff's "private" illegal acts but not to the illegality defense asserted here.

In *Memorex* , the Ninth Circuit relied on several decisions in which courts rejected illegality defenses, including *Kiefer-Stewart* and *Perma Life*, both of which involved asserted defenses that were based on the plaintiff's alleged *antitrust* violations. *See Kiefer-Stewart*, 340 U.S. at 214; *Perma Life*, 392 U.S. at 139-40; *see also Radovich v. Nat. Football League*, 352 U.S. 445, 454 n.10, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1956) (noting that violations of antitrust laws are regarded as "*a special form of public injury*" (emphasis in *Radovich*)

1382 (emphasis added). The court, however, recognized that in some instances a plaintiff's violation of the law may bar an antitrust action. *See id.* at 1382 n.5; *id* at 1383 (citing *Javelin*'s holding that a plaintiff will be barred from recovery when the illegal conspiracy of the defendants "would not have been formed but for the plaintiff's participation"). Nonetheless, the analysis and policies underlying the court's holding in *Memorex* apply here. As the Ninth Circuit has explained, the same principle underlies *Kiefer-Stewart, Perma Life, Calnetics*, and *Memorex*: "a plaintiff's illegal conduct cannot be raised as a complete bar to his antitrust action." *First Beverages, Inc. v. Royal Crown Cola Co.*, 612 F.2d 1164, 1174 (9th Cir. 1980).[19] It is worth emphasizing that *Kiefer-Stewart, Perma Life, Calnetics*, and *Memorex*, along with *Purex* and *Semke*, all involved defenses based on illegal activity in which a plaintiff was alleged to have directly participated. PharmacyChecker itself, however, has broken no law; it is

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(quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)). In *Calnetics*, where the Ninth Circuit rejected the defendants' "illegal sales" argument as equivalent to "the *in pari delicto* type of defense struck down in *Perma Life*," the plaintiff's alleged illegality also involved an antitrust violation. *See Calnetics*, 532 F.2d at 688-89; *see also Purex*, 318 F. Supp. at 323-24 (rejecting affirmative defenses that were based on the plaintiff's alleged antitrust violation); *Semke*, 456 F.2d at 1367-70 (rejecting a defense based on the plaintiff's violation of a state licensing statute).

19. As discussed, the Ninth Circuit in *Javelin* identified a narrow exception. The Court acknowledges that other exceptions may apply in factual circumstances not relevant here, such as when a plaintiff's *entire* business is illegal and that plaintiff is subject to criminal punishment.

merely facilitating illegal activity by third parties, among other lawful activities.

iii. Other Caselaw

LegitScript relies on several cases in which courts have concluded that a plaintiff that engaged in or sought to engage in illegal activity lacked antitrust standing. For the reasons discussed below, the Court finds those cases inapplicable, inconsistent with controlling law, or otherwise unpersuasive.

In several cases involving antitrust plaintiffs who had been involved in illegal activity, courts have concluded that the plaintiffs lacked injury because they failed to establish that their damages had been caused by anticompetitive acts. LegitScript relies on *Realnetworks*, in which the plaintiff, who sought to market a product (RealDVD) that would allow the copying of DVDs, asserted that the defendant movie production studios' refusal to license the copying of DVDs caused the plaintiff an antitrust injury. *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 2010 U.S. Dist. LEXIS 1433, 2010 WL 145098 at *1-2, 5 (N.D. Cal. Jan. 8, 2010). In that case, the defendants sought a temporary restraining order and then a preliminary injunction barring the plaintiff's manufacture and distribution of RealDVD. The court granted both, concluding they were "necessitated by [the plaintiff's] own possibly unlawful conduct." 2010 U.S. Dist. LEXIS 1433, [WL] at *5. The court in *Realnetworks* concluded that the plaintiff had failed to allege a plausible antitrust injury, not because the plaintiff had engaged in illegal activity

but because the harm that the plaintiff suffered resulted from the court's injunctions. *Id.; see also* 2010 U.S. Dist. LEXIS 1433, [WL] at *6 ("The Court does not here hold that Real is barred from maintaining an antitrust claim because it has engaged in illegal activity[.]"); *cf. Snake River Valley Elec. Ass'n v. Pacificorp*, 357 F.3d 1042, 1050 n.8 (9th Cir. 2004) ("Because the statute does not permit the transfer of customers by mere private action (i.e., PacificCorp could not yield customers [to the plaintiff], without state approval from the PUC, even if it wanted to do so), . . . the statute in question precludes the element of causal antitrust injury . . . even if PacificCorp acted anti-competitively . . . ." (citation omitted)).

Thus, *Realnetworks* did not address whether a plaintiff's own illegal activity or facilitation of illegal activity by others, without more, negates antitrust injury. Rather, the court found merely that effects that flowed from the plaintiff's intended (and likely illegal) activity—the resulting injunctions—were the actual cause of the asserted injury. Here, however, LegitScript has not shown evidence to support its argument that "[PharmacyChecker] would have suffered *the same injury* regardless of LegitScript's conduct due to enforcement by the FDA, Secretary of Health and Human Services, or enforcement agencies such as U.S. Customs Border Patrol." *See* ECF 278 at 19 (emphasis added). LegitScript has offered no evidence of any such enforcement activity or even threatened enforcement activity. *Realnetworks*, therefore, is inapposite.

LegitScript also relies on the Eighth Circuit's decision in *In re Canadian Import Antitrust Litigation*, 470 F.3d

785 (8th Cir. 2006). The plaintiffs in this class action were U.S.-based *consumers* who purchased prescription drugs from the defendant drug companies. The plaintiffs alleged that the defendants unlawfully conspired to suppress the importation of certain prescription drugs from Canadian pharmacies, thereby resulting in increased prices for prescription drugs sold in the United States. *Id.* at 787-88. The district court "concluded that the plaintiffs lacked standing to pursue their federal antitrust claims because the allegedly anticompetitive behavior discouraged only unlawful importation of drugs and not lawful activity that the Sherman Act was designed to protect." *Id.* at 788. On appeal, the plaintiffs argued that the importation of the drugs at issue was not, in fact, illegal; in the alternative, they argued that even if such importation was illegal, they nonetheless could pursue an antitrust claim based on the defendants' anticompetitive conduct. *Id.* at 788, 791.

The Eighth Circuit concluded, first, that such importation would have violated federal law because the drugs at issue were not labeled in conformity with federal requirements. *Id.* at 788-91.[20] The court then addressed the plaintiffs' alternative argument that they could still maintain their antitrust claim. Notably, the Eighth Circuit did not conclude that the plaintiffs' antitrust claim was barred as a matter of law because the plaintiffs sought to achieve their goal (lower prescription drug prices

20. LegitScript relies on *In re Canadian Import* in part for the Eighth Circuit's conclusion that importation of the drugs at issue in that case was illegal. *See* 470 F.3d at 789. PharmacyChecker, however, does not import drugs from non-U.S. pharmacies; nor has LegitScript shown that PharmacyChecker's business itself is otherwise illegal.

in the United States) by furthering activity that was illegal (importation of drugs not labeled in conformity with federal law). Rather, the court concluded that the plaintiffs' claim was barred because the plaintiffs could not demonstrate any injury *caused* by the defendants' conduct. The court explained:

> Plaintiffs allege that they are injured by increased prices for prescription drugs in the United States, which they say result from their inability to import less expensive drugs distributed by Canadian pharmacies. As we have explained, however, the importation of drugs from Canada is prohibited by federal law. The absence of competition from Canadian sources in the domestic prescription drug market, therefore, is caused by the federal statutory and regulatory scheme adopted by the United States government, not by the conduct of the defendants. Consequently, the alleged conduct of the defendants did not cause an injury of the type that the antitrust laws were designed to remedy. *See RSA Media, Inc. v. AK Media Group, Inc.*, 260 F.3d 10, 15 (1st Cir. 2001) (plaintiff lacked antitrust standing where it "was not excluded from the market for outdoor billboards because of [defendant's] threats," but rather "because of the Massachusetts regulatory scheme that prevents new billboards from being built"); *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998) (City suffered no

> antitrust injury and had no antitrust standing because "any injury suffered by the City did not flow from the defendants' conduct, but, rather, from the realities of the regulated environment in which all three were actors"); 2 P. Areeda & H. Hovenkamp, *Antitrust Law* § 338, at 320 (2d ed. 2000) (explaining that antitrust standing is lacking where "a force other than the antitrust violation fully accounts for the plaintiff's injury").

In re Canadian Import, 470 F.3d at 791-92 (alteration in original). *In re Canadian Import* does not apply here for the same reasons, discussed above, that *Realnetworks* is inapposite. *See Rebotix Repair, LLC v. Intuitive Surgical, Inc.*, 2022 U.S. Dist. LEXIS 142861, 2022 WL 3272538, at *8 (M.D. Fla. Aug. 10, 2022) (concluding that cases such as *In re Canadian Import* "stand for the proposition that a regulatory or legislative bar can *factually* break the chain of causation between an antitrust defendant's challenged conduct and the plaintiff's injury" (emphasis in original)).

LegitScript's reliance on *Pearl Music Co.* is similarly unavailing. *See Pearl Music Co. v. Recording Indus. Ass'n of Am., Inc.*, 460 F. Supp. 1060 (C.D. Cal. 1978). The plaintiffs in that case were engaged in a tape piracy business that was "by its very nature, entirely illegal." *Id.* at 1068. The court concluded that that the "almost total magnitude" of the plaintiffs' illegal conduct made the plaintiffs' "miniscule conduct that *may* be legal, insignificant." *Id.* The court in *Pearl Music* therefore concluded that the plaintiffs "should not be able to assert

or claim that they have rights protected by the antitrust laws."[21] *Id.; cf. Bubis v. Blanton*, 885 F.2d 317, 320 (6th Cir. 1989) (affirming dismissal of antitrust claim for lack of standing because the plaintiff's interest in the allegedly harmed business was entirely illegal). Even if correctly decided, *Pearl Music* is distinguishable: the evidence in the record does not show that any aspect of PharmacyChecker's business is illegal—let alone "entirely illegal."[22]

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21. The court in *Pearl Music* distinguished *Memorex* and *Calnetics* on the ground that neither of those cases "present a factual pattern as is present here that is, one in which the plaintiff is engaged in a business which is, by its very nature, entirely illegal." 460 F. Supp. at 1068.

22. Even if the Court agreed with LegitScript that the *facilitation* of illegal activity is *itself* illegal or otherwise equivalent to illegal activity, *Pearl Music* and similar cases would still be distinguishable. PharmacyChecker's facilitation of illegal activity only applies to actual drug purchases made by U.S. consumers at foreign pharmacies. The evidence in the record of such actual transactions includes LegitScript's evidence of PharmacyChecker assisting three consumers after problems occurred with their purchases and PharmarcyChecker's evidence that one pharmacy indicated that 3.47% of clicks from PharmacyChecker's website resulted in drug purchases. At summary judgment, the Court views the evidence in the light most favorable to the nonmoving party. Even accepting LegitScript's argument that facilitation of cross-border importation of drugs is itself illegal, the evidence does not show that only a "miniscule" or "insignificant" portion of PharmacyChecker's business is legal. *See Pearl Music*, 460 F. Supp. at 1068. To the contrary, the evidence shows no more than a "miniscule" or "insignificant" amount of the purportedly illegal activity.

The case with facts most analogous to those here is *Maltz v. Sax*, 134 F.2d 2 (7th Cir. 1943).[23] That case, however, is distinguishable and has been overruled at least in part. In *Maltz*, the court held that the plaintiff, whose business was "limited to making and selling gambling apparatus," could not bring an antitrust claim for two reasons. *Id.* at 4. First, the plaintiff "[came] into court with unclean hands." *Id.* at 5. Second, the plaintiff's business was limited to the making and selling of products usable only for activities that were unlawful or "consistently condemned . . . as against public policy," and he therefore had "no legal rights to protect." *Id.* at 4, 5.

As discussed earlier, the equitable defense of unclean hands is no longer recognized as a defense to an antitrust action. *See Kiefer-Stewart*, 340 U.S. at 212; *Memorex*, 555 F.2d at 1381. As for the Seventh Circuit's conclusion that plaintiff had "no legal right in a business, the conduct of which was gambling," *Maltz*, 134 F.2d at 5, the facts in this case are distinguishable. PharmacyChecker *does* have a legal right in its business. Moreover, PharmacyChecker's business is not "limited to the making and selling" of products usable only for activities that are unlawful or that have been "consistently condemned . . . as against public policy."[24] *See id.* at 4.

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23. No circuit court has cited *Maltz* approvingly in more than 45 years, and the Seventh Circuit has not cited it in nearly 70 years. The most recent appellate case to cite *Maltz* approvingly was *Memorex*—for the limited proposition that some injury must occur before a plaintiff can recover. *Memorex*, 555 F.2d at 1383.

24. Further, the Seventh Circuit's reliance on public policy considerations likely do not survive *Perma Life*, and *Maltz* may

3. Final Thoughts

Even when an antitrust plaintiff has *directly* engaged an illegal activity that un equivocally constitutes a public harm, the Supreme Court has held that such harm must be addressed, if at all, by means other than depriving the plaintiff of an otherwise valid antitrust cause of action or immunizing the antitrust defendants. *See Kiefer-Stewart*, 340 U.S. at 214 (holding that if the plaintiff had violated antitrust laws in an unrelated conspiracy, the plaintiff "could be held responsible in appropriate proceedings brought . . . by the Government or by injured private persons," but that such illegal conduct "could not legalize the unlawful combination of [the defendants] nor immunize them against liability to those they injured"); *Perma Life*, 392 U.S. at 134 (similar); *cf. Memorex*, 555 F.2d at 1382 & n.3 (noting that the plaintiff was subject to "civil action and even criminal penalties for its wrongdoing" but holding that "[a] wrongful act committed against one who violates

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therefore have been overruled in another respect. *Compare Maltz*, 134 F.2d at 4 (discussing "against-public-policy businesses practices which include the use of gambling machines" and noting that "[f]ederal courts have consistently condemned [gambling] as against public policy"); and *id.* at 6 (concluding that a "construction of the Sherman Act" that would bar the plaintiff's claim was "[m]ore consistent with our general public policy"); *with Perma Life*, 392 U.S. at 139 (noting "the overriding public policy in favor of competition" and explaining that "a more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement"); *see also Consol. Exp.*, 602 F.2d at 526 n.21 ("The appellees also rely on *Maltz v. Sax*. We do not believe that holding survives *Perma Life*." (citation omitted)).

the antitrust laws must not become a shield in the violator's hands against operation of the antitrust laws"). The Ninth Circuit has held that the same principle applies, even when a plaintiff would not have acquired an antitrust cause of action but for the plaintiff's illegal activity. *See Calnetics*, 532 F.2d at 689; *Memorex*, 555 F.2d at 1381-82.

Under Ninth Circuit law, even direct involvement by a plaintiff in illegal activity "cannot be raised as a complete bar to his antitrust action." *First Beverages*, 612 F.2d at 1174 (construing *Kiefer-Stewart, Perma Life, Calnetics*, and *Memorex*).[25] It would contravene Supreme Court and Ninth Circuit precedent for this Court to fashion a new rule that deprives a plaintiff of an antitrust cause of action and immunize an antitrust defendant when the plaintiff's business is entirely *legal*. That is so even if the plaintiff's website is used for purposes of facilitating unlawful activity by others and the plaintiff indirectly derives revenue (even a large portion of its revenue) from that activity. *See Perma Life*, 392 U.S. at 139 (noting "the overriding public policy in favor of competition" and admonishing that weighing the "relative moral worth of the parties would only result in a seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement"); *cf. Radovich v. NFL*, 352 U.S. 445, 453, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957) ("In the face of [the Congressional policy underlying the antitrust laws], this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.").

25. Again, the Ninth Circuit in *Javelin* identified a narrow exception, and the Court acknowledges that other exceptions may apply, such as when a plaintiff's entire business is itself illegal.

Thus, at this stage of the lawsuit, LegitScript has not met its burden to justify summary judgment based on its argument that PharmacyChecker lacks either antitrust injury or antitrust standing.

CONCLUSION

The Court DENIES Defendant LegitScript's Motion for Summary Judgment. ECF 271. The Court also DENIES AS MOOT Defendant's Renewed Motion to Stay Discovery. ECF 269.

IT IS SO ORDERED.

DATED this 3rd day of January, 2024.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 28, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 19-CV-7577 (KMK)

PHARMACYCHECKER.COM,

Plaintiff,

v.

NATIONAL ASSOCIATION OF BOARDS OF PHARMACY, *et al.*,

Defendants.

OPINION & ORDER

KENNETH M. KARAS, United States District Judge:

PharmacyChecker.com ("PCC" or "Plaintiff") brings this Action against the National Association of Boards of Pharmacy ("NABP"), Alliance for Safe Online Pharmacies ("ASOP"), Center for Safe Internet Pharmacies Ltd. ("CSIP"), and Partnership for Safe Medicines ("PSM"; collectively, "Defendants") alleging that Defendants unlawfully conspired to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and that NABP falsely advertised or promoted in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125. (*See generally* Am.

Compl. (Dkt. No. 82).)[1] Before the Court are four motions: (1) Defendants' Joint Motion for Summary Judgment on Plaintiff's Sherman Act § 1 claim, (*see* Not. of Mot. ("SJ Not. of Mot.") (Dkt. No. 263)); (2) Plaintiff's Motion to Strike Portions of Defendants' Submissions in Support of Defendants' Motion for Summary Judgment, (*see* Pl.'s Mot. to Strike Portions of Def.'s Submissions ("Mot. to Strike") (Dkt. No. 273)); (3) Defendants' Joint Motion to Strike Portions of the Declaration of Gabriel Levitt (*see* Defs.' Pre-Motion Letter to Strike ("Levitt Decl. PML") (Dkt. No. 280)); and (4) Defendants' Joint Motion to Exclude the Expert Testimony of Benjamin England, Esq., (*see* Not. of Mot. ("Daubert Not. of Mot.") (Dkt. No. 260)). For the following reasons, Defendants' Joint Motion for Summary Judgment on Plaintiff's Sherman Act § 1 claim is granted, Plaintiff's Motion to Strike is denied, Defendants' Motion to Strike is denied, and Defendants' Joint Motion to Exclude Expert Testimony is granted in part and denied in part.

I. Background

A. The Parties' Motions to Strike

To start, the Court must address the Parties' motions to strike, which ask this Court to strike portions of both Plaintiff's and Defendants' submissions related to Defendants' motion for summary judgment. (*See generally*

1. PCC also originally brought claims against LegitScript LLC. (*See* Am. Compl.) However, PCC's claims against LegitScript LLC were severed and transferred to the U.S. District Court for the District of Oregon. (*See* Dkt. No. 219.)

Mot. to Strike; Levitt Decl. PML; Defs Mem. of Law in Supp. of Mot. ("Defs.' Mot. to Strike") (Dkt. No. 288).) "Because 'a decision on the motion to strike may affect [the movant's] ability to prevail on summary judgment,' it is appropriate to consider a motion to strike prior to a motion for summary judgment." *Pugliese v. Verizon N.Y. Inc.*, No. 05-CV-4005, 2008 U.S. Dist. LEXIS 52677, 2008 WL 2882092, at *5 (S.D.N.Y. July 9, 2008) (alterations in original) (quoting *Gucci Am., Inc. v. Ashley Reed Trading, Inc.*, No. 00-CV-6041, 2003 U.S. Dist. LEXIS 18062, 2003 WL 22327162, at *2 (S.D.N.Y. Oct.10, 2003)); *see also Pearlstein v. BlackBerry Ltd.*, No. 13-CV-7060, 2022 U.S. Dist. LEXIS 1537, 2022 WL 19792, at *7 (S.D.N.Y. Jan. 3, 2022) ("[I]f [the] defendants' motion to strike is denied, there are numerous genuine issues of material fact that would preclude summary judgment in their favor."). Specifically, "[b]ecause the purpose of summary judgment is to weed out cases in which there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law, it is appropriate for district courts to decide questions regarding the admissibility of evidence on summary judgment,' where the Court must exercise this 'gatekeeper' role." *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 398 (S.D.N.Y. 2015) (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997)).

In its Memorandum of Law, Plaintiff argues that certain exhibits and statements "should be stricken and/or disregarded because they violate the Federal Rules of Evidence, are false, and/or blatantly misrepresent the evidence." (Mot. to Strike 1.) Specifically, Plaintiff

argues that several of Defendants' statements pursuant to Local Rule 56.1 "rely[] on quoted deposition questions masquerading as testimony." (*Id.*) Plaintiff also argues that several exhibits are not properly authenticated, contain inadmissible hearsay, and lack foundation. (*Id.* at 8.)

In their Memorandum of Law, Defendants argue that Plaintiff offered "rebuttal-type expert witness testimony" in a declaration by PCC's President Gabriel Levitt accompanying Plaintiff's 56.1 reply. (Defs.' Mot. to Strike 2.) Specifically, Defendants request that the Court strike nine statements from the Levitt declaration for lack of foundation based on Mr. Levitt's expertise, as well as for "conclusory opinions" that "contradict the findings of Defendants' SEO expert without evidentiary support." (*Id.* at 2-5.)

For the reasons stated below, Plaintiff's Motion to Strike and Defendants' Motion to Strike are both denied.

1. Applicable Law

Under Local Rule 56.1, motions for summary judgment must be supported by "a separate, short[,] and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried" and, for each paragraph, a "citation to evidence which would be admissible." Local Rules of the United States District Courts for the Southern and Eastern District of New York, Rule 56.1(a) & (d) ("Local Rule 56.1"). "The purpose of Local Rule 56.1

is to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." *Mayagüez S.A. v. Citibank, N.A.*, No. 16-CV-6788, 2022 U.S. Dist. LEXIS 54936, 2022 WL 901627, at *8 (S.D.N.Y. Mar. 25, 2022) (quoting *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001). Accordingly, a Rule 56.1 statement "is not itself a vehicle for making factual assertions that are otherwise unsupported in the record." *Holtz*, 258 F.3d at 74.

However, "[m]otions to strike are generally disfavored and will not be granted unless the matter asserted clearly has no bearing on the issue in dispute." *Pearlstein*, 2022 U.S. Dist. LEXIS 1537, 2022 WL 19792, at *7 (quoting *Kehr ex rel. Kehr v. Yamaha Motor Corp., U.S.A.*, 596 F. Supp. 2d 821, 829 (S.D.N.Y. 2008)). "A party seeking to strike a Rule 56.1 statement bears a heavy burden . . . ." *Christians of Cal., Inc. v. Clive Christian N.Y., LLP*, No. 13-CV-275, 2014 U.S. Dist. LEXIS 95531, 2014 WL 3407108, at *2 (S.D.N.Y. July 7, 2014) (quotation marks and citation omitted). Accordingly, "courts in this Circuit frequently deny motions to strike paragraphs in Rule 56.1 statements, and [instead] simply disregard any improper assertions." *Ross Univ. Sch. Of Med., Ltd. v. Brooklyn-Queens Health Care, Inc.*, No. 09-CV-1410, 2012 U.S. Dist. LEXIS 174295, 2012 WL 6091570, at *6 (E.D.N.Y. Dec. 7, 2012) (collecting cases), *report and recommendation adopted in relevant part*, 2013 U.S. Dist. LEXIS 45949, 2013 WL 1334271 (E.D.N.Y. Mar. 28, 2013); *see also In re Namenda Direct Purchaser Antitrust Litig.*, No. 15-CV-7488, 2017 U.S. Dist. LEXIS 213712, 2017 WL 6606629, at

*1 (S.D.N.Y. Dec. 20, 2017) (disregarding improper legal argument in 56.1 statement).

For that reason, "[w]here . . . the record does not support the assertions in a Local 56.1 statement, those assertions [are] disregarded and the record reviewed independently." *Holtz*, 358 F.3d at 74; *see also Baity v. Kralik*, 51 F. Supp. 3d 414, 419 (S.D.N.Y. 2014) (finding statements "lack[ing] citations to admissible evidence" to violate Local Rule 56.1 and Federal Rule of Civil Procedure 56). Similarly, the Court can also disregard legal conclusions or unsubstantiated opinions in a Local Rule 56.1 statement. *See Am Gen. Life Ins. Co. v. Diana Spira 2005 Irrevocable Life Ins. Trust*, No. 08-CV-6843, 2014 U.S. Dist. LEXIS 165367, 2014 WL 6694502, at *1 (S.D.N.Y. Nov. 25, 2014) ("The Court grants [the plaintiff's] motion [to strike] as to argumentative statements in the [56.1 statement] and as to purported factual statements which are unsupported by any citation to record evidence."); *Epstein v. Kemper Ins. Cos.*, 210 F. Supp. 2d 308, 314 (S.D.N.Y. 2002) ("Statements in an affidavit or Rule 56.1 statement are inappropriate if they are not based on personal knowledge, contain inadmissible hearsay, are conclusory or argumentative, or do not cite to supporting evidence."); *Simmons v. Woodycrest Ctr. for Human Dev., Inc.*, No. 10-CV-5193, 2011 U.S. Dist. LEXIS 24513, 2011 WL 855942, at *1 n.1 (S.D.N.Y. Mar. 9, 2011) (disregarding portions of the defendants' Rule 56.1 statement consisting of legal conclusions or "gross distortions of the summary judgment record"). Importantly, Courts have "broad discretion to determine whether to overlook a party's failure to comply with local court rules." *Holtz*, 258 F.3d at 73.

2. Plaintiff's Motion to Strike

In contravention of this Court's Individual Rules, Plaintiff filed an unauthorized motion asking the Court to strike, in whole or in part, over a quarter of Defendants' statements pursuant to Rule 56.1 and related exhibits: 37 statements and 24 exhibits to be exact. (*See generally* Mot. to Strike.) Plaintiff proffers several overlapping reasons for striking each statement and exhibit, including alleging that Defendants improperly insert legal argument, disputing the factual accuracy of several of Defendants' statements based on quoted material in associated exhibits, as well as questioning the admissibility of exhibits for lack of foundation, authentication, and hearsay concerns. (*Id.*)

In opposition, Defendants categorize Plaintiff's objections as "(i) arguments about how to interpret the evidence provided by Defendants, and (ii) arguments regarding the admissibility of the evidence." (Defs.' Joint Opp. to Mot. to Strike ("Defs Mot. to Strike Opp.") 4 (Dkt. No. 292).) As to the interpretation arguments, Defendants argue that the Court may "draw its conclusions from the documents and depositions submitted, not [a party's] characterization [sic] of [them]," and should deny the formal motion to strike. (*Id.* (quoting *Pharm., Inc. v. Am. Pharm. Partners, Inc.*, 511 F. Supp. 2d 324, 2007 WL 2728898, at *1 (E.D.N.Y. 2007)).) As to the admissibility arguments, Defendants broadly disagree, and state that they have satisfied their responsibility at this stage of litigation. (*Id.* at 4-5.)

Regarding Plaintiff's argument that Defendants' statements are replete with legal conclusions and contain factual errors, the Court is well equipped to "disregard" these assertions and review the record independently. *Holtz*, 358 F.3d at 74; *see also Baity*, 51 F.Supp.3d at 419 (finding statements "lack[ing] citations to admissible evidence" to violate Local Rule 56.1 and Federal Rule of Civil Procedure 56); *Simmons*, 2011 U.S. Dist. LEXIS 24513, 2011 WL 855942, at *1 n.1 (disregarding portions of the defendants' Rule 56.1 statement consisting of legal conclusions or "gross distortions of the summary judgment record"). The Court therefore declines to make piecemeal rulings on the relevance of each statement, although it will, as a matter of course, decline to rely upon disputed or otherwise inaccurate assertions.

As to the statements that Plaintiff alleges rely on inadmissible evidence, this Court will exercise its broad discretion and "simply ignore . . . those paragraphs lacking factual support or citing to inadmissible evidence." *Mayaguez S.A.*, 2022 U.S. Dist. LEXIS 54936, 2022 WL 901627, at *8 (alterations and quotation marks omitted) (citing *Emanuel v. Griffin*, No. 13-CV-1806, 2015 U.S. Dist. LEXIS 37944, 2015 WL 1379007, at *2 (S.D.N.Y. Mar. 25, 2015)); *see also Sauerhaft v. Bd. of Educ. of Hastings-on-Hudson Union Free Sch. Dist.*, No. 05-CV-9087, 2009 U.S. Dist. LEXIS 46196, 2009 WL 1576467, at *8 (S.D.N.Y. June 2, 2009) ("[N]othing in the rules or the case law requires a court to strike any portion of a Rule 56(e) affidavit that is not properly supported." (alteration, quotation marks, and citation omitted)). The Court "declines Defendant[s'] invitation to analyze [exhibits] line-by-line to determine

which parts comport with the local rules and Fed. R. Civ. P. 56(e) and which do not. The better course of action is to admit" the exhibits and consider only the portions that are admissible. *Miller v. Batesville Casket Co.*, No. 02-CV-5612, 2007 U.S. Dist. LEXIS 53068, 2007 WL 2120371, at *5 (E.D.N.Y. July 23, 2007), *vacated on other grounds*, 312 Fed. App'x 404 (2d Cir. 2009) (summary order); *see also Mayaguez S.A.*, 2022 U.S. Dist. LEXIS 54936, 2022 WL 901627, at *8; *Sauerhaft*, 2009 U.S. Dist. LEXIS 46196, 2009 WL 1576467 at *8 ("A court may decline to conduct a line-by-line analysis and instead simply disregard the allegations that are not properly supported.").

Plaintiff also lodges a blanket objection at scores of exhibits, stating that the exhibits lack authentication and foundation. (*See, e.g.*, Mot. To Strike 8 (listing objections to "other exhibits").) Evidence is authenticated if its proponent provides sufficient evidence to demonstrate that it "is what the proponent claims it is." Fed. R. Evid. 901(a). "A district court 'has broad discretion in determining whether an item of evidence has been properly authenticated.'" *Hallett v. Stuart Dean Co.*, 517 F. Supp. 3d 260, 268 (S.D.N.Y. 2021) (quoting *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001)). As Defendants point out, (*See* Defs. Mot. to Strike Opp. 5), the majority of these exhibits "were produced [by Plaintiff to Defendants] in this litigation, and [Plaintiff] offers no specific reason to doubt any document's authenticity." *Hallett*, 517 F. Supp. 3d at 268; *see also John Paul Mitchell Sys. v. Quality King Distribs., Inc.*, 106 F. Supp. 2d 462, 472 (S.D.N.Y. 2000) ("[T]he act of production implicitly authenticate[s] [a] document[]."). To the extent that Plaintiff's authentication

and foundation objections rest upon documents Plaintiff itself produced, the Court will overrule this objection for the purposes of summary judgment. *Comm. Data Servers Inc. v. IBM*, 262 F. Supp. 2d 50, 58 n.3, 60 (S.D.N.Y. 2003) ("There is sufficient evidence of their authenticity for the court to consider these documents on this motion for summary judgment."). For other objections related to authentication or foundation, the Court will address the objections as needed throughout the Court's analysis.

As such, the Court will not "expend judicial resources addressing each of the [exhibits and associated statements] that [Plaintiff] identifies in its motion to determine whether it should be stricken." *Mayaguez S.A.*, 2022 U.S. Dist. LEXIS 54936, 2022 WL 901627, at *8 (alteration omitted). Instead, this Court will, as it is required to do, carefully review and disregard inadmissible or unsupported material. *Id.* To the extent that Defendants' Rule 56.1 Statement cites inadmissible material, or does not provide supporting citations to the record, this Court will disregard it in resolving Defendants' motion for summary judgment.

3. Defendants' Motion to Strike

Defendants argue that "[i]nstead of retaining one or more experts" to rebut Defendants' proffered experts, "Plaintiff has instead attempted a run-around by including what is clearly on its face rebuttal-type expert witness testimony from a lay witness," namely Gabriel Levitt. (Levitt Decl. PML 1.) Specifically, Defendants allege that the relevant statements in the Levitt Declaration "either reference selected portions from the opinions

and detailed computations of Defendants' experts, and attempt to refute or twist them to favor Plaintiff, or offer conclusory opinions . . . without evidentiary support." (*Id.* at 2 (citations omitted).) In opposition, Plaintiff argues that the testimony represents "an objective recitation of factual information rather than opinion[,]" and that the statements were otherwise admissible as lay opinion under Federal Rules of Evidence 701. (Pl.'s Opp. to Mot. ("Pl.'s Strike Opp.") 1 (Dkt. No. 299).)

For reasons similar to Plaintiff's motion to strike, this Court denies Defendants' motion to strike as well. This Court will exercise its broad discretion and "simply ignore . . . those paragraphs lacking factual support or citing to inadmissible evidence." *Mayaguez S.A.*, 2022 U.S. Dist. LEXIS 54936, 2022 WL 901627, at *8 (citing *Emanuel*, 2015 U.S. Dist. LEXIS 37944, 2015 WL 1379007, at *2); *see also Sauerhaft*, 2009 U.S. Dist. LEXIS 46196, 2009 WL 1576467, at *8 (explaining that "nothing in the rules or the case law requires a court to strike any portion of a Rule 56(e) affidavit that is not properly supported" and that "[a] court may decline to conduct a line-by-line analysis and instead simply disregard the allegations that are not properly supported." (alterations, quotation marks, and citations omitted)). To the extent that the Levitt Declaration cites inadmissible material, or does not provide supporting citations to the record, this Court will disregard it in resolving the instant motion for summary judgment.[2]

2. Defendants also lodge several objections to Levitt's "analysis and computations based on numbers derived from the expert report[s]" of Defendants' experts, specifically arguing that this practice is improper expert testimony. (Defs.' Mot. to Strike 2-3

B. Factual Background

The following facts are taken from the Parties' statements pursuant to Local Civil Rule 56.1, specifically Defendants' 56.1 Statement, (Defs.' Mem. in Supp. of Joint Mot. for Summ. J. Ex. 1 ("Defs.' 56.1") (Dkt. No. 264-1)), Plaintiff's Response to Defendants' 56.1 Statement, (Pls.' Resp. to Defs.' 56.1 Statement ("Pl.'s Resp. 56.1") (Dkt. No. 269-1)), Defendants' Reply to Plaintiff's 56.1 Statement, (Defs.' Reply to Pl.'s 56.1 ("Defs.'56.1 Reply") (Dkt. No. 281-1)), and the admissible evidence submitted by the Parties.[3] The facts are recounted "in the light most

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(quotation marks omitted).) It is true that an affidavit may not contain expert testimony unless the affiant has first been designated an expert under Fed. R. Civ. P. 26(a)(2). In this case, no such designation was made. However, Levitt's testimony is more properly understood as testimony by a lay witness "result[ing] from a process of reasoning familiar in everyday life,"—namely, basic arithmetic—instead of expert testimony which "results from a process of reasoning which can be mastered only by specialists in the field." Fed. R. Evid. 701, advisory committee's notes to 2000 amends.; *see also United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007) (ruling that a witness provided permissible lay testimony under Rule 701 "because he merely did the math" (quotation marks omitted)); *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005) (finding that "the mere calculation of an average of 103 numbers is not the sort of statistical determination which requires" special knowledge). Accordingly, the Court will consider the mathematical calculations contained in Mr. Levitt's declaration.

3. While "Local Civil Rule 56.1 does not provide for a 'reply' in further support of a Rule 56.1 statement of undisputed facts," it also "does not prohibit such replies." *Cap. Rec., LLC v. Vimeo, LLC*, No. 09-CV-10101, 2018 U.S. Dist. LEXIS 153998, 2018 WL 4659475, at *1 (S.D.N.Y. Sept. 7, 2018). The Court will consider Defendants' reply to

favorable to" Plaintiff, the non-movant. *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 30 (2d Cir. 2018) (quotation marks omitted).

1. Overview of Plaintiff PCC's Website

The Parties agree that PCC itself "is not a pharmacy and does not sell, dispense, or distribute drugs." (Pl.'s Resp. 56.1 ¶ 96; Defs.' 56.1 Reply ¶ 96.)[4] However, the

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the extent that it responds to new facts raised by Plaintiffs in their response, including Plaintiff's additional statements of undisputed facts and any new evidence introduced in Plaintiff's response. *See Roth v. Cheesecake Factory Rests. Inc.*, No. 19-CV-6570, 2021 U.S. Dist. LEXIS 23801, 2021 WL 1103505, at *2 (S.D.N.Y. Feb. 5, 2021) (considering only facts asserted in response to new facts raised in the non-movant's response), *report and recommendation adopted*, No. 19-CV-6570, 2021 U.S. Dist. LEXIS 44934, 2021 WL 912416 (S.D.N.Y. Mar. 10, 2021); *Cunningham v. Cornell Univ.*, No. 16-CV-6525, 2019 U.S. Dist. LEXIS 167868, 2019 WL 4735876, at *1 n.3 (S.D.N.Y. Sept. 27, 2019) ("The Court will not consider . . . [the] [d]efendants' [r]eply except to the extent it responds to new facts in [the] [p]laintiffs' [c]ounterstatement."); *Pape v. Dircksen & Talleyrand Inc.*, No. 16-CV-5377, 2019 U.S. Dist. LEXIS 17717, 2019 WL 1435882, at *3 (E.D.N.Y. Feb. 1, 2019) (declining "to consider the Reply Rule 56.1 Statement, except to the extent it responded to [] new facts"), *report and recommendation adopted*, No. 16-CV-5377, 2019 U.S. Dist. LEXIS 55158, 2019 WL 1441125 (E.D.N.Y. Mar. 31, 2019).

4. Defendants dispute this clause only insofar as it "implies that [PCC] does not assist in or enable the sale and distribution of drugs to consumers." (Defs.' 56.1 Reply ¶ 96.) This dispute does not substantively undermine the factual allegation, and accordingly, the Court deems this fact admitted. *See Arch Specialty Ins. Co. v. TDL Restoration, Inc.*, No. 18-CV-6712, 2021 U.S. Dist. LEXIS 62961, 2021 WL 1225447, at *1 n.1 (S.D.N.Y. Mar. 31, 2021) (collecting

Parties dispute the ultimate mission of PCC, specifically whether PCC is targeting its marketing toward U.S. consumers. (*See* Defs.' 56.1 ¶¶ 38-50; Pl.'s Resp. 56.1 ¶¶ 38-50.) Defendants assert that "PCC's mission is to help U.S. consumers find and purchase lower-cost medicine from pharmacies outside the U.S." (Defs.' 56.1 ¶ 38.) Plaintiff asserts that PCC's mission is to "ensure that consumers are properly informed about purchasing safe and affordable medication online to meet their individual health needs" and "to help consumers afford medication they need." (Pl.'s Resp. 56.1 ¶ 38.) Defendants argue that "PCC solicits American consumers to use PharmacyChecker.com to find and import drugs from international pharmacies to save money." (Defs.' 56.1 ¶ 39.)[5] Plaintiff argues that PCC

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cases) ("Where the Parties identify disputed facts but with semantic objections only or by asserting irrelevant facts, [the Court will not consider] these purported disputes, which do not actually challenge the factual substance described in the relevant paragraphs, . . . as creating disputes of fact.").

5. Plaintiff lodges evidentiary objections to Defendants Exhibits 40 and 41 which are used to support statement 39. (*See* Pl.'s Resp. 56.1 ¶ 39; Mot. To Strike 8.) As to Exhibit 41, Plaintiff appears to mistakenly believe that this is a draft email rather than a blog post. (*See* Pl.'s Resp. 56.1 ¶ 39.) As to both exhibits, Plaintiff argues that these exhibits are not authenticated, lack foundation, and are inadmissible hearsay. (Pl.'s Resp. 56.1 ¶ 39; Mot. To Strike 8.)

First, as the documents were produced by Plaintiff during discovery, the Court overrules the authentication and foundation objection. *See Hallett*, 517 F. Supp. 3d at 268 (overruling authentication objections because the exhibits "were produced [by Plaintiff to Defendants] in this litigation, and [Plaintiff] offers no specific reason to doubt any document's authenticity"). In addition,

"encourages visitors worldwide to use information on its website." (Pl.'s Resp. 56.1 ¶ 39.) Finally, Defendants claim that PCC "targets U.S. consumers with the 'title tags' of its web pages—around 70% of the site's pages have 'US' or 'U.S.' in their title tags." (Defs.' 56.1 ¶ 41.) Plaintiff counters that the HTML meta tags "reflect information [P]laintiff tracks so that [PCC] users have an accurate idea of what to expect on [P]laintiff's website." (Pl.'s Resp. 56.1 ¶ 41.) Regardless, the Parties agree that "PCC's 'forte' is 'international online pharmacies' prices[,]'" (Defs.' 56.1 ¶ 44; Pl.'s Resp. 56.1 ¶ 44), and that "PCC has described itself as a 'maverick' for recommending foreign pharmacy websites and providing 'information to consumers about safe international pharmacies that sell to consumers in the United States[,]'" (Defs.' 56.1 ¶ 50; Pl.'s Resp. 56.1 ¶ 50).

When a user navigates to PCC's website, the homepage allows users to search for a prescription drug name in search of "prescription savings you can trust." (Defs.' 56.1 ¶ 45; Pl.'s Resp. 56.1 ¶ 45.) The page states that there are "Verified International and Canadian online pharmacy

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while both statements are hearsay being offered for the truth of the matter asserted (i.e. that "PCC solicits American consumers to use [PCC] to find and import drugs from international pharmacies to save money"), both statements fall firmly within the hearsay exception as admissions by a party-opponent. *See* Fed. R. Evid. 801(d)(2). Exhibit 40 is a pamphlet created by PCC, presumably to provide to consumers to "empower[] patients to afford medication." (Defs.' Mem. of Law in Supp. of Mot. Ex. 40 (Dkt. No. 264-41).) Exhibit 41 is a blog post from PCC's own website, quoting PCC's CEO Tod Cooperman. (Defs.' Mem. of Law in Supp. of Mot. Ex. 41 (Dkt. No. 264-42).) As such, the Court will consider these exhibits at summary judgment.

options" as well as "[f]ree U.S. pharmacy coupons." (Defs.' 56.1 ¶ 45; Pl.'s Resp. 56.1 ¶ 45.) PCC also states that users can "[c]ompare drug prices and save up to 90%." (Defs.' 56.1 ¶ 45; Pl.'s Resp. 56.1 ¶ 45.) In addition, at the top of PCC's homepage, a user can click on two relevant links, one taking the user to a page about "Accredited Online Pharmacies," and another about "Prescription Savings." (*See* Defs.' 56.1 ¶ 45; Pl.'s Resp. 56.1 ¶ 45.)

On the "Accredited Online Pharmacies" page, the "web page listing . . . is titled 'Accredited Canadian and International Online Pharmacies.'" (Defs.' 56.1 ¶ 46; Pl.'s Resp. 56.1 ¶ 46.) Here, PCC describes the company's purpose as "helping patients across the world find the lowest prescription medication costs from licensed pharmacies in Canada and other countries." (*See* Defs.' 56.1 ¶ 46; Pl.'s Resp. 56.1 ¶ 46.)[6] PCC also lists several countries with pharmacies that are accredited through "the PharmacyChecker Verification Program[,]" including "Canada, Australia, India, Mauritius, New Zealand, Turkey, the UK, and the United States." (Defs.' 56.1 ¶ 46; Pl.'s Resp. 56.1 ¶ 46; Defs.' Mem. of Law in Supp. of Mot. Ex. 48 at 1.)

On the starting page for "Prescription Savings," PCC "compares U.S. prices to Canadian and International

6. The Court notes that the excerpted portion of PCC's website included in the body of Defendants' 56.1 statement differs from the attached Exhibit 48. (*Compare* Defs.' 56.1 ¶ 46 *with* Defs.' Mem. of Law in Supp. of Mot. Ex. 48 (Dkt. No. 264-49).) Specifically, Exhibit 48 excludes the first paragraph quoted in the excerpt in Defendants' 56.1. However, Plaintiff does not dispute the excerpt in ¶ 46, and the Court deems this fact admitted.

prices and shows the percentage savings available" to users interested in purchasing certain drugs from "trusted international mail order online pharmacies, including licensed Canadian pharmacies and local U.S. pharmacies." (Defs.' 56.1 ¶ 47; Pl.'s Resp. 56.1 ¶ 47.)[7] The page includes a comparison chart that lists a drug name, followed by the price of the drug in the United States, Canada, and internationally. (Defs.' 56.1 ¶ 47; Pl.'s Resp. 56.1 ¶ 47.) All prices are listed on the website in U.S. dollars. (Defs.' 56.1 ¶ 42; Pl.'s Resp. 56.1 ¶ 42.)[8]

When a user searches for a specific drug price comparison, PCC will first state the lowest price found for the drug at the top of the page. (Defs.' 56.1 ¶ 16 (screenshot stating "[t]he lowest price on PharmacyChecker.com for Januvia . . . is $0.60 per tablet for 84 tablets at

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7. Plaintiff disputes Defendants' assertion that these prices are specifically targeted to "Americans who import drugs from foreign pharmacies rather than buying those drugs locally in the U.S.," because there is "no admissible evidence that the prices are 'for Americans who import drugs.'" (*See* Pl.'s Resp. 56.1 ¶ 47.) However, as Plaintiff does not appear to dispute the actual text of the webpage and excerpted exhibit, the Court deems the relevant undisputed facts admitted.

8. Plaintiff appears to have mistakenly stated that the relevant portion of this statement is disputed. As excerpted by the Court, Defendants stated that PCC "lists prices for prescription drugs in U.S. dollars and no other currency." (Defs.' 56.1 ¶ 42.) Plaintiff asserts that this statement is disputed, but then notes that "Plaintiff does list prices for prescription drugs in U.S. dollars," citing the same evidence as Defendants. (*See* Pl.'s Resp. 56.1 ¶ 42.) Plaintiff continues, seemingly explaining why PCC lists prices in U.S. dollars, but not disputing the fact that prices are indeed listed in a single currency. (*Id.*) As such, the Court deems this relevant fact admitted.

PharmacyChecker-accredited online pharmacies"); Pl.'s Resp. 56.1 ¶ 16 (same); *see also* Defs.' 56.1 ¶ 52.)[9] PCC then shows a chart of "Pharmacy Savings Option[s]" with international price comparisons, "including direct links to the online pharmacy pages where the consumer can order the drug." (Defs.' 56.1 ¶¶ 16, 52; Pl.'s Resp. 56.1 ¶¶ 16, 52.) Each listing also states which country the drug will ship from. (Defs.' 56.1 ¶ 16 (stating that Sunshine Pharmacy will "[s]hip[] [w]orldwide from Canada"); Pl.'s Resp. 56.1 ¶ 16 (same).)

Though the Parties dispute the timing, this chart is at least in part sorted by a "bidding system," where PCC "displays accredited pharmacies on its website in order of the highest bidder." (Defs.' 56.1 ¶¶ 16-17; Pl.'s Resp. 56.1 ¶¶ 16-17.)[10] "On instruction from an accredited pharmacy customer, PCC increases or decreases bids, and adds, removes, and adjusts daily budgets for total click through fees that a pharmacy is to be charged before being removed from the site for the remainder of the day once the daily budget is hit." (Defs.' 56.1 ¶ 20; Pl.'s Resp. 56.1 ¶ 20.) "At times, PCC advises its accredited pharmacies on how to test bid amounts to get to the top of the list displayed on

9. Plaintiff's objection to Defendants' statement 52 is purely semantic: the screenshot as provided would be seen by a U.S. consumer, as stated by Defendant. Accordingly, the Court deems this fact admitted. *See Arch Specialty Ins. Co.*, 2021 U.S. Dist. LEXIS 62961, 2021 WL 1225447, at *1 n.1.

10. Again, Plaintiff's objection to Defendants' characterization of a "bidding system" is purely semantic and immaterial to this Court. The Court acknowledges Plaintiff's evidentiary objection to Exhibit 11, but admits this statement of fact based on the other supporting Exhibits not in dispute by the Parties.

PCC"s website." (Defs.' 56.1 ¶ 21; Pl.'s Resp. 56.1 ¶ 21.) This bidding system "is not disclosed to consumers using its website." (Defs.' 56.1 ¶ 19; Pl.'s Resp. 56.1 ¶ 19.)

Finally, "PCC's website has been published in English since 2003." (Defs.' 56.1 ¶ 43; Pl.'s Resp. 56.1 ¶ 43.) "When PCC launched a Spanish version of the website in 2016, PCC focused on the value of this for Spanish speakers in the U.S., noting that '38% of Hispanics living in the U.S. speak mainly Spanish.' The press release announcing the Spanish version quoted PCC CEO Tod Cooperman as saying 'No one living in the U.S. should have to forgo filling a prescription because of high drug prices, especially when lower prices on the same drugs are available to informed consumers. We are pleased to extend our information to the Spanish-speaking community.'" (Defs.' 56.1 ¶ 43; Pl.'s Resp. 56.1 ¶ 43.)

2. PCC's Pricing Model

From January 2015 through August 2021, the majority of PCC's revenue came from three sources: approximately [TEXT REDACTED BY THE COURT] came from cost-per-click fees "that PCC charges its accredited pharmacies for sending consumers to those accredited pharmacies' websites"; [TEXT REDACTED BY THE COURT] came from fees pharmacies pay to participate in PCC's Verification Program; and [TEXT REDACTED BY THE COURT] came from fees verified pharmacies pay to be listed on PCC's website. (Defs.' 56.1 ¶¶ 8-9; Pl.'s Resp. 56.1 ¶¶ 8-9.)[11] As to the verification program,

11. Plaintiff disputes the characterization of this evidence, but does not dispute its factual basis. As such, the Court deems this fact

approximately [TEXT REDACTED BY THE COURT] of the fees paid to PCC were paid by foreign pharmacies. (Defs.' 56.1 ¶¶ 8, 22; Pl.'s Resp. 56.1 ¶¶ 8, 22.) As to the listing program, the Parties dispute nearly every aspect of the program's makeup, including how many U.S. pharmacies have participated in the listing program both currently and historically. (Defs.' 56.1 ¶¶ 24-25; Pl.'s Resp. 56.1 ¶¶ 24-25.) However, the Parties agree that "PCC's other revenue streams, including application fees received from online pharmacies, revenue from discount cards, Medicare drug plans, advertising, and e-book, provide less than [TEXT REDACTED BY THE COURT] of its total revenues." (Defs.' 56.1 ¶ 10; Pl.'s Resp. 56.1 ¶ 10.)

At all times relevant to this litigation, the majority of PCC's accredited pharmacies were based outside of the United States. (Defs.' 56.1 ¶ 27; Pl.'s Resp. 56.1 ¶ 27.) In fact, during this period, between [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] of PCC's total revenue and "over [TEXT REDACTED BY THE COURT] of its click-through revenue . . . came from PCC-accredited foreign pharmacies." (Defs.' 56.1 ¶ 22; Pl.'s Resp. 56.1 ¶ 22.) U.S. consumers in particular "generat[ed] [TEXT REDACTED BY THE COURT] of click-through fees paid to the company" during this period. (Defs.' 56.1 ¶ 40; Pl.'s Resp. 56.1 ¶ 40.)[12] In addition, [TEXT

admitted. *See Arch Specialty Ins. Co.*, 2021 U.S. Dist. LEXIS 62961, 2021 WL 1225447, at *1 n.1.

12. Again, Plaintiff disputes the characterization of this evidence, but does not dispute its factual basis. Instead, Plaintiff introduces yet another metric it argues the Court should use to understand how cost-per-click fees factor into PCC's revenue,

REDACTED BY THE COURT] different pharmacy websites received paid clicks from PCC. (*See* Defs.' 56.1 ¶¶ 29-30, 35 (comparing clicks for pharmacy websites during the relevant period); Pl.'s Resp. 56.1 ¶¶ 29-30, 35 (same).) "The '[TEXT REDACTED BY THE COURT]' of users who visit [PCC] click-through to pharmacies [TEXT REDACTED BY THE COURT] [TEXT REDACTED BY THE COURT]" (Defs.' 56.1 ¶ 31; Pl.'s Resp. 56.1 ¶ 31.) However, the Parties dispute the relevance of this data as it pertains to U.S. consumers, disagreeing primarily about how much of the click-through fees from U.S. consumers were billed to these foreign websites. (*See* Defs.' 56.1 ¶¶ 32-34; Pl.'s Resp. 56.1 ¶¶ 32-34.) The Parties agree, however, that "[a]t least [TEXT REDACTED BY THE COURT] websites that received clicks between January 2015 and August 2021 were foreign. Those foreign websites accounted for [TEXT REDACTED BY THE COURT] of the click fees ([TEXT REDACTED BY THE COURT]) and [TEXT REDACTED BY THE COURT] of clicks ([TEXT REDACTED BY THE COURT])." (Defs.' 56.1 ¶ 29; Pl.'s Resp. 56.1 ¶ 29.) "Only [TEXT REDACTED BY THE COURT] [websites] are U.S. sites, accounting for [TEXT REDACTED BY THE COURT] of the click fees ([TEXT REDACTED BY THE COURT]) and [TEXT REDACTED BY THE COURT] of total clicks ([TEXT REDACTED BY THE COURT])." (Defs.' 56.1 ¶ 30; Pl.'s Resp. 56.1 ¶ 30.)

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based on calculations by PCC CEO Gabriel Levitt. (*See* Pl.'s Resp. 56.1 ¶ 40.) The Court will address this characterization as needed while applying the law to the facts. As such, the Court deems this fact admitted. *See Arch Specialty Ins. Co.*, 2021 U.S. Dist. LEXIS 62961, 2021 WL 1225447, at *1 n.1.

3. PCC Consumer Support Materials and Services

PCC maintains a "Consumer Support page" which lists several frequently asked questions and associated answers. (*See* Defs.' 56.1 ¶ 48; Pl.'s Resp. 56.1 ¶ 48.)[13] First, the page states that "PharmacyChecker is the only free, independent company that verifies the safety of Canadian and other international online pharmacies. We then compare their drug prices to U.S. discounts so you get the best deal." (Defs.' 56.1 ¶ 48; Pl.'s Resp. 56.1 ¶ 48.) Next, the page asks several questions, excerpted as relevant below:

> *How much can Americans save by purchasing their prescription drugs online?*
>
> U.S. consumers could pay up to 90% less than what they pay at a local pharmacy—savings like this has meant thousands of dollars a year for users of PharmacyChecker price comparisons. Cost is the difference between patients adhering to their prescribed medication and having to go without it. Americans are forced to make tough decisions: Do I pay my bills? Or should I skip my meds this week? This is unacceptable.

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13. Plaintiff disputes this statement because it is "overly broad" and "not supported by admissible evidence" that the page is "focused on Americans buying drugs from abroad." (Pl.'s Resp. 56.1 ¶ 48.) However, Plaintiff does not dispute the actual statements listed on the consumer support page, including the accuracy of the answers excerpted in Defendants' 56.1 or related Exhibit 6. (*Id.*) As such, the Court deems the relevant facts as excerpted by the Court admitted.

Appendix C

Everyone deserves the opportunity and choice to purchase more affordable medication from licensed pharmacies, whether domestic or international.

How fast is international prescription delivery?

Be advised that medication ordered from outside the U.S. can normally take 2-3 weeks to arrive. If ordering medication from India, it can take even longer. If you need your medication quickly, then you should consult your local pharmacy for immediate supply, and then you may want to purchase more internationally for future use. We publish a pharmacy profile for each accredited pharmacy in the PharmacyChecker Verification Program to provide consumers with specific details, such as particular shipping locations, shipping costs, and payment methods accepted by the pharmacy.

Is it safe to order medication online from a pharmacy outside the U.S.? Yes, as long as you buy from the safest international online pharmacies. With a valid prescription for the medication ordered, dispensed from a licensed pharmacy that is verified in the PharmacyChecker Verification Program, it is exceedingly safe. Peer-reviewed studies based on testing of prescription medication and online

pharmacy practices, strongly demonstrate the safety of ordering medications from an international online pharmacy approved in the PharmacyChecker Verification Program. It is important to note, risks do exist when ordering medication from an unverified international online pharmacy, particularly one that does not require a prescription. [. . .]

[Unknown Question]?

[. . .] Online pharmacies based outside the U.S. are not "rogue" by definition. Licensed and legitimate pharmacies in Canada and other countries sell safe and effective medications internationally, including to consumers in the U.S. Some regulatory bodies, including the Food and Drug Administration (FDA), refer to such pharmacies as "illegal" or "fake" but such distinctions can mislead consumers and impede their access to affordable, safe and effective medication that they cannot obtain locally due to high U.S. drug prices. Pharmacies in some countries are equally as safe if not safer than those in the U.S. [. . .][14]

14. Plaintiff argues that Defendants' Rule 56.1 statement, which excerpts this question and answer, should be stricken in its entirety because "it is not supported by admissible evidence and is legal conclusion couched as fact." (Pl.'s Resp. 56.1 ¶ 3.) As discussed, this Court will only rely on admissible evidence and disregard improper statements or legal conclusions.

Appendix C

Is it legal to order prescription drugs online?

There is no law against ordering medication online. As a resident of the U.S., it's entirely legal to order medication online that is mailed directly from a state-licensed pharmacy. International drug importation is another story: Technically, in the U.S., under most circumstances, it is prohibited to import medication that you order *internationally* online. However, it is important to know that people in the U.S. are not prosecuted for doing so, as long as the medication imported is for your own use and not for resale. [. . .]

What if my medication gets stuck at Customs?

While the law allows the FDA and U.S. Customs and Border Patrol to detain and refuse international prescription orders arriving through the mail, less than one percent of medication orders are actually stopped, at least for orders where a prescription is required. If

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Here, Plaintiff offers no substantive evidentiary objection to Defendants' Exhibit 6, which is relevant to the quoted statement. Instead, Plaintiff argues that the Exhibit does not support Defendants' statement that "buying medications internationally is federally prohibited" because the cited excerpt concerns pharmacies operating internationally, rather than the legality of importation. (Pl.'s Resp. 56.1 ¶ 3.) While the provided Exhibit appears to be cut off, Plaintiff again does not appear to dispute the statement that is actually quoted. (*Id.*) As such, the Court deems the relevant fact as excerpted by the Court admitted.

> that happens, you will receive a letter from the FDA that your drug order was detained or refused. You are allowed to challenge the FDA's decision and try and have it released. [. . .]

(*See* Defs.' 56.1 ¶ 48; Pl.'s Resp. 56.1 ¶ 48; Defs.' Mem. Ex. 6 (Dkt. No. 264-7).)

On the Consumer Support page, PCC maintains a customer complaint form. (Defs.' 56.1 ¶ 61; Pl.'s Resp. 56.1 ¶ 61.) The complaint form states:

> We're sorry if a PharmacyChecker accredited online pharmacy has let you down. Below, you have the opportunity to file a complaint with us about the pharmacy. For us to process your complaint, you must authorize us to contact the company on your behalf. Please describe the problem you had with the pharmacy, and we will do our best to resolve the issue.

(Defs.' 56.1 ¶ 61; Pl.'s Resp. 56.1 ¶ 61.) "Under 'Desired Action,' the form allows the consumer to choose between the options of a full refund, a partial refund, send replacement product, or other." (Defs.' 56.1 ¶ 61; Pl.'s Resp. 56.1 ¶ 61.) While the Parties do not dispute that PCC has assisted U.S. consumers with issues that arose from their purchases from foreign pharmacies, the Parties do dispute the extent to which PCC intervened and the frequency of these types of requests. (Defs.' 56.1 ¶¶ 57, 59-60, 62-64; Pl.'s Resp. 56.1 ¶¶ 57, 59-60, 62-64.) For example, the Parties agree that PCC has assisted at least

one consumer with obtaining a refund from an accredited pharmacy for unfulfilled purchases. (Defs.' 56.1 ¶ 62; Pl.'s Resp. 56.1 ¶ 62.) The Parties also agree that PCC has responded and assisted some consumers who receive incorrect or unmarked medication and has followed up and worked with accredited pharmacies on consumers' behalf regarding issues with orders. (Defs.' 56.1 ¶¶ 63-64; Pl.'s Resp. 56.1 ¶¶ 63-64.)

C. Procedural History[15]

PCC filed its initial Complaint on August 13, 2019. (*See* Compl. (Dkt. No. 1).) After the Court's denial of PCC's Motion for a Preliminary Injunction, (*see* Dkt. No. 73), PCC filed its Amended Complaint on October 21, 2019, (*see* Am. Compl.). On November 6, 2019, NABP, PSM, and LegitScript filed pre-motion letters in anticipation of moving to dismiss PCC's Amended Complaint. (*See* Dkt. Nos. 85, 86, 87.) After receiving responses from PCC, (*see* Dkt. Nos. 89, 90, 91), the Court held a pre-motion conference and set a briefing schedule, (*see* Dkt. (minute entry for Feb. 6, 2020); Dkt. No. 94).

On March 13, 2020, Defendants filed a Joint Motion To Dismiss PCC's Amended Complaint. (*See* Not. of Joint Mot. (Dkt. No. 97); Defs.' Mem. of Law in Supp. of Joint Mot. (Dkt. No. 100); Decl. of Erik T. Koons in Supp. of Joint Mot. (Dkt. No. 102); Decl. of Marjorie Clifton in Supp. of

15. The procedural history of this case is lengthy and complex, involving a higher-than-average number of motions, which have often been briefed simultaneously. (*See generally* Dkt.) The Court herein recounts only the procedural history relevant to the instant Motion.

Joint Mot. (Dkt. No. 103).) On the same day, PSM, ASOP, and LegitScript filed individual Motions To Dismiss PCC's Amended Complaint. (*See* PSM's Not. of Mot. (Dkt. No. 97); PSM's Mem. of Law in Supp. of Mot. (Dkt. No. 98); Decl. of Leslie E. John in Supp. of PSM's Mot. (Dkt. No. 99); ASOP's Not. of Mot. (Dkt. No. 104); ASOP's Mem. of Law in Supp. of Mot. (Dkt. No. 105); LegitScript's Not. of Mot. (Dkt. No. 106); Decl. of Rachel J. Adcox in Supp. of LegitScript's Mot. (Dkt. No. 107); Decl. of John Horton in Supp. of LegitScript's Mot. (Dkt. No. 108); LegitScript's Mem. of Law in Supp. of Mot. (Dkt. No. 109).) On April 17, 2020, PCC filed responses to all four motions to dismiss. (*See* PCC's Mem. of Law in Opp'n to Joint Mot. (Dkt. No. 113); PCC's Mem. of Law in Opp'n to PSM's Mot. (Dkt. No. 111); PCC's Mem. of Law in Opp'n to ASOP's Mot. (Dkt. No. 110); PCC's Mem. of Law in Opp'n to LegitScript's Mot. (Dkt. No. 109).) On May 15, 2020, Defendants jointly filed their Reply and PSM, ASOP, and LegitScript each filed individual Replies. (*See* Defs.' Reply Mem. of Law in Supp. of Joint Mot. (Dkt. No. 116); PSM's Reply Mem. of Law in Supp. of Mot. (Dkt. No. 115); ASOP's Reply Mem. of Law in Supp. of Mot. (Dkt. No. 118); LegitScript's Reply Mem. of Law in Supp. of Mot. (Dkt. No. 117).) The Court held oral argument on all four motions on November 10, 2020, (*see* Dkt. (minute entry for Nov. 10, 2020)), and on March 30, 2021, the Court granted LegitScript's Motion To Dismiss, denied Defendants' Joint Motion To Dismiss, denied ASOP's Motion To Dismiss, and granted in part and denied in part PSM's Motion To Dismiss, (*see* Dkt. No. 129).[16]

16. By virtue of the Court's granting of LegitScript's Motion To Dismiss, PCC's claims against LegitScript were later severed

On May 11, 2021, ASOP and PSM each filed Answers to PCC's Amended Complaint, (*see* ASOP's Answer (Dkt. No. 147); PSM's Answer (Dkt. No. 150)), and NABP filed both an Answer and Counterclaims, (*see* NABP's Answer & Counterclaims (Dkt. No. 148).). CSIP filed its Answer on May 25, 2021. (*See* CSIP's Answer (Dkt. No. 157).)

On April 14, 2022, Defendants filed a pre-motion letter in anticipation of moving to exclude Plaintiff's expert testimony of Benjamin England, Esq. (*See* Dkt. No. 235.) On the same day, Defendants also filed a pre-motion letter in anticipation of a joint motion for summary judgment. (*See* Dkt. No. 233.) After receiving a response on both letters from PCC, (*see* Dkt. Nos. 238-39), the Court held a pre-motion conference and set a briefing schedule, (*see* Dkt. (minute entry for May 9, 2022); Dkt. No. 251).

On June 22, 2022, Defendants filed a joint motion to exclude the expert testimony. (*See* Daubert Not. of Mot.; Defs.' Mem. of Law in Supp. of Mot. ("Defs.' Daubert Mem.") (Dkt. No. 261).) PCC filed its Opposition on July 20, 2022. (*See* PCC's Mem. of Law in Opp'n to Mot. ("PCC's Daubert Mem.") (Dkt. No. 268); Decl. of James Lerner in Supp. of Pl.'s Opp. to Mot. ("Lerner Decl.") (Dkt. No. 268-1).) Defendants filed their Reply on August 5, 2022. (*See* Defs.' Reply Mem. of Law in Supp. of Mot. ("Defs.' Daubert Reply") (Dkt. No. 278).)

On June 22, 2022, Defendants also filed a joint motion for summary judgment. (*See* SJ Not. of Mot.; Defs.' Mem.

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and transferred to the U.S. District Court for the District of Oregon. *See supra* Note 1.

of Law in Supp. of Mot. ("Defs.' SJ Mem.") (Dkt. No. 264); Defs.' 56.1.) PCC filed its Opposition on July 20, 2022. (*See* PCC's Mem. of Law in Opp'n to Mot. ("PCC's SJ Mem.") (Dkt. No. 269); Decl. of Gabriel Levitt in Opp. of Mot. ("Levitt Decl.") (Dkt. No. 271).) Defendants filed their Reply on August 5, 2022. (*See* Defs.' Reply Mem. of Law in Supp. of Mot. ("Def.'s SJ Reply") (Dkt. No. 281).)

On July 20, 2022, PCC filed a motion to strike portions of Defendants' submissions in support of Defendants' Motion for Summary Judgment. (*See* Mot. to Strike.) Defendants filed their Opposition on August 17, 2022. (*See* Defs Mot. to Strike Opp; Decl. of Melanie M. Kiser in Supp. of Defs.' Opp. to Mot. to Strike (Dkt. No. 292-1).) PCC filed its Reply on August 24, 2022. (*See* Pl.'s Reply Mem. of Law in Supp. of Mot. (Dkt. No. 302).)

On August 5, 2022, Defendants filed a pre-motion letter requesting leave to file a motion to strike certain paragraphs of the Declaration of Gabriel Levitt. (*See* Levitt Decl. PML.) In lieu of a pre-motion conference, the Court set a briefing schedule. (Dkt. No. 284.) On August 15, 2022, Defendants filed a memorandum of law in support of their Motion. (*See* Defs.' Mot. to Strike.) Plaintiff filed its Opposition on August 22, 2022. (Pl.'s Strike Opp.)

Finally, on February 16, 2023, Defendants filed a notice of supplemental authority in support of Defendants joint motions for summary judgment and motion to exclude testimony. (*See* Dkt. No. 337.) Plaintiff filed a response on February 24, 2023. (*See* Dkt. No. 342.)

II. Discussion

A. Standard of Review

Summary judgment is appropriate where the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 123-24 (2d Cir. 2014) (same). "In deciding whether to award summary judgment, the [C]ourt must construe the record evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Torcivia*, 17 F.4th at 354; *see also Horror Inc. v. Miller*, 15 F.4th 232, 240 (2d Cir. 2021) (same). "It is the movant's burden to show that no genuine factual dispute exists." *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004); *see also Red Pocket, Inc. v. Interactive Commc'ns Int'l, Inc.*, No. 17-CV-5670, 2020 U.S. Dist. LEXIS 29109, 2020 WL 838279, at *4 (S.D.N.Y. Feb. 20, 2020) (same).

"However, when the burden of proof at trial would fall on the non[-]moving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the non[-]movant's claim," in which case "the non[-]moving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs., L.P. v. Pricewaterhouse Coopers LLP*, 735 F.3d 114, 123 (2d Cir. 2013) (alteration and quotation marks omitted). Further, "[t]o survive a [summary judgment] motion . . ., [a non-movant] need[s] to create more than a

'metaphysical' possibility that his allegations were correct; he need[s] to 'come forward with specific facts showing that there is a genuine issue for trial,'" *Wrobel v. Cnty. of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) (emphasis omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)), "and cannot rely on the mere allegations or denials contained in the pleadings," *Guardian Life Ins. Co. v. Gilmore*, 45 F. Supp. 3d 310, 322 (S.D.N.Y. 2014) (quotation marks omitted); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009) ("When a motion for summary judgment is properly supported by documents or other evidentiary materials, the party opposing summary judgment may not merely rest on the allegations or denials of his pleading."). And, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

"On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law." *Royal Crown Day Care LLC v. Dep't of Health & Mental Hygiene*, 746 F.3d 538, 544 (2d Cir. 2014) (quotation marks omitted). At this stage, "[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Brod v. Omya*, 653 F.3d 156, 164 (2d Cir. 2011) (quotation marks omitted). Thus, a court's goal should be "to isolate and dispose of factually unsupported claims." *Geneva*

Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 495 (2d Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

When ruling on a motion for summary judgment, a district court should consider only evidence that would be admissible at trial. *See Nora Beverages, Inc. v. Perrier Grp. Of Am., Inc.*, 164 F.3d 736, 746 (2d Cir. 1998). "[W]here a party relies on affidavits . . . to establish facts, the statements 'must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant . . . is competent to testify on the matters stated.'" *DiStiso v. Cook*, 691 F.3d 226, 230 (2d Cir. 2012) (quoting Fed. R. Civ. P. 56(c)(4)); *see also Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) ("Rule 56 requires a motion for summary judgment to be supported with affidavits based on personal knowledge . . . ."); *Baity*, 51 F. Supp. 3d at 419 (disregarding "statements not based on [the] [p]laintiff's personal knowledge"); *Flaherty v. Filardi*, No. 03-CV-2167, 2007 U.S. Dist. LEXIS 4595, 2007 WL 163112, at *5 (S.D.N.Y. Jan. 24, 2007) ("The test for admissibility is whether a reasonable trier of fact could believe the witness had personal knowledge." (quotation marks omitted)).

B. Analysis

On March 30, 2021, this Court denied Defendants' Motion To Dismiss, holding that Plaintiff's Amended Complaint "[did] not establish that Plaintiff's enterprise is completely illegal or geared toward illegality." *PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds.*

of Pharm., 530 F. Supp. 3d 301, 330 (S.D.N.Y. 2021). However, the Court noted that "[a]t summary judgment, Plaintiff will no longer be sheltered by the vagueness of its" complaint, stating that "[i]f discovery supports Defendants' claim that the primary purpose of Plaintiff's business is to facilitate unlawful importation, [Defendants] may advance the same argument at that juncture." *Id.* at 330-31 (citation, alterations, and quotation marks omitted). In the instant Motion, Defendants do just that: moving for summary judgment on the very limited issue of illegality. (*See generally* Defs.' SJ Mem.)

In support of their motion for summary judgment, Defendants argue that (1) personal importation of prescription drugs from foreign online pharmacies is unambiguously illegal, (*see id.* at 11-15), (2) almost all of PCC's revenue is derived from accredited international online pharmacies that sell to U.S. consumers, (*see id.* at 15-19), and (3) that PCC's "primary mission" is to facilitate U.S. consumers' unlawful importation of foreign pharmaceuticals, (*see id.* at 19-27). The Court will address each argument in turn.

1. Applicable Law

Section 4 of the Clayton Act provides for a private right of action and treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). However, the Supreme Court has recognized that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of*

Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (quotation marks omitted). As such, the right to seek treble damages for federal antitrust violations has "developed limiting contours . . . embodied in the concept of 'antitrust standing'." *Gatt Commc'ns v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013) (quoting *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 436-38 (2d Cir. 2005)).

The Second Circuit has explained that "[t]o establish antitrust standing, 'a plaintiff must show (1) antitrust injury, which is injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful, and (2) that he is a proper plaintiff in light of the four efficient enforcer factors.'" *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 115 (2d Cir. 2021) (quoting *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009) (quotation marks omitted)). Importantly, "[t]he fact that private plaintiffs have been injured by acts that violate the antitrust laws is not enough to confer standing to sue." *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 438 (2d Cir. 2005). "[R]ather, the issue is whether that harm is an 'injury of the type the antitrust laws were intended to prevent.'" *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 440 (S.D.N.Y. 2015) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)).

While legality is not formally an element of the antitrust inquiry, several courts around the country have found that a plaintiff cannot suffer an antitrust injury

if its asserted harm is based in illegal conduct. This principle was established in *Maltz v. Sax*, 134 F.2d 2 (2d Cir. 1943), where the court held that the plaintiff could not recover because "the damages claimed were for an injury to something which the laws did not recognize as a legal right"; namely, gambling. *Id.* at 5. The *Maltz* court explained: "[The] [p]laintiff has no legal right in a business, the conduct of which was gambling, for which he may obtain protection either in an action at law, or by a suit in equity. He had no legal rights to protect. Therefore [the] defendants could not invade them." *Id.*

In ruling on Defendants' Motion To Dismiss, this Court surveyed opinions of courts across the country that issued similar opinions at various stages of litigation, finding that each case supports the principle of assessing the legality of an enterprise during an antirust standing inquiry. *PharmacyChecker.com LLC*, 530 F. Supp. 3d at 328-31. From these cases, the Court adopted the following principle: "where the plaintiff's enterprise is completely or almost completely illegal, or completely or almost completely geared toward facilitating illegality, that plaintiff cannot plead an antitrust injury." *Id.* at 329-30.[17]

17. PCC argues that this Court applied the wrong antitrust standing standard by introducing illegality, stating that "a federal court may not decline to enforce [§] 1 of the Sherman Act on the purported basis that a plaintiff's business is completely or almost completely geared toward facilitating unlawful conduct by others." (PCC's SJ Mem. 8-16 (quotation marks omitted).) Defendants in reply reiterate the "ample law supporting [the Court'] holding" and argue that PCC waived any alternative standing argument at this time. (Defs.' SJ Reply 3-6.) The Court agrees with Defendants for the reasons stated below.

Contrary to PCC's assertion that "this marks [P]laintiff's first opportunity to litigate the appropriate standard for determining standing," (*see* PCC's SJ Mem. 11), PCC has had ample opportunity to argue the "proper" standard. Of course, the Court did not create this standard out of thin air, despite PCC's assertion that the Court adopted this standard "without briefing." (*Id.* at 12.) In fact, the Parties briefed antitrust standing *extensively* at the motion to dismiss stage, and PCC raises very similar arguments here as it did at the motion to dismiss. (*Compare id.* at 8-15 *with* Pl.'s Opp. to Defs.' Joint Mot. to Dismiss 8-16 (Dkt. No. 114).) Moreover, as Defendants point out, this Court again revisited this issue in relation to Defendants' motion for Phase One discovery as well as Defendants' objection to the Magistrate Judge's order on expert disclosure sequencing. (*See* Dkt. Nos. 163, 194, 195.) At each stage of the litigation, this Court has reiterated the law of the case as it relates to antitrust standing.

"The law-of-the-case doctrine generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Musacchio v. United States*, 577 U.S. 237, 244-45, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016) (citations and quotation marks omitted); *see also Bergerson v. N.Y. State Off. of Mental Health, Cent. N.Y. Psychiatric Ctr.*, 652 F.3d 277, 288 (2d Cir. 2011) (noting that "there is a strong presumption against amendment of prior orders" (citation omitted)); *Bellezza v. Holland*, No. 09-CV-8434, 2011 U.S. Dist. LEXIS 76030, 2011 WL 2848141, at *3 (S.D.N.Y. July 12, 2011) (explaining that reconsideration is appropriate only where there are "cogent or compelling reasons not to [follow the earlier decision], such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice" (citation and quotation marks omitted)).

PCC fails to introduce any "cogent or compelling reasons" counselling this Court to reconsider the rule of law for this case, instead choosing to relitigate old arguments under the guise of PCC's

2. Application

a. Expert Testimony

As an initial matter, the Court will address Defendants' putative motion to disqualify Plaintiff's proffered expert witness. (*See generally* Daubert Not. of Mot.; Defs.' Daubert Mem.) In opposing Defendants' Motion for Summary Judgment, Plaintiff relies on the expert testimony of Benjamin England, Esq. ("England"). (*See generally* PCC's SJ Mem.) England is the founding member and CEO of a "[f]ood [and] [d]rug [c]onsulting [p]ractice and FDA/USDA/Customs and Trade focused law firm . . . providing regulatory consulting and representation of clients" before various federal and state regulatory agencies. (Defs.' Daubert Mem. Ex. 1 ("England CV") (Dkt. No. 261-1).) Plaintiff retained England to "review case files, deposition testimony[,] and marketing materials for [PCC] to opine upon the operation and the interpretation and implementation of the Personal Importation Policy (PIP)" of the FDA. (Defs.' Daubert Mem. Ex. 3 ("England Report") at 6 (Dkt. No. 261-3).) Defendants argue that England's testimony "provides impermissible and incorrect legal conclusions" as well as "speculation" that is not helpful to the Court to assess the legality of Plaintiff's business. (Defs.' Dabuert Mem. 1.) The Court will address each argument to the extent necessary to decide the instant Motion.

"first opportunity to litigate" antitrust standing. As such, this Court will continue to adjudicate the issue of antitrust standing under the same standard delineated in deciding the motions to dismiss.

At the summary judgment stage, a court can "decide questions regarding the admissibility of evidence, including expert opinion evidence[.]" *Gjini v. U.S.*, No. 16-CV-3707, 2019 U.S. Dist. LEXIS 20978, 2019 WL 498350, at *13 (S.D.N.Y. Feb. 8, 2019) (alteration in original) (quoting *Bah v. Nordson Corp.*, No. 00-CV-9060, 2005 U.S. Dist. LEXIS 15683, 2005 WL 1813023, at *6 (S.D.N.Y. Aug. 1, 2005)). "If a proffer of expert testimony is excluded as inadmissible pursuant to [Federal Rule of Evidence] 702, the court must make the summary judgment determination on a record that does not include that evidence." *Colon ex rel. Molina v. BIC USA, Inc.*, 199 F. Supp. 2d 53, 68 (S.D.N.Y. 2001). Rule 702 of the Federal Rules of Evidence provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Although it is the role of the jury to determine the credibility of an expert witness, it is the role of the trial court to serve as a "gatekeep[er]" to ensure that the expert

testimony is reliable and relevant before it is presented to the jury. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (finding that the trial judge's gatekeeping obligation applies to all expert testimony); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (holding that the district court must ensure that a witness is qualified as an expert and "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand").

"[T]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied." *I.M. v. United States*, 362 F. Supp. 3d 161, 191 (S.D.N.Y. 2019) (alteration in original) (quoting *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007)); *see also LVL XIII Brands, Inc. v. Louis Vuitton Malletier S.A.*, 209 F. Supp. 3d 612, 635 (S.D.N.Y. 2016) (same). "[T]he trial judge has broad discretion in the matter of the admission or exclusion of expert evidence[.]" *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119, 8 L. Ed. 2d 313 (1962); *see also Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 213 (2d Cir. 2009) ("The decision to admit expert testimony is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous.").

The Court must first address "the threshold question of whether a witness is qualified as an expert by knowledge, skill, experience, training, or education to render his or her opinions." *Nimely v. City of N.Y.*, 414

F.3d 381, 396 n.11 (2d Cir. 2005) (quotation marks and citation omitted). In doing this, the Court asks "whether the proffered expert has the educational background or training in a relevant field . . . by looking at the totality of the witness's background." *Arista Recs. LLC v. Lime Grp. LLC*, No. 06-CV-5936, 2011 U.S. Dist. LEXIS 47416, 2011 WL 1674796, at *2 (S.D.N.Y. May 2, 2011) (citations and quotation marks omitted). Then, the Court must "compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony" to "ensure that the expert will actually be testifying on issues or subject matters within his or her area of expertise." *Id.* (alteration, citations, and quotation marks omitted). Courts in the Second Circuit liberally construe the expert qualifications requirement, and generally will not exclude expert testimony provided "the expert has educational and experiential qualifications in a general field closely related to the subject matter in question[.]" *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 282 (E.D.N.Y. 2007); *see also In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 559 (S.D.N.Y. 2004) ("The Second Circuit has taken a liberal view of the qualification requirements of Rule 702, at least to the extent that a lack of formal training does not necessarily disqualify an expert from testifying if he or she has equivalent relevant practical experience.").

Here, England has a Bachelor's degree in Biological Sciences from the University of Maryland and a law degree from the University of Miami School of Law. (*See* England CV 3-4.) Of significance, England spent approximately 14 years working for the FDA in several

different capacities, including as: (1) a senior special agent charged with "[e]nforc[ing] [f]ood, [d]rug[,] and [c]osmetic [l]aws"; (2) as a "consumer safety officer/ compliance officer" who "[a]pplied [f]ederal [f]ood, [d]rug[,] and [c]osmetic [l]aws . . . and directed civil and regulatory investigations related to the fraudulent importation of FDA regulated commodities"; and (3) as regulatory counsel to the Associate Commissioner for Regulatory Affairs "advising on matters related to FDA enforcement, imports, bioterrorism, and product safety; law, regulation, and policy development, [as well as] agency-wide implementation of international trade issues for FDA-regulated products and jurisdiction." (*Id.* at 3.) Since leaving the FDA, England has spent almost 20 years in private practice counseling clients on similar regulatory issues, including the requirements of FDA, USDA, and US Customs law. (*Id.* at 2-3.) Given England's almost 35 years of experience directly related to the issues at hand in this case, the Court concludes that he has the educational credentials, experience, and training to qualify as an expert in FDA policy and practice.

However, this does not end the Court's inquiry into the permissibility of England's expert testimony. Defendants argue that "[t]he Court should exclude England's first three opinions about the federal laws and accompanying regulatory framework governing prescription drug importation because they state legal conclusions." (Defs.' Daubert Mem. 1.) Specifically, Defendants argue that England impermissibly "opines as to the federal laws and regulations" in his first three opinions, and the Court should exclude this testimony because "they state ultimate legal conclusions at the heart of Defendants' . . . motion

for summary judgment and thus usurp the Court's role as arbiter of law." (*Id.* at 4-5.) In the alternative, Defendants argue that the Court "should exclude these opinions because they are simply incorrect." (*Id.* at 5.)

An expert's role, under Federal Rule of Evidence 702(a), is to assist the trier of fact in "understand[ing] the evidence" or "determin[ing] a fact in issue," not to dictate either the facts or the law to the jury. Fed. R. Evid. 702(a); *see also Scentsational Technologies, LLC v. Pepsi, Inc.*, No. 13-CV-8645, 2018 U.S. Dist. LEXIS 24375, 2018 WL 1889763, at *3 (S.D.N.Y. Apr. 18, 2018) ("[E]xpert testimony may not usurp the province of the judge to instruct on the law, or of the jury to make factual determinations."). "Thus, while 'an opinion is not objectionable just because it embraces an ultimate issue,' the Second Circuit 'is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion.'" *Joint Stock Co. Channel One Russ. Worldwide v. Infomir LLC*, No. 16-CV-1318, 2021 U.S. Dist. LEXIS 200928, 2021 WL 4810266, at *14 (S.D.N.Y. Sept. 30, 2021) (memorandum and order) (citations omitted) (quoting Fed. R. Evid. 704(a); then quoting *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992) (collecting cases)); *see also United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) ("[A]lthough an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts."). "[T]he general rule is that an expert may not testify as to what the law is, because such testimony would impinge on the trial court's function." *In re Air Disaster at Lockerbie Scot. on Dec. 21, 1988*, 37 F.3d 804, 826-27 (2d Cir. 1994), *overruled on unrelated grounds by Zicherman v. Korean Air Lines*

Co. Ltd., 516 U.S. 217, 116 S. Ct. 629, 133 L. Ed. 2d 596 (1996). "Whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing the jury [on the law]." *Hygh*, 961 F.2d at 364.

England offered four opinions in his expert report, three of which are relevant to this portion of the inquiry. (England Report 6.) Specifically, England stated the following opinions:

> 1. Drugs that comply with FDA's labeling and approval requirements can be and are legally imported whether commercially or by individuals for their own personal use and FDA lacks the power to prevent such importations.
>
> 2. Drugs that comply with FDA's approval requirements except for labeling or packaging differences may be imported under FDA's drug labeling exemptions, whether they are imported commercially or by individuals for their own personal use.
>
> 3. FDA was mandated by Congress to establish clear guidance to consumers explaining when FDA would permit the importation of drugs that might otherwise be refused admission if imported commercially and FDA's Personal Importation Policy is that guidance.

(*Id.*; *see also* Defs.' Daubert Mem. 3.) While Plaintiff argues that "Mr. England is not being proffered to

testify whether plaintiff's enterprise is completely or almost completely geared toward facilitating illegality," (PCC's Daubert Mem. 5 (quotation marks omitted)), it is clear to the Court that, at least with respect to these three opinions, England is doing exactly that. To decide whether PCC is "facilitating illegality," this Court must determine the purely legal question of whether personal importation is permissible under U.S. law. Each of the opinions England has proffered is an attempt to "testify as to what the law is," by offering England's view of the meaning of these statutes based on his experience as a lawyer under the guise of expert advice. *In re Air Disaster at Lockerbie Scot. on Dec. 21, 1988*, 37 F.3d at 826-27 (stating that this type of testimony would "impinge on the trial court's function" by "implicitly provid[ing] a legal standard to the jury").

In response, Plaintiff asserts that "in cases involving a specialized industry or complex regulatory scheme . . . courts routinely allow experts to interpret regulatory requirements and procedures because 'a lay jury cannot be expected to understand the complex regulatory framework that informs' the legality of the actor's conduct." (PCC's Daubert Mem. 8-13 (citing *In re Fosamax Prods. Liab. Litig. ("Fosamax")*, 645 F. Supp. 2d 164 (S.D.N.Y. 2009).) However, *Fosamax* as cited by Plaintiff is distinguishable for several reasons.

In *Fosamax*, the court permitted an expert witness to testify "about general FDA regulatory requirements and procedures" and "offering an opinion as to [the company's] compliance therewith." *Fosamax*, 645 F. Supp. 2d at 191. However, in deciding to allow this expert's testimony, the

court cited the expert's "voluminous report of 143 pages" which was divided into four sections applying the duties and obligations of the FDA to the drug at issue. *Id.* at 189. Specifically, the court noted that the sections "then extensively summarize or quote the record evidence that provides the bases for her opinions." *Id.*

In comparison, England's report totals a mere 14 pages, including five pages describing his qualifications. (*See* England Report 2-6.) Moreover, England spends an additional four pages describing his interpretation of federal statutes and implementing regulations, followed by three pages of his view of the personal importation program without any citations to support his assertions. (*See id.* at 11-13.) For example, England states that the personal importation program was "[i]nitially established as travel policy[] in the 1970s" and the "FDA began permitting individuals who traveled abroad for medical treatment to return with personal use quantities of drugs even though the drugs were unapproved new drugs and misbranded." (*Id.* at 11.) England does not appear to base this fact and others throughout the report on his time at the FDA, as he was not employed at the FDA in the 1970s. (*See generally* England CV.) And despite Plaintiff's assertions that England's report is grounded on publicly available materials, (*see* PCC's Daubert Mem. 4), England offers several conclusory statements without any support. (*See, e.g.*, England Report 14 ("Clearly there are drugs that can be imported legally, ipso facto, under the PIP or relevant law and regulations."); *id.* ("Therefore, any [PCC] accredited (and licensed) pharmacy that ships to the U.S. a drug that is from an approved source, the fact that the labeling does not conform to the FDCA requirements

for adequate directions for use does not make the drug misbranded if it is dispensed by the pharmacy pursuant to a valid prescription. The valid prescription (and other factors described in the FDA regulation) bring the drug within a drug labeling exemption and so the personal importation of the drug by the patient is legal.").) To borrow from language in *Fosamax*, "[s]ome opinions in [England's] report are too conclusory . . . to be admitted." *Fosamax*, 645 F. Supp. 2d at 191.

The other cases Plaintiff cites in support of this principle are similarly unavailing. For example, the court in *In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152 (S.D.N.Y. 2018) specifically admitted expert testimony about a complex statutory scheme because the expert did *not* provide "legal conclusions" or "opine on whether [the defendants] violated the Act, but simply explain[ed] the mechanics of drug approval." *Id.* at 184 (quotation marks and citation omitted). England's testimony in contrast attempts to directly state what the law is as it relates to personal pharmaceutical importation. (*See, e.g.*, England Report 6 ("Drugs that comply with FDA's labeling and approval requirements *can be and are legally imported* whether commercially or by individuals for their own personal use . . . ." (emphasis added)).) Plaintiff's other cases fare no better as they acknowledge the limits of an expert's opinions about the law. *See, e.g., In re Suboxone Antitrust Litig.*, No. 16-CV-5073, 2020 U.S. Dist. LEXIS 219949, 2020 WL 6887885, at *40 (E.D. Pa. Nov. 24, 2020) (excluding an expert's testimony on regulations related to citizen petitions because "her opinion is, at its core, a pure legal conclusion as to whether the [petition at issue] had merit," thus "usurp[ing] the jury's role in applying

the law to the facts"); *Am. HomDe Assur. Co. v. Merck & Co.*, 462 F. Supp. 2d. 435, 448 (S.D.N.Y. 2006) (allowing expert testimony on FDA regulations but excluding other expert testimony that "clearly impinges upon the province of the [c]ourt, in so far as he essentially proffers his own version of contractual interpretation").

At bottom, England is not providing the Court with an extensive interpretation of a complex regulatory scheme, as was the case in *Fosamax* and similar cases. Instead, England is using his first three opinions to dictate what the law is for personal importation of prescription drugs. For these reasons, the Court grants Defendants' Motion to exclude England's testimony as to the first three opinions listed in the expert report.[18],[19]

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18. In the alternative, Defendants also argue that the Court "should exclude these opinions because they are simply incorrect." (Defs.' Daubert Mem. at 5.) However, the Second Circuit has held multiple times that the focus of the *Daubert* inquiry is the *relevance* of an expert's testimony, not its "correctness." *See In re Pfizer Inc. Secs. Litig.*, 819 F.3d 642, 661 (2d Cir. 2016) (declining to weigh in as to whether "[p]laintiffs' [expert's] theory is either legally or factually sustainable" because "*Daubert* and Rule 702 merely authorize the court to ensure that the expert's testimony both rests on a reliable foundation and is relevant to the task at hand" (quotation marks and citation omitted)); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266-67 (2d Cir. 2002) ("In undertaking this flexible inquiry, the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions.").

19. To be clear, however, England's testimony would not have created a genuine issue of material fact sufficient to withstand

Defendants also challenge England's fourth opinion, arguing that the opinion should be excluded because it is (1) "irrelevant to the critical issue of whether Plaintiff facilitates" personal importation, (2) "constitutes unreliable speculation about the intent or motivation of a party," and (3) lacks foundation. (Defs.' Daubert Mem. 16 (emphasis omitted).) For the reasons stated below, the Court disagrees.

"In determining whether an expert's opinion should be excluded as unreliable, 'the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.'" *Houser v. Norfolk S. Ry. Co.*, 264 F. Supp. 3d 470, 475 (W.D.N.Y. 2017) (quoting *Amorgianos*, 303 F.3d at 267). Neither "*Daubert* [n]or the Federal Rules of Evidence require[ ] a district

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summary judgment. Though the Court has determined England's opinions here to be impermissible legal opinions, taken most charitably, this testimony would represent "specialized knowledge" that could "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). In other words, England's opinions here are not "facts" themselves, but are instead additional context for the Court's ultimate legal conclusion on the statutory scheme for personal importation of pharmaceutical drugs. As such, England's opinions on the statutory scheme would not be dispositive or dictate what the law must be in this inquiry, as this is strictly the province of the Court. *See, e.g., In re Suboxone Antitrust Litig.*, 2020 U.S. Dist. LEXIS 219949, 2020 WL 6887885, at *40 (excluding an expert's testimony because "her opinion is, at its core, a pure legal conclusion as to whether the [petition at issue] had merit," thus "usurp[ing] the jury's role in applying the law to the facts").

court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Nimely*, 414 F.3d at 396 (italics omitted) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)). "Thus, when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Amorgianos*, 303 F.3d at 266.

As relevant to the instant inquiry, England's fourth opinion reads as follows:

> PharmacyChecker.com does not buy, sell, distribute, dispense or process orders for drugs and its requirements for pharmacy participation in the accreditation program are clearly consistent with FDA's Personal Importation Policy and designed to ensure participating pharmacies conform to the FDA policy as mandated by Congress.

(England Report 6.) Defendants argue that England's opinion is "irrelevant to the key issue of antitrust injury," counseling the Court to exclude the evidence on this ground. (Defs.' Daubert Mem. 16-17.)[20] However, while this

20. Defendants also argue that "whether Plaintiff itself buys, sells[,] or dispenses orders is a question of fact which is not an appropriate subject for expert testimony." (Defs.' Daubert Mem. 16 n.5.) However, and as Plaintiff points out in opposition, Defendants

Court has an essential gate-keeper role in determining the admissibility of expert testimony, the standards for inclusion of expert testimony are quite permissive for qualified experts—and rightfully so. England's testimony here has a "valid . . . connection to the pertinent inquiry," which is the relevant "precondition to admissibility." *Kumho Tire Co.*, 526 U.S. at 149 (quotation marks and citation omitted). Moreover, it is the role of the Court at summary judgment to assess admissible evidence to determine whether it is "sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs., L.P.*, 735 F.3d at 123 (quotation marks and citation omitted). While the Court declines to determine whether England's fourth opinion is material at this time, the Court will—as it must—rigorously review the record and expert evidence provided in determining whether to grant summary judgment. To put it simply: whether the Defendants find this evidence "irrelevant" is irrelevant to the Court at this time. The Court will determine the weight to give this expert testimony in deciding summary judgment.

Defendants also argue that England's opinion that PCC's verification program is "purportedly designed to ensure compliance with FDA policy" is "unfounded speculation about the intent of Plaintiff. (Defs.' Daubert Mem. 17-18.) Plaintiff argues that England "is not being proffered to testify as to the institutional intent or motive of [P]laintiff when it created its accreditation program,"

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have lodged no dispute to this fact and thus the Court deems it admitted for the purpose of summary judgment. (*See* PCC's Daubert Mem. 19-20; Pl.'s Resp. 56.1 ¶ 96; Defs.' 56.1 Reply ¶ 96.)

but instead represents England's "interpretation of the written language of the program." (PCC's Daubert Mem. 20-21.) While this is a much closer question, the Court agrees with Plaintiff.

The Parties argue about the import of *Town of Halfmoon v. Gen. Electric Co.*, No. 09-CV-228, 2016 U.S. Dist. LEXIS 26888, 2016 WL 866343 (N.D.N.Y. Mar. 3, 2016). (*See* PCC's Daubert Mem. 20-21; Defs.' Daubert Reply 9.) In *Halfmoon*, the defendant gave notice that it would call an expert to address whether certain "response costs were necessary and consistent" with federal regulations that were a prerequisite to recovery under the relevant statute. 2016 U.S. Dist. LEXIS 26888, 2016 WL 866343, at *15 (quotation marks omitted). The plaintiff challenged the expert's testimony on several grounds, including that the opinions "impermissibly rest[ed] on conclusions about the motivations and intent of [the plaintiff's] decision-makers." 2016 U.S. Dist. LEXIS 26888, [WL] at *16 (quotation marks omitted). The *Halfmoon* court disagreed, noting that the expert's report did not "rest on any effort to read [the plaintiff's] institutional mind," but was instead "based on a review of the paper trail" created by a town official and "an examination of whether or not any documentary evidence produced in discovery substantiates [the plaintiff's] claim." *Id.* Here, while Defendants are correct that England did not review a "paper trail or documentary evidence" as the expert did in *Halfmoon*, this does not mean that England's expert opinion rests on motivations and intent. Instead, England relies on a thorough review of PCC's website, a 30(b)(6) deposition and its associated exhibits discussing PCC's verification program, and his expertise

as a compliance officer to provide his view of compliance with laws and regulations. (*See* PCC's Daubert Mem. Ex. 2 (Dkt. No. 268-3).) Moreover, the *Halfmoon* court acknowledged that "the distinction between fact and legal conclusions is extremely fine," and "the mere fact that an expert's opinion is based on criteria delineated by the applicable law does not transmogrify it into a legal conclusion." *Halfmoon*, 2016 U.S. Dist. LEXIS 26888, 2016 WL 866343, at *16 (alteration, quotation marks, and citation omitted).

Defendants also cite to *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531 (S.D.N.Y. 2004), for the same principle. However, the proposed testimony in *Rezulin* differed in ways that supported its exclusion. In *Rezulin*, the expert's proposed testimony "merely repeated facts or other opinions stated by other potential witnesses or in documents produced in discovery," including speculating about "what the FDA might have done with different information." 309 F. Supp. 2d at 546. In addition, the expert drew several inferences from documents produced in discovery, making comments such as the expert "knows for sure" that a pharmaceutical company took the drug off the market "for safety reasons because the chairman of the company allegedly wrote this in a letter." *Id.* at 546-47 (quotation marks omitted). The expert repeatedly made such claims and speculative inferences about intent, with the plaintiffs conceding that the expert was describing "the facts and conditions from which the jury could infer [the] defendant's motivation in stifling research." *Id.* at 547 & n.45. Here, England's testimony does not come close to the improprieties at issue in *Rezulin*. And to the extent that the Court believes that the testimony does begin to veer that way, "the Court will exercise

its supervisory authority . . . to ensure that neither [the expert's] testimony nor the testimony of any other expert for that matter, usurps the role of the trial judge . . . as to the applicable law or . . . applying that law to the facts before it." *Halfmoon*, 2016 U.S. Dist. LEXIS 26888, 2016 WL 866343, at *17 (citation and quotation marks omitted).

Finally, as to Defendants' claim that the England opinion lacks "reasonable foundation," (*see* Defs.' Daubert Mem. 18), the Court disagrees for the same reasons stated above. To the extent that Defendants argue that England's lack of foundation is amplified by discrepancies between exhibits from discovery, testimony, and England's opinions, "factors which make evidence less than conclusive affect only weight, not admissibility." *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003) (citation and quotation marks omitted); *see also United States v. Mustafa*, 753 F. App'x 22, 36 (2d Cir. 2018) (summary order) (citing *Schultz*).

Accordingly, the Court grants Defendants' Motion to Exclude England's testimony as to England's first three opinions, and denies Defendants' Motion to Exclude as to the final opinion.

b. Federal Standards for Illegality

Defendants first argue that they are entitled to summary judgment on the legal question as to whether the personal importation of prescription drugs from foreign online pharmacies is illegal. Specifically, Defendants argue that federal law "unambiguously" makes the

personal importation of prescription drugs illegal, citing to the comprehensive scheme of federal laws and to decisions from courts outside of this District and Circuit who have found as such. (*See* Defs.' SJ Mem. 11-15.)

The importation of prescription drugs is governed by the Federal Food, Drug, and Cosmetic Act ("FFDCA"). In relevant part, the FFDCA prohibits the "introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded[,]" as well any introduction into interstate commerce of any new drug that is not manufactured pursuant to FDA approval. 21 U.S.C. § 331(a), (d); *see also* 21 U.S.C. § 355(a).

The Eighth Circuit has noted that:

> [t]he United States Food and Drug Administration ("FDA") repeatedly has expressed the view that virtually all importation of drugs into the United States by individual consumers violates the FFDCA, because the drugs are not approved in accordance with 21 U.S.C. § 355, are not labeled as required by 21 U.S.C. § 352, or are dispensed without a valid prescription in contravention of 21 U.S.C. § 353(b)(1).

In re Canadian Import Antitrust Litg. ("Canadian Import"), 470 F.3d 785, 788-89 (8th Cir. 2006); *see also Pharm. Rsch. & Mfrs. of Am. v. Dep't of Health & Human Servs.*, No. 10-CV-3402, 2023 U.S. Dist. LEXIS

19752, 2023 WL 1795644, at *1-2 (D.D.C. Feb. 6, 2023) (analyzing *Canadian Import*). These laws overlap by design, "work[ing] in conjunction with the other statutory standards and FDA regulations to create a system that excludes noncompliant and potentially unsafe pharmaceuticals. *Canadian Import*, 470 F.3d at 790. For example, the FFDCA describes in various sections what drugs are "adulterated" or "misbranded." Drugs are considered misbranded in a variety of circumstances, including lacking information required by statute, *see* 21 U.S.C. § 352, if they are labeled in a language other than English, *see* 21 C.F.R. § 201.15(c), or are dispensed without a valid prescription, *see* 21 U.S.C. § 353(b)(1). In addition, the FFDCA expressly prohibits knowingly importing or reimporting drugs, subject to limited exceptions. 21 U.S.C. § 333(b)(1)(A).

Importantly, foreign pharmaceuticals—manufactured and distributed abroad and later imported into the United States—are "unapproved" drugs within the meaning of 21 U.S.C. § 355. *See Pharm. Rsch. & Mfrs. of Am.*, 2023 U.S. Dist. LEXIS 19752, 2023 WL 1795644, at *1 (stating that "the domestic drug supply chain is strictly monitored"); *Canadian Import*, 470 F.3d at 789; *Vermont v. Leavitt*, 405 F. Supp. 2d 466, 473 (D. Vt. 2005) ("Any drug, even a foreign version of an FDA approved drug, will be an unapproved drug unless it meets all United States packaging, labeling and dosage requirements."); *Personal Importation*, Food & Drug Admin. (last updated January 10, 2023), https://www.fda.gov/industry/import-basics/personal-importation ("If a drug is approved for use in another country but is an unapproved new drug in the

U.S. it is illegal to import."); *United States v. Rx Depot Inc.*, 290 F. Supp. 2d 1238, 1245 (N.D. Okla. 2003) (finding that the defendants violated the FFDCA "each time" they introduce an unapproved Canadian drug in violation of 21 U.S.C. § 355). As the Eighth Circuit has summarized:

> [d]rugs that are manufactured and distributed [outside of the United States] are not approved pursuant to [the FDA's approval process]. Because foreign labeling differs from domestic labeling, approval granted to a particular product to be distributed in the United States does not constitute approval of another drug—even one with the same chemical composition—to be distributed [internationally] with different labeling, and then imported into the United States.

Canadian Import, 470 F.3d at 789-90.

While Plaintiff is correct that there are various exceptions to and exemptions from these laws, (*see, e.g.*, PCC's SJ Mem. 22 (citing labeling exemptions listed under 21 C.F.R. § 201.100)), these exemptions do not negate the bright-line rule of illegality. The FDA defines personal importation as "a product not for further sale or distribution into U.S. commerce . . . carried in baggage or shipped by a courier or international mail." *Personal Importation*, Food & Drug Admin. (last updated January 10, 2023), https://www.fda.gov/industry/import-basics/personal-importation. The FDA further notes that "[i]n most circumstances, it is illegal for individuals to import

drugs . . . into the U.S. for personal use because these products purchased from other countries have not been approved by the FDA for use and sale in the U.S. *Id.* The FDA emphasizes the importance of this scheme, stating that it "cannot ensure the safety and effectiveness of the medicine purchased over the Internet from foreign sources. . . . For these reasons, the FDA recommends only obtaining medicines from legal sources in the U.S." *Id.* The FDA continues to provide information regarding situations for which personal importation of a prescription drug "might be allowed": (1) the drug "is for a serious condition for which effective treatment may not be available domestically either through commercial or clinical means"; (2) "[t]here is no known commercialization or promotion of the product to persons residing in the U.S."; (3) the product "does not represent an unreasonable risk"; (4) the consumer "affirms in writing that the product is for personal use"; and (5) the quantity is "generally not more than a three month supply" and the consumer must "[p]rovide the name and address of the doctor licensed in the U.S. responsible for . . . treatment with the product, or [p]rovide evidence that the product is for the continuation of a treatment begun in a foreign country." *Id.* Notably, however, the FDA does not specifically state whether personal importation would indeed be allowed under these circumstances, just that it "might" be allowed. *Id.*

However, there are two clear statutory exceptions to this bright-line rule. First, the Secretary of Health and Human Services ("HHS" or "the Secretary") may authorize importation for emergency use. 21 U.S.C. § 381(d)(2). Second, importation may be permitted

under section 1121 of the Medicare Prescription Drug, Improvement, and Modernization Act, Pub. L. No. 108-173, 117 Stat. 2066 (2003) (the "MMA"). *See* 21 U.S.C. § 384. In 2003, Congress passed the MMA which provided the Secretary with various authorities to relax enforcement of prescription drug importation penalties. *See id.* For example, the Secretary is given the authority to "promulgate regulations permitting pharmacists and wholesalers to import prescription drugs from Canada into the United States." *Id.* at § 384(b). In addition, "[t]he Secretary may grant to individuals, by regulation or on a case-by-case basis, a waiver of the prohibition of importation of a prescription drug . . . under such conditions as the Secretary determines to be appropriate." *Id.* § 384 (j)(2)(A). Specifically, the Secretary may grant a waiver to permit personal importation of a prescription drug under with the following conditions: the drug is (1) "imported from a licensed pharmacy for personal use by an individual, not for resale, in quantities that do not exceed a 90-day supply"; (2) "accompanied by a copy of a valid prescription"; (3) "is imported from Canada, from a seller registered with the Secretary"; (4) "is a prescription drug approved by the Secretary"; (5) "is in the form of a final finished dosage that was manufactured in an establishment registered under [the FFDCA]"; and (6) "is imported under such other conditions as the Secretary determines to be necessary to ensure public safety." *Id.* § 384(j)(3).

The Parties strongly disagree about whether this exception and related guidance (the "Personal Importation Policy") is indeed operative and relevant to PCC's

business, and whether it governs the personal importation of prescription drugs from foreign pharmacies. (*See generally* Defs.' SJ Mem.; PCC's SJ Mem.) Specifically, the Parties disagree as to (1) whether the Secretary must certify any use of the personal importation plan under § 384(j); and, if so, (2) whether the Secretary has in fact ever invoked the Personal Importation Policy for importation from foreign pharmacies.

To both questions, Defendants argue that the Secretary has "never implemented this section to allow for personal importation," citing another section of the statute that notes that "[t]his section shall become effective only if the Secretary certifies to the Congress that the implementation of this section will pose no additional risk to the public's health and safety; and result in a significant reduction in the cost of covered products to the American consumer." (Defs.' SJ Mem. 13). *See also* 21 U.S.C. § 384 (l)(1). Plaintiff disagrees with Defendants' assertion that the Secretary must make this certification prior to invoking § 384(j), arguing that the "program" referenced in the relevant clause refers to the "wholesale importation program under subsection (b), not (j)." (PCC's SJ Mem. 25-26.) However, based on basic principles of statutory interpretation, it is clear that where the certification provision states that "this section shall become effective" only if preconditions occur, the statute intends for the entire section (i.e., § 384) to be affected, rather than just particular subsections (i.e., § 384(b)). Moreover, Plaintiff's interpretation of the statute has been roundly rejected by other courts, and this Court finds no compelling reason to disagree.

For example, in *Vermont v. Leavitt*, 405 F. Supp. 2d 466 (D. Vt. 2005), the court called Plaintiff's proposed reading of the statute "highly implausible," finding that the "only sensible way to read the statute is to assume that Congress intended the certification provision to apply to the whole of [§] 384." *Id.* at 474-75 ("The certification provision clearly states that 'this section shall become effective' only if the Secretary certifies. Thus, the Court begins with a very strong presumption that Congress meant 'section' when it wrote 'section.'" (citations omitted)). Other courts have agreed, citing the court's reasoning in *Leavitt*. *See Canadian Import*, 470 F. 3d at 790 ("In 2000 and 2003, Congress enacted amendments to the FFDCA that would permit limited importation of certain prescription drugs from Canada by pharmacists, wholesalers, or individuals, 21 U.S.C. § 384(b), (j), but only if the Secretary of Health and Human Services first certifies[.]"); *Montgomery Cnty. v. Leavitt*, 445 F. Supp. 2d 505, 510-11 (D. Md. 2006) (citing *Leavitt* to support the proposition that "it is clear that Congress intended the certification provision to apply to both subsection (b) and to the individual waiver provision of subsection (j)"); *cf. Pharm. Rsch. & Mfrs. of Am.*, 2023 U.S. Dist. LEXIS 19752, 2023 WL 1795644, at *2 (describing the Secretary's certification as a "precondition" to promulgating regulations to import prescription drugs from Canada).

Given this authority, this Court concludes that the Secretary has never invoked § 384(j) to put the Personal Importation Policy into effect. In July 2019, HHS and the FDA announced the "Safe Importation Action Plan," which proposed two pathways "to allow the safe importation of

certain drugs originally intended for foreign markets" to provide "safe, lower cost drugs to consumers." Dept. of Health & Human Servs. & U.S. Food & Drug Admin., Safe Importation Action Plan (2019), https://www.hhs.gov/sites/default/files/safe-importation-action-plan.pdf. In December 2019, the FDA issued a Notice of Proposed Rulemaking pursuant to the Safe Importation Action Plan, outlining the steps that the federal government intended to take for the importation of drugs. *See* Importation of Prescription Drugs, 84 Fed. Reg. 70796 (proposed Dec. 23, 2019). In the proposed rule, the FDA was careful to underscore that it was "not proposing to implement the personal importation provisions [in § 384(j)] through this rulemaking." *Id.* at 70800. The FDA went on to explain:

> The internet provides consumers with instant access to information and services, including prescription medications. Medications that are purchased online and imported through international mail, express couriers, and other means pose significant challenges for FDA and its ability to adequately safeguard the quality and safety of drugs taken by U.S. consumers.
>
> While there are pharmacy websites that operate legally and offer convenience, privacy, and safeguards for purchasing medicines, there are many rogue online pharmacies that sell medicines at deeply discounted prices, often without requiring a prescription or adhering to other safeguards followed by pharmacies licensed by a State in the United States. These

> rogue online pharmacies are often run by sophisticated criminal networks that knowingly and unlawfully cause the importation of adulterated, counterfeit, misbranded and unapproved drugs into the United States. [. . .] Consumers go to these websites believing they are buying safe and effective medications, but often they are being deceived and put at risk by individuals who put financial gain above patient safety.
>
> [. . .]
>
> Given these risks, and other concerns . . ., the proposed rule, if finalized, would not implement personal importation provisions under [§ 384(j)].

Id. In the final rule promulgated in October 2020, the FDA addressed several comments that "ask[ed] FDA to expand the proposed rule to . . . allow personal importation of certain prescription drugs." Importation of Prescription Drugs, 85 Fed. Reg. 62094, 62097 (Oct. 1. 2020) (to be codified at 21 C.F.R. pts. 1, 251). Here, the FDA again reiterated that it was "not implementing the personal importation provisions . . . through this rulemaking." *Id.*

Despite this, Plaintiff continues to argue that there is significant daylight between federal law's prohibition on personal importation and the practical reality of importation, claiming that "there is no prohibition on introducing FDA-approved drugs, provided other

requirements are met." (PCC's SJ Mem. 21.) In making this argument, Plaintiff appears to conflate the FDA website guidance on personal importation with the requirements of § 384, arguing that the existence of the Personal Importation Policy is, by design, evidence that there are some exceptions to the prohibition on personal importation that would make the conduct not per se illegal. (*Id.* at 21-28.)[21] Defendants largely rely on *Canadian Import* to argue that "personal importation of prescription drugs from foreign on[]line pharmacies is unambiguously illegal." (Defs.' SJ Mem. 11.)

As explained above, the Eighth Circuit in *Canadian Import* noted that the FDA "repeatedly has expressed the view that virtually all importation of drugs into

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21. In particular, Plaintiff cites *Cook v. Food & Drug Admin.*, 733 F.3d 1, 407 U.S. App. D.C. 1 (D.C. Cir. 2013) for several propositions, including that the FDA has discretion as to how it implements personal importation. (PCC's SJ Mem. 22-23.) Specifically, Plaintiff states that the FDA has pointed to § 384(j) "[a]s evidence that the Congress is aware of and agrees" that "it can 'allow the importation of drugs that are clearly for personal use.'" (*Id.* (citing *Cook*, 733 F.3d at 10 (quotation marks omitted)).)

However, the D.C. Circuit plainly disagreed with Plaintiff in the same paragraph, agreeing instead with the statutory interpretation outlined by this Court. *Cook*, 733 F.3d at 10. The D.C. Circuit stated that "[t]he FDA . . . conveniently overlooks the very next subsection, which effectuates the statute by authorizing the Secretary to grant individual waivers to import prescription drugs. [ ] Congress would have no reason to grant the FDA explicit waiver authority if, as the FDA argues, the agency was already authorized not to enforce [the personal importation of drugs]." *Id.* (citations omitted).

the United States by individual consumers violates the FFDCA." 470 F.3d at 788-89; *see also Pharm. Rsch. & Mfrs. of Am.*, 2023 U.S. Dist. LEXIS 19752, 2023 WL 1795644, at *2 ("The statutory drug-importation scheme has thus lain dormant for most of its history, and importing drugs from Canada or elsewhere has remained effectively illegal."). The *Canadian Import* court also found that this was a "congressional plan to create a closed system designed to guarantee safe and effective drugs for consumers in the United States." *Canadian Import*, 470 F.3d at 790 (quotation marks and citation omitted). While foreign drugs may be "similar in substance" to those manufactured in the United States, foreign drugs may also have "chemical compositions that are not yet approved by the FDA" and may not be "manufactured in accordance with FDA rules[ ] or . . . transported or stored in a manner that is deemed safe by the FDA." *Id.* Specifically, this "closed system ensures that approved prescription drugs are subject to FDA oversight and are continuously under the custody of a U.S. manufacturer or authorized distributor" which makes the drugs safe, consistent, and predictable for the American consumer. *Id.* (quotation marks and citation omitted).

Plaintiff attempts to limit *Canadian Import* by arguing that the case "considered only a class of U.S. plaintiffs who, as alleged, purchased certain drugs in the United States also sold in Canada with different labeling," but "'the Canadian prescription drugs at issue [were] not labeled in conformity with federal law' and were therefore illegal to import under the provisions the class invoked." (PCC's SJ Mem. 23 (citing *Canadian Import*, 470 F.3d at

788-89).) In the alternative, Plaintiff argues that "many drugs sold in Canada ae FDA-approved drugs" and *Canadian Import* only applies to the small, mislabeled class of drugs at issue in the opinion. (*Id.*) However, and as noted in *Canadian Import*, the "fundamental[]" issue regarding the mislabeled drugs in the case "illustrates why . . . Canadian drugs are 'unapproved' drugs'" under federal law—foreign manufactured and distributed drugs are not approved according to the existing statutory framework. *Canadian Import*, 470 F.3d at 789-790.

This Court finds the Eighth Circuit's reasoning is particularly persuasive given its discussion of the MMA. Specifically, the Eighth Circuit reasoned that it was under this "closed system" backdrop that Congress created a "special procedure for authorizing importation of prescription drugs from Canada," ultimately supported the conclusion that federal law does not permit personal importation. *See id.* at 790-91. "While it is true that no federal statute by its express terms bans importation of prescriptions drugs from Canada, such an explicit country-by-country prohibition is unnecessary to accomplish the task. By creating the comprehensive regulatory system . . ., Congress has effectively precluded importation of these drugs absent the sort of special authorization contemplated by 21 U.S.C. § 384." *Id.*

As such, and as relevant to the instant Motion, the Court finds that personal importation of prescription drugs is illegal under current federal law. Plaintiff argues in the alternative that its verification and accreditation system "filters out unlawful importations with requirements consistent with lawful importation."

(*See* PCC's SJ Mem. 26-28.) Plaintiff cites provisions in its "Verification Program Accreditation Standards and Guide," which largely correlate with the FDA's personal importation guidance on its website. (*See id.* at 27 (listing the requirements); Pl.'s Mem. in Opp. Ex. 27 (Dkt. No. 270-28).) *See also Personal Importation*, Food & Drug Admin. (last updated January 10, 2023), https://www.fda.gov/industry/import-basics/personal-importation. However, PCC does not establish that its accreditation program even follows all of the listed guidance. *Compare Personal Importation*, Food & Drug Admin. (last updated January 10, 2023), https://www.fda.gov/industry/import-basics/personal-importation (requiring that the product "is for a serious condition for which effective treatment may not be available domestically either through commercial or clinical means" and does not represent an "unreasonable risk") *with* (PCC's SJ Mem. 27). Moreover, the Court emphasizes the fragility of this argument, as evidenced by the language the FDA itself uses to describe personal importation. *See Personal Importation*, Food & Drug Admin. (last updated January 10, 2023), https://www.fda.gov/industry/import-basics/personal-importation (providing "information regarding situations for which [personal importation of unapproved drugs] *might* be allowed" (emphasis added)). In addition, to the extent Plaintiff argues that its accreditation guidelines comport with the MMA, Plaintiff has quite the mountain to climb. Section 384(j) not only has not been invoked by the Secretary, but even if it had been invoked, the potential provisions only apply to Canada, not all international personal importation. *Id.* As such, Plaintiff's arguments are unpersuasive.

c. PCC's Revenue Share from International Pharmacies

Defendants next argue that "PCC's financial records firmly establish that its enterprise is almost completely geared toward facilitating illegal importation of drugs," because the "overwhelming majority of PCC's revenue comes from consumers clicking on the links that allow them to directly connect to, and unlawfully purchase drugs from, foreign pharmacies." (Defs.' SJ Mem. 15 (quotation marks omitted).) Specifically, Defendants argue that "[TEXT REDACTED BY THE COURT] of PCC's total revenue comes from PCC's foreign online pharmacies for aspects of its business . . . that enable [those pharmacies] to make illegal prescription drug sales to consumers." (*Id.*)

The Court agrees that revenue is highly probative in determining whether summary judgment should be granted to Defendants because it is indicative of how much of Plaintiff's business is derived from illegality or facilitating illegality. In denying Defendants' Motion To Dismiss, this Court provided a non-exhaustive list of examples as to factors that may indicate "illegality" at summary judgment. *See PharmacyChecker.com*, 530 F. Supp. 3d at 330-331. For example, the Court found that Plaintiff's Amended Complaint "alleges that its business consists of presumably legal activities, including accrediting U.S. online pharmacies, and providing price comparisons for U.S. online pharmacies." *Id.* at 330 (citations omitted). The Court also noted that the Amended Complaint "does not allege that all or almost all of

Plaintiff's business relates to these foreign pharmacies," nor did admissions at oral argument "concern the presumably legal aspects of Plaintiff's business." *Id.* In a later discovery order, this Court stated that the Amended Complaint "made no claims regarding the share of [PCC's] business related to the sales of prescription drugs from foreign pharmacies to U.S. consumers[.]" (Order 3 (Dkt. No. 167).) However, as Plaintiff is no longer "sheltered by the vagueness of its [amended complaint]," Plaintiff now faces the tall task of showing that the "primary purpose" of its business is not "to facilitate unlawful importation." *PharmacyChecker.com*, 530 F. Supp. 3d at 330-331.

Based on this background and the Court's finding here that personal importation of prescription drugs is illegal under current federal law, it follows that the overall breakdown of PCC's revenue is crucial: PCC's enterprise is necessarily "completely or almost completely illegal, or completely or almost completely geared toward facilitating illegality" if the majority of its revenue stems from facilitating the purchase of foreign drugs by U.S. consumers.

The Parties do not dispute that between [TEXT REDACTED BY THE COURT] of PCC's total revenue from January 2015 to August 2021 is attributable to online pharmacies located outside of the United States. (Defs.' 56.1 ¶ 22; Pl.'s Resp. 56.1 ¶ 22; *see also* Defs.' Mem. Ex. 16 ("Farrar Report"), at ¶¶ 16, 38, 41 (Dkt. 264-17).) This Court underscores that it is not illegal for a U.S. business to receive some or even almost all of its revenue share from foreign entities. It is, however, illegal if this revenue

stems from illegal activity (i.e., facilitating the purchase of foreign drugs the importation of which is prohibited by federal law). To make this determination, the Court must assess the sources of this revenue, and whether each of these sources facilitate illegal importation.

During the relevant period, the vast majority of PCC's revenue came from three sources: approximately [TEXT REDACTED BY THE COURT] came from cost-per-click fees "that PCC charges its accredited pharmacies for sending consumers to those accredited pharmacies' websites"; [TEXT REDACTED BY THE COURT] came from fees pharmacies pay to participate in PCC's Verification Program; and [TEXT REDACTED BY THE COURT] came from fees verified pharmacies pay to be listed on PCC's website. (Defs.' 56.1 ¶¶ 8-9; Pl.'s Resp. 56.1 ¶¶ 8-9; *see also* Farrar Report at ¶ 14.) "PCC's other revenue streams, including application fees received from online pharmacies, revenue from discount cards, Medicare drug plans, advertising, and e-book, provide less than [TEXT REDACTED BY THE COURT] of its total revenues." (Defs.' 56.1 ¶ 10; Pl.'s Resp. 56.1 ¶ 10; *see also* Farrar Report at ¶ 14.) Most relevant to this inquiry is an analysis of PCC's "cost-per-click" fees, otherwise described as "click-fees." Defendants' expert described this type of monetization for PCC, stating that "[a]ccredited [w]eb [s]ite[s] . . . pay[] a fee each time a consumer clicks on a link in [PCC] pointing to the[ir] website." (Defs.' Mem. Ex. 19 ("Kent Am. Report") at ¶ 24 (Dkt. No. 264-20).) These click-fees are "a very common form of payment for traffic on the Internet," according to Defendants' expert. (*Id.*)

Click-fees are also the key metric in analyzing PCC's revenue because they show (1) whether U.S. consumers are clicking on predominantly foreign pharmacies; and (2) whether these clicks represent the majority of Plaintiff's revenue. Importantly, the Parties agree that "[a]t least [TEXT REDACTED BY THE COURT] websites that received clicks between January 2015 and August 2021 were foreign[,]" which accounted for "[TEXT REDACTED BY THE COURT] of the click fees ([TEXT REDACTED BY THE COURT]) and [TEXT REDACTED BY THE COURT] of clicks ([TEXT REDACTED BY THE COURT])[.]" (Defs.' 56.1 ¶ 29; Pl.'s Resp. 56.1 ¶ 29; *see also* Kent Am. Report ¶¶ 39-40.) "Only [TEXT REDACTED BY THE COURT] [websites that received clicks] are U.S. sites, accounting for [TEXT REDACTED BY THE COURT] of the click fees ([TEXT REDACTED BY THE COURT]) and [TEXT REDACTED BY THE COURT] of total clicks ([TEXT REDACTED BY THE COURT])." (Defs.' 56.1 ¶ 30; Pl.'s Resp. 56.1 ¶ 30; *see also* Kent Am. Report ¶ 40.) As such, the vast majority of users who visit PCC end up clicking through to pharmacies outside of the U.S. (*See* Defs.' 56.1 ¶ 31; Pl.'s Resp. 56.1 ¶ 31.)

As it relates to U.S. consumers, the Parties agree that U.S. consumers "generat[ed] [TEXT REDACTED BY THE COURT] of click-through fees paid to the company" during this period. (Defs.' 56.1 ¶ 40; Pl.'s Resp. 56.1 ¶ 40; *see also* Kent Am. Report ¶¶ 56-58 ("I found that clicks by US visitors on the [PCC] site were responsible for most of [PCC's] revenues.").) Put another way, within the almost [TEXT REDACTED BY THE COURT] share of PCC's total revenue represented by U.S. consumers,

those consumers were searching for prescription drugs from online pharmacies by clicking on links to accredited websites [TEXT REDACTED BY THE COURT] of the time. This percentage is particularly stark when looking at the click percentages [TEXT REDACTED BY THE COURT] for users in other countries: the next largest share comes from [TEXT REDACTED BY THE COURT] users who generate of PCC's click fees, followed by users from the [TEXT REDACTED BY THE COURT] who generate [TEXT REDACTED BY THE COURT] of click fees. (Kent Am. Report ¶ 57.)

At bottom, the only material dispute between the Parties is how the Court should interpret the [TEXT REDACTED BY THE COURT] of click-through fees. Defendants contend that the Court should rely on calculations from their expert, Mr. Peter Kent ("Kent"), who found that "[a]bout [TEXT REDACTED BY THE COURT] of the click fees for clicks from U.S. consumers were billed to foreign PCC-accredited websites." (Defs.' 56.1 ¶ 32; *see also* Kent Am. Report ¶¶ 16, 62 ("About [TEXT REDACTED BY THE COURT] of the click fees for clicks from US consumers were paid by non-US Accredited Web Sites.").) In other words, Defendants calculate that [TEXT REDACTED BY THE COURT] of the [TEXT REDACTED BY THE COURT] of PCC's total revenue derived from U.S. consumers results from fees for U.S. consumers clicks to foreign websites. On the other hand, Plaintiff asks the Court to rely on a different figure, calculated based upon Defendants' expert testimony, which found that [TEXT REDACTED BY THE COURT] of PCC's *total revenue* is from fees generated

by U.S. consumers clicking to foreign online pharmacies. (*See* Pl.'s Resp. 56.1 ¶¶ 32-33; Levitt Decl. ¶ 45.)

It is clear to the Court, however, that no matter how one slices this pie, click fees from U.S. consumers to foreign pharmacies represents the largest share of PCC's revenue. Indeed, as outlined above, there is no source of revenue that could come even close to the costs per clicks generated by U.S. consumers. "The almost total magnitude of this illegal conduct by [Plaintiff] makes their miniscule conduct that may be legal, insignificant . . . ." *Pearl Music Co., Inc. v. Recording Indus. Ass'n of Am., Inc.*, 460 F. Supp. 1060, 1068 (C.D. Cal. 1978); *see also id.* (comparing the facts of the case to *Memorex Corp. v. IBM Corp.*, 555 F.2d 1379 (9th Cir. 1977) where the business was "engaged in wrongful or illegal conduct only in part of its sizeable enterprise"). And, most importantly for purposes of deciding Defendants' summary judgment motion, there is no genuine dispute of material fact as to the data that underlie these two calculations because, if PCC were to lose the click fees from U.S. consumer clicks to foreign websites under either calculation, PCC's business would likely cease to exist.

While not dispositive on its own, this finding is bolstered by PCC's statements on its website as well as PCC's actions toward U.S. consumers who request PCC's support for issues with their transactions. As Defendants explain: "PCC's primary mission is to facilitate U.S. consumers' unlawful importation of foreign pharmaceuticals," because (1) the company "exists to facilitate the purchase of foreign drugs by American

consumers"; (2) "PCC actively 'intervenes' in U.S. consumers' purchase transactions with PCC accredited foreign pharmacies"; and (3) "PCC is well aware of the illegality of the personal importation it facilitates and from which it profits." (Defs.' SJ Mem. 19-27.) While the Court recognizes the dispute between the Parties about the true "mission" of PCC, (*see* Defs.' 56.1 ¶¶ 38-50; Pl.'s Resp. 56.1 ¶¶ 38-50), there are several uncontroverted and undisputed facts bolstering Defendants' remaining assertions.

To start, when a user navigates to the "Prescription Savings" page on PCC's website, PCC states that it "compares U.S. prices to Canadian and International prices and shows the percentage savings available" to users interested in purchasing certain drugs from "trusted international mail order online pharmacies, including licensed Canadian pharmacies and local U.S. pharmacies." (Defs.' 56.1 ¶ 47; Pl.'s Resp. 56.1 ¶ 47.)[22] As users search for prescription drugs, all prices are listed in U.S. dollars, without regard to the location of the pharmacy or the location of the potential consumer. (*See* Defs.' 56.1 ¶ 42; Pl.'s Resp. 56.1 ¶ 42.)

In addition, PCC and its executives have made several statements—many of which are still available

22. The Court notes that Plaintiff disputes that these prices are specifically targeted to "Americans who import drugs from foreign pharmacies rather than buying those drugs locally in the U.S.," because there is "no admissible evidence that the prices are 'for Americans who import drugs.'" (*See* Pl.'s Resp. 56.1 ¶ 47.) However, as discussed in the factual background, Plaintiff does not dispute the text of the page itself. (*See* Defs.' 56.1 ¶ 47; Pl.'s Resp. 56.1 ¶ 47.)

on PCC's website—indicating that the company is, at a minimum, aware of an effort to contravene the American pharmaceutical statutory scheme, and at most, aware of the illegality of personal importation that PCC offers to facilitate. For example, when announcing the Spanish version of its website, CEO Tod Cooperman was quoted in the press release stating "No one living in the U.S. should have to forgo filling a prescription because of high drug prices, especially when lower prices on the same drugs are available to informed consumers." (Defs.' 56.1 ¶ 43; Pl.'s Resp. 56.1 ¶ 43.) In its press release, PCC also focused on the value of a Spanish language website for U.S. consumers, "noting that 38% of Hispanics living in the U.S. speak mainly Spanish." (Defs.' 56.1 ¶ 43; Pl.'s Resp. 56.1 ¶ 43 (quotation marks omitted).) In addition, PCC openly touts its work helping all consumers "get the best deal" on its Consumer Support page, while simultaneously providing advice specifically to U.S. consumers. (*See* Defs.' Mem. Ex. 6; Defs.' 56.1 ¶ 48; Pl.'s Resp. 56.1 ¶ 48.) PCC lists at least seven "frequently asked questions" on its Consumer Support page, providing consumers with information on a variety of topics, including "[h]ow much can Americans save by purchasing their prescription drugs online" and how "fast" international prescription delivery can be for consumers. (*See* Defs.' Mem. Ex. 6; Defs.' 56.1 ¶ 48; Pl.'s Resp. 56.1 ¶ 48.) In response, PCC states that "U.S. consumers could pay up to 90% less than what they pay at a local pharmacy" and that "[e]veryone deserves the opportunity and choice to purchase more affordable medication from licensed pharmacies, *whether domestic or international*." (*See* Defs.' Mem. Ex. 6 (emphasis added).) PCC "advise[s] [consumers] that medication ordered from outside the

U.S. can normally take 2-3 weeks to arrive[,]" and tells consumers to purchase from a local pharmacy "for immediate supply" and later "purchase more internationally for future use." (*Id.*)

Even more probative, however, are PCC's statements regarding its interpretation of federal law on personal importation, as well as various statements about the safety of prescription drugs from foreign pharmacies. In response to a question about the legality of ordering prescription drugs online, PCC describes the prohibition of "[i]nternational drug importation" as a technicality, stating: "Technically, in the U.S., under most circumstances, it is prohibited to import medication that you order *internationally* online." (*Id.* (emphasis in original).) PCC continues by opining on FDA's enforcement discretion, telling its U.S. consumers that "it is important to know that people in the U.S. are not prosecuted for [importing medication], as long as the medication imported is for your own use and not for resale." (*Id.*) In response to another question about international shipping, PCC states that "the law allows the FDA and U.S. Customs and Border Patrol to detain and refuse international prescription orders[,]" but counsels that "less than one percent of medication orders are actually stopped, at least for orders where a prescription is required." (*Id.*) With these statements, PCC is attempting to downplay the potential illegality by citing unsubstantiated statistics about the FDA's interception of imported foreign prescription drugs. Of course, several cases cited within this Opinion agree with this Court's analysis: to the extent that there is statutorily authorized enforcement discretion for the

FDA, HHS, or the FDA, these agencies have not officially invoked that discretion to allow personal importation. *See, e.g., Cook*, 733 F.3d at 9-10 (disagreeing with FDA's various arguments for discretion in drug importation); *Canadian Import*, 470 F.3d at 789-91 (describing a "comprehensive regulatory system" where "Congress has effectively precluded importation of these drugs absent . . . special authorization").

Moreover, PCC answers at least two frequently asked questions by directly contradicting FDA guidance about the safety of prescription medications from foreign pharmacies, enticing U.S. consumers to purchase from foreign pharmacies despite the carefully controlled congressional scheme designed to keep consumers safe. In response to a question describing possible dangerous pharmacies, PCC states that "[o]nline pharmacies based outside the U.S. are not 'rogue' by definition." (*See* Defs.' Mem. Ex. 6.) However, PCC does not stop there, explaining that:

> [s]ome regulatory bodies, including the [FDA], refer to such pharmacies as "illegal" or "fake" but such distinctions can mislead consumers and impede their access to affordable, safe and effective medication that they cannot obtain locally due to high U.S. drug prices. Pharmacies in some countries are equally as safe if not safer than those in the U.S. [. . .]

(*Id.*) This is in direct contravention of FDA guidance that PCC cites throughout its briefing arguing that

personal importation is not always illegal. *See Personal Importation*, Food & Drug Admin. (last updated January 10, 2023), https://www.fda.gov/industry/import-basics/personal-importation (recommending that consumers "only obtain[] medicines from legal sources in the U.S." because the FDA "cannot ensure the safety and effectiveness of the medicine purchased over the Internet from foreign sources"); Importation of Prescription Drugs, 84 Fed. Reg. 70796 (proposed Dec. 23, 2019) (describing "rouge online pharmacies . . . run by sophisticated criminal networks," but also stating that "[g]iven these risks, *and other concerns*[,]" the proposed rule would not implement personal importation provisions (emphasis added)). Of course, in offering this assessment, PCC also holds itself out as a source for "exceedingly safe" medication "from a pharmacy outside the U.S." to U.S. consumers, despite apparently knowing—and attempting to discount—the exact risks that the FDA and federal laws are designed to prevent. (Defs.' Mem. Ex. 6; *see also id.* (reminding consumers that "risks do exist when ordering medication from an unverified international online pharmacy," unlike the pharmacies accredited by PCC's verification program).)

Finally, it is important to note that PCC does not stop by providing this information on its website. In fact, when consumers reach out to PCC with complaints of all varieties, it is undisputed that members of PCC's support team endeavor to assist. (*See* Defs.' 56.1 ¶¶ 57, 59-60, 62-64; Pl.'s Resp. 56.1 ¶¶ 57, 59-60, 62-64.) These complaints vary, including issues with "address delivery details, obtain[ing] refunds for orders of prescription drugs, and follow[ing]

up on order errors." (*See* Defs.' 56.1 ¶ 60.)[23] In addition, PCC advertises its ability to "contact the company" or "intervene" on a consumer's behalf. (*See* Defs.' 56.1 ¶ 61 ("For us to process your complaint, you must authorize us to contact the company on your behalf."); Pl.'s Resp. 56.1 ¶ 61 (same); Defs.' SJ Mem. Ex. 64 (Dkt. No. 264-65) ("If you would like us to assist you with a customer complaint we can intervene on your behalf.").)

Specifically, exhibits offered by Defendants establish that PCC has intervened on behalf of U.S. consumers with

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23. Plaintiff lodges a slew of objections to statement 60 and its supporting exhibits, almost all of which are unavailing to this Court. (*See* Pl.'s Resp. 56.1 ¶ 60.) Plaintiff argues that statement 60 should be stricken because it is "irrelevant" and "unsupported by admissible evidence." (*Id.*) The Court disagrees with Plaintiff's assessment of relevance for reasons discussed below. *See infra* ("[W]hile not dispositive, these emails are relevant in that they are consistent with the other evidence that reveals the mission and purpose of Plaintiff's business.").

The other objections are equally unpersuasive. First, the Court disagrees with Plaintiff's objection as it relates to Exhibits 75, 76, 77, and 78 as unauthenticated, as these exhibits were produced by Plaintiff to Defendants and Plaintiff "offers no specific reason to doubt any document's authenticity." *Hallett*, 517 F. Supp. 3d at 268; *John Paul Mitchell Sys*, 106 F. Supp. 2d at 472 ("[T]he act of production implicitly authenticate[s] [a] document[]."). Second, the Court will disregard Exhibits 28, 74, and 79 for the purposes of this analysis, given Plaintiff's evidentiary objections, but this does not change the analysis. (*See* Pl.'s Resp. 56.1 ¶ 60.) There are several other Exhibits that Defendants rely upon to substantiate this statement, to which Plaintiff has not lodged objections. (*See id.* (citing no objections to Exhibits 5, 10, 64, 73, and 80).)

foreign pharmacies with issues related to their order. For example, PCC helped at least two U.S. consumers with relatively mundane requests: (1) ascertaining an order confirmation for a customer without a working email address for a prescription drug purchased from a Canadian pharmacy, (*see* Defs.' SJ Mem. Ex. 71 (Dkt. No. 264-72) (mailing the prescription drug to Los Angeles); Kent Am. Report ¶ 39 (listing QualityPrescriptionDrugs.com as based in Canada)); and (2) assisting a customer with credit card processing issues (*see* Defs.' SJ Mem. Ex. 73 (Dkt. No. 264-74) (identifying a customer with an American phone number)).

More poignantly, PCC intervened on behalf of two U.S. customers who received incorrect or unmarked medication, potentially dangerous issues which are exactly the type of issues federal law is designed to prevent. (*See* Defs.' 56.1 ¶ 64; Pl.'s Resp. 56.1 ¶ 64.) In one email, a customer received a prescription order from pharmacies in Delhi, India that contained "no imprint to identify or verify their validity as a generic" drug. (Defs.' SJ Mem. Ex. 81 (Dkt. No. 264-82).) The customer expressed particular frustration with PCC because that customer "placed great reliance on [PCC's] association to oversee standards and compliance[,]" underscoring federal law that "[p]rescription pills without imprints are considered invalid in the US." (*Id.*) In this email chain, PCC's President Gabriel Levitt personally forwarded this email to two employees, recognizing that the pills could "be non-compliant" and urging the employees to "draft a response and plan of action" for his review. (*Id.*) Presumably after receiving a question through PCC's customer complaint form, (*see* Defs.' 56.1 ¶ 61; Pl.'s Resp.

56.1 ¶ 61), PCC sent a U.S. consumer an email advising the customer that "[m]edications approved for sale in other countries often have different packaging, labeling[,] and can also have different inactive ingredients and appearances than those approved for sale in the U.S.[,]" (Defs.' SJ Mem. Ex. 82 (Dkt. No. 264-83)). The customer responded to PCC with further information about their purchase from a Canadian pharmacy, where the customer received an order of prescription drugs "without any markings on the capsules" and were "not the same size" as the expected drug. (*Id.*) Plaintiff argues that these exhibits are largely "irrelevant and overly broad based on the cited evidence showing a total of [two] consumer complaints." (Pl.'s Resp. 56.1 ¶ 64.) However, while not dispositive, these emails are relevant in that they are consistent with the other evidence that reveals the mission and purpose of Plaintiff's business.

Simply put, PCC cannot have it both ways. PCC cannot both lodge repeated objections to its mission and purpose throughout its briefing, arguing that its business is "encourag[ing] visitors worldwide," (*see* Defs.' 56.1 ¶¶ 38-50; Pl.'s Resp. 56.1 ¶¶ 38-50), while also instructing U.S. consumers *specifically* about ways to get around the "technicalities" of federal law. And as discussed, PCC's actions are not surprising, as U.S. consumers' clicks through to foreign pharmacies are what sustain PCC's business.

PCC's only remining argument attacks the sufficiency of Defendants' submissions, arguing that Defendants "rel[ied] on impermissible inferences" because they failed to "connect[] a click to a transaction and a transaction to

an unlawful importation." (PCC's SJ Mem. 19-20.)[24] PCC describes this as a "necessary assumption[]" in the Court's

24. Plaintiff also argues that Defendants cannot prove as a matter of law that PCC is "almost completely geared toward facilitating illegality" because Defendants' "statistics do not account for their anticompetitive conduct's effect on [P]laintiff's enterprise." (PCC's SJ Mem. 28-30.) To support this argument, Plaintiff cites one email produced in discovery between PCC and a Kentucky-based pharmacy, alleging that the pharmacy withdrew its accreditation with PCC because of this pharmacy's potential concerns with their Verified Internet Pharmacy Practice ("VIPPS") certification, which was provided by NABP. (*See* Pl.'s Resp. 56.1 ¶¶ 9, 11, 24-25; Pl.'s Resp. 56.1 Ex. 22 (Dkt. No. 269-14).) Defendants argue that "PCC's claim rests on hearsay and speculation," noting that PCC "points to two employee declarations (both of whom Defendants deposed and PCC could have cross-noticed) and an unauthenticated email, all containing, at least double hearsay." (Defs.' SJ Reply 13-15.) For the reasons stated below, the Court agrees with Defendants.

As to the hearsay allegations, while the Court does not agree that this testimony and associated exhibit is unauthenticated, the email and associated testimony does include inadmissible hearsay. Exhibit 22 is an email that was produced in discovery by PCC and attested to by Mr. Levitt in a declaration, which is sufficient for authentication purposes at summary judgment. *John Paul Mitchell Sys*, 106 F. Supp. 2d at 472 ("[T]he act of production implicitly authenticate[s] [a] document[]."). However, PCC attempts to use this email to prove the truth of the matter asserted (i.e. that NABP "threatened to strip" a U.S. pharmacy's VIPPS accreditation) through an out-of-court statement from a non-party to the litigation, who learned from another unidentified source that working with PCC "is considered a violation." (*See* PCC's SJ Mem. 29; Pl.'s Resp. 56.1 Ex. 22.) There is no evidence or testimony indicating that this U.S. pharmacy representative was unavailable to testify to this email, nor do any other hearsay exceptions apply. Fed. R. Evid. 803, 804. And this Court finds no compelling reason to admit this statement under the residual hearsay exception, given that Plaintiff failed to provide any evidence to "corroborat[e] the statement." Fed. R. Evid. 807.

analysis as to whether Plaintiff's enterprise is completely or almost completely geared toward facilitating illegality. (*Id.* at 20.) However, and as Defendants rightfully point out, this is not the standard. On its face, to "facilitate" illegal action does not require actual proof of purchases. "Facilitating" an offense means that a party "make[s] [the offense] easier" or "help[s] [to] bring [it] about." *Facilitate*, Merriam-Webster, https://www.merriam-webster.com/

Plaintiff attempts to excuse this conduct by stating that PCC "does not know the full extent of [D]efendants' conduct . . . [because] [i]t has not been permitted to take that discovery." (PCC's SJ Mem. 29.) Presumably, PCC is arguing (without stating) that this Court precluded it from taking this discovery. However, PCC is incorrect. The Court adopted a phased discovery schedule, starting discovery with a focus on "whether Plaintiff's enterprise is completely or almost completely geared toward facilitating illegality." (*See* Dkt. No. 167.) As this Court has stated *repeatedly*, "[i]t is a threshold requirement that Plaintiff's enterprise not be completely or almost completely geared toward facilitating illegality" because it is essential to the antitrust injury. (Order at 2 (Dkt. No. 167); *see also* Order at 6 (Dkt. No. 220) (finding that "illegality is not an affirmative defense, but rather negates an element of Plaintiff's prima facie case").) In Phase One, Plaintiff bore "the burden of proving that its business is legal." (Order at 6 (Dkt. No. 220).) And as the nonmovant here at summary judgment, if Plaintiff "fail[s] to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof[," the movant is "entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 323. Plaintiff was well within its rights to seek affirmative discovery on this issue. Instead, PCC chose not to and rested on an inconsistent statement.

Without this inadmissible evidence, Plaintiff is asking this Court to "rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," which it is well-established is improper in the Second Circuit. *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (quoting *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995)). This Court declines Plaintiff's invitation.

dictionary/facilitate#legalDictionary (last visited Dec. 2, 2022). This is not just a dictionary definition: courts within and outside the Second Circuit have also used this definition of facilitation in other areas of the law. *See, e.g., United States v. Wyly*, 193 F.3d 289, 302 (5th Cir. 1999) (finding property used to facilitate money laundering was "forfeitable[] because of its substantial nexus to the crime" as it was "indispensable" to the conspiracy at issue); *United States v. Sabhnani*, 566 F. Supp. 2d 148, 152 (E.D.N.Y. 2008) ("Facilitation occurs when the property makes the prohibited conduct less difficult or more or less free from obstruction or hinderance." (citing *Wyly*, 193 F.3d at 302)); *United States v. Schlesinger*, 396 F. Supp. 2d 267, 272 (E.D.N.Y. 2005) (establishing that the property at issue was "integral to the fraud perpetrated by the Defendants" and "facilitated" the offense). Here, it is clear that PCC "makes easier" the illegal conduct at issue: PCC directs U.S. consumers to foreign pharmacies where they can purchase prescription medication in violation of federal law. In fact, PCC has described this facilitation as its mission "to help consumers afford medication they need." (Pl.'s Resp. 56.1 ¶ 38.)

As such, Defendants have met their burden to prove that PCC's enterprise is "completely or almost completely geared towards facilitating illegality." *PharmacyChecker.com*, 530 F. Supp. 3d at 329-30. Plaintiff accordingly does not have standing to maintain its claim pursuant to § 1 of the Sherman Act. *Id.* (describing the principle and finding that, if true, "[P]laintiff cannot plead an antitrust injury"); *Pearl Music Co.*, 460 F. Supp. at 1068 (finding that plaintiffs lacked "the standing or capacity to maintain [an] anti-trust action" because the plaintiffs "engaged in

a business which is, by its very nature, entirely illegal"). Therefore, the Court grants Defendants' Motion for Summary Judgment on Plaintiff's Sherman Act § 1 claim, and Defendants ASOP, CSIP, and PSM are dismissed from this case.

III. Conclusion

For the foregoing reasons, Defendants' Joint Motion for Summary Judgment on Plaintiff's Sherman Act § 1 claim is granted, Plaintiff's Motion to Strike is denied, Defendants' Motion to Strike is denied, and Defendants' Joint Motion to Exclude Expert testimony is granted in part and denied in part. The Clerk of Court is respectfully requested to file this Opinion under seal, restricted to the Parties and the Court, and to terminate the pending motions at Dkt. Nos. 260, 263, and 273. The Court will hold a status conference on May 1, 2023 at 2:00 PM.[25]

SO ORDERED.

Dated: March 28, 2023
White Plains, New York

/s/ Kenneth M. Karas
KENNETH M. KARAS
United States District Judge

25. Because unredacted versions of these Motions and accompanying Memorandum were filed under seal, the Parties may have two weeks from the date of this Opinion & Order (the "Opinion") to propose redactions to the Opinion before it is issued publicly.