

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

CASE TYPE: Civil Other/Misc.

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Dires, LLC d/b/a Personal Comfort Bed,

Plaintiff,

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS**

v.

27-cv-19-18323

Sleep Number Corporation,

Judge Ronald L. Abrams

Defendant.

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This matter came on for a hearing before the Honorable Ronald L. Abrams in Courtroom 1659 of the Hennepin County Government Center on February 13, 2019. Christopher Madel, Esq., and Ellen Ahrens, Esq., appeared on behalf of Plaintiff. Andrew Hansen, Esq., and Elizabeth Patton, Esq., appeared on behalf of Defendant. Based on the submissions of the Parties, arguments of counsel, and available record, the Court enters the following:

**ORDER**

1. Defendant's Motion to Dismiss is **DENIED** with respect to Plaintiff's claims for violation of the Minnesota Antitrust Law arising after October 23, 2017.
2. Defendant's Motion to Dismiss is **GRANTED** with respect to Plaintiff's claims for violation of the Minnesota Antitrust Law arising before October 23, 2017 and such claims are **DISMISSED WITH PREJUDICE**.
3. Defendant's Motion to Dismiss is **GRANTED** with respect to Plaintiff's claim for tortious interference, and that claim is **DISMISSED WITH PREJUDICE**.
4. Defendant's Motion to Dismiss is **GRANTED** with respect to Plaintiff's claim for violation of the Minnesota Deceptive Trade Practices Act, and that claim is **DISMISSED WITH PREJUDICE**.
5. Defendant's Motion to Dismiss is **GRANTED** with respect to Plaintiff's claim for unjust enrichment, and that claim is **DISMISSED WITH PREJUDICE**.
6. The attached Memorandum is incorporated herein.

BY THE COURT:

Dated: May 13, 2020

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Ronald L. Abrams  
Judge of District Court

## MEMORANDUM

### Factual Background

#### I. Parties' Online Advertising

Plaintiff Dires, LLC d/b/a Personal Comfort Bed ("Plaintiff") is a Florida limited liability company that sells consumer adjustable firmness air mattress bed systems ("number beds") in the United States. Plaintiff's products are sold almost exclusively online. Defendant Sleep Number Corporation ("Defendant") is a Minnesota corporation that sells number beds online and through its approximately 500 retail stores across the United States. Plaintiff and Defendant compete directly in the consumer adjustable firmness air mattress bed system market (the "Number Bed Market") in the United States. Defendant is the largest manufacturer and seller of number beds in the United States and maintains a share of over 90% of that market. Plaintiff's products have more settings than Defendant's and have been more highly ranked in some consumer publications.

Plaintiff sells its products through its own website and on sales website such as Amazon, or by phone after customers find its phone number online. Plaintiff does not operate physical stores. Therefore, Plaintiff's primary means of competing with Defendant is through online advertising and marketing. Plaintiff conducts its online advertising through search engines, such as Google and Bing, and social media sites, such as YouTube and Facebook

Online users search for information using keywords or keyword phrases (collectively "keywords"), which the user believes will help them find the information they seek. When a user enters the keywords, they are transmitted to the search engine. The search engine then examines indices of responsive webpages, and returns search results, listing applicable webpages. The indices examined include the organic index (the primary index of webpage text), the pay-per-click index (which contains advertisements), and the local index (which contains information on local businesses). To appear in the organic index, advertisers ensure that keywords they expect customers to use in searching for information appear on their webpages. To appear in the pay-per-click index, advertisers pay search engines to include them in this index. This requires advertisers to create an advertising account with the search engine firm, create advertisements in that account, and define when advertisements should appear depending on the keywords used by consumers. Search engines choose which advertisements appear based on advertisers bidding on higher positions when keywords are used, and based on relevance. Search engines are paid for pay-per-click advertisements only if the user clicks on the ad. Using the right keywords, therefore, increases the likelihood that an advertisement will appear to an online consumer.

Both Plaintiff and Defendant use keywords on their websites and bid on keywords for pay-per-click advertisements. Search engines generally do not restrict which keywords are available for bidding. Advertisers commonly bid on keywords that will present their advertisements in response to a user's search for another company's brand name. For example, Defendant has branded the term "number bed," but Plaintiff has regularly advertised online using the phrase "number bed" as a keyword. Plaintiff found that this phrase was "critical" to entice customers to purchase its beds. Further, when Plaintiff has used this phrase in the past, its advertising cost decreased and, consequently, its profitability has increased. The phrase "number bed" has never been registered as a trademark.

## II. Defendant's Communications with Online Advertising Firms

Beginning in 2013, Defendant communicated to the search engine Google that it owned the trademark for the phrase “number bed.” According to Plaintiff, this representation was false. Google accepted Defendant’s representation and deemed the phrase “registered” with Google. This meant that Google would monitor online advertisements for the use of this phrase and prohibit other advertisers from using it. This decision was made several months after a high-ranking Google employee joined Defendant’s Board of Directors. Subsequently, Google prohibited Plaintiff from using the phrase “number bed” and other comparative terms in its online advertisements. Plaintiff continued to attempt using the phrase, and Google temporarily suspended Plaintiff’s advertising account. Continuing through 2015, Google disapproved some of Plaintiff’s online advertisements that used the phrase “number bed.” The search engine firm Bing also disapproved such advertisements. In 2015, Google again temporarily suspended Plaintiff’s advertising account. Soon after, Amazon removed Plaintiff’s listings for products based on communications from Defendant. During a period from mid-2015 through mid-2017, Plaintiff was less-restricted in its ability to use the phrase “number bed” in online advertisements. Defendant again began to complain about Plaintiff’s use of advertisements comparing their products, and containing the word “number,” in the spring of 2017. Google subsequently disapproved some of Plaintiff’s online advertisements.

## III. California Antitrust Action

On March 30, 2016, Plaintiff filed an antitrust lawsuit against Defendant in the United States District Court for the Central District of California, alleging that Defendant deliberately attempted to, and did, monopolize the number bed market in the United States in violation of Section 2 of the Sherman Act (the “California Antitrust Action”). (Patton Aff., Ex. 3, Dckt. 23, “(In Chambers) Order re: Motion to Dismiss or Strike,” *Am. Nat’l Mfg., Inc. v. Select Comfort Corp.*, No. 5:16-cv-00582-R-JC, at \*1 (C.D. Cal. Mar. 30, 2016).)<sup>1</sup> Plaintiff specifically alleged that Defendant engaged in the following anticompetitive acts: trademark litigation threats against approximately 129 competitors in the number bed market over the preceding five to seven years; trademark litigation based on objectively baseless claims; patent litigation against Plaintiff before the International Trade Commission; opposition to competitors’ attempts to register trademarks using the word “number”; acquisition of competitor Comfortaire; and obtaining an exclusive supply contract for vulcanized rubber through coercion of a manufacturer. (*Id.* at \*1–2.) Defendant moved to dismiss Plaintiff’s antitrust claims and the court granted that motion with leave to amend. (*Id.* at \*13.) The court stated that Plaintiff’s failure to file a First Amended Complaint within 30 days of the order “will be deemed their admission that amendment is futile, and in that event, this action will be dismissed with prejudice.” (*Id.*)

Judge King’s order was entered on September 28, 2016. (Patton Aff., Ex. 1.)<sup>2</sup> Plaintiff had until October 28, 2016 to file a First Amended Complaint. On October 25, 2016, Judge King

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<sup>1</sup> This Court takes judicial notice of the opinion of Judge George H. King in the California Antitrust Action. *See Rohricht v. O’Hare*, 586 N.W.2d 587, 588 (Minn. Ct. App. 1998) (permitting courts to take judicial notice of opinions in underlying actions, including any adjudicated facts).

<sup>2</sup> This Court may consider the docket in and underlying action as a court docket is a public record. *See State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000). As discussed in greater detail below, Defendant’s remaining exhibits do not constitute public records.

entered an order extending the time for Plaintiff to file a First Amended Complaint to November 11, 2016. (Patton Aff., Ex. 2.) Plaintiff did not file a First Amended Complaint by November 11, 2016. (*Id.*) On January 13, 2017, Plaintiff filed a Notice of Voluntary Dismissal. (*Id.*)

#### **IV. Minnesota Trademark Action**

On November 16, 2012, Defendant sued Plaintiff and others for trademark and trade dress infringement in the United States District Court for the District of Minnesota (the “Minnesota Trademark Action”). *Select Comfort Corp. v. Baxter*, Civ. No. 12-2899 (DWF/SER), 2018 WL 6529493 (D. Minn. Dec. 12, 2018), *appeal docketed* No. 19-1077 (8th Cir. 2019). The case was tried in 2017. The jury’s October 23, 2017 verdict found that Defendant had no trademark rights in the phrase “number bed.” On November 10, 2017, Defendant again registered the trademark “number bed” with Google. On December 1, 2017, Google disallowed Plaintiff’s attempt to place an advertisement containing the phrase “number bed” on Google, on the basis that the advertisement used Defendant’s alleged trademark. Subsequently, search engines disallowed Plaintiff’s advertisements containing the phrase “number bed,” comparative phrases, and other phrases that the federal jury had found to be non-infringing. This continued through 2018. On December 12, 2018, Judge Frank denied Defendant’s motions for a new trial and for judgment as a matter of law. Nonetheless, as a result of continued communications between Defendant and search engine firms, Plaintiff’s advertisements containing the phrase “number bed” and other terms the federal jury found to be non-infringing were disapproved. Defendant appealed to the United States Court of Appeals for the Eighth Circuit. That appeal is pending. As recently as April 17, 2019, Defendant registered “number bed” with Google.

#### **V. Conduct of Defendant’s Employees**

At least three of Defendant’s employees have made negative comments or posted negative ratings or reviews regarding Plaintiff, its products, and its services online. On May 27, 2019, a store manager at one of Defendant’s stores gave Plaintiff a one-star rating on Facebook, despite never having purchased any of Plaintiff’s products. In June 2019, a sales associate at one of Defendant’s stores commented on a YouTube video posted by Plaintiff, falsely stating that Plaintiff requires a restocking fee, despite never having purchased any of Plaintiff’s products. On October 6, 2019, a store manager at one of Defendant’s stores commented on one of Plaintiff’s Facebook posts, stating that Plaintiff’s product was a “[c]heap knockoff,” despite never having purchased any of Plaintiff’s products.

#### **VI. Present Action**

Plaintiff filed the present action on November 5, 2019 bringing claims for violation of the Minnesota Antitrust Law, tortious interference with prospective economic advantage, violation of the Minnesota Deceptive Trade Practices Act, and unjust enrichment. Defendant now moves to dismiss this action for failure to state a claim upon which relief can be granted.

## Analysis

### **I. Motion to Dismiss Standard**

Defendant moves to dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to Minn. R. Civ. P. 12.02. Generally, a “claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). Under this standard, courts must “determine whether the complaint sets forth a legally sufficient claim for relief.” *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 189 (Minn. Ct. App. 2007). The Minnesota Supreme Court expressly rejected the federal plausibility standard. *Walsh*, 851 N.W.2d at 603. Instead, Minnesota is a notice-pleading state in which absolute specificity in pleadings is not required and pleadings are liberally interpreted. *Id.*; *Dahl*, 742 N.W.2d at 189. “It is immaterial at the pleadings stage whether the plaintiff can prove the facts alleged.” *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 623 (Minn. 2007). Nonetheless, “[c]ourts are always able to dismiss pleadings consisting solely of vague or conclusory allegations wholly unsupported by fact.” *In re Milk Indirect Purchaser Antitrust Litig.*, 588 N.W.2d 772, 775 (Minn. Ct. App. 1999).

Defendant argues that antitrust allegations are subject to a heightened pleading standard. Minnesota courts recognize that federal court decisions are controlling on antitrust issues. *In re Milk Indirect Purchaser*, 588 N.W.2d at 774. “In federal court, notice pleading is sufficient for all causes of action unless otherwise specified in the rules of civil procedure.” *Id.* There are no specific procedural requirements in either the Federal or Minnesota Rules of Civil Procedure subjecting antitrust claims to heightened pleading standards. *Id.* Notice pleading is thus sufficient for antitrust claims. *Id.*; *see also Fusco v. Xerox Corp.*, 676 F.2d 332, 337 n.7 (8th Cir. 1982) (“The liberal rules of pleading embodied in Fed. R. Civ. P. 8 are as applicable to claims in antitrust . . . cases as they are in any other case . . . All that is required is a short, plain statement of facts sufficient to give the defendant fair notice.”). Therefore, in reviewing the Complaint under Minn. R. Civ. P. 12.02, this Court must apply the *Walsh* notice-pleading standard. *See Walsh*, 851 N.W.2d at 603.

The Parties dispute whether the Court can consider materials outside the pleadings in ruling on Defendant’s motion. . “Generally, the court may not consider extrinsic evidence on a motion to dismiss.” *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Courts must consider “only the facts alleged in the complaint, accepting those facts as true, and construing all inferences in favor of the nonmoving party.” *Dahl*, 742 N.W.2d at 189. Here, Defendants submitted hundreds of pages of exhibits with their Motion to Dismiss, including copies of the civil dockets and opinions in the underlying actions (Patton Aff., Exs. 1–4.), printouts of internet search results from various search engines (Patton Aff., Exs. 5–36.), letters and emails (Patton Aff., Exs. 37–41.), Google’s advertising policies (Patton Aff., Exs. 42–43.), and online articles and press releases about the mattress industry (Patton Aff., Exs. 44–48.). Defendant argues that the Court can consider these documents because they are referenced in the Complaint, central to the Complaint, public records, or legal documents.

First, courts may consider material outside the pleadings “when the complaint refers to the [material] and the [material] is central to the claims alleged.” *In re Hennepin Cnty.*, 540 N.W.2d at 189 (emphasis added). Even if Defendant could establish that the materials it submitted are

central to the Complaint, such materials would have to be referenced in the Complaint in order for this Court to consider them. The Complaint contains no references to the internet search results performed by Defendant's attorneys, emails, articles, press releases, or advertising policies Defendant provided. Because these documents are "not referenced in or part of the pleading that was the subject of the motion to dismiss," their alleged centrality is insufficient for the Court to consider them. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004).

Second, courts may take judicial notice of opinions in underlying actions, including any adjudicated facts. *Rohricht v. O'Hare*, 586 N.W.2d 587, 588 (Minn. Ct. App. 1998). However, courts may not consider any part of the underlying record that is "evidentiary in nature," such as testimony or evidence admitted in the underlying action. *Id.*; *301 Clifton Place LLC v. 301 Clifton Place Condo. Ass'n*, 783 N.W.2d 551, 560 (Minn. Ct. App. 2010). Thus this Court may consider the court opinions in the underlying actions and Exhibits 1–4 of the Patton Affidavit. However, even if any of the other materials, such as search results, were considered by the courts in the underlying actions, they are not properly before *this* Court.

Finally, there is some support for the proposition that courts may consider public records, but other than the dockets and court decisions in the underlying actions, none of the materials submitted by Defendant constitute public records. *See State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000) (holding that appellate court could review compilations of state and federal court sentencing statistics); *Mutua v. Deutsche Bank Nat. Tr. Co.*, A13-0498, 2013 WL 6839723, at \*1, \*3 (Minn. Ct. App. Dec. 20, 2013) (considering "publicly available documents filed with the U.S. Securities and Exchange Commission" on a motion to dismiss). In both *Rewitzer* and *Mutua*, the materials considered by the Court were comprised of information from public institutions, including the courts and a federal agency. By contrast, the materials Defendant submitted contained information and communications from private individuals and entities, including its own attorneys. Defendant has not identified, and this Court is not aware of, any authority to support the proposition that, simply by virtue of being available on the internet, materials are public records which are properly considered by courts reviewing a motion to dismiss. This Court declines to consider such evidence.

## **II. Plaintiff's Antitrust Claims Are Not Barred by Collateral Estoppel. Plaintiff's Antitrust Claims Are Not Barred by Res Judicata for Claims Arising After November 11, 2016.**

Defendant argues that Plaintiff's Minnesota antitrust claims are barred by the doctrines of res judicata and collateral estoppel because the court in the California Antitrust Action previously entered a final judgment on Plaintiff's federal antitrust claims against Defendant. Res judicata and collateral estoppel are related, but distinct doctrines. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). "Fundamental to both doctrines is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies." *Id.* (quotations omitted). Though res judicata is based on the same principle as collateral estoppel "it is the broader of the two and applies more generally to a set of circumstances giving rise to entire claims or lawsuits" while collateral estoppel "applies to specific legal issues that have been adjudicated." *Id.* Further, while neither doctrine "is to be rigidly applied" "the United States Supreme Court has cautioned that res judicata should be invoked only after careful inquiry because it . . . 'blockades unexplored paths

that may lead to truth.” *Id.* (quoting *Brown v. Felsen*, 442 U.S. 127, 132 (1979)). Here, Plaintiff’s Minnesota antitrust claims are not barred by the doctrine of collateral estoppel, and Plaintiff’s Minnesota antitrust claims related to Defendant’s conduct after November 11, 2016 are not barred by the doctrine of res judicata. However, Plaintiff’s antitrust claims related to Defendant’s conduct prior to November 11, 2016 are barred by the doctrine of res judicata.

#### **A. Collateral Estoppel Does Not Bar Plaintiff’s Antitrust Claims**

Collateral estoppel “prohibits a party from relitigating issues that have been previously adjudicated.” *All Finish Concrete, Inc. v. Erickson*, 899 N.W.2d 557, 566 (Minn. Ct. App. 2017). The doctrine applies when:

- (1) the issue is identical to one in a prior adjudication;
- (2) there was a final judgment on the merits;
- (3) the estopped party was a party or in privity with a party to the prior adjudication;
- and
- (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

*Id.* (quotations omitted). Here, collateral estoppel does not apply because the first and fourth elements are not satisfied.

With respect to the first prong, “[t]he issue must have been distinctly contested and directly determined in the earlier adjudication.” *Id.* In the context of collateral estoppel, “issues are identical when the issues presented by the current litigation are in substance the same as those resolved in the previous litigation.” *Id.* (citations and quotations omitted). Here, Plaintiff alleges that Defendant engaged in exclusionary conduct in violation of the Minnesota Antitrust Law, Minn. Stat. § 325D.51, when it falsely claimed to search engines that it owned the trademark for “number bed” and when its employees made false and misleading statements about Plaintiff, its services, and its products. (Compl. ¶ 175.) By contrast, in the California Antitrust Action, Plaintiff alleged that Defendant violated Section 2 of the Sherman Act by engaging in trademark litigation threats, initiating objectively baseless trademark infringement suits, initiating patent infringement suits, opposing trademark registration by other competitors, acquiring competitor Comfortaire, and coercing a manufacturer into an exclusive supply arrangement. (Patton Aff., Ex. 3.) Plaintiff did not raise antitrust claims based on complaints to search engines or misleading statements by Defendant’s employees in the California Antitrust Action (*Id.*) Therefore, the antitrust claims in the present action and the antitrust claims raised in the California Antitrust Action are not identical for purposes of collateral estoppel and the first prong is not satisfied.

With respect to the second prong, “[a] final judgment is defined as one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *All Finish Concrete*, 899 N.W.2d at 568. Here, there was a final judgment on the merits in the California Antitrust action. The United States District Court for the Central District of California dismissed Plaintiff’s federal antitrust claims with leave to amend, stating that “[s]hould Plaintiffs elect to file a First Amended Complaint (“FAC”) they shall do so within 30 days hereof.” (Patton Aff., Ex 3.)<sup>3</sup>

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<sup>3</sup> Plaintiff described its post-decision actions as follows:

The court further stated that, in the event Plaintiffs failed to do so, “this action will be dismissed with prejudice.” (*Id.*) Plaintiffs did not file a FAC within 30 days of the order. (Patton Aff., Ex. 4.) In determining the preclusive effect of a prior judgment in another forum, this Court must apply the forum court’s law. *Semtek Intern., Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001). Under Ninth Circuit law, the failure to cure a deficiency within the period provided by the district court converts a dismissal into a “final order of dismissal with prejudice.” *Lynch v. City of Alhambra*, 880 F.2d 1122, 1124 (9th Cir. 1989). Therefore, Plaintiff’s failure to file a FAC within the time provided by the court converted the dismissal with leave to amend to a dismissal with prejudice. Though Plaintiff later voluntarily dismissed the action, this voluntary dismissal did not come until after the earlier dismissal had been converted to a dismissal with prejudice. (Patton Aff., Ex. 4.) Therefore, there was a final judgment on the merits in the California Antitrust Action and the second prong is satisfied.

With respect to the third prong, Plaintiff and Defendants were parties in the California Antitrust Action. (Patton Aff., Ex. 4.) Therefore, the third prong is satisfied.

With respect to the fourth prong, the issue of whether a party had a full and fair opportunity to litigate “generally focuses on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties.” *State v. Joseph*, 636 N.W.2d 322, 328 (Minn. 2001) (quotations omitted). Plaintiff did not have a full and fair opportunity to litigate the issue of whether Defendant engaged in antitrust violations when it complained to search engines regarding Plaintiff’s use of the phrase “number bed” in advertisements or when its employees made negative statements about Plaintiff, its services, and products, because no such claims were raised in the California Antitrust Action. Therefore, the fourth prong was not satisfied.

Application of the doctrine of collateral estoppel to bar litigation of Plaintiff’s Minnesota antitrust claims is inappropriate because Plaintiff did not previously adjudicate these issues in the California Antitrust Action. Therefore, Plaintiff’s Minnesota antitrust claims are not barred by the doctrine of collateral estoppel.

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“Here, no judgment was entered in the 2016 California Antitrust Action. The court granted Sleep Number’s motion to dismiss but allowed plaintiffs, which included Dires and American National Manufacturing, Inc., leave to amend. After **procedural machinations**, the plaintiffs voluntarily dismissed their First Amended Complaint *without prejudice* and consistent Fed. R. Civ. P. 41(a)(1).” (emphasis added)(Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to dismiss at 10-11) (citations omitted).

As will be discussed *infra.*, Plaintiff’s attempt to voluntarily dismiss the California Antitrust Action was ineffective pursuant to explicit terms of Judge King’s Order re: Motion to Dismiss or Strike and binding precedent from the Ninth Circuit Court of Appeals. Plaintiff’s attempt to voluntarily dismiss pursuant to Rule 41(a)(1) also runs afoul of Federal Rule of Civil Procedure 1, and its Minnesota counterpart. The Rule provides that the Rules of Civil Procedure “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The extraordinary “procedural machinations” attempted by the Plaintiff should not be condoned or rewarded by any court, anywhere or at any time. The Court included Plaintiff’s entire statement on this issue so that there can be no question about the context in which it was made in its Memorandum in Opposition. The Court provides this footnote solely as *dicta*.

## B. Res Judicata Does Not Bar Plaintiff's Post-November 11, 2016 Antitrust Claims

Res judicata “concerns circumstances giving rise to a claim and precludes subsequent litigation—regardless of whether a particular issue or legal theory was actually litigated.” *Hauschildt*, 686 N.W.2d at 840. The doctrine “applies to all claims litigated and to all claims that could have been litigated in the earlier action.” *Rucker v. Schmidt*, 768 N.W.2d 408, 412 (Minn. Ct. App. 2009). Res judicata functions as an “absolute bar” to subsequent claims when:

- (1) the earlier claim involved the same set of factual circumstances;
- (2) the earlier claim involved the same parties or their privies;
- (3) there was a final judgment on the merits;
- (4) the estopped party had a full and fair opportunity to litigate the matter.

*Id.* (quotations omitted). All four prongs must be satisfied. *Id.* Here, the doctrine of res judicata applies to Plaintiff's claims related to complaints Defendant made to search engines prior to dismissal of the California Antitrust action, but not to claims arising out of complaints made after dismissal or to claims related to comments made by Defendant's employees.

With respect to the first prong “a claim or cause of action is a group of operative facts giving rise to one or more bases for suing. . . . Therefore, the focus of res judicata is whether the second claim arises out of the same set of factual circumstances.” *Id.* at 840 (citations and quotations omitted). “The ‘common test for determining whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence will sustain both actions.’” *Id.* at 840–41 (quoting *McMenomy v. Ryden*, 148 N.W.2d 804, 807 (Minn. 1967)). Here, Plaintiff alleges that Defendant complained to search engines about Plaintiff's use of the phrase “number bed” and comparative phrases in its online advertisements starting as early as 2013 and that, as a result of these complaints, search engines disapproved certain advertisements by Plaintiff and even temporarily suspended Plaintiff from advertising. (Compl., Ex. 1.) Therefore, while Plaintiff did not raise claims related to Defendant's complaints to search engines regarding the use of the phrase “number bed,” in the California Antitrust Action, Plaintiff *could have* done so.

However, Plaintiff *could not have* raised claims related to the alleged false, misleading, and defamatory reviews and comments Defendant's employees made about Plaintiff, its products, and its services because Defendant's employees did not engage in that conduct until after the California Antitrust Action had already been dismissed. (Compl. ¶¶ 147–58.) Plaintiff likewise could not have raised claims related to the alleged complaints to search engines made after dismissal of the California Antitrust Action on November 11, 2016 because “claims cannot be considered the same cause of action if the right to assert the second claim did not arise at the same time as the right to assert the first claim.” *Rucker*, 768 N.W.2d at 841 (quotations omitted). Therefore, the first prong is satisfied with respect to claims relating to search engine complaints made prior to November 11, 2016 but is not satisfied with respect to claims relating to search engine complaints made after November 11, 2016 or claims relating to comments or reviews by Defendant's employees.

With respect to the second prong, both the California Antitrust Action and the present action involve the same parties. Plaintiff was one of two plaintiffs in the California Antitrust Action and Defendant was the defendant in that case. Therefore, the second prong is satisfied.

With respect to the third prong, there was a final judgment on the merits. As discussed in greater detail above, this Court is bound to apply the forum's law to determine the res judicata effect of the California Antitrust Action. *Semetek*, 531 U.S. at 507. In the Ninth Circuit, failure to correct deficiencies identified by the district court will convert a dismissal into a dismissal with prejudice. *Lynch*, 880 F.2d at 1124. Therefore, Plaintiff's failure to file a FAC within the time allotted converted the dismissal to a dismissal with prejudice, such that there was a final judgment on the merits in the California Antitrust Action as of November 11, 2016. The third prong is satisfied.

With respect to the fourth prong, Plaintiff had a full and fair opportunity to litigate any claims related to Defendant's complaints to search engine that arose prior to November 11, 2016. In determining whether a party had a "full and fair opportunity" to litigate a matter, courts consider "whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." *Joseph* 636 N.W.2d at 328 (quotations omitted). Here, there were no procedural limitations in the prior proceeding. Plaintiff had the incentive to litigate its claims fully. Prevailing in that litigation would have allowed for damages to compensate an alleged antitrust injury, and the relationship between the Parties was not of a nature that would limit Plaintiff's ability to litigate. Therefore, Plaintiff had a full and fair opportunity to litigate the claims arising prior to the dismissal.

However, Plaintiff did not have a full and fair opportunity to litigate claims related to Defendant's complaints to search engines arising after November 11, 2016 or claims related to comments and reviews by Defendant's employees, because such claims did not even accrue until after the California Antitrust Action was dismissed.

The doctrine of res judicata bars Plaintiff from relitigating any claims related to Defendant's complaints to search engines prior to November 11, 2016 when the California Antitrust Action was dismissed with prejudice. However, any claims related to Defendant's complaints to search engines made after that date, and any claims related to comments and reviews by Defendant's employees are not barred under the doctrine because such claims could not have been raised in the California Antitrust Action and Plaintiff did not have a full and fair opportunity to litigate those claims.

### **III. Plaintiff's Claims Are Not Time Barred**

"[A]ll actions under the Minnesota Antitrust Law are governed by the four-year statute of limitations in Minn. Stat. § 325D.64." *State v. Rupp*, 393 N.W.2d 496, 502 (Minn. Ct. App. 1986) (citing *State v. DeWitt*, 389 N.W.2d 722, 723–24 (Minn. 1986)). Dismissal is proper under Rule 12.02 on statute of limitations grounds "only if it clearly and unequivocally appears from the face of the complaint that the statute of limitations has run and only if the complaint contains no facts to toll that running." *Pederson v. Am. Lutheran Church*, 404 N.W.2d 887, 889 (Minn. Ct. App. 1987). "An assertion that the statute of limitations bars a cause of action is an affirmative defense and 'the party asserting the defense has the burden of establishing each of the elements.'" *Hansen v. U.S. Bank Nat'l Ass'n*, 934 N.W.2d 319 (Minn. 2019) (quoting *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008)). Courts "will not make inferential leaps in favor of a defendant to conclude that a lawsuit is time-barred." *Id.* Federal courts, likewise, apply the same

approach to motions to dismiss based on the statute of limitations and have recognized that “the possible existence of a statute of limitations defense is not ordinarily a ground for a Rule 12(b)(6) dismissal unless the complaint itself establishes the defense.” *Id.* (quoting *Joyce v. Armstrong Teasdale, LLP*, 635 F.3d 364, 367 (8th Cir. 2011)).

“An antitrust cause of action generally ‘accrues and the statute begins to run when a defendant commits an act that injures the plaintiff’s business.’” *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1050 (8th Cir. 2000) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)); *see also Hansen*, 934 N.W.2d at 372. However, the statute of limitations can be tolled where there is a continuing violation. Minn. Stat. § 325D.64. Specifically, “a cause of action for a continuing violation is deemed to arise at any time during the period of violation.” *Concord*, 207 F.3d at 1050. The statutory continuing violation doctrine “relates to when a cause of action accrues rather than to the recovery of damages” such that a claim may not be barred if the first overt act occurred prior to the applicable limitations period, but a plaintiff may be unable to recover damages for overt acts occurring outside the limitations period. *See In re Processed Egg Prods. Antitrust Litig.*, 931 F.Supp.2d 654, 663–64 (E.D. Pa. 2013) (interpreting Minn. Stat. § 325D.64). Plaintiff argues that because the statute of limitations for Minnesota antitrust claims is established by Minnesota law, it must be interpreted consistent with Minnesota law on the continuing violations doctrine. But Minnesota courts interpret the Minnesota Antitrust Law consistently with federal antitrust law, with the exception of federal standing limitations. *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007). Minnesota’s statute of limitations and the statutory provision governing continuing violations in antitrust law should therefore be interpreted consistently with federal law.

Under the federal continuing violation doctrine, “[a] continuing antitrust violation is one in which the plaintiff’s interests are repeatedly invaded.” *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004). That is, “each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages caused by that act and . . . the statute of limitations runs from the commission of that act.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). The limitations period will restart as of each overt act by the defendant. *Klehr v. A.O. Smith Corp. & A.O. Smith Harvestore Prods., Inc.*, 521 U.S. 179, 189 (1997); *Varner*, 371 F.3d at 1019. “An overt act has two elements (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff.” *Id.*

Plaintiff filed this action on November 5, 2019. The Complaint alleges facts establishing that Plaintiff was injured by overt acts of Defendant in the four years prior to filing this action. Defendant attempts to argue that the conduct during this period amounts to reaffirmations of Defendant’s alleged wrongful conduct between 2013 and 2015. Though the Complaint alleges that Defendant wrongfully complained to search engines regarding the use of the phrase “number bed” in Plaintiff’s advertisements as early as 2013, it alleges new, and independent acts by Defendant within the four years prior to Plaintiff filing this action. Specifically, the Complaint alleges that Defendant complained to search engines regarding particular online advertisements and phrases between November 5, 2015 and November 5, 2019, rather than, for instance, directing Google to its original 2013 complaints. (*See Compl.*, 103; *Compl.*, Ex. 1.) Additionally, the Complaint alleges that Defendant’s employees made false, misleading, and disparaging remarks about Plaintiff, its services, and its products starting in 2017. (*Compl.* ¶¶ 148–58.) These acts by

Defendant are all independent from Defendant's initial complaints to search engines, and represent new acts by Defendant allegedly aimed at maintaining a monopoly in the market. Moreover, the Complaint alleges that these acts resulted in new and accumulating injuries. Plaintiff states that with each complaint Defendant made, Plaintiff was further limited in its ability to advertise and reach new customers. (Compl., ¶¶ 144–46 159.) Taking the facts alleged in the Complaint as true and construing all reasonable inferences in Plaintiff's favor, Plaintiff adequately pled independent, overt acts by Defendant causing new injuries within the four years prior to Plaintiff filing this action. The Complaint alleges facts sufficient to toll the running of the statute of limitations; therefore, dismissal based on the statute of limitations is not proper. *Pederson*, 404 N.W.2d at 889.

#### IV. Plaintiff Adequately Plead Antitrust Standing

Defendant argues that Plaintiff's antitrust claim must be dismissed because Plaintiff failed to adequately plead antitrust standing. The Minnesota Antitrust Law provides that “[a]ny person . . . injured directly or indirectly” by an antitrust violation may recover damages. Minn. Stat. § 325D.57. The Minnesota Supreme Court has stated that Minnesota courts are “not required to define who may sue in our state courts in the same way federal courts have defined who may maintain an action in federal court.” *Id.* at 626 (quotations omitted). The Minnesota Supreme Court explained that “Minnesota antitrust law contains ‘an expansive grant of standing’ designed to protect Minnesota citizens from ‘sharp commercial practices.’” *Id.* at 627 (quoting *Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 496–97 (Minn. 1996)). On this basis, the court rejected the multi-factor federal test for standing. *Id.* at 628. Instead:

[s]tanding under Minnesota antitrust law must be defined by some prudential limits informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the antitrust law; otherwise, almost any antitrust violation would provide almost any citizen with a cause of action arising from the resulting ripples of harm throughout the state's economy.

*Id.* No Minnesota court has yet “define[d] the outer limits of antitrust standing in Minnesota.” *Id.* at 631. However, federal law is instructive on this point because the Minnesota Antitrust Law is “generally interpreted consistently with federal antitrust law” given that both Minnesota and federal antitrust law have the same purpose. *Id.* at 626–27. Further, with respect to the injury-in-fact and prudential standing requirements, Minnesota and federal antitrust standing requirements are similar.

Under Minnesota and federal antitrust law, plaintiffs must prove an antitrust injury. *Id.* at 624; *In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 791 (8th Cir. 2006). Further, like Minnesota antitrust standing, federal antitrust standing “has prudential limits based on remoteness of injury and complexity of proof.” *Id.* at 624. Specifically, courts must consider “the causal connection between the alleged antitrust violation and harm to the plaintiff, the directness or indirectness of the asserted injury, and the degree to which the alleged damages are speculative.” *In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 791 (8th Cir. 2006). Therefore, while this Court is not required to apply federal standing requirements and while it declines to apply the multi-factor federal standing test, this Court turns to federal law to guide its interpretation of the prudential limits of standing under the Minnesota Antitrust Law.

### **A. Plaintiff Has Pled an Antitrust Injury**

Antitrust plaintiffs “must prove an injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Canadian Import Antitrust Litig.*, 470 F.3d at 791 (quotations omitted); *see also Lorix*, 736 N.W.2d at 624 (requiring antitrust plaintiffs to prove “a concrete and particularized invasion of a legally protected interest.”). An antitrust injury “should reflect the anticompetitive effect of either the violation or of the anticompetitive acts made possible by the violation. It should, in short, be ‘the type of loss that the claimed violations would be likely to cause.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969)). The purpose of both Minnesota and federal antitrust laws is “to protect competition, not competitors.” *Midwest Comms. v. Minn. Twins, Inc.*, 779 F.2d 444, 450 (8th Cir. 1985); *Lorix*, 736 N.W.2d at 626. Taking the facts alleged in the Complaint as true, Plaintiff has established an injury to competition and consumers.

Specifically, Plaintiff alleged that Defendant “increas[ed] barriers to competition for advertising through . . . false trademark claims to private search engine companies.” (Compl. ¶ 122.) In doing so, Defendant “prevented . . . competitors from effectively using . . . search engine firms’ advertising services and requiring . . . competitors to use other, more costly advertising methods. (*Id.*; *see also* Compl. ¶ 119) Because Defendant “manipulated the search engine results,” the “consumers were not exposed to a variety of competitors” and “competition was harmed.” (Compl. ¶ 120.) In addition, Plaintiff alleged that Defendant used its monopoly power “to control prices or exclude competition in the relevant market or submarket.” (Compl. ¶ 49.) Finally, the Complaint alleges that, as a result of Defendant’s alleged misconduct, Defendant “caused the prices of its beds to rise above levels that would exist in a truly competitive market,” thus injuring end consumers. (Compl. ¶ 177; *see also* Compl. ¶¶ 7.)

The allegations in the Complaint demonstrate that Defendant violated antitrust laws and that, as a result, competition and consumers were injured. This is exactly the type of injury that the antitrust laws were designed to prevent. *See Midwest Comms.*, 779 F.2d at 450. Thus, Plaintiff sufficiently alleged an antitrust injury.

### **B. Plaintiff Sufficiently Pled a Causal Connection Between Defendant’s Conduct and the Alleged Antitrust Injury**

“[A] mere causal connection between an antitrust violation and harm to a plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect.” *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983). There must be proximate cause between the harm to the plaintiff and the antitrust violation. *Id.*; *see also Lorix*, 736 N.W.2d at 627 (observing that Minnesota antitrust standing is informed by foreseeability and proximate cause). In the antitrust context, courts determine whether proximate cause exists by looking: (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant’s conduct unlawful.” *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 (1982)).

First, Plaintiff alleged a sufficiently close nexus between the alleged antitrust violation and harm to Plaintiff, other competitors, and consumers. Plaintiff alleges that Defendant unlawfully maintained a monopoly over the number bed market by making false claims to search engines that the online advertisements of Plaintiff and other competitors infringed on Defendant's trademarks, such that those advertisements were disapproved. (Compl. ¶¶ 119–20, 122.) Plaintiff alleges that, as a direct result of Defendant's complaints, it and other competitors were limited in the scope of their online advertisements and were unable to reach potential customers. (*Id.*; Compl. ¶ 177.) The alleged injury, therefore, is not "too remote" to warrant standing. *Blue Shield*, 457 U.S. at 477. Second, as discussed in greater detail above, Plaintiff alleges an injury to competition and to end-consumers, which is the type of injury antitrust laws are designed to address. *See Midwest Comms*, 779 F.2d at 450; *Lorix*, 736 N.W.2d at 626. Taking the allegations in the Complaint as true, Defendant's alleged conduct prevented competitors from reaching customers, limited customer choice, and caused customers to pay higher prices. Plaintiff adequately pled causation.

### **C. Plaintiff Adequately Pled a Direct Injury**

Unlike federal antitrust law, Minnesota antitrust law allows those who are harmed "directly or indirectly" to recover for antitrust injuries. Minn. Stat. § 325D.57. Therefore, it is not necessary to evaluate the directness of Plaintiff's injury under the prudential limitations of federal antitrust standing. *See Lorix*, 736 N.W.2d at 628. Regardless, Plaintiff alleges a direct antitrust injury. A plaintiff is directly injured by anticompetitive conduct if they are "the target of the anticompetitive injury," that is, if they are "actual or potential competitors foreclosed from the applicable market." *Midwest Comms.*, 779 F.2d at 451. Here, Plaintiff alleges that it was a competitor of Defendant in the number bed market, and that Defendant made complaints to search engines about Plaintiff's advertisements specifically, resulting in disapproval of those advertisements. (Compl. ¶¶ 1–7 ; Compl., Ex. 1.) Plaintiff therefore pled a direct injury though it was not required to do so.

### **D. Plaintiff Sufficiently Pled Damages**

Antitrust damages "must be capable of reasonable ascertainment and must not be speculative or conjectural." *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490–91 (8th Cir. 1992) (quotations omitted). Here, Plaintiff alleges that there was a measurable difference between its profit growth when it was able to use the phrase "number bed" and comparative phrases, and when it was prohibited from doing so. (Compl. ¶¶ 159–61.) Plaintiff specifically alleged that on occasions it was permitted to use "number bed" and comparative terms, its advertising costs decreased dramatically, while its sales and profitability increased. (Compl. ¶ 161.) For purposes of a motion to dismiss, these allegations are sufficient to establish that Plaintiff's alleged damages are "capable of reasonable ascertainment," because it identifies the relevant data (Plaintiff's advertising costs, sales, and net profits) during relevant time periods (periods in which search engines permitted Plaintiff to use the phrase "number bed" and comparative phrases in advertisements, compared to those period in which such advertisements were disapproved).

At the pleadings stage, Plaintiff is not required to plead damages with "absolute specificity" but is instead required only to plead sufficient information to notify the opposing party of its claims. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604–05 (Minn. 2014). The Complaint provides sufficient information to Defendant to notify Defendant of the process by which Plaintiff's antitrust damages could be calculated. It appears that Plaintiff's approximate damages are "reasonably

ascertainable” with this calculation. *See Amerinet*, 972 F.2d at 1490–91; *see also Grp. Health Plan, Inc. v. Philip Morris, Inc.*, 68 F.Supp.2d 1064, 1071 (D. Minn. 1999) (declining to determine whether antitrust damages were too speculative at the motion to dismiss stage). Therefore, Plaintiff has sufficiently plead reasonably ascertainable damages.

### **E. Plaintiff Sufficiently Pled an Antitrust Injury and the Prudential Limitations for Antitrust Standing**

Taking the facts alleged in the Complaint as true, Plaintiff pled an injury to competition, which was proximately caused by Defendant’s alleged anticompetitive conduct and was a direct injury to Plaintiff, and plead sufficient facts to put Defendant on notice as to how Plaintiff’s damages could reasonably be ascertained. For purposes of Defendant’s Motion to Dismiss, Plaintiff has sufficiently pled an antitrust injury and pled facts which satisfy the prudential limitations for antitrust standing.

### **V. Plaintiff Adequately Pled an Antitrust Cause of Action**

Defendant argues that Plaintiff failed to plead an antitrust monopoly claim under the Minnesota Antitrust Law. The Minnesota Antitrust Law is interpreted consistently with federal antitrust law under the Sherman Act. *Inline Pckg., LLC v. Graphic Pckg. Int’l, Inc.*, 164 F. Supp. 3d 1117, 1125 (D. Minn. 2016). To state a cause of action for monopolization under the Sherman Act, a plaintiff must prove that the defendant: “(1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power, as opposed to gaining that power as a result ‘of a superior product, business acumen, or historical accident.’” *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1390 (8th Cir. 1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)). Here, Plaintiff pled sufficient facts to state a monopolization claim.

#### **A. Plaintiff Adequately Pled a Relevant Market**

“Antitrust claims often rise or fall on the definition of the relevant market.” *Bathke v. Casey’s Gen. Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995). “It is the plaintiff’s burden to define the relevant market.” *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 560 (8th Cir. 1998). Failure to define a valid relevant market will defeat a monopolization claim. *Id.* A relevant market has two components: a product market and a geographic market. *Inline Pckg., LLC v. Graphic Pckg., Int’l, Inc.*, 164 F.Supp. 3d 1117, 1125 (D. Minn. 2016). The relevant product market “includes all reasonably interchangeable products” while the relevant geographic market “is defined by considering the commercial realities faced by consumers” and “includes the geographic area in which consumers can practically seek alternative sources of product.” *Id.* (citations and quotations omitted). Generally, “proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers. This general rule, however, does not amount to a *per se* prohibition against dismissal of antitrust claims for failure to plead a relevant market.” *Double D. Spotting*, 136 F.3d at 560 (citations and quotations omitted).

Plaintiff adequately pled a relevant product market. The Complaint states that the relevant product market is the consumer adjustable firmness air mattress bed, or number bed, market. (Compl. ¶ 170.) The Complaint alleges that this a submarket of the mattress market. (Compl. ¶ 172.) “The outer boundaries of a product market are determined by the reasonable

interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Within a broad market, “well-defined submarkets may exist which, in themselves, constitute markets for antitrust purposes.” *Id.* “[A] submarket may be identified by industry or public recognition of its separate economic character, special uses or characteristics or production facilities, distinct customers or prices, price sensitivity, and specialized vendors.” *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 614 (8th Cir. 2011). These indicia of a product submarket “are instructive in determining the existence of a submarket, but the presence of some, and absence of others, is not dispositive.” *Id.* Here, Plaintiff pled facts which, on balance, are sufficient to demonstrate the existence of a number bed submarket on a motion to dismiss.

First, Plaintiff alleges that both the public and the mattress industry recognize number beds as “a specialized type of bed [in] a distinct market” and that trade journals categorize number beds as distinct product types. (Compl. ¶¶ 22, 45.) Second, Plaintiff alleges that number beds are distinguished from other mattress types based on their unique characteristics. (Compl. ¶¶ 19, 36–39, 41.) Specifically, the “key product attribute” of number beds is the adjustability of mattress firmness, which customers can adjust at any time according to preference. (Compl. ¶¶ 19, 36, 39.) By contrast, the firmness of conventional innerspring or foam mattresses cannot be adjusted. (Compl. ¶ 39.) Moreover, number beds contain replaceable parts, such that users can easily replace broken parts, whereas other mattress types must be entirely replaced if a part breaks. (Compl. ¶38.) Third, Plaintiff alleges that number beds have distinct customers and prices. (Compl. ¶¶ 22, 36.) Number beds are generally more expensive than other mattress types and the adjustability of number beds make them “uniquely attractive” to a “dedicated population of customers” for whom number beds are “the only realistic and preferred choice.” (*Id.*) Fourth, Plaintiff alleges that the number bed submarket is not sensitive to small price increases. (Compl. ¶ 43.) That is, “[c]onsumer preferences for adjustable firmness air mattress beds would sustain product sales in the face of a small but significant non-transitory increase in price.” (*Id.*) Finally, Plaintiff alleges that number beds are sold by specialized vendors. (Compl. ¶ 22.) The Complaint states that “many retail outlets . . . exclusively distribute and sell” number beds. (*Id.*) Plaintiff has pled facts in support of all five indicia of a submarket. Taking the facts alleged as true, as is required at the pleadings stage, Plaintiff has adequately pled the existence of a relevant submarket for number beds.

In addition, Plaintiff adequately pled a relevant geographic market. The Complaint states that the relevant geographic market is the United States. (Compl. ¶ 169.) Consumers in the United States can practically seek alternative sources of number beds from anywhere in the United States because Plaintiff, Defendant, and other competitors sell number beds online and some competitors, such as Defendant, maintain physical stores in locations across the United States. (Compl. ¶¶ 1–2.) Thus, while further factual inquiry into the commercial realities faced by number bed consumers may be required, for purposes of a motion to dismiss, Plaintiff has adequately pled the relevant geographic market for number beds.

For purposes of Plaintiff’s monopolization claim, the relevant market is the number bed market in the United States. Obviously, the relevant market will be hotly contested by the parties as the litigation proceeds. Alleging a relevant market and surviving a motion to dismiss is different than proving a relevant market.

## **B. Plaintiff Pled Sufficient Facts Demonstrating that Defendant Willfully Acquired and Maintained a Monopoly Over the Relevant Market**

Monopoly power is “the power to control prices or exclude competition. The existence of such power ordinarily may be inferred from the predominant share of the market.” *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). In *Grinnell*, the Supreme Court recognized that possessing a share of 87% of the market constituted a monopoly. *Id.* The Complaint here alleges that Defendant possessed 90% of the number bed market, such that Defendant could and did control prices and exclude competition. (Compl. ¶¶ 48, 171.) For purposes of a motion to dismiss, the Complaint alleges sufficient facts to establish that Defendant possessed monopoly power over the number bed market.

The question of whether a party has “willfully acquired or maintained” monopoly power is one of specific intent. *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 696 (8th Cir. 1984). A “business entity that possesses monopoly power cannot lawfully exercise it with the specific intent of restraining competition.” *Id.* The Complaint alleges that Defendant acted with the specific intent to maintain its monopoly power over the number bed market and exclude competition. (Compl. ¶ 175.) For purposes of a motion to dismiss, the Complaint alleges sufficient facts to establish that Defendant willfully acquired or maintained monopoly power over the number bed market.

Plaintiff pled facts which, if true, would establish that Defendant willfully acquired or maintained a monopoly over the number bed market in the United States. Therefore, Plaintiff stated a claim for monopolization under the Minnesota Antitrust Law.

## **VI. This Court Has Subject Matter Jurisdiction**

Defendant argues that Plaintiff’s Minnesota antitrust claim should be dismissed for lack of subject matter jurisdiction because it involves nationwide, rather than local conduct, and therefore is not cognizable under the Minnesota Antitrust Law. Defendant failed to identify any authority, and the Court is aware of none, that restricts jurisdiction under the Minnesota Antitrust Law to claims arising out of wholly local conduct. Defendant’s entire argument rests on an unpublished appellate decision in which the Minnesota Court of Appeals declined to exercise jurisdiction over a federal Sherman Act claim. *See N. Valley, Inc. v. Valley Paving Inc.*, No. A10-1690, 2011 WL 1546489, \*2, \*5 (Minn. Ct. App. Apr. 26, 2011). Even assuming that Plaintiff’s claims could have been brought in a federal court under federal law, Plaintiff chose to file claims in Minnesota state court under Minnesota law. That choice enjoys a presumption of validity. *See Kennecott Holdings Corp. v. Liberty Mut. Ins. Co.*, 578 N.W.2d 358 (Minn. 1998) (“A litigant’s right to bring an action wherever it chooses has long been recognized, so long as the court has subject matter and personal jurisdiction over the defendant.”); *see also Peridot, Inc. v. Kimberly-Clark Corp.*, No. MC-98-012686, 2000 WL 673933 (Minn. Dist. Ct. Feb. 7, 2000) (exercising jurisdiction over claims raised under the Minnesota Antitrust Law despite the existence of a parallel case filed in federal district court based on the same conduct). Defendant failed to identify any authority under which the mere ability to file a claim under federal law deprives a plaintiff of the right to raise that claim under state law, in a state forum. Therefore, as long as Minnesota law provides for subject matter jurisdiction over antitrust claims involving conduct outside of Minnesota, this Court may properly exercise subject matter jurisdiction over Plaintiff’s Minnesota antitrust claim.

Subject matter jurisdiction is “a court’s authority to hear and determine a particular class of actions and the particular questions presented to the court for its decision.” *Zweber v. Credit River Tp.*, 882 N.W.2d 605, 607 (Minn. 2016). Whether a court has subject matter jurisdiction to hear a claim “depends on whether the court in question has the statutory and constitutional power to adjudicate the case.” *Id.* Minnesota courts have constitutional authority to adjudicate all civil and criminal cases. *Bode v. Minnesota Dept. of Natural Resources*, 594 N.W.2d 257, 259 (Minn. Ct. App. 2999)(citing Minn. Const. Art. VI, § 3). Further, Minnesota state courts have authority to adjudicate claims arising under the Minnesota Antitrust Law. *Bode v. Minnesota Dept. of Natural Resources*, 594 N.W.2d 257, 259 (Minn. Ct. App. 2999)(citing Minn. Const. Art. VI, § 3). The Minnesota Antitrust Law provides that certain types of conduct, including monopolization, are unlawful. Minn. Stat. §§ 325D.49–325D.66. However, there are *no* geographic limitations in the Minnesota Antitrust Law. *See id.* Further, the Minnesota Antitrust Law provides that “any person” injured by a violation may seek relief under it, without any reference to where the person resides or where the injury took place. Minn. Stat. § 325D.57. The phrase “any person” in the context of the Minnesota Antitrust Law is given “broad effect”. *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 630 (Minn. 2007). Thus, the Minnesota Antitrust Law may be broadly applied to provide relief for anticompetitive conduct to any person, even if some of that conduct occurs outside of Minnesota. This Court has subject matter jurisdiction over Plaintiff’s Minnesota antitrust claims.

## **VII. Defendant’s Conduct Up to the Date of the Jury Verdict in the Minnesota Trademark Action is Immunized Under the *Noerr-Pennington* Doctrine**

“Generally, the *Noerr-Pennington* doctrine protects a citizen’s First Amendment right to ‘petition the government for redress of grievances’ by immunizing individuals from liability for injuries allegedly caused by their petitioning of the government.” *Kellar v. VonHoltum*, 568 N.W.2d 186, 192–93; *see also Allied Tube Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (“Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability.”). Further, because “[t]he right to petition means more than simply the right to communicate directly with the government,” *Noerr-Pennington* immunity “necessarily includes those activities reasonably and normally attendant to effective petitioning.” *In re IBP Confidential Business Docs. Litig.*, 755 F.2d 1300, 1309 (8th Cir. 1985). However, even where *Noerr-Pennington* immunity would otherwise apply, it will not apply to “sham” litigation. *Professional Real Estate*, 508 U.S. at 56. Here, Defendant’s communications with search engine firms and online sales websites asserting that it had rights in the phrase “number bed” are immunized under the *Noerr-Pennington* doctrine as conduct reasonably and normally attendant to litigation up to October 23, 2017, when the federal jury in the Minnesota Trademark Action rendered its verdict. After the jury verdict, Defendant’s conduct amounts to a sham and is not subject to *Noerr-Pennington* protection.

### **A. The *Noerr-Pennington* Doctrine Immunizes Defendant’s Communications with Search Engine Firms and Online Sales Websites**

“The right to petition means more than simply the right to communicate directly with the government. It necessarily includes those activities reasonably and normally attendant to effective petitioning.” *In re IBP*, 755 F.2d at 1310. Though the Eighth Circuit has yet to “delineate the outer

limits of this right,”<sup>4</sup> *id.*, the majority of circuit courts that have addressed the issue have held that threats of litigation or pre-suit demand letters are immunized under the *Noerr-Pennington* doctrine. *Select Comfort Corp. v. Sleep Better Store, LLC*, 838 F. Supp. 2d 889 (D. Minn. 2012).

Defendant argues that its communications with search engine firms or online sales websites regarding Plaintiff’s use of the phrase “number bed” and comparative phrases fall within the scope of *Noerr-Pennington* immunity as conduct “reasonably and normally attendant” to litigation. See *In re IBP*, 755 F.2d at 1310. The federal district court has issued two opinions addressing the application of *Noerr-Pennington* to communications with third-parties not directly threatened with litigation: *Inline Packaging, LLC v. Graphic Packaging, International, Inc.*, 164 F. Supp. 3d 1117 (D. Minn. 2016), and *Select Comfort*, 838 F. Supp. 2d. at 891. These opinions do not support Defendant’s argument.

In *Inline*, the court concluded that communications to a third-party threatening to sue a competitor in the cardboard packaging industry were not immunized by *Noerr-Pennington*. 164 F.Supp. 3d at 1132. However, *Inline* is factually distinguishable from the present case because here Defendant did not send communications to Google and other third-parties stating that it would sue Plaintiff, as the defendant in *Inline* did. Instead, Defendant merely communicated to third-party websites that Plaintiff was infringing on its trademark, and, as a result, those websites disapproved Plaintiff’s use of allegedly infringing phrases. (Compl. ¶¶ 5, 89, 104; Compl., Ex. 1.) The decision in *Inline* is inapposite because it involves communications of a different nature than those in the present case and therefore does not guide this Court’s application of the *Noerr-Pennington* doctrine.

In *Select Comfort*, Defendant sent communications to Overstock.com stating that another competitor in the number bed market was infringing on its trademark in the phrase “Number Air Mattress” and similar phrases in advertisements and in listings on the site. *Id.* at 891. In response to these communications, Overstock.com agreed to stop using the phrase on its website. *Id.* There, Judge Erickson explained that “[t]here can be no doubt that Select Comfort would be entitled to immunity had it simply filed a complaint against Overstock.com for infringement” but rather than suing Overstock.com, “Select Comfort chose the ‘more civilized’ route of sending a pre-suit demand letter.” *Id.* at 899. Further, “[t]he fact that no litigation with Overstock.com ensued only supports the proposition that such letters are desirable methods of petitioning.” *Id.* Judge Erickson noted that such communications allow those who believe they have rights in a phrase to “effectively and efficiently” vindicate those rights without resort to expensive and lengthy litigation. *Id.* Thus, Defendant’s communications with third-parties not directly threatened with litigation were immunized under the *Noerr-Pennington* doctrine as conduct reasonably and normally attendant to litigation. *Id.* Both *Select Comfort* and the present case involve the same Defendant engaging in the same conduct: stating to third-party websites that a competitor in the number bed market was infringing on its trademarks by using certain phrases containing the word “number” in online advertisements and sales listings, and causing those websites to disapprove the competitors’ use of such phrases. . (Compl. ¶¶ 5, 89, 104; Compl., Ex. 1.) Given the similarities between these two cases, and Judge Erickson’s careful analysis of decisions from all seven circuits

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<sup>4</sup> Following *In re IBP*, the Eighth Circuit still has not addressed the outer limits of this right or clarified which conduct is “reasonably and normally attendant” to litigation. Thus, this Court relies on the applicable decisions of the federal district court to delineate this right.

to have addressed the application of *Noerr-Pennington* to purely private communications, this Court finds Judge Erickson’s reasoning particularly compelling.

As in *Select Comfort*, Defendant has here chosen to try and vindicate its trademark rights by notifying private third-party websites and search engine firms that it believed Plaintiff was infringing on its trademark. By attempting to avoid litigation by communicating directly with third-parties who had allowed Plaintiff to use allegedly infringing phrases on their platforms, Defendant engaged in conduct reasonably and normally attendant to litigation. *See In Re IBP*, 755 F.2d at 1310; *Select Comfort*, 838 F. Supp. 2d at 891. Under the reasoning in *Select Comfort*, such conduct by Defendant is immunized under the *Noerr-Pennington* doctrine except to the extent that it constitutes a sham.

## **B. Defendant’s Conduct Occurring After October 23, 2017 Falls within the Sham Exception to the *Noerr-Pennington* Doctrine**

Though Defendant’s conduct was of a type “reasonably and normally attendant to petitioning,” only Defendant’s conduct prior to the federal jury verdict would be immunized under *Noerr-Pennington* because Defendant’s conduct after the federal jury verdict was rendered amounts to a sham. “Under the sham exception, activity ‘ostensibly directed toward influencing governmental action’ does not qualify for *Noerr* immunity if it ‘is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.’” *Professional Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51 (1993) (quoting *E. Ry. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)). Conduct is a “sham” if “it is both (i) objectively baseless in that no reasonable litigant could expect success on the merits and (ii) subjectively motivated by bad faith.” *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080 n.4 (8th Cir. 1999).

### **1. Defendant’s Conduct Was Objectively Baseless After the Jury Verdict in the Minnesota Trademark Action**

Under the first prong of the sham exception, “[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized.” *Professional Real Estate*, 508 U.S. at 51. In determining whether litigation is objectively baseless, courts should look to whether there is probable cause, which “requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.” *Id.* at 62; *see also Porous*, 186 F.3d at 1080 n.4 (“A lawsuit lacking in probable cause and pursued without a reasonable belief of possible success is simply an objectively baseless or ‘sham’ lawsuit.”). Here, Defendant’s conduct prior to the federal jury verdict was not objectively baseless, but Defendant’s conduct after the federal jury verdict was rendered was so, regardless of the fact that Defendant challenged the verdict by requesting post-trial relief and then appealed.

With respect to Defendant’s conduct prior to the federal jury verdict, the federal district court’s denial of both parties’ cross-motions for summary judgment on the issue of whether Defendant had trademark rights in the phrase “number bed” demonstrates that Defendant’s conduct was not objectively baseless. In *Porous*, the Eighth Circuit explained that the denial of a motion for judgment as a matter of law demonstrated that “reasonable jurors could differ as to whether [the defendant] should prevail.” *Id.* at 1080. Therefore, the litigation was “not lacking in

probable cause or otherwise objectively baseless.” *Id.* at 1081. Likewise, in the Minnesota Trademark Action, both parties argued that they were entitled to judgment as a matter of law on the issue of whether Defendant had any trademark rights in the phrase “number bed.” *Select Comfort Corp. v. Baxter*, 156 F. Supp. 3d 971, 985 (D. Minn. 2016). The district court denied both motions and concluded that the issue of trademark rights in the phrase “number bed” was an issue for the jury. *Id.* The district court’s holding demonstrates that the existence of trademark rights in the phrase “number bed” was a fact question that could be decided in favor of either party. Therefore, Defendant’s assertions that it had trademark rights in the phrase were not without probable cause.

With respect to Defendant’s conduct after the federal jury verdict, however, Defendant’s assertions that it had trademark rights in the phrase “number bed” were objectively baseless because a jury explicitly found that Defendant had no such rights. Within the meaning of the sham exception, probable cause “requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.” *Professional Real Estate*, 508 U.S. at 62 (quotations omitted). Here, the issue of whether Defendant had trademark rights in the phrase “number bed” was specifically adjudicated by a jury. (Compl. ¶ 129; Patton Aff., Ex. 4.) The jury held that Defendant had no trademark rights in the phrase “number bed,” such that Defendant had no valid claim to it.

Defendant attempts to argue that its rights to the phrase were not finally adjudicated because Defendant appealed the jury verdict, and that appeal is still pending. However, a pending appeal does not affect the finality of the district court’s judgment. *See Dickinson v. Ewing (In re Ewing)*, 852 F.2d 1057, 1060 (8th Cir. 1988) (recognizing that the pendency of an appeal does not affect the finality of a judgment for res judicata purposes); *Magee v. Hamline Univ.*, 1 F. Supp. 3d 967, 975 n.5 (D. Minn. 2014) (noting that the judgment entered by the district court was final even though it had been appealed and the appeal was still pending). The act of moving for a new trial or appealing a judgment did not automatically vacate or otherwise invalidate the jury’s verdict. Thus, Defendant’s attempts to claim rights in the phrase “number bed” in the face of that verdict were not supported by probable cause.

Defendant further argues that it was free to assert trademark rights in “number bed” and comparative phrases after the trial in the Minnesota Trademark Action because the jury verdict addressed only whether Plaintiff’s use of the phrase created confusion at the time of purchase, when it should have addressed whether there was confusion at the “time of click.” While the jury’s analysis apparently focused on the issue of confusion, the jury’s verdict stated that Defendant did not have “any” trademark rights in the phrase “number bed.” (Compl. ¶ 129.) Thus, the jury fully and finally adjudicated the issue of whether Defendant had rights in the phrase “number bed” and that verdict was not contingent on what point during the process of purchasing a mattress online a customer might be confused, if at all.

Finally, Defendant argues that it did not engage in conduct amounting to a sham following the Minnesota Trademark Action because it did not assert ownership of the phrase “number bed” to Google after the trial. Rather, Defendant states that the disapprovals issued by Google were based on complaints Defendant had made prior to the end of trial. It is not clear from the facts alleged in the Complaint when Defendant made the complaints prompting search engines to disapprove Plaintiff’s advertisements after trial in the Minnesota Trademark Action. The

allegations in the Complaint indicate that, from January 12, 2018 through at least July 26, 2019, search engine firms disapproved Plaintiff's advertisements because Defendant had "previously complained" about them. (Compl. ¶ 1.) That is, at some point in time, prior to the disapproval of particular advertisements, Defendant had complained to the search engine firms. Construing all reasonable inferences in favor of Plaintiff, as this Court is required to do, these allegations establish that Defendant may have made complaints to search engines after the federal jury entered its verdict and even after judgment was entered, as Plaintiff alleged.

Defendant's arguments are unavailing. A federal jury held that Defendant did not have *any* rights in the phrase "number bed" and the Complaint contains sufficient facts to establish that Defendant continued asserting such rights after the verdict was rendered and judgment entered in the Minnesota Trademark Action. Once the jury rendered its verdict, Defendant lacked probable cause to assert rights in the phrase. Such conduct was therefore objectively baseless. The first prong of the sham exception is satisfied.

## **2. Plaintiff Adequately Pled Facts Establishing that Defendant's Conduct Was Subjectively Motivated by Bad Faith**

"[A] court may examine the litigant's subjective motivation . . . focus[ing] on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor." *Id.* at 60–61 (citations, quotations, and emphasis omitted). Courts may only proceed to this second stage of analysis if the litigation is found to be objectively meritless. *See id.* at 56 ("[A]n objectively reasonable effort to litigate cannot be sham regardless of subjective intent."). Here, Plaintiff sufficiently pled facts showing that all of Defendant's conduct was motivated by an anticompetitive purpose before, and after, the federal jury verdict. (*See, e.g.*, Compl. ¶ 175 ("Sleep Number willfully and intentionally maintained and used its monopoly . . . [by] falsely claiming to search engines that it owned the trademark for a key phrase . . . [and by] making false and misleading statements about Dires, its services, and its products."); Compl. ¶ 176 ("By and through the misconduct alleged herein, Sleep Number intended to exclude Dires from the relevant market on a basis other than efficiency.")) Defendant's conduct was subjectively motivated by an intent to interfere with Plaintiff's business.

Defendant's conduct prior to the jury verdict in the Minnesota Trademark Action was not a sham because, while subjectively motivated by bad faith, Defendant had probable cause to believe that its assertion of trademarks was valid. However, Defendant's conduct after the jury rendered its verdict in the Minnesota Trademark Action was a sham because it was both objectively baseless and subjectively motivated by bad faith. Thus, while the *Noerr-Pennington* doctrine immunizes Defendant's pre-October 23, 2017 conduct, any communications occurring after the verdict in the Minnesota Trademark Action amount to a sham and are not immunized under *Noerr-Pennington*.

Plaintiff stated a claim for violation of the Minnesota Antitrust Law, and that claim is not barred by the doctrines of res judicata (except to the extent the claim is based on communications made prior to November 11, 2016) or collateral estoppel, the statute of limitations, or prudential standing limitations under Minnesota law. However, Defendant's conduct prior to the October 23, 2017 jury verdict in the Minnesota Trademark Action is immunized under the *Noerr-Pennington* doctrine. To the extent Plaintiff's antitrust claims are based on communications prior to October

23, 2017, such claims are **DISMISSED**. To the extent Plaintiff's antitrust claims are based on communications after October 23, 2017, Plaintiff has stated a claim for violation of the Minnesota Antitrust Law and Defendant's Motion to Dismiss is **DENIED**.

### **VIII. Plaintiff Failed to State a Claim for Tortious Interference with a Prospective Economic Advantage**

Plaintiff failed to allege all essential elements of its tortious interference claim. To recover for tortious interference with a prospective economic advantage, a plaintiff must establish:

- 1) The existence of a reasonable expectation of economic advantage;
- 2) Defendant's knowledge of that expectation of economic advantage;
- 3) That defendant intentionally interfered with plaintiff's reasonable expectation of economic advantage, and the intentional interference is either independently tortious or in violation of a state or federal statute or regulation;
- 4) That in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic advantage or benefit; and
- 5) That plaintiff sustained damages.

*Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014). Plaintiff has alleged facts which, if true, would establish the second through fifth elements of its claim, but failed to plead sufficient facts to establish the first element.

With respect to the first element, Plaintiff states that it "had and continues to have a reasonable expectation of economic advantage . . . to be able to advertise online using the phrase 'number bed' and other comparative phrases to increase its sales and profits." (Compl. ¶ 185.) But Plaintiff "bears the burden to demonstrate the existence of a *reasonable* expectation of an economic advantage." *Gieske*, 844 N.W.2d at 219 (emphasis added). This Court is not required to accept Plaintiff's legal conclusion that its expectation was reasonable. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Plaintiff here failed to allege sufficient facts which, if true, would establish a reasonable expectation of economic advantage.

"[T]o prove the defendant tortiously interfered with plaintiff's prospective economic advantage, a plaintiff must specifically identify a third party with whom the plaintiff had a reasonable probability of a future economic relationship." *Gieske*, 844 N.W.2d at 219. This requirement "promotes the interest to be protected: a *reasonable* expectation of a future economic advantage." *Id.* (emphasis in original). "[A] plaintiff's projection of future business with unidentified customers, without more, is insufficient as a matter of law." *Id.* at 221–22. For example, the court in *Gieske* held that the plaintiff's claim failed as a matter of law where he failed to identify specific customers with whom he expected to enjoy business, but merely argued that he expected to continue enjoying the same level of business that he had in the past. *Id.* at 222. Likewise, Plaintiff failed to identify any specific customers with whom it expected to enjoy a business relationship but instead argued that it expected its profits to continue increasing at the same rate they had previously. (Compl. ¶¶ 158–59.) As in *Gieske*, these allegations are insufficient, as a matter of law, to establish the first element of Plaintiff's tortious interference claim, and that claim must fail.

Plaintiff sufficiently pled the remaining elements of its tortious interference claim. With respect to the second element, Plaintiff alleges that Defendant “has been aware of, and has actual knowledge of, this expectation of economic advantage since 2012.” (Compl. ¶ 185.) Conditions of mind, including knowledge, may be averred generally. Minn. R. Civ. P. 9.02. Thus, this allegation is sufficient to establish, for purposes of a motion to dismiss, the second element of Plaintiff’s claim. With respect to the third element, Plaintiff alleges that Defendant “intentionally and unlawfully” interfered with Plaintiff’s expectation by engaging in conduct that is independently unlawful, namely antitrust violations. (Compl. ¶ 187.) As discussed in greater detail above, Plaintiff stated a claim for an antitrust violation, and need not allege Defendant’s intent with specificity. This element is sufficiently pled. With respect to the fourth element, Plaintiff alleges that it would have realized its expected benefit absent Defendant’s conduct. (Compl. ¶ 188.) This element is sufficiently pled. Finally, with respect to the fifth element, Plaintiff alleges that “[a]s a direct and proximate consequence” of Defendant’s alleged interference, it suffered damages. (Compl. ¶ 189.) The damages element is sufficiently pled.

Plaintiff has the burden to allege facts which, if true, would establish all five elements of its tortious interference claim. However, Plaintiff failed to plead a *reasonable* expectation of economic advantage, because it did not identify a single individual with whom it expected to conduct business. Therefore, Plaintiff has not established all elements of its tortious interference claim, which fails as a matter of law and must be **DISMISSED**.

#### **IX. Plaintiff Failed to State a Claim for Unjust Enrichment**

Plaintiff’s claim for unjust enrichment must be dismissed for failure to state a claim upon which relief can be granted because Plaintiff failed to allege that Plaintiff conferred a benefit on Defendant and because Plaintiff had an adequate remedy at law. “Unjust enrichment is an equitable doctrine that allows a plaintiff to recover a benefit conferred upon a defendant when retention of the benefit is not legally justifiable.” *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 838 (Minn. 2012).

Plaintiff argues that it need not allege a benefit conferred by the Plaintiff on the Defendant, only that it must establish that Defendant received a benefit that otherwise should have gone to Plaintiff. However, to state a claim for unjust enrichment, a claimant must allege “a benefit conferred by the plaintiff on the defendant.” *Zinter v. Univ. of Minn.*, 799 N.W.2d 243, 247 (Minn. Ct. App. 2011). Here, Plaintiff does not allege that it conferred a benefit on Defendant. Rather, Plaintiff alleges that Defendant, through allegedly unlawful conduct, obtained additional sales. (Compl. ¶¶ 106, 194.) However, there are no allegations in the Complaint which would establish that these alleged sales were conferred by Plaintiff onto Defendant, as required under *Zinter*,

Further, unjust enrichment is an equitable remedy for which a party may not recover when there is an “adequate remedy at law.” *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137, 140 (Minn. Ct. App. 1992). A claimant is not entitled to relief under a theory of unjust enrichment “where there is an adequate legal remedy or where statutory standards for recovery are set by the legislature.” *Id.* (holding that the remedy of unjust enrichment was not available where the plaintiff could file a mechanic’s lien or a lawsuit for breach of contract). Here, the Minnesota Antitrust Law provides a remedy for the alleged loss of sales, resulting from Plaintiff’s exclusion from online advertising. Minn. Stat. § 325D.57. As discussed in greater detail

above, Plaintiff stated a claim for relief under that statute based on the same underlying facts that Plaintiff now argues support a claim for unjust enrichment. Plaintiff has an adequate remedy at law under the Minnesota Antitrust Law, and has availed itself of that remedy in this action.

Plaintiff failed to state a claim for unjust enrichment because Plaintiff did not allege facts establishing that Plaintiff conferred a benefit on Defendant and, further, Plaintiff is not entitled to equitable relief because Plaintiff has an adequate remedy at law. Plaintiff's unjust enrichment claim is therefore **DISMISSED**.

#### **X. Plaintiff Failed to State a Claim for Deceptive Trade Practices**

Under the Minnesota Deceptive Trade Practices Act (MDTPA), “[a] person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person . . . disparages the goods, services, or business of another by false or misleading representation of fact.” Minn. Stat. § 325D.44, subd. 1(8). Defendant alleges that Plaintiff failed to state a claim under the MDTPA because (1) Plaintiff failed to plead with particularity; (2) the statements of Defendant's employees that form the basis of Plaintiff's claim were made outside the scope of employment and are not attributable to Defendant; (3) the statements were not disseminated to the public; and (4) Plaintiff failed to allege future harm justifying an injunction.

First, the Parties dispute whether claims for violations of the MDTPA must be pled with particularity. No published Minnesota appellate decision has addressed the issue. However, even if MDTPA claims must be pled with particularity, Plaintiff has done so. A claim is “pleaded with particularity when the ultimate facts are alleged.” *Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 182 (Minn. Ct. App. 2012) (quotations omitted). Under Minn. R. Civ. P. 9.02 and Fed. R. Civ. P. 9(b), the particularity requirement has been “construed to mean ‘the who, what, when, where, and how.’” *Id.* at 184 (quoting *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549–50 (8th Cir. 1997)). The Complaint alleges that at least three employees of Defendant, including Brittany McDaniel, Jesse Barnett, and Joshua Blass (the who) made false statements indicating that Plaintiff's products or services were of low quality, that Plaintiff's business required restocking fees, or disparaging Plaintiff's products as “cheap knockoffs” (the what), in July 2018, June 2019, and September 2019, respectively (the when), on the internet, specifically on Youtube and Facebook (the where), through ratings and comments (the how). (Compl. ¶¶ 148, 158.) Defendant further contends that, to plead MDTPA claims with particularity, parties must allege “provably false” statements. *See, E-Shops Corp. v. U.S. Bank Nat. Ass'n*, 678 F.3d 659, 666 (8th Cir. 2012). Defendant failed to identify any Minnesota decision imposing this requirement on MDTPA plaintiffs. Nonetheless, Plaintiff has satisfied it. Plaintiff alleges that employee Brittany McDaniel falsely indicated that she had personal experience with Plaintiff's products, and rated them poorly, despite there being no record of Ms. McDaniel ever having purchased any of Plaintiff's products. (Compl. ¶¶ 148–151.) Plaintiff further alleges that employee Jesse Barnett stated that Plaintiff requires a “restocking fee,” though Plaintiff does not require a restocking fee.<sup>5</sup> (Compl. ¶¶ 152–154.) Discovery would likely reveal the truth or falsity of such statements, that is, whether Ms. McDaniel had experience with Plaintiff's products and whether Plaintiff required a restocking fee at the time Mr. Barnett posted his comment. Thus, Plaintiff alleged “provably false” statements. Plaintiff

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<sup>5</sup> The statement of Defendant Joshua Blass that Plaintiff's product was a “[c]heap knockoff” appears to be a statement of opinion which would not satisfy the “provably false” requirement if such requirement exists.

therefore pled the “ultimate facts” constituting Defendant’s alleged deceptive trade practices. *See Baker*, 812 N.W.2d at 182. Even if MDTPA claims are required to be pled with particularity Plaintiff satisfied these requirements.

Second, the Parties dispute whether the allegedly disparaging statements by Defendant’s employees were made within the course of their employment such that they are attributable to Defendant. Under the MDTPA, an employer may be liable for disparaging statements made in the course of business, trade, or vocation. *Nw. Airlines v. Friday*, 617 N.W.2d 590, 595 (Minn. Ct. App. 2000). For a claim to lie against Defendant, based on the conduct of its employees, Plaintiff must allege “first, an actor personally liable for the tort, and, second, the actor must be within the scope of employment by the employer.” *Leaon v. Washington Cnty.*, 397 N.W.2d 867, 874 (Minn. 1986). Plaintiff here alleges that Defendant’s employees made false statements which constitute “common law fraud, common law misrepresentation, [and] commercial and business disparagement.” (Compl. ¶ 187.) As discussed in greater detail above, the allegations concerning the alleged conduct of Defendant’s employees was pled with particularity as required under Minn. R. Civ. P. 9.02, such as would satisfy the requirements for pleading fraud-based claims. Plaintiff has alleged sufficient facts to establish that Defendant’s employees engaged in independently tortious conduct. Moreover, Plaintiff alleges that Defendant was “using its employees to publish false, misleading, and defamatory reviews and comments about its services and products” in violation of Minn. Stat. § 325D.44, subd. 1(8). (Compl. ¶ 187.) The issue of whether an employee is acting within the scope of employment cannot be determined as a matter of law, but is instead a fact question. *See, e.g., Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 911 (Minn. 1999). At this stage of the litigation, the facts alleged in the Complaint must be taken as true, and all reasonable inferences construed in favor of Plaintiff. *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 189 (Minn. Ct. App. 2007). Taking the allegation that Defendant was “using its employees” to publish false or misleading statements about Plaintiff on the internet as true, Plaintiff has sufficiently alleged that Defendant’s employees were acting within the scope of their employment.

Third, Defendant argues that Plaintiff failed to state a claim under the MDTPA because Plaintiff failed to allege that the statements by Defendant’s employees were disseminated by the public. Plaintiff correctly points out that the MDTPA does not include a dissemination requirement. Regardless, the Complaint alleges that Defendant’s employees posted the allegedly false statements and reviews on two publicly accessible internet sites, Facebook and YouTube. (Compl. ¶¶ 148–58.) Construing all inferences in favor of Plaintiff, as is required, *Dahl*, 742 N.W.2d at 189, Plaintiff sufficiently alleged that Defendant’s employees publicly disseminated the false statements and reviews.

Finally, Defendant argues that Plaintiff failed to state a claim under the MDTPA because Plaintiff did not allege any future harm. The MDTPA “provides only injunctive relief,” though, unlike other equitable relief, injunctions under the MDTPA may be afforded “regardless of damages or other remedies available at law.” *Dennis Simmons D.D.S., P.A., v. Modern Aero, Inc.*, 603 N.W.2d 336, 339 (Minn. Ct. App. 1999). “A plaintiff’s failure to present evidence that he/she faces a risk of future harm requires dismissal of an MDTPA claim.” *Nelson v. Am. Family Mut. Ins. Co.*, 262 F. Supp. 3d 835, 862 (D. Minn. 2017) *see also Finstad v. Ride Auto, LLC*, No. A15-0411, 2015 WL 7693534, \*5 (Minn. Ct. App. Nov. 30, 2015) (holding that the plaintiff’s MDTPA claim failed because the plaintiff did not allege future harm as a result of the defendant’s deceptive

trade practices.). Plaintiff concedes that, under *Nelson*, it must establish future harm. However, Plaintiff argues that because this case is at the pleadings stage, while *Nelson* was decided on summary judgment, the allegations in the Complaint that Defendant “caused Dires to suffer irreparable injury with respect to its goodwill and reputation” (Compl. ¶ 162.) are sufficient because inferences must be construed in its favor at this stage.

Plaintiff’s argument is unpersuasive. The fact that Plaintiff’s reputation was harmed in the past does not support the inference that Plaintiff will suffer additional harm in the future, or that such conduct will continue in the future. While Plaintiff did not have to plead future harm with absolute specificity, at a minimum, Plaintiff had to allege that it would be harmed by such conduct at some point in the future. Plaintiff failed to do so. Even taking the facts alleged in the Complaint as true, there are no allegations as to future harm, and no indication that there will be any future conduct by Defendant for this Court to enjoin. Plaintiff’s MDTPA claim fails as a matter of law, and therefore must be **DISMISSED**.

### **Conclusion**

For the foregoing reasons, Plaintiff adequately pled a claim for a violation of the Minnesota Antitrust Law based on conduct occurring after October 23, 2017, and that claim is not barred by the statute of limitations, collateral estoppel, res judicata, or prudential standing limitations. However, Plaintiff failed to state a claim for violation of the Minnesota Antitrust Law based on conduct occurring prior to October 23, 2017, as Defendant’s conduct before that date was immunized under the *Noerr-Pennington* doctrine. The antitrust claims related to communications with search engines prior to October 23, 2017 will be dismissed pursuant to the above analysis of the *Noerr-Pennington* doctrine. In addition, Plaintiff failed to state a claim for tortious interference with a prospective economic advantage, violation of the MDTPA, and unjust enrichment. Therefore Defendant’s Motion to Dismiss is **DENIED** with respect to Plaintiff’s antitrust claims, to the extent such claims are based on Defendant’s conduct after October 23, 2017, and **GRANTED** with respect to all other claims.

R.L.A.