IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	)	11-md-02293 (DLC)
	)	ECF Case
This Document Relates to:		
THE STATE OF TEXAS; et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 12-cv-03394 (DLC)
PENGUIN GROUP (USA) INC.;	)	
Defendants.	)	

PLAINTIFF STATES' SUPPLEMENTAL MEMORANDUM OF LAW ON STATE LAW CLAIMS

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The Plaintiff States are pursuing damages as part of their Sherman Act claim and have briefed those claims in their Memorandum of Law. The Plaintiff States have also asserted state law claims against Penguin and Apple. Although Plaintiff States have agreed to a subsequent trial to assess the amount of any damages or civil penalties, Penguin's and Apple's liability under state law is at issue in the June 3 trial.

In an Order dated April 29, 2013, the Court ordered the Plaintiff States to file a supplemental brief providing copies of the relevant state laws, case law enumerating the elements of state law claims, and authority describing the extent to which any finding under Section 1 of the Sherman Act might affect those state law claims. The relevant statues of each state are attached hereto as exhibits.[1] We briefly set forth the elements of the state law claims, and their relation to claims under the Sherman Act, below.

1. Alabama

Alabama asserts claims under the Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-5(27), attached as Exhibit 1. Section 8-19-5 (27) states that, "The following deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful. . .[e]ngaging in any other unconscionable, false, misleading or deceptive act or practice in the conduct of trade or commerce." The Alabama Supreme Court has interpreted a prior version of the ADTPA to require knowledge of wrongdoing. *Sam v. Beaird*, 685 So.2d 742, 744 (Ala. Civ.

[1] Because the Court ordered the States to provide copies of the statutes "in effect at the time of the alleged misconduct," both current and historical versions are provided if the relevant sections were amended during the time period at issue, even if the amendments do not affect assessment of the state law claims. Where any amendments might affect the applicability of the statutes to the conduct at issue, such amendments are discussed in the text of this memorandum.

App. 1996) (*citing Strickland v. Kafko Mfg., Inc.*, 512 So.2d 714 (Ala.1987) (holding that lack of proof that manufacturer knew it failed to ship goods for which it had received payment supported the trial court's directed verdict that no claim was stated under § 8-19-5(17)).

Although, there is no authority addressing either all the elements of Section 8-19-5 Subsection 27, or how a Section 1 finding would affect Alabama's state law claims, Section 8-19-6 states that, "[D]ue consideration and great weight shall be given where applicable to interpretations of the Federal Trade Commission and the federal courts relating to Section5(a)(1) of the Federal Trade Commission Act." The Commission has interpreted the FTC Act to encompass violations of the Sherman Act. *FTC v. Cement Institute,* 333 U.S. 683, 694 (1948) ("all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act").

2. Alaska

Alaska asserts claims under the Alaska Restraint of Trade Act, AS 45.50.562 *et seq.* A copy of the Alaska Restraint of Trade Act in effect at the time of the alleged misconduct is attached as Exhibit 2. Section 45.50.562 provides that, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is unlawful."

The Alaska Supreme Court has confirmed that courts reviewing claims brought under Alaska's Restraint of Trade Act should use federal law as a guide and that the legislature intended that Alaska courts would look to cases decided under the Sherman Act, 15 U.S.C. § 1 *et seq.* in construing AS 45.50.562 through 45.50.596. *West v. Whitney-Fidalgo Seafoods, Inc.*, 628 P.2d 10, 14 (Alaska 1981) ("In using the federal language the committee intends that federal precedent under the Sherman Act provide a guide to the interpretation and construction of the state Act."); *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 448 (Alaska 2002) ("To

establish a prima facie case under AS 45.50.562, the plaintiff must prove three elements: (1) an agreement or conspiracy involving two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain competition; and (3) which actually injures competition,").

Alaska also alleges that Defendants' conduct violated the Alaska Unfair and Deceptive Trade Practices Act, AS 45.50.471 *et seq*. ("UTPA"). A copy of the Alaska Unfair and Deceptive Trade Practice Act in effect at the time of the alleged misconduct is attached as Exhibit 2. "An act or practice is deceptive or unfair if it has the capacity or tendency to deceive. All that is required is that the acts or practices were capable of being interpreted in a misleading way." *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 534-535 (Alaska 1980). Violations of the Alaska Antitrust Act can also be violations of Alaska's UTPA. "An act or transaction which violates the Sherman or Clayton Act would also constitute a violation of section 5 [of the Federal Trade Commission Act]; but since section 5 is much broader than either of those acts, an act or transaction need not rise to the level of a Sherman or Clayton violation to be declared an unfair business practice." *Matanuska Maid, Inc. v State,* 620 P.2d 182, 185 (Alaska 1980) (citations omitted).

3. Arizona

Arizona asserts claims under the Arizona Uniform State Antitrust Act ("AUSAA"), Ariz. Rev. Stat. §§ 44-1401 *et seq*., specifically § 44-1402 which declares, "A contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful." A copy of the relevant portion is attached as Exhibit 3. No Arizona court decision explicitly describes the elements of a state law cause of action under A.R.S. § 44-1402.

In accordance with the AUSAA's harmonization provision, A.R.S. § 44-1412, Arizona courts follow federal precedent in determining whether an antitrust violation has occurred under the AUSAA.[2] *See All Am. Sch. Supply Co. v. Slavens*, 625 P.2d 324, 325 (Ariz. 1981) (federal antitrust authority persuasive in interpreting Arizona antitrust statutes); *Wedgewood Inv. Corp. v. Int'l Harvester Co.*, 613 P.2d 620, 622-23 (Ariz. Ct. App. 1979) (Arizona court will look to federal antitrust case law for guidance; A.R.S. § 44-1402 is state counterpart to § 1 of the Sherman Act). Recognizing the similarity between Arizona and federal antitrust statutes, an Arizona District Court found that the resolution of state and federal claims should not differ. "The Arizona Antitrust Act, A.R.S. §§ 44-1401 *et seq.*, mirrors federal antitrust law. Because summary judgment is inappropriate on the federal claims under the Sherman Act, it is also inappropriate on the state law claims." *Brooks Fiber Communications of Tucson, Inc. v. GST Lightwave, Inc.*, 992 F.Supp. 1124, 1130 (D. Ariz. 1997).

4. Arkansas

Arkansas asserts claims under Arkansas's Unfair Practices Act, Ark. Code Ann. § 4-75-201 et seq., specifically Ark. Code Ann. § 4-75-309, for injunctive relief. There is no case law interpreting Ark. Code Ann. § 4-75-309, generally, or its relationship to the Sherman Act.[3] However, on its face, the language of Section 4-75-309 prohibits price fixing *per se*. Arkansas seeks consumer damages as *parens patriae* and civil penalties under § 4-75-315(a).[4]

[2] In *Bunkers' Glass Co. v. Pilkington*, PLC, 75 P.3d 99, (Ariz. 2003) the Arizona Supreme Court recognized that while Arizona courts interpreting the AUSAA look to federal courts to determine the standard of conduct required by antitrust law, they are not required to do so to determine who has standing to assert a state antitrust claim in state court. *Id.* at 106.

[3] *In re: TFT-LCD Antitrust Litigation*, 787 F.Supp.2d 1036, 1041-43 (N.D. Cal. 2011) contains a reference to this code section, but the discussion that follows describes and analyzes Ark. Code Ann. § 4-88-107(a)(10) without a discussion of § 4-75-309.

[4] The Plaintiff States' Second Amended Complaint incorrectly cited to § 4-75-213(a)(3) and (4).

5. Colorado

Colorado asserts claims and seeks relief under the Colorado Antitrust Act of 1992, Colo. Rev. Stat. 6-4-101, et seq., as described below.[5] Defendants' conduct violates Colo. Rev. Stat. 6-4-104, pursuant to which, "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is illegal." The attorney general of Colorado is bringing this action on behalf of the state seeking injunctive relief, fees, and costs pursuant to Colo. Rev. Stat. 6-4-111(1) and (4), and the imposition of a civil penalty pursuant to Colo. Rev. Stat. 6-4-112. A copy of the Colorado Antitrust Act of 1992 is attached as Exhibit 5.

In 1984, the Colorado Supreme court determined that: "Given the substantial similarity in text and purpose present in the federal and state antitrust statutes, we believe that federal decisions construing the Sherman and Clayton Acts, although not necessarily controlling on our interpretation of the Colorado law, are nevertheless entitled to careful scrutiny in determining the scope of the state antitrust statute." *People v. North Ave. Furniture & Appliance, Inc*., 645 P.2d 1291, 1296 (Colo. 1982). The U.S. District Court for the District of Colorado has also confirmed that: "Because both the case law and the legislative history suggest that the federal and state statutes should be construed together, my analysis on plaintiff's federal antitrust claims applies equally to the state law antitrust claim." *Smalley & Co. v. Emerson & Cuming, Inc.*, 808 F. Supp. 1503, 1516 (D. Colo. 1992).

In addition, when Colorado's antitrust laws were updated in 1992, the legislature explicitly added an interpretation section to the Colorado Antitrust Act of 1992 stating that, "[I]n construing this article, the courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws." Colo. Rev. Stat 6-4-119.

[5] Prior to July 1, 2009, Colo. Rev. Stat. 6-4-112 provided for a lesser amount of civil penalties. A copy of the previous version of that statute is included in exhibit 5.

6. Connecticut

Connecticut asserts claims under the Connecticut Antitrust Act, Conn. Gen. Stat. §35-24 *et seq*. A copy of the Connecticut Antitrust Act is attached as Exhibit 6. "The Connecticut Supreme Court has confirmed that the Connecticut Anti-Trust Act incorporates, in modified form, and with notable exceptions, various provisions of the federal antitrust laws, especially the Sherman Act." *Shea v. First Fed. Sav. & Loan Ass'n of New Haven*, 439 A.2d 997, 1006 (Conn. 1981). Specifically,

> Section 35-26 is substantially identical to §1 of the Sherman Act; 15 U.S.C. §1; and applies to contracts, combinations, or conspiracies in restraint of trade or commerce. The essence of a violation of § 1 of the Sherman Act is concerted action. For its provisions to apply, two or more persons must agree to act together. Section 35-28 has no specific counterpart in the federal antitrust laws. It codifies federal case law concerning certain per se violations of the Sherman Act, notably §1. A violation of § 35-28 must emanate from a contract, combination or conspiracy and thus requires a plurality of actors.

Id. (internal cites and quotes omitted). As the Court subsequently noted, "[O]ur construction of the Connecticut Anti-Trust Act is aided by reference to judicial opinions interpreting the federal antitrust statutes. Accordingly, we follow federal precedent when we interpret the act unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently." *Westport Taxi Service, Inc. v. Westport Transit District*, 664 A.2d 719, 728 (Conn. 1995) (internal cites omitted).

Connecticut also alleges that Defendants' conduct violated the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a *et seq*. *See* Exhibit 6. Connecticut follows the FTC's "cigarette rule" in determining whether an act or practice violates CUTPA, which, as formulated by the Connecticut Supreme Court, asks

> (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it

> is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.

Ramirez v. Health Net of the Northeast, Inc., 938 A.2d 576, 589 (Conn. 2008). There is no intent or *mens rea* requirement. *See, e.g., Associated Inv. Co. Ltd. P'ship v. Williams Assocs, IV*, 645 A.2d 505, 510 (Conn. 1994) ("the expansive language of CUTPA prohibits unfair or deceptive trade practices without requiring proof of intent to deceive, to defraud or to mislead").

Violations of the Connecticut Antitrust Act are also CUTPA violations. In holding that a complaint alleging a violation of the Connecticut Antitrust Act also stated a violation of CUTPA, the court in *Roncari Dev. Co. v. GMG Enterprises, Inc.*, 718 A.2d 1025, 1037 (Conn. Super. Ct.1997), relying on *FTC v. Motion Picture Advertising Co.*, 344 U.S. 392, 394–95 (1953), stated that:

> [A] combination or conspiracy in restraint of trade is an unfair method of competition. The standards established by the anti-trust acts, and by the courts in construing and applying such acts, are the standards to be applied in determining whether particular acts amount to unfair methods of competition within the Federal Trade Commission Act, and in determining whether practices which are against public policy because of their dangerous tendency to hinder competition or create a monopoly constitute unfair methods of competition. When first enacted, the Federal Trade Commission Act prohibited only unfair methods of competition. The provision now is understood to cover anticompetitive conduct of essentially the same character as the Sherman Act and Clayton Act. The Connecticut Antitrust Act covers the same subject matter.

Id. (internal cites and quotes omitted).

7. Delaware

Delaware asserts claims under the Delaware Antitrust Act, DEL. CODE, tit. 6, § 2101 *et seq.* A copy of the Delaware Antitrust Act in effect at the time of the alleged misconduct is

attached as Exhibit 7.[6]

Given the language of Section 2103 and Section 2113, a finding of a violation of Section 1 of the Sherman Antitrust Act would amount to a finding of a violation Section 2103 of the Delaware Antitrust Act. *See Universal Studios, Inc. v. Viacom Inc.*, 705 A.2d 579, 597 n. 103 (Del. Ch. 1977) (analyzing a claim under Delaware's Antitrust Act collectively with federal law because the Delaware Antitrust Act should be construed in light of federal precedent and given different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result); *see also Maddock v. Greenville Retirement Community, L.P.*, 1997 WL 89094, at *6 (Del. Ch. Feb. 26, 1997) (determining Section 2103 of Delaware's antitrust statute "was substantially modeled after, and expressly intended to be interpreted in harmony with, Section 1 of the Sherman Act"); *Hammermill Paper Co., v. Palese*, 1983 WL 19786, at 4 (Del. Ch. June 14, 1983) (noting the language of Section 2103 of the Delaware Antitrust Act is virtually identical to the opening provision of Section 1 of the Sherman Antitrust Act and that it is "manifestly evident" that it was the Delaware Legislature's intention to adopt the language, judicial interpretation and application of the Sherman Act).

Here, the only caveat to the above statement would relate to an issue involving the jurisdictional elements in the operative language of Section 2103 of the Delaware Antitrust Act ("trade or commerce of this State") and Section 1 of the Sherman Antitrust Act ("trade or commerce among the several States, or with foreign nations"). *See* 15 *U.S.C.* § 1. The former is defined by statute as meaning "all economic activity carried on wholly or *partially* in [Delaware], which involves or relates to any commodity, service or business activity." See DEL. CODE, tit. 6, § 2102.(4) (*emphasis added*). Since the defendants' conduct violative of Section 1

[6] Section 2111 of the Delaware Antitrust Act was amended on June 15, 2012 to extend the statute of limitations for violations from 3 years to 4 and to suspend the statute of limitations during the pendency of civil or criminal proceedings instituted by the federal government.

of the Sherman Antitrust Act restrained prices of e-books similarly across the country, including Delaware, and it clearly involves or relates to a commodity or business activity (the sale of eBooks) across the country, including Delaware, the state statute applies.

8. District of Columbia

The District of Columbia asserts claims under the District of Columbia Antitrust Act, D.C. Code § 28-4501 (2001) *et seq*. A copy of the District of Columbia Antitrust Act is attached as Exhibit 8. D.C. Code § 28-4502 provides that, "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or part of which is within the District of Columbia is declared to be illegal."

The District of Columbia Court of Appeals, the highest court of the District of Columbia, has not ruled on the elements of a claim under D.C. Code § 28-4502. D.C. Code § 28-4515 states, "It is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes." The United States District Court for the District of Columbia has confirmed that D.C. Code § 28-4502 "parallels § 1 of the Sherman Act." *Atlantic Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc*., 295 F. Supp. 2d 75, 87 (D.D.C. 2003) (applying the elements of §1 of the Sherman Act in entering a preliminary injunction in case alleging violations of that section and D.C. Code § 28-4502.) Liability under D.C. Code § 28-4502 is "governed by [Sherman Act §1] principles). *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d 125, 134 (D.D.C. 1999). Only one element of the D.C. Code § 28-4502 claim is different: connection within the jurisdiction. *GTE New Media Services, Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 45 (D.D.C. 1998) (citation omitted). Apple and Penguin have stipulated to having done business in all Plaintiff States.

The United States District Court has held that the elements of a claim under § 1 of the Sherman Act are that "defendants entered into some contract, combination, conspiracy, or other concerted activity that unreasonably restricts trade in the relevant market." *WAKA LLC v. DC Kickball*, 517 F. Supp. 2d 245, 250 (D.D.C. 2007) (citations and quotations omitted). Extending these elements, the court stated that claims that failed to state a Section 1 claim also fail to state a Section 28-4502 claim. *Id*. at 252.

The District of Columbia may, as *parens patriae*, seek injunctive relief for violations of the District of Columbia Antitrust Act. D.C. Code § 28-4508(a) authorizes "any person" to seek "appropriate injunctive or other equitable relief" in an antitrust action under the District of Columbia Antitrust Act. Consistent with interpretation of § 16 of the Clayton Act, D.C. Code § 28-4508(a) should be construed to authorize the District of Columbia to obtain injunctive relief in a *parens patriae* action. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972). In addition, the District of Columbia is entitled to damages in a *parens patriae* action under D.C. Code § 28-4507(b).

9. Idaho

The State of Idaho asserts claims under the Idaho Competition Act, IDAHO CODE ANN. § 48-101, *et seq.* The Idaho Competition Act is attached as Exhibit 9. There are no decisions from the Idaho Supreme Court interpreting and applying present Idaho Code Section 48-104 to price fixing allegations. Section 48-104 prohibits unreasonable restraints of trade and is the state analog to Section 1 of the Sherman Antitrust Act. Nevertheless, the Idaho Constitution explicitly forbids price fixing, IDAHO CONST. art. XI, § 18, and horizontal price fixing presumably falls within the ambit of Idaho's prohibition against unreasonable restraints of Idaho commerce, just as it does under federal antitrust law. This is the implication in *K. Hefner, Inc. v. Caremark, Inc.*,

918 P.2d 595 (Idaho 1996), although the court did not reach the issue in its ruling.[7]

The Idaho Supreme Court has interpreted Section 48-104 in other contexts and in a manner consistent with how the federal courts interpret Section 1 of the Sherman Act. For example, in *Pines Grazing Ass'n v. Flying Joseph Ranch*, 265 P.3d 1136, 1140-41 (Idaho 2011), *reh'g denied* (Jan. 6, 2012), the court, citing to various applicable federal case law, analyzed an alleged bid rigging scheme and determined it was in violation of Section 1 of the Sherman Act. The court also concluded, without any additional analysis, that the bid rigging scheme at issue violated Section 48-104 of the Idaho Competition Act as well.

10. Illinois

The State of Illinois charges the Defendants with violating section 3(1)(a) of the Illinois Antitrust Act, 740 ILL. COMP. STAT. ANN. 10/1 *et seq.* ("IAA"), which is attached as Exhibit 10. The State seeks injunctive relief under section 7(1), damages under its *parens patriae* power under section 7(2), and civil penalties under section 7(4). A copy of the relevant statutes is attached as Exhibit 10.[8]

[7] *Hefner*, 918 P.2d at 599. In *Hefner*, the Idaho Supreme Court considered whether it is sufficient to state a claim under Idaho's antitrust laws if the plaintiff alleges the plaintiff and the defendant entered into a contract that required the plaintiff to sell to one or more third parties at a price below the plaintiff's cost. The court ruled that such an allegation does not state a *per se* violation of the Idaho Antitrust Law, Idaho's predecessor to Idaho's Competition Act, enacted in 2000. The plaintiff and defendant were not competitors, so their conduct did not amount to a horizontal combination, let alone a *per se* illegal horizontal combination; neither did their contract attempt to fix prices charged to third parties, so there was no per se illegal vertical restraint. *Id.* at 599. The court stated that, if the claim were allowed, the plaintiff's construction would create a new category of *per se* illegal contracts, which the court declined to recognize. *Id.* However, the allegations were sufficient to survive a summary judgment motion and to require a ruling under the rule of reason doctrine. In *Heffner*, the court observed that an activity that is not clearly or obviously anticompetitive is analyzed under the rule of reason doctrine whereby the trier of fact considers the claimed unreasonableness of the restraint in the light of all circumstances of the case. *Id.* at 600. The court remanded the case to the trial court for further consideration.

[8] The IAA was amended effective January 1, 2010, by Public Act 96-0751. The amendment made one relevant change—an addition in section 7(2) that gives the Attorney General a statutory basis to exercise her *parens patriae* power, which until then was based only on common law. *See Illinois v. Bristol-Myers Co.*, 470 F.2d 1276, 1278 (D.C. Cir. 1972).

The Illinois Supreme Court described the elements of price-fixing under section 3(1)(a) of the Illinois Antitrust Act as follows:

> [T]he ultimate facts needed to prove a violation of section 3(1)(a) are agreements among those who would otherwise be competitors for the purpose or with the effect of fixing the price charged for any goods or service received.

Illinois v. Carriage Way West, Inc., 430 N.E.2d 1005, 1009 (Ill. 1981).

When interpreting section 3(1)(a), Illinois courts look to federal law on section 1 of the Sherman Act. Section 3(1)(a) is patterned after section 1 of the Sherman Act. *Illinois v. College Hills Corp.*, 435 N.E.2d 463, 469 (Ill. 1982). Their similarity triggers section 11 of the IAA, which directs courts to use federal law for guidance in interpreting the IAA: "When the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." 740 ILL. COMP. STAT. ANN. 10/11. In fact, an action decided under one law likely creates issue preclusion for a subsequent action under the other law. *See Gutnayer v. Cendant Corp.*, 116 F. App'x 758, 761, 2004 WL 2537437, at *2 (7th Cir. 2004) (unpublished order) (findings in state action undermining IAA claim doomed subsequent Sherman Act claim under issue preclusion).

11. Indiana

Indiana allege state claims arising under both Indiana Code § 24-1-1-1, *et. seq.*, and § 24-1-2-1, *et seq.*, though Indiana now relies solely on the latter as its Sherman Act §1 analog. A copy of the relevant statutes is attached as Exhibit 11.

While federal precedent is not controlling, state and federal courts look to decisions under

the federal Sherman Act in interpreting Indiana antitrust statutes. *See Brownsburg Cmty. Sch. Corp. v. Natare Corp*., 824 N.E.2d 336, 348 (Ind. 2005) ("Indiana courts have generally followed federal precedent in interpreting the Indiana Antitrust Act.") (citations omitted); *Midwest Gas Servs. v. Ind. Gas Co.*, 317 F.3d 703, 714 (7th Cir. 2003) (citations omitted) ("Indiana Antitrust Act follows the same standards as the Sherman Act"); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 721 n.27 (7th Cir. 1979) (noting that Indiana Code §24-1-2-1 was patterned after Sherman Act §1 and that Indiana courts have looked to decisional law under the Sherman Act to interpret Indiana Code §24-1-2-1.); s*ee also, Agmax, Inc. v. Countrymark Coop.*, 795 F. Supp. 888, 892 n.7 (S.D. Ind. 1992) (Indiana Code §24-1-1-1 and Indiana Code §24-1-2-1 are patterned after federal law so the Sherman Act provides guidance on their interpretation.).

12. Iowa

Iowa brings its state claims pursuant to Iowa Code Chapter 553, the Iowa Competition Law. A copy of the Iowa Competition Law is attached as Exhibit 12. Section 553.4 provides that, "A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market." The Iowa Competition Law also contains a uniformity clause, Iowa Code §553.2, which provides that the Iowa Competition Law "shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose. . . ."

Thus, Iowa courts and federal courts presented with claims under the Iowa Competition Law have applied the same standards applied by the courts in interpreting the Sherman Act. *See State v. Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127 (Iowa 1981) (examination of Sherman Act and federal case law "reveals the Iowa Competition Act is the progeny of the Sherman Act, 15 U.S.C. § 1, et seq. . . ."); *Next Generation Realty, Inc. v. Iowa Realty Co.*, 686 N.W.2d 206

(Iowa 2004) ("In adopting Iowa Code chapter 553, the legislature left us without authority to innovate from the federal courts' understanding of federal antitrust law."); *Mueller v. Wellmark, Inc*., 818 N.W.2d 244, 259 (Iowa 2012) (adopting federal law on state action exemptions); *Nevens v. Roth*, 326 N.W.2d 294, 298 (Iowa 1982) (same). A violation of the Sherman Act is a violation of the Iowa Competition Law. *See United States v. Microsoft Corp*., 87 F. Supp. 2d 30, 54 (D.D.C. 2000), *rev'd in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001).

13. Kansas

The State of Kansas asserts claims under the Kansas Restraint of Trade Act, Kan. Stat. Ann. § 50-101, et seq., which as in effect at the time of the alleged misconduct, is attached as Exhibit 13.[9] At the time of the alleged misconduct, Kan. Stat. Ann. § 50-112 made unlawful:

> [a]ll arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into [the] state . . . and all arrangements, contracts, agreements, trusts, or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles . . . .

The Kansas Supreme Court interpreted the statute to establish that all price fixing, vertical or horizontal, including strictly vertical resale price maintenance, constituted a *per* se violation of the Kansas Restraint of Trade Act, and held that there was no equivalent to the federal "rule of reason" in such cases. *See O'Brien v. Leegin Creative Leather Prods., Inc.*, 277

[9] On April 18, 2013, after the time of the alleged misconduct, Kansas Senate Bill 124 became effective, which changed certain key provisions of the Kansas Restraint of Trade Act. However, New Section 6 of the bill provides:

> Section 1 and the amendments to K.S.A. 50–101 and 50–112 by this act shall be applied retroactively to any choses in action or defenses premised on any provision of the Kansas restraint of trade act amended or repealed by this act, and any such choses in action or defenses that have accrued as of the effective date of this act shall be abated, but ***causes of action that were pending in any court before the effective date of this act, shall not be abated***. All other non-remedial provisions of this section shall be applied prospectively. 2013 KAN. LAWS CH. 102 (S.B. 124) (emphasis added).

P.3d 1062, 1078-84 (2012) (reaffirming the vitality of a simple, *per se* rule against vertical price restraints; "reasonableness does not set the antitrust violation standard in Kansas"). This is consistent with Kansas courts' observations that the Kansas statute differed in important respects from the Sherman Act, and, as such, interpretations of federal antitrust law were entitled to little weight in assessing allegations of violations of the state statute. *Id*. at 1079 ("federal precedents interpreting, construing, and applying federal statutes have little or no precedential weight when the task is interpretation and application of a clear and dissimilar Kansas statute"); *see also Bergstrom v. Noah*, 974 P.2d 520, 531 (Kan. 1999).[10]

The Kansas Restraint of Trade Act, as applicable to Kansas's claims in this suit, condemns the Defendants' conduct *even if* the Court finds such conduct to have been "reasonable." *O'Brien* holds that "[f]or purposes of a Kansas Restraint of Trade Act claim alleging the existence of an arrangement, contract, agreement, trust, or combination between persons designed to advance, reduce, or control price, or one that tends to advance, reduce, or control price, the phrase 'designed to' contemplates a subjective standard but the phrase 'tends to' contemplates an objective standard, one that requires examination of the defendant's behavior to discern whether it would reasonably be expected to produce a particular result, regardless of the defendant's intention." *O'Brien*, 294 Kan. at 335. Thus, intent *or* expected or likely result to advance, reduce or control prices or in an arrangement, contract, agreement, trust, or combination between persons is sufficient to show a violation of the Kansas Restraint of Trade Act.

[10] The States acknowledge that Kansas Senate Bill 124 was passed in large part as a response to the *O'Brien* decision, in order to bring the law of the state more in line with federal law. New Section 1 of the Bill explicitly added a provision incorporating the rule of reason, as well as a harmony clause. 2013 KAN. LAWS CH. 102 (S.B. 124). However, as set forth in fn7, the new statute cannot be applied retroactively to the States' claims since they were pending in this Court at the time the Bill became effective.

14. Louisiana

Louisiana asserts state law claims under LA. REV. STAT. ANN. 51:121 *et. seq.*, which pertain to monopolies and anticompetitive behavior. A copy of the relevant statutes is attached as Exhibit 14. LSA-R.S. 51:122 and 123 are "virtually identical in relevant part to the analogous provisions of federal antitrust statutes." *Louisiana Power and Light Co. v. United Gas*, 493 So.2d 1149, 1154 (La. 1986). Thus, the federal courts' interpretations of section 1 of the Sherman Antitrust Act are persuasive when analyzing antitrust claims under Louisiana law. *Id* at 1158. Courts have analyzed state antitrust claims by citing the elements of a claim under section 1 of the Sherman Act: "that the defendant (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." *Abraham v. Richland Parish Hosp. Serv. Dist. 1-B*, 938 So.2d 1163, 1172 (La. Ct. App. 2006) (internal citations omitted). In the absence of contrary state precedent, federal antitrust precedent is controlling for interpretation of parallel provisions of state and federal antitrust law.

Louisiana also alleges a violation of the Louisiana Unfair Trade Practices Act (LUTPA), LSA-R.S. 51:1401 *et. seq*. *See* Exhibit 14. LUTPA mirrors the Federal Trade Commission Act of 1914, stating that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." LSA-R.S. 51:1405(A). Louisiana courts have looked to federal interpretation of the FTC Act for guidance in LUTPA cases, stating:

> [LUTPA] prohibits the same types of deceptive and anticompetitive conduct prohibited by the Federal Trade Commission Act…therefore, in interpreting Louisiana's statute, a court must consider how the Federal Trade Commission and the federal courts have applied the Federal Trade Commission Act to various types of conduct.

Capitol House Preservation Co. v. Perryman Consultants, Inc., 47 So.3d 408, 417 (La.

Ct. App. 2009) (internal citations omitted). The Commission has interpreted the FTC Act to encompass violations of the Sherman Act. *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948) ("all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act").

15. Maryland

Maryland asserts claims under the Maryland Antitrust Act, Maryland Antitrust Act, MD. CODE ANN., COM. LAW § 11-201 *et seq*. A copy of the Maryland Antitrust Act is attached as Exhibit 15.

From its first interpretation of the Maryland Antitrust Act, the Maryland Court of Appeals has consistently held that Maryland courts should "be guided (but not bound) by the opinions of the federal courts under the federal antitrust laws." *Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co*., 382 A.2d 867, 870 (Md. 1978). Because §11-204(a)(1) of the Maryland Antitrust Act is "essentially the same" as §1 of the Sherman Act, the federal courts' interpretation of a §1 violation guides how §11-204(a)(1) should be construed. *See Natural Design, Inc. v. Rouse Co.*, 485 A.2d 663, 666 (Md. 1984); *see also Davidson v. Microsoft Corp*., 792 A.2d 336, 340-41 (Md. Ct. Spec. App. 2002). Therefore, the elements of a price-fixing case under the Maryland Act are "essentially the same" as those required for a claim under §1 of the Sherman Act. Where facts show a price-fixing arrangement, Maryland courts apply a *per se* rule. *Natural Design*, 485 A.2d at 669.

16. Massachusetts

Massachusetts asserts claims under the Massachusetts Consumer Protection Act, Mass. Gen. Laws c. 93A § 2 *et seq*. A copy of the Massachusetts Consumer Protection Act is attached as

Exhibit 16. An act or practice in trade or commerce is unfair and therefore violative of the Massachusetts Consumer Protection Act if "it is within the penumbra of some common-law, statutory or other established concept of unfairness; [or if it] is immoral, unethical, oppressive, or unscrupulous[.]" *PMP Assocs. Inc. v. Globe Newspaper Co.*, 321 N.E. 915, 917 (Mass. 1975); *Datacomm Interface Inc. v. Computerworld, Inc.*, 489 N.E.2d 185, 196 (Mass. 1986); *see also Milliken & Co. v. Duro Textiles, LLC*, 887 N.E.2d 244, 259 (Mass. 2008) (holding that it is well-established that a practice is unfair or deceptive in violation of Chapter 93A if it meets the above test).

Section 2(b) of the Massachusetts Consumer Protection Act states that courts are to be guided by interpretations from the Federal Trade Commission regarding § 5(a)(1) of the FTC Act. M.G.L c. 93A § 2(b); *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303, 309 (Mass. 2002). The Commission has interpreted the FTC Act to encompass violations of the Sherman Act. *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948) ("all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act").

The Massachusetts Supreme Judicial Court has recognized that the FTC's conclusion – that Sherman Act violations are unfair trade practice violations – means that they are also Massachusetts Consumer Protection Act violations. *Ciardi*, 762 N.E.2d at 308-09. In *Ciardi*, the plaintiff sued vitamin manufacturer defendants under M.G.L. c. 93A, asserting an unlawful horizontal agreement to raise prices. *Id.* at 306-07. After noting that it looks to FTC guidance in defining violations of M.G.L. c. 93A, the Court observed that § 5(a)(1) of the FTC Act encompasses violations of the Sherman Act and Clayton Act. *Id. at 308-09* (citing cases). Given that the FTC Act encompasses federal antitrust violations:

> Price-fixing constitutes an unfair method of competition in violation of the FTC Act. Therefore, the allegations in the plaintiff's complaint, which in essence state that the

> defendants engaged in price-fixing of vitamin products at artificially inflated levels to her detriment would, if proven, clearly state a violation of 93A.

Id. at 59-60 (citations omitted); *see also Boos v. Abbott Laboratories*, 925 F.Supp. 49, 56 (D. Mass. 1996); *Alvares v. Microsoft Corp.*, 2001 WL 914202 at *3 (Mass. Sup. Ct. 2001).

Defendants knew or should have known that their conduct violated the Massachusetts Consumer Protection Act. *E.g., Richards v. Arteva Specialties S.A.R.L.*, 850 N.E.2d 1068, 1075 (Mass. App. Ct. 2006) (allegation that "defendants had conspired to 'fix, raise, maintain, and stabilize prices'" was "unquestionably a violation of G.L. c. 93A."); *Ciardi*, 762 N.E.2d at 308-09. Because horizontal agreements to raise price are unquestionably violations of M.G.L c. 93A and federal antitrust statutes, defendants should have known that the alleged conduct violates the Massachusetts Consumer Protection Act. Accordingly, defendants are liable for a civil penalty of up to $5,000 per violation. M.G.L. c. 93A § 4.

17. Michigan

Michigan asserts claims under the Michigan Antitrust Reform Act, MICH. COMP. LAWS 445.771 *et seq* ("MARA"). A copy of the relevant statutes is attached as Exhibit 17. This Court should analyze Michigan's MARA Section 2 claim, M.C.L. § 445.772, using the federal courts' interpretation of the comparable federal statute, Section 1 of the Sherman Act, 15 U.S.C. § 1. Section 445.772 prohibits "A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market . . . ." The Michigan Court of Appeals has held that MARA Section 2 and the Sherman Act Section 1 "require similar evidence of concerted action or combination." *Blair v. Checker Cab Co.*, 558 N.W.2d 439, 442 (Mich. Ct. App. 1996). The Court went on to analyze the plaintiff's MARA Section 2 claim by "consider[ing] federal precedent interpreting the Sherman Act's prohibition on combination in restraint of trade." *Id.* at 675 (citing *Mohammed v. Union Carbide Corp.*, 606 F. Supp. 252, 257

(E.D. Mich. 1985)). The Court's entire MARA analysis relied solely on federal case law in reversing the trial court's dismissal of the plaintiff's MARA claim, finding that the plaintiff had stated a cause of action in alleging a conspiracy. *Id*. at 675-677.

18. Missouri

The State of Missouri has alleged violations of the Missouri Antitrust Law, MO. REV. STAT. § 416.031 and the Missouri Merchandising Practices Act, MO. REV. STAT. §407.020. A copy of the relevant statutes is attached as Exhibit 18. The elements of a violation of Missouri's Antitrust Law are virtually identical to those required under the Sherman Act, with § 416.031, reflecting 15 U.S.C. §§ 1-2. Missouri's Antitrust Law should, pursuant to § 416.141, "be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes" and, as recognized by the Missouri Supreme Court, "closely parallels provisions of the Sherman and Clayton Acts of federal antitrust law." *Fischer, Spuhl, Herzwurm & Assocs. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 312 (Mo. 1979). Accordingly, nothing more is needed to prove a violation of Missouri's Antitrust Law than is needed to support a federal law claim. The State of Missouri seeks injunctive relief, treble damages, and an award of reasonable costs and fees under Missouri's Antitrust Law.

Missouri also alleges that Defendants' conduct violated Missouri's Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010, *et seq*., which governs the advertisement and sale of all merchandise "in, to or from" Missouri. Missouri alleges that the evidence proving violations of the Sherman Antitrust Act and the Missouri Antitrust Law will also prove violations of the Merchandising Practices Act in this case. The State seeks the imposition of civil penalties under the Act.

The purpose of Missouri's Merchandising Practices Act is to protect consumers and to

"to preserve fundamental honesty, fair play and right dealings in public transactions." *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 724 (Mo. 2009) (en banc) (internal citation and quotation marks omitted). The Merchandising Practices Act broadly declares unfair or deceptive practices unlawful without defining those terms in order "to give broad scope to the meaning of the statute and to prevent evasion because of overly meticulous definitions." *Id.* (quoting *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. Ct. App. 1988)). The Missouri Supreme Court has noted that the literal words of the Act "cover every practice imaginable and every unfairness to whatever degree." *Ports Petroleum Co. v. Nixon*, 37 S.W.3d 237, 240 (Mo. 2001) (en banc). Speaking to the overarching public policy underlying Chapter 407, courts have described the laws as "paternalistic" and observed that "Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices." *High Life Sales Co. v. Brown-Forman Corp*., 823 S.W.2d 493, 498 (Mo. 1992) (en banc) (quoting *Electrical and Magneto Serv. Co. v. AMBAC Int'l Co*., 941 F.2d 660, 662 (8th Cir. 1991)).

Because the Act's description of prohibited conduct is broad, the Attorney General was authorized to promulgate regulations "necessary for the administration and enforcement" of Chapter 407, and, according to Missouri courts, such regulations have "independent power as law." *Huch*, 290 S.W.3d at 724. Attached as Exhibit 18 are copies of the Attorney General's Rules for Advertising, Rules Governing Unfair Practices, and Rules Governing Fraudulent and Omissive Acts and Practices, 15 CSR 60-7.010 *et seq*., 15 CSR 60-8.010 *et seq*., and 15 CSR 60-9.010 *et seq*. While the defendants' actions would meet the elements of other forms of unlawful practice in § 407.020, the elements for establishing an "unfair practice" are easily established by the evidence in this case. There are several ways to establish "unfair practice" under the Attorney

General's regulations, *see* 15 CSR 60-8.010 *et seq*., but two of these alternatives are particularly relevant to antitrust violations:

> **15 CSR 60-8.020 Unfair Practice in General**
> (1) An unfair practice is any practice which-
> (A) Either-
> 1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or
> 2. Is unethical, oppressive or unscrupulous; and
> (B) Presents a risk of, or causes, substantial injury to consumers.
>
> **15 CSR 60-8.090 Illegal Conduct**
> (1) It is an unfair practice for any person in connection with the advertisement or sale of merchandise to engage in any method, use or practice which-
> (A) Violates state or federal law intended to protect the public; and
> (B) Presents a risk of, or causes substantial injury to consumers.

Based on the above elements, if the evidence in this case establishes a violation of federal or state antitrust law, or public policy as established by state law or the Federal Trade Commission (which enforces, among other laws, the Sherman Antitrust Act), and has the risk of causing injury to consumers, it satisfies the elements of "unfair practice." *See* 15 CSR 60-8.090 (1)(A), (B). The conduct alleged in this case is also alleged to have had the effect of increasing prices of e-books, thereby satisfying the "risk of substantial injury to consumers" element. Thus, the conduct alleged in this case constitutes unfair practices under 15 CSR 60-8.020 as well as 15 CSR 60-8.090. As confirmed by the Missouri Supreme Court, the regulations' declaration of unfairness will render the defendants' conduct unlawful under the Merchandising Practices Act. *Huch*, 290 S.W.3d at 725.

While the regulations have explicitly addressed the use of violations of other laws to establish violations of the Merchandising Practices Act, Missouri's courts have also considered these elements. The Merchandising Practices Act expressly does *not* bar any other civil claim but, rather, is intended to be cumulative. Mo. Rev. Stat. § 407.120. Missouri state courts have

found, for example, that violation of state liquor laws by selling alcohol to minors is a proper basis for liability under the Act. *State ex rel. Nixon v. Beer Nuts, Ltd*., 29 S.W.3d 828, 838 (Mo. Ct. App. 2000); *see also Ward v. West Cnty. Motor Co.*, __ S.W.3d __, 2013 WL 1420997 at *3 (Mo. Apr. 9, 2013) (en banc) (violations of state statutes and common law prohibiting conversion of funds unlawful as "unfair practice" under MMPA); *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 714 (Mo. Ct. App. 2008) (overruling a motion to dismiss, holding that the unlicensed practice of law could be the basis for liability under the Act.) In contrast, a violation of Missouri's Motor Fuel Marketing Act, which prohibits below-cost sales, could not be the basis for establishing an "unfair practice" under the Merchandising Practices Act because consumers purchasing below-cost fuel "are not initially harmed by the sale itself." *Ports Petroleum*, 37 S.W.3d at 241.

Federal courts have considered Missouri's unfairness regulations mentioned above in conjunction with federal antitrust claims. The District Court for the District of Maine concluded that a conspiracy to prevent the re-importation of Canadian automobiles in violation of antitrust laws – thereby potentially increasing the price of cars available to U.S. customers – constituted an unfair practice under 15 C.S.R. 60-8.020(A)(1). *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F. Supp. 2d 160, 191 (D. Me. 2004).[11] The court distinguished the Missouri Supreme Court's decision in *Ports Petroleum* because the alleged antitrust conspiracy, if proven, would have injured the plaintiff automobile purchasers by maintaining higher prices: "The alleged conspiracy could thus constitute an unfair practice in violation of the [Missouri

[11] Despite this conclusion, the court ultimately dismissed the Missouri law claim on the basis that the Missouri Supreme Court had not held that consumers could recover damages as indirect purchasers under the Merchandising Practices Act. *See In re New Motor Vehicles*, 350 F. Supp. 2d at 192. The Missouri Supreme Court has since done so. *See Gibbons v. J. Nuckolls, Inc.* 216 S.W.3d 667 (Mo. 2007).

Merchandising Practices Act] because it not only purportedly hindered competition but also immediately harmed the actual buyer." *Id*. at 191 n.49. In a later decision, another federal district court agreed that antitrust allegations of sham litigation to prevent a generic drug manufacturer's entry into the market fell within the Merchandising Practices Act's "expansive scope" so as to support a claim under the Act. *See Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC,* 737 F. Supp. 2d 380, 416-417 (E.D. Pa. 2010). That court, having the benefit of the later Missouri Supreme Court confirming indirect purchaser standing, denied a motion to dismiss the claim for relief under the Merchandising Practices Act. The Missouri Attorney General's office has routinely pursued relief under both Missouri's Antitrust Law and Merchandising Practices Act, with the latter claim relying on the same facts as the antitrust claim.[12]

Because in this case the same facts needed to prove the antitrust claims will satisfy the elements for one or more allegations of unlawful practices under the Merchandising Practices Act, the State of Missouri also seeks the broad relief afforded by its Merchandising Practices Act, including an order imposing civil penalties under § 407.100.6 based upon the showing of those violations.

19. Nebraska

Nebraska asserts claims under its Consumer Protection Act, Neb. Rev. Stat. § 59-1601 *et seq.*, its Unlawful Restraint of Trade Act ("Junkin Act"), Neb. Rev. Stat. § 59-801 *et. seq.*, and its Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 *et seq.* A copy of the relevant statutes is attached as Exhibit 19. The Consumer Protection Act ("CPA") is "the state

[12] *See e.g.*, *In re TFT-LCD* (Flat Panel) Antitrust Litigation, 787 F. Supp. 2d 1036 (N.D. Cal. 2011); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

version of the Sherman Antitrust Act." *Nebraska ex rel. Douglas v. Assoc. Grocers of Neb. Co-op, Inc.*, 332 N.W.2d 690, 693 (Neb. 1983); *see also Triple 7, Inc. v. Intervet, Inc.*, 338 F. Supp. 2d 1082, 1087 (D. Neb. 2004). Section 59-1603 provides that "Any contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful." Courts reviewing claims under the CPA have looked to interpretations of federal antitrust law for such propositions as the validity of circumstantial evidence and the applicability of the *per se* rule to price fixing cases. *See, e.g., Douglas*, 332 N.W.2d at 693. The Defendants' conduct also violates Section 59-1602, which outlaws "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." This section "mirrors federal law," specifically Section 5 of the FTC Act, 15 U.S.C. 45(a)(1). *Raad v. Wal-Mart Stores, Inc*., 13 F. Supp. 2d 1003, 1010 n.1 (D. Neb. 1998). Since Section 5 of the FTC Act condemns violations of the Sherman Act, a Sherman Act violation would also violate Section 59-1602 of the CPA.

The Junkin Act contains applicable provisions substantially similar to those in the CPA. Section 59-801 provides that, "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal." Courts have recognized that it, too, "is essentially identical to § 1 of the Sherman Act." *Vande Guchte v. Kort*, 703 N.W.2d 611, 621 (Neb. Ct. App. 2005) (citing federal cases in analyzing allegedly illegal tying arrangement). The act also contains a harmony clause that extends to the entirety of Chapter 59, which includes both the Junkin Act and the CPA, providing that, where sections of the chapter are similar to federal antitrust statutes, courts "shall follow the construction given to the federal law by the federal courts." Neb Rev. Stat. § 59-829; *see also Arthur v. Microsoft Corp*., 676 N.W.2d 29, 33 (Neb. 2004) (analyzing indirect purchaser issue

under CPA with reference to federal precedent). As such, Nebraska courts have applied the same standards for analyzing claims under the Junkin Act as parallel claims under the Sherman Act. *See Heath Consultants, Inc. v. Precision Instruments, Inc.*, 527 N.W.2d 596 (Neb. 1995) (sufficient evidence supported tying claims under Sections 1 and 2 of Sherman Act and Section 59-801 of Junkin Act; summary judgment reversed). With respect to the CPA and Junkin Act claims, a violation of Section 1 is sufficient to establish a violation of the Nebraska state analogs.

Nebraska's Uniform Deceptive Trade Practices Act provides that, "An unconscionable act or practice by a supplier in connection with a consumer transaction shall be a violation of the Uniform Deceptive Trade Practices Act." Neb. Rev. Stat. § 87-303.01(1). Unconscionability is "a question of law for the court." *Id*. § 87-303.01(2). Courts often consider UDTPA claims and CPA claims together and analyze them similarly, *see Missouri ex rel. Sternberg v. Consumer's Choice Foods, Inc.*, 755 N.W.2d 583, 590-93 (Neb. 2008), and Nebraska submits that the Defendants' conduct in this case violates the statute.

20. New Mexico

New Mexico asserts claims under the New Mexico Antitrust Act, N.M. Stat. §57-1-1 *et seq.* A copy of the New Mexico Antitrust Act is attached as Exhibit 20. Section 57-1-1 provides that, "Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful." The New Mexico Supreme Court has held that "[t]o establish a violation [of Section 57-1-1 NMSA], the plaintiff must show a conspiracy or combination among two or more persons, and an unreasonable restraint of trade due to this combination or conspiracy. Furthermore, the object of the conduct must be to restrain trade." *Clough v. Adventist Health Sys., Inc.*, 780 P.2d 627, 630 (N.M. 1989) (internal citations omitted). Section 57-1-15 provides that the New Mexico Antitrust Act shall be construed in

harmony with federal antitrust law, so that federal and state laws are uniformly applied. *See also Clough*, 780 P.2d at 630 (statute was "patterned after Section 1 of the federal Sherman Antitrust Act"; direct or circumstantial evidence of agreement relevant); *Romero v. Philip Morris Inc.*, 242 P.3d 280, 286 (N.M. 2010). Thus, if the States establish a violation of Section 1 of the Sherman Act, they have also established a violation of the New Mexico Antitrust Act.

New Mexico also alleges that Defendants' conduct violated the New Mexico Unfair Trade Practices Act (UPA), N.M. Stat. § 57-12-1 *et seq.*, also attached as Exhibit 20. The elements of a claim for "unfair or deceptive trade practices" or "unconscionable trade practices" are set forth in subsections 57-12-2(D) and (E) of the New Mexico UPA. As described by the New Mexico Supreme Court with regard to "unfair or deceptive" practices:

> Four elements must be established to invoke the Unfair Practices Act. First, the complaining party must show that the party charged made an "oral or written statement, visual description or other representation…" that was either false or misleading. Second, the false or misleading representation must have been "knowingly made in connection with the sale, lease, rental or loan of goods or services in the extension of credit or … collection of debts…." Third, the conduct complained of must have occurred in the regular course of the representer's trade or commerce. And, fourth, the representation must have been of the type that "may, tends to or does, deceive or mislead any person."

Ashlock v. Sunwest Bank, 753 P.2d 346, 347 (N.M. 1988) (quoting N.M. Stat. 57-12-2(D)), *overruled on other grounds by Gonzales v. Surgidev Corp.*, 899 P.2d 576 (N.M. 1995). A claim under the UPA does not require that the defendant intended to deceive or mislead. *Id.* at 347-48. New Mexico's appellate courts have not elaborated on the elements of an "unconscionable trade practices" claim beyond the language of Section 57-12-2(E).

The New Mexico UPA provides that "to the extent possible [it should] be guided by interpretations given by the federal trade commission and the federal courts." N.M. Stat. § 57-12-4. However, the New Mexico Court of Appeals has held that despite this clause, the FTC's

"cigarette rule" does not apply because the New Mexico UPA specifically defines "unfair or deceptive," which must take precedence over federal common law definitions. *See Richardson Ford Sales, Inc. v. Johnson*, 676 P.2d 1344, 1346-47 (N.M. Ct. App. 1984).

New Mexico's courts have not discussed the interplay between the Sherman Act and claims under New Mexico's UPA.

21. New York

New York's State Law Claims are brought pursuant to the Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347. The basis for New York's Donnelly Act claims in this litigation are sections 340(5), 342, and 342-a, which are attached as Exhibit 21. In *People v. Rattenni*, 613 N.E.2d 155, 158 (N.Y. 1993) New York's highest court quoted the Donnelly Act as declaring: "'Every contract, agreement, arrangement or combination whereby ***[c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained * * * to be against public policy, illegal and void." The Court added that "[t]he Donnelly Act was modeled on the Federal Sherman Act of 1890," and concluded that State antitrust law "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." *Id.* (internal citations omitted).

New York does not assert a basis for deviating from federal law for its Donnelly Act claim. Moreover, defendants have not asserted any basis for deviating from federal law. Therefore, if the States establish that Defendants violated Section 1 of the Sherman Act, they should also be held to have violated the Donnelly Act. A civil penalty under section 342-a can be recovered in federal court. *See New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065, 1086 (2d Cir. 1988).

22. North Dakota

North Dakota asserts claims under the North Dakota Uniform State Antitrust Act, N.D. Cent. Code § 51-08.1-01, *et seq.*, attached as Exhibit 22. Section 51-08.1-02 provides that, "A contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." The courts of the State, in reviewing claims under state law, look to both interpretations of federal law and those of the laws of other states that have adopted an antitrust statute based on the Uniform State Antitrust Law. *See, e.g.*, *Ag Acceptance Corp. v. Glinz*, 684 N.W.2d 632, 639-41 (N.D. 2004) (reviewing federal case law on tying arrangements); *Beckler v. Visa U.S.A., Inc.*, 2004 WL 2115144 at *2(N.D. Dist. Ct. Aug. 23, 2004) ("the Court assumes that a 'tying' arrangement illegal under the Clayton and Sherman Acts is also illegal under State law"); *Beckler v. Visa U.S.A., Inc.*, 2004 WL 2475100 at *4 (N.D. Dist. Ct. Sept. 21, 2004) (looking to interpretation of Michigan and New York law in analyzing antitrust standing).

The legislative history to N.D.C.C. chapter 51-08.1 reflects the legislature's intent when it enacted the statute. When the bill was heard before the Senate and House Judiciary Committees, testimony was presented regarding the statute's interaction with federal law, including the following statement: "Senate Bill No. 2101 [Uniform State Antitrust Act] tracks language of federal Antitrust Acts with respect to collusive conduct and monopolization, so that the standards of proscribed conduct may be determined by federal precedent." *Hearing on S.B. 2101 Before the S. Judiciary Comm.*, 50th Legis. Sess. (Jan. 19, 1987) (testimony of Jay E. Buringrud (N.D. Commission on Uniform State Laws)).

Because the language of the North Dakota antitrust statute is substantially similar to that of Section 1 of the Sherman Act, and because courts have looked to interpretation of federal law

in assessing state claims, a violation of the Sherman Act suffices to establish a violation of Section 51-08.1-02.

23. Ohio

Ohio asserts claims under Ohio's antitrust law, the Valentine Act, Ohio Revised Code §1331.01 *et seq.*, which provides that combinations restricting trade are unlawful. The Valentine Act is attached as Exhibit 23. The Ohio Supreme Court has held that courts should look to federal antitrust law when interpreting the Valentine Act. "Ohio has long followed federal law in interpreting the Valentine Act." *Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 795 (Ohio 2005); *see also C.K. & J.K., Inc. v. Fairview Shopping Center Corp.*, 407 N.E.2d 507, 509 (Ohio 1989) ("These statutes, known as the Valentine Act, were patterned after the Sherman Antitrust Act, and as a consequence this court has interpreted the statutory language in light of federal judicial construction of the Sherman Act") (citations omitted). Ohio courts thus look to federal law regarding the interpretation of Ohio's Valentine act, including establishing its elements. *Id.*; *see also Eichenberger v. Graham*, 2013 WL 1287353, at *3 (Ohio Ct. App. Mar. 28, 2013); *Szuch v. King*, 2010 WL 4925814, at *6-7 (Ohio Ct. App. Dec. 3, 2010); *Island Express Boat Lines, Ltd. v. Put-In-Bay Boat Line Co.*, 2007 WL 707474, at *14 (Ohio Ct. App. Mar. 9, 2007).

24. Pennsylvania

The Commonwealth of Pennsylvania asserts a claim under Pennsylvania common law doctrine against unreasonable restraint of trade. The Commonwealth of Pennsylvania, by and through its Attorney General, can bring an antitrust suit as *parens patriae* on behalf of natural persons. *See* Commonwealth Attorneys Act, 71 P.S. § 732-204 (c); *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369, 386 (D.D.C. 2002). In *Collins v. Main Line*

Board of Realtors, 304 A.2d 493, 496 (Pa. 1973), the Pennsylvania Supreme Court applied federal court interpretation of the Sherman Act to decide a state common law antitrust claim. The Court held that, to establish a violation, the plaintiff may show that "the illegal bargain tends to create or has for its purpose to create a monopoly in prices or products," or that "competition has in fact been restricted by the monopolistic agreement." *Id.* at 496-97. See also, *Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187*, 14 A.2d 438, 441 (Pa. 1940) (the Sherman Act is "merely the application of the common-law doctrine concerning restraint of trade to the field of interstate commerce."). In *Huberman v. Warminster Township*, 1981 WL 820, at *2-*3 (Pa. Com. Pl. Jan. 30, 1981), the Court of Common Pleas recognized that the Pennsylvania Supreme Court in *Collins* held that the federal Sherman Act embodied Pennsylvania's common law doctrine concerning restraint of trade and applied federal case law interpreting the Sherman Act to a Pennsylvania common law antitrust claim. The District Court for the Eastern District of Pennsylvania also followed *Collins* in *Yeager's Fuels v. Pennsylvania Power & Light*, 953 F. Supp. 617, 668 (E.D. Pa. 1997) by applying federal case law to state common law claims. Accordingly, the Court should deem a violation of Section 1 of the Sherman Act a violation of the Pennsylvania common law doctrine against unreasonable restraint of trade.

Injunctive relief is available for persons who have been or will be injured by a restraint of trade or monopoly. *Schwartz*, 14 A.2d at 439-40. Since the Pennsylvania Supreme Court in *Commonwealth v. Carlisle*, Brightly's Rep. 36, 40, 42 (Pa. 1821) considered antitrust conduct such as price fixing to be indictable, antitrust conduct would give rise to an action for damages under Pennsylvania common law. The Pennsylvania Supreme Court has only denied damages for common law antitrust violations based on the doctrine of *in pari delicto* or unclean hands. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173 (1871).

25. Puerto Rico

Puerto Rico asserts claims for injunctive relief and consumer damages under Puerto Rico's Act No. 77 of June 25, 1964, also known as *Puerto Rico's Antitrust and Restrictions of Commerce Law*, 10 P.R. Laws Ann. §257 *et. seq*., ("Puerto Rico's Antitrust Law"). Puerto Rico seeks civil penalties for violations of Puerto Rico's Antitrust Law under Puerto Rico's Act No. 5 of April 23, 1973, as amended, 3 LPRA sec. 341 *et. seq*., and Regulations No. 2648 of May 29, 1980, and No. 7932 of October 15, 2010. A copy of the relevant laws are attached as Exhibit 25.

Puerto Rico's Antitrust Law prohibits any "contract, combination in the form of trust or otherwise, or conspiracy in unreasonable restraint of trade or commerce in the Commonwealth of Puerto Rico or in any section thereof." 10 P.R. Laws Ann. § 258. As the Federal Court of Appeals for the First Circuit has explained, every determination of whether an act is prohibited by this section of local antitrust law must be made taking into consideration federal doctrines and interpretations under the Sherman Antitrust Act. *Caribe BMW v. Bayerische Motor en Werke*, 19 F.3d 745, (1st Cir. 1994); *see also*, Op. Sec. Just. No. 17 of 1986. Accordingly, a violation of the Sherman would violate the Puerto Rico Antitrust Law if the conduct restricts business or commerce in Puerto Rico or in any area within it. G.G. & Supp. Corp. v. S. & F. Systs., Inc., 153 D.P.R. 861 (2001); Pressure Vessels P.R. v Empire Gas P.R., 137 D.P.R. 497 (1994). Additionally, Puerto Rico's Antitrust Law declares unlawful any unfair method of competition, and any unfair or deceptive acts or practices in trade or commerce. 10 P.R. Laws Ann. § 259. Regulation No. 2648 of May 29 ,1980, known as "Regulation No. VII on Fair Competition and for the enforcement of Act No. 77 of June 25, 1964", adopted pursuant to 10 P.R. Laws Ann. § 259(b) proscribes every act or unfair method of competition, amongst which lies any "agreement or combination between competitors to fix, increase, reduce, maintain, or create a substantial

uniformity or to interfere with a product's prices."

Puerto Rico's Code of Civil Procedure recognizes the right of consumers of goods and services and/or the Commonwealth of Puerto Rico -in its capacity of *parens patriae*- to file a class action on behalf of said consumers to recover damages, as well as to seek injunctions for violations of any state statute. 32 P.R. Laws Ann. §3341. In connection with the *parens patriae* action, Puerto Rico's Act No. 5 of April 23, 1973, as amended, 3 LPRA sec. 341 *et. seq.*, authorizes maximum civil penalty of $10,000.00, per day, per violation of any of the Department of Consumers Affairs' Regulations.

On its part, Regulation No. 7932, also prohibits any unfair or deceptive practice as those alleged in the complaint.

26. South Dakota

South Dakota asserts claims under South Dakota Codified Laws chapter 37-1, Restraint of Trade, Monopolies and Discriminatory Trade Practices, attached as Exhibit 26.

There is no reported South Dakota court decision that sets forth the elements required to establish a violation of S.D. Codified Laws §37-1-3.1 under the facts of this case. However, S.D. Codified Laws § 37-1-22 and South Dakota case law support the conclusion that this Court should apply federal case law construing Section 1 of the Sherman Act to determine whether a state law violation has occurred. The South Dakota Supreme Court in *Byre v. City of Chamberlain*, 362 N.W.2d 69, 73 (S.D. 1985), stated: "SDCL ch. 37–1, Restraint of Trade, Monopolies and Discriminatory Trade Practices, is taken directly from the Sherman Act, 15 U.S.C. § 1 *et seq.*" In *Assam Drug Co., Inc. v. Miller Brewing Co., Inc.*, 798 F.2d 311, 313-14 (8th Cir. 1986) the Eighth Circuit applied S.D. Codified Laws §37-1-22 and *Byre v. City of Chamberlain* in its analysis of a state law claim removed to federal court.

In interpreting S.D. Codified Laws §37-1-3.1 in *In re Chocolate Confectionery Antitrust Litigation*, 602 F.Supp.2d 538, 581 (M.D. Pa. 2009), the court adopted the interpretation that South Dakota must establish that Defendants' conduct produced anticompetitive effects within South Dakota. Because the increased prices for e-books purchased by South Dakota consumers from Apple and Penguin's retail agents satisfies this requirement.

27. Tennessee

Tennessee asserts claims under the Tennessee Trade Practices Act, Tenn. Code Ann. § 47-25-101 *et seq.* The Tennessee Trade Practices Act is attached as Exhibit 27.

The Tennessee Supreme Court has opined that "Tennessee does not have a statutory 'harmony clause' mandating courts to interpret the TTPA consistently with federal law." *Freeman Industries, LLC v. Eastman Chemical Co.*, 172 S.W.3d 512, 520 (2005). However, in *Tennessee ex rel. Leech v. Levi Strauss & Co.*, 1980 WL 4696, at *2, n.2 (Tenn. Ch. Sept. 25, 1980) the Tennessee Chancery Court observed that "[t]he State antitrust statute…is quite similar to the Sherman Antitrust Act" and that the "[a]uthorities which define the character of private damage suits under federal antitrust statutes, particularly the Sherman Act, are [therefore] most persuasive." Additionally, the Tennessee Supreme Court has opined that in behavior similar to that pled in this case "the proper standard for determining whether a case falls within the scope of the TTPA is a 'substantial effects' standard. Pursuant to this standard, courts must decide whether the alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree. Federal courts have applied the substantial effects standard to the Sherman Act." *Freeman Industries, LLC at 523.*

The determination of whether an effect is substantial does not involve "mathematical nicety." *Anesthesia Advantage, Inc. v. Metz Group,* 912 F.2d 397, 401 (10th Cir.1990). Rather, the test is

pragmatic, turning upon the particular facts of the case. *See id.* at 402; *Huelsman v. Civic Ctr. Corp.*, 873 F.2d 1171, 1175 (8th Cir.1989). The anticompetitive conduct, however, need not threaten the demise of Tennessee businesses or affect market prices to substantially affect intrastate commerce. *See Hospital Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 745–47, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (referring to the Sherman Antitrust Act) *Id.* at 524.

In the States' Second Amended Complaint, Tennessee also pled a claim for violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101 *et seq*. Tennessee is no longer pursuing that aspect of its claims.

28. Texas

Texas has asserted claims for civil penalties, injunctive relief and the costs of suit under the Texas Free Enterprise and Antitrust Act of 1983, Tex. Bus. & Com. Code §§ 15.01 *et seq.* ("Texas Antitrust Act"). A copy of the relevant portions of the Texas Antitrust Act is attached as Exhibit 28.

The Texas Antitrust Act states, "Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful." Tex. Bus. & Com. Code § 15.05(a). The Texas Antitrust Act requires that its provisions be read in harmony with federal antitrust law. Specifically, the Texas Antitrust Act states:

> The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and *shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes* to the extent consistent with this purpose.

Tex Bus. & Com. Code § 15.04 (emphasis added); *see also Times Herald Printing Co. v. A.H. Belo Corp.*, 820 S.W.2d 206, 211 (Tex. App. 1991).

Texas state courts have repeatedly looked to federal court decisions under the Sherman Act to determine the scope of the Texas Antitrust Act. In *Times Herald*, for example, the court followed federal cases in setting forth the appropriate legal standards for analyzing the conduct at issue. *See e.g. Times Herald*, 820 S.W. 2d at 211-12 ("Texas Courts must construe state antitrust safeguards in harmony with federal judicial interpretations of comparable federal statutes"); *see also Ash v. Hack Branch Distributing Co., Inc.*, 54 S.W. 3d 401 (Tex. App. 2001) (in reversing grant of summary judgment, court followed federal antitrust cases in determining that there was sufficient evidence to support a trial on plaintiffs' price-fixing claim); *cf. Abbott Labs., Inc. v. Segura*, 907 S.W. 2d 503 (Tex. 1995) (following federal cases in determining indirect purchasers did not have standing to pursue antitrust damages claims); *Roberts v. Whitfill*, 191 S.W. 3d 348 (Tex. App. 10th Dist. 2006) (relying on federal court decisions in determining that plaintiff did not have antitrust standing to pursue her price fixing claims).

29. Utah

Utah has asserted claims for injunctive relief, treble damages for natural persons, civil penalties, attorney's fees, and costs of suit, under the Utah Antitrust Act, Utah Code sections 76-10-911 through 926. A copy of the Utah Antitrust Act is attached as Exhibit 29.

Both the Utah Constitution, Article XII, section 20, and Utah Code §76-10-914(1) closely mirrors the first sentence of Section 1 of the Sherman Act and Utah Code § 76-10-926 evinces an unambiguous legislative intent for the Utah Antitrust Act to be interpreted comparably to federal antitrust statutes. Accordingly, while the Utah Supreme Court has only addressed the issue in a limited context,[13] Federal Courts have long recognized the close relationship between the Utah

[13] In *Summit Water Dist. Co. v. Summit County*, 123 P.3d 437, 446 (Utah 2005), the Utah Supreme Court noted that "In accord with Utah Code section 76–10–926, we first examine federal law on this issue" with reference to the scope of the state sovereign immunity under federal antitrust law.

Antitrust Act and parallel federal antitrust laws: "It is worth noting that generally Utah antitrust laws are to be construed in harmony with the federal antitrust scheme." *Rio Vista Oil, Ltd. v. Southland Corp.*, 667 F. Supp. 757, 762 (D. Utah 1987) (quoting Utah Code § 76-10-926). "The [Utah Antitrust] Act, which is modeled after and closely resembles the federal antitrust statute, expressly provides that it is to be applied and interpreted consistently with its federal counterpart. Utah Code Ann. § 76–10–926. This court sees no reason to rule differently with respect to the state claim than with respect to the federal claim." *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 805 (D. Utah 1988).

Utah has elected, pursuant to Utah Code §76-10-919(3), to seek for the state and its political subdivisions "the civil penalty provided by the Utah Antitrust Act, in addition to injunctive relief, costs of suit, and reasonable attorney fees." Additionally, the Utah Antitrust Act gives courts broad powers to assess an equitable civil penalty: "Any person, other than an individual, who violates this act is subject to a civil penalty of not more than $500,000 for each violation." Utah Code §76-10-918(2).[14]

30. Vermont

Vermont alleges that Defendants' conduct violates the Vermont Consumer Protection Act ("CPA"), Vt. Stat. Ann. tit. 9, § 2451, *et seq*. A copy of the CPA is attached as Exhibit 30.

The Vermont antitrust law, 9 Vt. Stat. Ann. § 2453(a) (2011) prohibits unfair methods of competition, including conduct that would violate Section 1 of the Sherman Act. When enacting the CPA, the legislature made its intent explicit for courts to interpret the CPA in harmony with

[14] Utah reserves detailed argument on the amount of the civil penalty for the later trial on monetary relief. Utah will assert that each offer or sale of an e-book at an increased price as a result of the conspiracy is a separate violation for purposes of the civil penalty statute, Utah Code section 76-10-918(2). Of course, Utah does not intend to seek a civil penalty of $500,000 per defendant per e-book sale. Consistent with the constitutional mandate and legislative intent to maintain free markets, Utah will seek a penalty that is "proportionate to the seriousness of [the] offenses," and likely to "prevent the commission of offenses" by these defendants and others. Utah Code §76-1-104, *Purposes and Principles of Construction*.

the Federal Trade Commission Act, stating, in 9 V.S.A. § 2453(b), that

> It is the intent of the legislature that in construing subsection (a) of this section, the courts of this state will be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act as from time to time amended by the Federal Trade Commission and the courts of the United States."

9 V.S.A. § 2453(b). The standard of unfairness under the Federal Trade Commission Act encompasses practices that violate the Sherman Act. *Vermont Mobile Home Owners' Ass'n, Inc. v. Lapierre*, 131 F. Supp. 2d 553, 558 (D. Vt. 2001).

In order to prove an antitrust case brought under §2453(a), a plaintiff must prove: "1) an unfair method of competition in commerce), (2) an injury or impact suffered as a result of that violation, and (3) an estimated measure of damages." *Id*. at 546. [15] Pursuant to 9 V.S.A. § 2458, the attorney general may obtain injunctive relief and a civil penalty of up to $10,000 per violation of 2453(a), as well as damages. *Wright v. Honeywell Intern., Inc.*, 989 A.2d 539, 543 (2009).

31. Virginia

Virginia brings suit for injunctive relief, treble damages for consumers and civil penalties under the Virginia Antitrust Act ("VAA"), Va. Code Ann. §§ 59.1-9.1 through 59.1-9.17. A copy of the relevant portions of the Virginia Antitrust Act are attached as Exhibit 31. Section 59.1-9.17 of the VAA provides that the entire statute "shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions." Section 59.1-9.5, which provides that "[e]very contract, combination or conspiracy in restraint of trade or commerce of this Commonwealth is unlawful," is Virginia's counterpart to Sherman Act § 1.

[15] Vermont does not have antitrust laws that are separate from its consumer protection laws. *Elkins v. Microsoft*, 817 A. 2d 9, 17 (2002), but it does have a separate statutory antitrust remedies provision. 9 V.S.A. §2465.

The Supreme Court of Virginia has not construed the VAA. However, the Fourth Circuit has confirmed that the elements of § 59.1-9.5 are substantially the same as the elements of § 1 of the Sherman Act. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991) ("The Virginia Antitrust Act, with the exception of an interstate commerce component, shares common elements with sections one and two of the Sherman Act."); *see also Mountain Area Realty, Inc. v. Wintergreen Partners, Inc.*, 2007 WL 4561293, at *2 (W.D. Va. Dec. 21, 2007) ("To establish a violation of Section 1 of the Sherman Act, MAR must prove: (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade. [The Plaintiff's] claims under the Virginia Antitrust Act are governed by the same standard as its claims under the Sherman Antitrust Act.") (internal quotation marks and citations omitted); *Net Realty Holding Trust v. Franconia Properties, Inc.*, 544 F. Supp. 759, 767 n.10 (E.D. Va. 1982) (noting that the wording of § 59.1-9.5 is "virtually identical" to its federal counterpart and holding that the same rule of reason analysis applied to the federal claim should be applied to the state claim).

Because § 59.1-9.5 is construed in the same manner as Sherman Act § 1, a finding that the Defendants in this matter violated Sherman Act § 1 will, of necessity, mean that the defendants also violated § 59.1-9.5. Section 59.1-9.11 provides that, in an action brought by the Virginia Attorney General, the court may assess a civil penalty of not more than $100,000 for each willful or flagrant violation of the VAA. However, it further provides that no civil penalty may be assessed for any violation for which any fine or penalty is imposed pursuant to federal law.

32. West Virginia

West Virginia brings claims under its Antitrust Act codified at W.Va. Code §§ 47-18-1 *et seq.* A copy of the relevant portions of West Virginia's Antitrust Act is attached as Exhibit 32. West Virginia antitrust laws shall be construed liberally and in harmony with ruling judicial

interpretations of comparable federal antitrust statutes. W.Va. Code § 47-18-16. The West Virginia Supreme Court of Appeals has interpreted this provision as "direct[ing]" West Virginia Courts "to apply the federal decisional law interpreting the Sherman Act to [West Virginia's] own parallel antitrust statute, W. Va. Code § 47-18-3(a)." *Gray v. Marshall County Bd. of Educ.*, 367 S.E.2d 751, 755 (W. Va. 1988); s*ee also Kessel v. Monongalia County Gen. Hosp. Co.*, 648 S.E.2d 366, 379-80 (W. Va. 2007) (applying same directive to W.Va. Code § 47-18-3(b)).

33. Wisconsin

The State of Wisconsin alleges that the defendants violated relevant portions of Wis. Stat. §133.03. A copy of the relevant Wisconsin statutes is attached as Exhibit 33.

Wisconsin's antitrust act is intended to be a reenactment of the first two sections of the Sherman Act and generally follows federal antitrust law. *Eichenseer v. Dane County Tavern League*, 748 N.W. 2d 154, 174 (Wis. 2008). "We follow our precedent set forth in *Olstad* for determining when Chapter 133 reaches interstate commerce: A plaintiff filing an action under Wisconsin's Antitrust Act must allege price fixing as a result of the formation of a combination or conspiracy that 'substantially affects' the people of Wisconsin and has impacts in this state[] when the challenged conduct occurs predominately or exclusively outside this state." *Meyers v. Bayer A.G.*¸ 735 N.W.2d 448, 451 (Wis. 2007) (citing *Olstad v. Microsoft*, 700 N.W.2d 139 (Wis. 2005)).

CONCLUSION

For the foregoing reasons, the Penguin and Apple violations of Section 1 of the Sherman Act, as briefed in the Plaintiff States Memorandum of Law constitute violations of the state law claims enumerated above.

Dated: May 6, 2013

Respectfully Submitted,

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