

No. 21-1441

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

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HOBART-MAYFIELD, INC., dba Mayfield Athletics

Plaintiff-Appellant

v.

NATIONAL OPERATING COMMITTEE ON STANDARDS FOR ATHLETIC EQUIPMENT, aka NOCSAE; KRANOS CORPORATION, dba Schutt Sports; RIDDELL, INC.; XENITH, LLC; GREGG HARTLEY, in his capacity as Vice President of the National Operating Committee on Standards for Athletic Equipment; MICHAEL OLIVER, in his capacity as Executive Director/Legal Counsel of the National Operating Committee on Standards for Athletic Equipment; VINCENT LONG, in his capacity as Engineering Manager of Schutt Sports; KYLE LAMSON, in his capacity as Director of New Product Innovation of Xenith, LLC

Defendants-Appellees

On Appeal from the United States District Court for the  
Eastern District of Michigan, Case No. 2:19-12712  
Hon. Gershwin A. Drain

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 21-1441

Case Name: Hobart-Mayfield, Inc. v. NOCSAE, et al.

Name of counsel: William S. Cook, Jennifer Morante (admission pending)

Pursuant to 6th Cir. R. 26.1, NOCSAE  
*Name of Party*

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

## Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 21-1441

Case Name: Hobart-Mayfield, Inc. v. NOCSAE, et al.

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

## Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 21-1441

Case Name: Hobart-Mayfield, Inc. v. NOCSAE, et al

Name of counsel: David A. Ettinger

Pursuant to 6th Cir. R. 26.1, Xenith, LLC

*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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## **I. STATEMENT OF ISSUES**

Whether the District Court properly dismissed Plaintiff-Appellant's First Amended Complaint ("FAC") where the FAC failed to allege a cognizable claim upon which relief may be granted.

Defendants-Appellees answer "Yes."

## **II. STANDARDS OF REVIEW**

This Circuit applies a *de novo* standard of review to a District Court's order granting a motion to dismiss under Rule 12(b)(6). *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 599 (6th Cir. 2016).

## **III. STATEMENT OF ALLEGED FACTS**

The National Operating Committee on Standards for Athletic Equipment ("NOCSAE") is a nonprofit body that "develops voluntary performance and test standards for athletic equipment that are available for adoption by any athletic regulatory body." FAC ¶33, RE 61, Page ID # 1350. NOCSAE has established standards for evaluating and certifying football helmets and faceguards which have been adopted by virtually all football leagues. *Id.* ¶3, Page ID # 1341; *id.* ¶30, Page ID ## 1348-1349.

NOCSAE has entered into license agreements with various athletic equipment manufacturers, pursuant to which such manufacturers pay NOCSAE a fee for use of its trademarked logos and phrases. *Id.* ¶41, Page ID ## 1351-1352. These license agreements apply to "sports equipment manufacturers" generally, with NOCSAE

activities including “football helmets, gloves and facemasks, baseball and softball batter’s and catcher’s helmets, baseballs and softballs, ice hockey helmets, soccer shin guards, lacrosse helmets and facemasks, and polo helmets.” *Id.* ¶3, Page ID # 1341; *id.* ¶¶40-42, Page ID ## 1351-1352; *id.* Ex. K, Page ID # 1526. Manufacturers having license agreements with NOCSAE include football helmet manufacturers Kranos Corporation d/b/a Schutt Sports (“Schutt”), Riddell, Inc. (“Riddell”), and Xenith, LLC (“Xenith”) (collectively, the “Manufacturer Defendants”). *Id.* ¶3, Page ID # 1341.

Plaintiff-Appellant, Hobart-Mayfield, Inc. d/b/a Mayfield Athletics (“Mayfield”), alleges that it has developed the “S.A.F.E.Clip,” an add-on faceguard clip designed to replace the standard clips on a football helmet’s facemask. *Id.* ¶1, Page ID # 1340.

In 2013 and 2018, NOCSAE issued press releases indicating that the addition of items to a previously certified helmet creates a new untested model. In such circumstances, the helmet manufacturer has the right to declare its NOCSAE certification void, to allow the certification to remain unaffected, or to engage in additional certification testing of the new model with the add-on product. *Id.* ¶¶88, 90, Page ID ## 1365-1367.<sup>1</sup> In addition, NOCSAE documents attached to the FAC

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<sup>1</sup> This statement did not apply to all add-ons, as “[p]roducts such as skull caps, headbands, mouth guards, ear inserts or other items that are not attached or incorporated in some way into the helmet are not the types of products that create a

state that, commencing in 2015, all equipment must obtain a “certificate of compliance . . . made by an American National Standards Institute . . . accredited product certification body selected by NOCSAE.” *Id.* Ex. C, Section 6.2, Page ID # 1469.

Mayfield alleges that it discussed testing of the S.A.F.E.Clip with Schutt and that, in an email dated February 8, 2018, an Engineering Manager at Schutt indicated that Mayfield’s “original clip” “result[ed] in facial contact of the guard to the chin which as you know is considered a failure.” *Id.* ¶171, Page ID # 1391. While Mayfield alleges that “[t]his ‘original clip’ was different from the second generation S.A.F.E.Clip, which Mayfield Athletics marketed in 2018 and which never failed any independent testing” (*id.*), Mayfield does not allege that it ever discussed its later-generation S.A.F.E.Clip with any of the Manufacturer Defendants nor that it provided the Manufacturer Defendants with any test results. Order, RE 68, Page ID # 1963 (“When asked about this during the hearing [on the motion to dismiss], Plaintiff conceded that the First Amended Complaint contains no allegations stating that Mayfield submitted evidence to the Manufacturer Defendants that demonstrated its product, the S.A.F.E.Clip, complied with NOCSAE standards.”); *see also* Hearing Tr. at 26:5-12, RE 72, Page ID # 2001, (DISTRICT COURT: “After the

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new model as defined in the NOCSAE standards and are not items which change the model definition.” FAC, RE 68 ¶88, Page ID # 1366; *id.* ¶90, Page ID # 1367.

policy change, did Mayfield provide the manufacturing defendants with proof that the clip satisfied NOCSAE standards, and did the defendants nevertheless invoke the licensing agreement to void the certification?” COUNSEL FOR MAYFIELD: “So, the answer as to the S.A.F.E.Clip is there are no allegations in the complaint to that effect.”).

#### **IV. STATEMENT OF THE CASE**

Mayfield filed suit against NOCSAE and the Defendant Manufacturers on September 16, 2019. Complaint, RE 1. After Defendants moved to dismiss Mayfield’s original Complaint, Mayfield filed the FAC on October 20, 2020. FAC, RE 61. The FAC includes six counts against Defendants, including alleged violations of the Sherman Act and the Michigan Antitrust Reform Act by all Defendants, and Tortious Interference with a Business Relationship or Expectancy by each Defendant. *See generally* FAC, RE 61.

Defendants thereafter moved to dismiss the FAC for failure to state a claim. Motion to Dismiss, RE 62. After consideration of the parties’ briefs and oral argument, the District Court granted Defendants’ motion and dismissed Mayfield’s FAC on April 22, 2021. Opinion and Order Granting Defendants’ Motion to Dismiss, RE 68 (hereinafter, the “Order”).

#### **V. SUMMARY OF ARGUMENT**

Mayfield alleges a conspiracy involving football helmet manufacturers and NOCSAE, a nonprofit organization that develops voluntary performance and test standards for athletic equipment. Mayfield alleges that NOCSAE and the Manufacturer Defendants have interfered with Mayfield's sales of its "S.A.F.E.Clip," a faceguard clip for football helmets. But the FAC falls far short of the Supreme Court's requirement in *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007), that allegations must *plausibly* support antitrust conspiracy claims.

The FAC lacks any specific factual allegations of conspiracy. It fails to allege that any Defendants even communicated regarding the subject of the alleged conspiracy. In fact the only factual allegation of any communications between Defendants reflects a subject (namely, a concern about safety) that is inconsistent with Mayfield's claim of an anticompetitive conspiracy. Far from supporting a purported conspiracy, this communication demonstrates that the Manufacturer Defendants exercised prudent judgment in consideration of the potential dangers associated with attaching a product that had *failed* safety testing to their football helmets. As the District Court noted, "helmet manufacturers have an equally 'strong incentive and moral imperative to control the quality of their products . . . [i]f they do not, safety is compromised, and they subject themselves to negative press and liability.'" *Id.*, Page ID # 1967 (quoting Motion to Dismiss, RE 62, Page ID # 1585).

Mayfield asserts that a later version of the S.A.F.E.Clip was proven to be safe. But as the District Court found, the FAC “contains no allegations that the newest generation of the S.A.F.E.Clip met NOCSAE certification standards, was provided to Defendants, and was nevertheless rejected by the Manufacturer Defendants.” Order, RE 68, Page ID # 1971.

Mayfield claims that license agreements between NOCSAE and each of the Manufacturer Defendants somehow create an unreasonable restraint of trade. But the factual allegations of the FAC make clear that those license agreements are typical trademark license agreements, allowing the manufacturer to put NOCSAE’s logo on its products. The FAC does *not* allege that the license agreements include provisions relating to Mayfield’s allegations.

Similarly, the FAC’s factual allegations with regard to tortious interference fail as a matter of law. The FAC does not include any facts that would indicate that it is likely that Mayfield would have been able to make sales to the vast class of customers for whom it claims an expectancy. Moreover, given the FAC’s allegations regarding safety concerns, its factual allegations do not support any conclusion that Defendants’ conduct was malicious.

Given the omission of factual allegations sufficient to support Mayfield’s claims, the District Court properly dismissed the FAC in its entirety.

## **VI. ARGUMENT**



**A. The District Court Properly Followed And Applied Controlling Case Law To Dismiss The FAC**

**1. Parallel Conduct Without More Does Not Plausibly Allege An Antitrust Conspiracy**

The first error in Mayfield’s argument is that it ignores the critical lessons in *Twombly*, 550 U.S. 544, which played an important role in the District Court’s decision to dismiss the FAC. The allegations here are remarkably like those made in *Twombly*, which—like this case—involved claims of an antitrust refusal to deal. Moreover, *Twombly* specifically addresses the required allegations in the context of a claimed conspiracy to interfere with another firm based on circumstantial evidence. *Twombly*’s principles confirm that Mayfield has failed to properly allege a conspiracy.

The claim in *Twombly* was that regional telephone monopolies conspired to limit the growth of competitive local carriers. The Supreme Court held that the “nub of the complaint . . . is the [defendants’] parallel behavior, consisting of steps to keep the [local carriers] out.” 550 U.S. at 565.

As in this case, defendants in *Twombly* were alleged to have taken similar actions which harmed the plaintiffs, i.e., parallel conduct. But the Supreme Court held that, “*without more, parallel conduct does not suggest conspiracy*” and that “without that further circumstance pointing toward a meeting of the minds, an account of the defendants’ commercial efforts stays in neutral territory.” 550 U.S. at

557 (emphasis added). “Neutral territory” is conduct equally consistent with conspiracy and no conspiracy, and is insufficient to state a valid claim. *Id.*

The Supreme Court in *Twombly* expressly rejected the conclusion that parallel conduct was sufficient to allow the complaint to go forward because “there is no reason to infer that the companies had agreed among themselves to do *what was only natural anyway*.” 550 U.S. at 566 (emphasis added). That is because each defendant had “reason[s] to want to avoid dealing” with the local carriers, and it was entirely natural for them to unilaterally refuse to do so. *Id.* This Court has similarly explained that a conspiracy claim must include facts “plausibly alleging (*not merely consistent with*) an agreement.” *In re Travel Agent Commission Antitrust Litig.*, 583 F.3d 896, 908 (6th Cir. 2009) (emphasis added).

As the District Court held, the allegations of the FAC “fail to rise above the level of speculation with neutral, parallel conduct.” Order, RE 68, Page ID # 1964. Indeed, “Plaintiff fails to allege that it ever provided Defendants with a NOCSAE-compliant S.A.F.E.Clip.” *Id.* at Page ID # 1967. Thus, as discussed below, each Manufacturer Defendant would have been more than justified in declining to adopt the S.A.F.E.Clip.

**2. Prudent Action In Response To Safety Concerns Cannot Form The Basis For An Antitrust Conspiracy**

The District Court held that it was only prudent (in the words of *Twombly*, “only natural”) for the Manufacturer Defendants to decline to accept a product that could compromise the safety and integrity of their helmets:

As Defendants note, it was prudent for them to decline to use the S.A.F.E.Clip at this juncture because helmet manufacturers have an equally ‘strong incentive and moral imperative to control the quality of their products . . . [i]f they do not, safety is compromised, and they subject themselves to negative press and liability.’

Order, RE 68, Page ID # 1967.

The District Court’s conclusions are strongly supported by the language of the FAC itself. The materials attached to the FAC at Exhibit A (Defendant NOCSAE’s materials) explain that helmets “provide a substantial level of protection for serious head injuries, including concussions . . . .” FAC Ex. A, RE 61, Page ID # 1435. The FAC further acknowledges that the Manufacturer Defendants “face potential legal exposure due to concussions and other injuries arising from football play under theories of product liability.” *Id.* ¶182, Page ID # 1394. There is thus no dispute that this case is about products employed in circumstances implicating serious safety concerns.

The FAC explains that Mayfield’s clip is “installed on football helmets to attach the faceguard to the helmet.” *Id.* ¶62, Page ID # 1358. Helmets already have their face masks attached, and the FAC explains that the Mayfield clip “can be

retrofitted to most existing helmets and faceguard.” *Id.* Thus, the addition of the S.A.F.E.Clips requires modifications to the Manufacturer Defendants’ helmets.

It was therefore “only natural” for each of the Manufacturer Defendants to be concerned about the modification of its helmets by unsupervised third parties, and “only natural” to decline to adopt such a product, absent ironclad assurances as to its safety. This is especially true because, in the words of Exhibit A to the FAC, add-on products can “interfere with performance in ways unintended by the manufacturer.” *Id.* Ex. A, Page ID # 1429. As in *Twombly*, each Manufacturer Defendant had a “reason to want to avoid dealing” with Mayfield. 550 U.S. at 566.

Moreover, the FAC itself makes clear that the manufacturers had significant concerns about the S.A.F.E.Clip. The FAC describes the communications between Schutt and Mayfield (and between Schutt and Xenith) concerning the safety of the S.A.F.E.Clip. *Id.* ¶¶171-173, Page ID # 1391. According to the FAC, Schutt told Mayfield that it found that the S.A.F.E.Clip failed testing, as it caused “facial contact of the guard to the chin.” *Id.* ¶171, Page ID # 1391. Thus, the Mayfield clip caused the helmet’s face guard to strike the chin on contact – clearly, a potential safety (and liability) issue.

In Appellant’s Brief, Mayfield alleges that these safety problems were identified with regard to an earlier version of the S.A.F.E.Clip, which has since been improved. Brief of Appellant Hobart-Mayfield, Inc. (“Appellant’s Br.”) at 10, RE

25, Page ID # 29. But, as the District Court noted, and as Mayfield fails to rebut, Mayfield does not allege that the supposedly improved version was ever provided to any of the Manufacturer Defendants. Order, RE 68, Page ID # 1971. While the FAC states that “[b]etween 2016 and 2018, several generations of the S.A.F.E.Clip were extensively tested and refined” (FAC ¶66, RE 61, Page ID # 1358), the FAC alleges that Schutt told Mayfield in 2018 that an engineer from another football helmet manufacturer reported safety issues in connection with S.A.F.E.Clips “that they had just recently bought off your internet site.” *Id.* ¶171, Page ID # 1391. Thus, the only allegations regarding defendants’ testing were that it revealed unresolved safety issues with the S.A.F.E.Clips.

Under the circumstances, there is no basis for believing that the Manufacturer Defendants were aware that there was an allegedly improved S.A.F.E.Clip. In the absence of such awareness, of course, each of the Manufacturer Defendants had every reason to unilaterally reject the S.A.F.E.Clip. Again, in the words of the Supreme Court in *Twombly*, it was “only natural” to do so. 550 U.S. at 566. As the District Court held, without any allegation regarding such knowledge:

Plaintiff does no more than speculate that its product *would* be rejected even if it were in full compliance with NOCSAE standards—but *mere speculation does not survive the pleading requirements established under Twombly*.

Order, RE 68, Page ID ## 1963-1964 (emphasis added).

Finally, contrary to Mayfield's assertions in Appellant's Brief, the FAC does *not* allege any facts indicating that helmets retrofitted with S.A.F.E.Clips actually satisfy NOCSAE standards. Mayfield alleges that "ICS Laboratories" tested a selection of helmets with S.A.F.E.Clips. *Id.* ¶67, Page ID ## 1358-1359. But, according to the FAC, NOCSAE requires testing to be conducted through the Safety Equipment Institute ("SEI"), which oversees the NOCSAE certification process through authorized, accredited, independent testing laboratories. *Id.* ¶38, Page ID ## 1350-1351. Mayfield does not allege that SEI oversaw any testing of helmets with S.A.F.E.Clips attached, or that SEI selected an approved lab for testing such helmets, as would be required for NOCSAE certification.

Additionally, the FAC does not allege that Mayfield's procedures were in accordance with *all* NOCSAE standards (which require, among other things, documentation regarding manufacturing protocols and quality assurance). FAC Ex. C, p.4, RE 61, Page ID # 1458. As such, Mayfield's repeated assertion that its product satisfies NOCSAE's standards is not supported by the FAC, as the District Court correctly determined. *See* Order, RE 68, Page ID # 1971 ("Plaintiff's First Amended Complaint contains no allegations that the newest generation of the S.A.F.E.Clip met NOCSAE certification standards."). For all these reasons, the Manufacturer Defendants' conduct was completely consistent with reasonable,

unilateral decision-making. Under the Supreme Court’s teachings in *Twombly*, these allegations do not “plausibly” suggest a conspiracy.

**3. Plaintiff’s Vague And Conclusory Allegations Do Not State A Cause Of Action Under The Antitrust Laws**

The second critical lesson of *Twombly* on which the FAC flounders, as the District Court also found, is that boilerplate allegations do not suffice. *Specific* facts must be alleged to survive a motion to dismiss.

A plaintiff cannot rely on mere “labels . . . devoid of further factual enhancement,” an approach specifically rejected by the Supreme Court in *Iqbal* and *Twombly*. As this Court has confirmed, “[g]eneric pleading, alleging misconduct against defendants *without specifics as to the role each played in the alleged conspiracy*, was specifically rejected by *Twombly*.” *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) (emphasis added). “[B]are assertions” that fail to identify the relevant “who, what, where, when, how or why” will not suffice. *Id.* at 437.

As the District Court noted, the FAC failed to meet this standard:

[T]he First Amended Complaint largely contains bare legal conclusions or allegations of unilateral conduct that remain in neutral territory and does not rise to the level of conspiratorial action.

\* \* \*

[W]ithout more information, such as (1) when conspiratorial communication and conduct occurred between Defendants; (2) which Defendants

communicated with one another to influence NOCSAE policy; or (3) how Defendants acted in concert to unilaterally exclude the S.A.F.E.Clip from the market, the Court cannot find Plaintiff's second Count sufficient to withstand dismissal.

Order, RE 68, Page ID # 1966.

For example, the FAC alleges:

Schutt Sports has stated that any use of a helmet Add-on would result in Schutt Sports decertifying the helmet and making it ineligible for use at every level of Organized Play.

FAC ¶240, RE 61, Page ID # 1411. The same facts are alleged in identical, conclusory terms regarding the other two Manufacturer Defendants; only the name of the Defendant is changed in those paragraphs. *See id.* ¶247, Page ID # 1412; *id.* ¶254, Page ID ## 1413-1414.

The only specific factual example the FAC offers relates not to Mayfield but to a third-party Zuti faceguard that is not part of this case at all, and a statement by an employee of a single manufacturer, Riddell, indicating that a helmet certification would be void if the Zuti faceguard were affixed to the helmet. FAC ¶160, RE 61, Page ID # 1387. But an allegation of a statement by an employee of one manufacturer is not indicative of a conspiracy between multiple manufacturers. And, notably, Mayfield asserts that it is *not* alleging “that Appellees have surreptitiously conspired to exclude all Add-on products from the market.” Appellant's Br. at 21, RE 25, Page ID # 29.



Appellant's Brief tries to skirt its lack of specific facts by making sweeping assertions about the allegations in the FAC. For example, Mayfield asserts that "all potential customers are prohibited from buying and using Add-ons in organized league play, regardless of the safety, innovation and cost benefits they confer." Appellant's Br. at 4, RE 25, Page ID # 12. But Mayfield does not point to any facts in the FAC to support these assertions, much less any conspiracy. As the District Court noted, Mayfield "does no more than speculate that its product *would* be rejected even if it were in full compliance with NOCSAE standards." Order, RE 68, Page ID # 1964. Such speculation, of course, is insufficient to state a claim under the requirements of *Twombly*. *Id.*

Appellant's Brief next argues that David Halstead, associated with NOCSAE, "directed" customers to defer to the helmet manufacturers. Appellant's Br. at 39-40, RE 25, Page ID ## 47-48. But the alleged *facts* in the FAC are not at all conspiratorial. Mr. Halstead's statement, attached to the FAC, was as follows:

At this point the only way to get your product on the field is to have an arrangement with the helmet manufacturers so your devices can be on and tested by them prior to sale and further that the helmet manufacturer will not declare the helmet certification void with your device attached.

FAC Ex. N, RE 61, Page ID # 1549.

The fact that Mr. Halstead advised add-on manufacturers to ask Manufacturer Defendants to test their products to alleviate any safety concerns is entirely

reasonable. After all, what careful manufacturer would support certification of an add-on product that changed the characteristics of its helmets without testing it? Mr. Halstead's alleged statement thus does not suggest a conspiracy. It was "only natural," is consistent with unilateral conduct, and therefore does not move the needle out of "neutral territory." *Twombly*, 550 U.S. at 557, 566.

The only other factual allegation that relates to Mayfield's assertion that "NOCSAE representatives expressly discouraged potential customers from purchasing add-on products" is a statement on NOCSAE's website that "a manufacturer *can* declare a product certification to the NOCSAE standard void if its product is altered." FAC ¶151, RE 61, Page ID # 1384 (emphasis added). But that statement of fact does not seek to discourage anything.

**B. The FAC Fails To Allege Direct Evidence Of A Conspiracy**

Appellant's Brief continues to rely on its argument, rejected by the District Court, that Count I of the FAC somehow alleges direct evidence of a conspiracy through an explicit agreement.<sup>2</sup> But this assertion ignores the facts set forth in the FAC, and mangles the definitions of "direct evidence" and "explicit agreement."

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<sup>2</sup> Appellant's Brief makes clear that the FAC in Count I does not allege a conspiracy based on circumstantial evidence. It states that "Mayfield is not alleging in Count I that Appellees have surreptitiously conspired to exclude all add-on products from the market. Rather, the unlawful agreement in Count I is the License Agreement itself . . ." Appellant's Br. at 21, RE 25, Page ID # 29. But the "License Agreement itself" says nothing about certification or add-on products. Thus, Count I stands or falls on the allegations of an unlawful explicit agreement.

“Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.” *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (cited favorably in *Highland v. Home Servs. of Am., Inc.*, 771 F.3d 310, 322 (6th Cir. 2014)).

Here, as the District Court noted:

[T]here are no allegations of any communication, agreement, or conspiratorial conduct between Defendants about the policy change or any of the Manufacturer Defendants’ licensing agreements.

Order, RE 68, Page ID # 1960. As discussed below, in the absence of such allegations, the District Court properly dismissed the FAC.

**1. The License Agreements Are Not Unreasonable Restraints Of Trade**

Appellant’s Brief asserts that NOCSAE’s licensing agreements grant the Manufacturer Defendants the right to void the NOCSAE certification for any helmet used with an add-on. Appellant’s Br. at 20, RE 25, Page ID # 28. But the factual allegations of the FAC say only that these license agreements provide that “each Helmet Manufacturer Defendant that produces a helmet that meets NOCSAE standards can affix the NOCSAE logo indicating that the helmet is NOCSAE certified.” FAC ¶117, RE 61, Page ID # 1373. That is not indicative of a conspiracy and says nothing about voiding certifications or add-ons. These are standard

trademark license agreements that, as the District Court noted, are not even specific to football or helmets:

Defendants emphasize that these license agreements applied to “sports equipment manufacturers” more broadly, including helmets and other equipment for baseball, softball, ice hockey, lacrosse, and polo. ECF No. 62, PageID.1588. Plaintiff’s allegations do not adequately explain how these widely used licensing agreements are evidence of a conspiracy specifically executed by football helmet manufacturers.

Order, RE 68, Page ID ## 1960-1961.

Thus, according to the factual allegations in the FAC, there is no “explicit” agreement that would affect certification of Mayfield’s product. For the same reason, there is no “direct” evidence of any conspiracy set forth in the license agreements. As the District Court noted, “Defendants are correct to emphasize that neither the form agreements nor the press statements ‘require that any action be taken with respect to add-ons, much less require their exclusion.’” Order, RE 68, Page ID # 1959 (citing Motion to Dismiss, RE 65, Page ID # 1938). Accordingly, the District Court’s dismissal of Count I of the FAC was proper.

## **2. The NOCSAE Policies Are Not Agreements**

Mayfield further attempts to rely on a series of policy statements by NOCSAE to support its allegations of agreement. As a preliminary matter, Mayfield admits that these policies are “beyond the four corners” of the license agreements. Mayfield Response to Motion to Dismiss, RE 63, Page ID # 1618; *see also* Order, RE 68 at

Page ID # 1958. The FAC does not allege any facts indicating that the license agreements were amended (in writing or otherwise), or that that these policy statements were jointly authored by NOCSAE and the Manufacturer Defendants. Nor does the FAC allege that the policy statements were even the subject of communication between NOCSAE and the Manufacturer Defendants. The only supportable conclusion based on the allegations in the FAC is that the policy statements were unilaterally made by NOCSAE. As such, they cannot constitute “direct” or “explicit” evidence of agreement. And if they are unilateral, they cannot be antitrust violations under Mayfield’s theory, whether or not it agrees with the substance of the policies.

Appellant’s Brief’s efforts to create a broader “explicit” agreement consists of nothing more than linguistic sleight of hand. According to the Brief, the so-called explicit agreement “is comprised of express, written Licensing Agreements *together with* NOCSAE’s 2018 written policy . . . .” *Id.* at 18-19, RE 25, Page ID ## 26-27 (emphasis added). But one of these two documents is a written agreement, and the other is a unilateral statement. FAC ¶41, RE 61, Page ID ## 1351-1352, *id.* ¶¶88, 90, Page ID ## 1365-1367. There is no reason to conclude that “together” they comprise an explicit agreement. No facts are alleged to suggest that the Manufacturer Defendants agreed in any way to the unilateral policy, much less that they incorporated it into the License Agreements.

Similarly, Appellant's Brief states that the written policies "change the manner in which the License Agreements operated, *thereby* amending the terms of the Licensing Agreements." Appellant's Br. at 19-20, RE 25, Page ID ## 27-28 (emphasis added). But, in fact, there are no factual allegations in the FAC to indicate that the License Agreements spoke to de-certification at all. Therefore, the written policies did not in any way "change the manner in which the License Agreements operated." And there are certainly no facts to indicate that they amended the License Agreements. This kind of empty lawyer's argument cannot substitute for actual facts. And there are no actual facts alleged to support the conclusion that there is an explicit agreement here.

Similarly, the argument in the Appellant's Brief at 19, RE 25, Page ID # 27, tries to suggest that the License Agreements are "not merely a grant of intellectual property rights" cites only to ¶¶ 3, 41 and 44 of the FAC, RE 61, Page ID ## 1341, 1351-1353. But those paragraphs only refer, factually, to the payment of license fees in exchange for the use of a logo. They say nothing about certification of add-on products or anything else relating to add-on products.

Though this would in any event be beyond the scope of Mayfield's allegations of an explicit, direct agreement, the FAC likewise fails to include allegations that create the inference of any agreement between NOCSAE and the Manufacturer Defendants relating to the Mayfield S.A.F.E.Clip. While Mayfield argues that there

was a change in NOCSAE policy when Mayfield's product was first developed, as the District Court explained, the change in policy did not affect the Manufacturer Defendants' ability to reject add-ons:

The change in policy reflected the omission of the Add-on manufacturer certification—but did not impact what the Manufacturer Defendants could or could not do with NOCSAE certifications. As Plaintiff's First Amended Complaint notes, the Manufacturer Defendants always had "the right, under NOCSAE standards, to declare its certification void" in 2013. ECF No. 61, PageID.1365. Defendants are correct to emphasize that neither the form agreements nor the press statements "require that any action be taken with respect to add-ons, much less require their exclusion." ECF No. 65, PageID.1938.

Order, RE 68, Page ID # 1959.

Thus, since the manufacturers were free to reject add-on products as early as 2013, long before Mayfield arrived on the scene, the timing of NOCSAE's policies cannot be linked to the advent of Mayfield or the S.A.F.E.Clip. Moreover, even if *arguendo* the timing was closer, that falls far short of suggesting a conspiracy between NOCSAE and three Manufacturer Defendants, none of which is alleged to have even communicated with NOCSAE on the issue. *Id.* at Page ID # 1960 ("[T]here are no allegations of any communication, agreement, or conspiratorial conduct between Defendants about the policy change or any of the Manufacturer Defendants' licensing agreements"). And, as the District Court found, Mayfield "additionally fails to demonstrate how the certification policy modification was

unreasonable in light of Defendants’ competing and valid interests in maintaining their brand credibility and helmet safety standards.” *Id.* at Page ID # 1961.

**3. The FAC Fails To Plausibly Allege Any Broader Conspiracy Or Any Conspiracy Based On Circumstantial Evidence**

Mayfield attempts to remedy these deficiencies by referring vaguely to a broader conspiracy involving all “add-on” products. But Mayfield’s Reply in Support of its Motion for Leave to Amend its original Complaint conceded that “the PAC [now refiled as the FAC] is not stating a claim as to other Add-on products.” Mayfield’s Reply, RE 57, Page ID # 1291. Appellant’s Brief similarly confirms that it is *not* alleging that Manufacturer Defendants “have surreptitiously conspired to exclude all Add-on products from the market.” Appellant’s Br. at 21, RE 25, Page ID # 29. The concession is not surprising, since Mayfield fails to allege which specific “add-on” products are at issue, what their functions are, whether they are effective or ineffective, what interactions, if any, the manufacturers of such unidentified “add-ons” have had with the Manufacturer Defendants; what actions, if any, the Manufacturer Defendants took with regard to these products; what interactions, if any, the manufacturers of these unidentified “add-on” products had with NOCSAE; and what actions NOCSAE took with regard to each of these products.



Therefore, the FAC must stand or fall on its allegations relating to Mayfield and the S.A.F.E.Clip alone. As the District Court noted:

[T]he claims in the First Amended Complaint must derive from Mayfield's experiences; allegations as to other Add-on products, such as the Zuti faceguard, cannot be substituted to form the basis of Plaintiff's own claims. Plaintiff's claims must therefore "stand or fall on its allegations relating to Mayfield and the S.A.F.E.Clip."

Order, RE 68, Page ID # 1963. And, as discussed above, the allegations as to the S.A.F.E.Clip are insufficient to state a claim; as the District Court noted, "Plaintiff does no more than speculate that its product would be rejected even if it were in full compliance with NOCSAE standards—but mere speculation does not survive the pleading requirements established under *Twombly*." *Id.* at Page ID # 1964.

Contrary to the sweeping statements in Appellant's Brief, the *factual* allegations in the FAC do not support Mayfield's claims of parallel conduct. For example, there are no allegations that Xenith stated that it would void any certifications using add-on products. The only factual allegation as to Xenith refers to a general statement in its warranty policy that the warranty would be void if replacement products "other than Xenith approved replacement parts" were used. FAC ¶156, RE 61, Page ID # 1386. This allegation fails to establish any parallel conduct for multiple reasons. First, it does not speak to voiding certifications at all. Second, it only says that warranties shall be void if products are not approved, but does not say which products will or will not be approved. Third, the allegations do

not address when the warranty policy was adopted, and whether that was done long before either Mayfield's clip or other add-on products came on the scene. Fourth, Mayfield does not allege that such a straightforward provision is at all unusual. Therefore, there is no basis for concluding that these factual allegations are at all indicative of any conspiracy.

Similarly, the allegations as to Schutt say only that add-ons that "do not follow the manufacturer's guidelines" "may" void a warranty and would void a NOCSAE certification. FAC ¶157, RE 61, Page ID # 1386. This statement does not indicate which products would and would not follow the guidelines. Nor is there any indication as to whether this statement was created in response to, or even after, Mayfield's product was adopted.<sup>3</sup>

Other allegations in the FAC, *see* FAC ¶92, RE 61, Page ID # 1367, are wholly conclusory, without any specific facts alleged. Thus, the assertion in Appellant's Brief that there were "blanket policies by the helmet manufacturers that all helmet certifications are void when used with any add-on" is completely unsupported by the factual allegations in the FAC.

a. **The FAC Fails To Allege Facts From Which One Could Infer That The Manufacturer Defendants Control NOCSAE**

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<sup>3</sup> Thus, the statement in Appellant's Brief that Schutt Sports has engaged in a "blanket de-certification of helmets/add-on combinations," citing to FAC ¶157, RE 61, Page ID #1386, is simply false.

Mayfield's allegations relating to what it regards as "plus factors" do not change this conclusion. First, Mayfield's assertion that it has alleged that the Manufacturer Defendants control NOCSAE misstates the FAC's allegations. The FAC alleges only that employees of the Manufacturer Defendants are current *or former* members of the NOCSAE standards committee or board. FAC ¶¶46-47, RE 61, Page ID ## 1353-1354. The exhibits to the FAC show that *ten* different organizations are represented on the NOCSAE Board:

NOCSAE's board of directors represent a diverse and passionate group of sports and medical professionals that have joined forces for the common goal of reducing sports-related injuries. Serving without compensation, NOCSAE's board of directors is comprised of representatives from the American College Health Association, American Orthopaedic Society for Sports Medicine, American College of Sports Medicine, American Medical Society for Sports Medicine, American Academy of Pediatrics, Athletic Equipment Managers Association, American Football Coaches Association, National Athletic Equipment Reconditioners Association, National Athletic Trainers Association, Sports & Fitness Industry Association. Non-voting members of the board include the National Collegiate Athletic Association (NCAA) and the National Federation of State High School Associations (NFHS).

*Id.* Ex. A, Page ID ## 1424-1425.

While the FAC identifies two people with ties to the Sports and Fitness Industry Association ("SFIA") who are on the NOCSAE Board (*id.* ¶46, Page ID ## 1353-1354; *id.* ¶132, Page ID ## 1377-1378), no facts are alleged to indicate that the

Manufacturer Defendants somehow controlled SFIA or that the SFIA controlled NOCSAE. Indeed, the board is “chosen by various national athletic and professional organizations which represent a balance of key stakeholder interests, including public, end-user, medical and scientific, manufacturer, and national governing.” FAC Ex. C, RE 61, Page ID # 1458. That two individuals (who are not even alleged to have ever communicated about the S.A.F.E.Clip) controlled the NOCSAE Board is simply implausible.

As the District Court noted:

[M]ere presence on either a board or at a trade association meeting, without further factual allegations, does not amount to a conspiracy claim.

\* \* \*

Additionally, exhibits to the First Amended Complaint reveal that NOCSAE’s board contains representation from at least ten different organizations, not just football helmet manufacturers. *See* ECF No. 61, PageID.1424-25 (listing, for example, the American Medical Society for Sports Medicine and the National Athletic Trainers Association as additional NOCSAE board members).

Order, RE 68, Page ID # 1965.

In any event, influence, even where advocacy is present, is insufficient to support an antitrust conspiracy claim. *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (a competitor’s complaint regarding the plaintiff’s conduct, followed by action by the entity complained to, is not sufficient to support a claim of antitrust conspiracy; “something more than evidence of complaints is needed”).

Here, the FAC does not even contain allegations of complaints by the Manufacturer Defendants to NOCSAE concerning Mayfield or any “add-on” manufacturer. The FAC falls far short of the threshold for viability.

**b. The Communications Between Certain Manufacturer Defendants Refute Any Claim Of Conspiracy**

Mayfield next argues that a single allegation of a communication between the parties provides a “plus factor” supporting its allegations of conspiracy. But, as the District Court noted, it shows just the opposite. The FAC alleges that Vincent Long of Schutt communicated with an engineer from Xenith to exchange testing information about the S.A.F.E.Clip. FAC ¶171, RE 61, Page ID # 1391. As Mayfield acknowledges, Mr. Long indicated that the S.A.F.E.Clip had failed safety testing. *Id.* Far from a conspiracy to harm Mayfield, this allegation reveals a communication (between only two of the Manufacturer Defendants) regarding a *valid safety concern*.

As the District Court explained, it was only natural for the manufacturers to decline to adopt the product, given these safety concerns:

Plaintiff highlights that this communication between the parties was in purported violation of nondisclosure agreements. *Id.* But the Court is not persuaded that this exchange evinces an attempt by Defendants to “coordinate their opposition to the product and further lessen competition from Mayfield Athletics and other Add-on manufacturers.” *Id.* at 1392. To the contrary, the communication plainly illustrates that Defendants found that an older version of the S.A.F.E.Clip failed NOCSAE

compliance—which Plaintiff does not dispute. The Court agrees with Defendants that it was “only natural” for the Manufacturer Defendants to individually reject the use of a product that changed their helmets absent ironclad assurance as to its safety, especially considering the potential for serious head injuries and concussions. *See* ECF No. 62, PageID.1585. Thus, without more, this claim does not “invest[ ] either the action or inaction alleged with a plausible suggestion of conspiracy.” *Twombly*, 550 U.S. at 565.

Order, RE 68, Page ID ## 1964-1965.

The fact that this communication was allegedly in violation of a non-disclosure agreement does not indicate that the communication was somehow probative of an anticompetitive conspiracy. Discussions between two manufacturers about safety problems with the S.A.F.E.Clip are hardly an indication that the manufacturers intended to conspire to suppress a product *despite* its alleged safety advantages, as Mayfield claims. Rather, they simply indicate that the manufacturers had legitimate safety concerns about the S.A.F.E.Clip.

**c. Mayfield’s Theory Makes No Economic Sense**

Mayfield’s allegations that the Manufacturer Defendants had motives to conspire to exclude add-ons fare no better. If a particular add-on was demonstrated to have improved safety and quality, helmet manufacturers logically could limit their product-liability exposure by incorporating such an add-on. This would motivate them to adopt an add-on, not conspire to exclude it.

The fact that Mayfield's theory makes no economic sense provides a further reason to reject it. *See, e.g., Lifeline Ltd. No. II v. Connecticut Gen. Life Ins. Co.*, 821 F. Supp. 1201, 1205 (E.D. Mich. 1993) (complaint dismissed where "[t]he conspiracy that plaintiff alleges makes no economic sense"); *Cascades Computer Innovation LLC v. RPX Corp.*, No. 12-CV-01143 YGR, 2013 WL 316023, at \*11 (N.D. Cal. Jan. 24, 2013) ("where the facts alleged in the complaint demonstrate that an alleged conspiracy makes no economic sense, the claim must be dismissed"). These cases follow the Supreme Court's analysis in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("[I]f [the defendants] had no rational economic motive to conspire, and if their conduct is consistent with other equally plausible explanations, the conduct does not give rise to an inference of conspiracy."). *See also Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 227 (4th Cir. 2004).

The FAC theorizes that NOCSAE acted against its interests because it would obtain more royalties from the license agreement if it had licensed Mayfield. FAC ¶164, RE 61, Page ID ## 970-971. However, Mayfield ignores its own allegation that NOCSAE "is an independent and *non-profit* standards development body with the sole mission to enhance athletic safety through scientific research and the creation of performance standards for athletic equipment." *Id.* Ex. A, Page ID # 1005 (emphasis added). The notion that NOCSAE would license every company that

requests it, merited or not, simply to obtain more license fees is implausible; to do so would violate its core mission. Indeed, NOCSAE’s credibility (as a nonprofit organization dedicated to safety) would be significantly undermined if it allowed its trademarks to be used on products that were not approved under its own safety procedures. FAC Ex. A, RE 61, Page ID # 1423.

**d. Mayfield’s Allegations Regarding Opportunity And Market Structure Do Not Make Its Claim Plausible**

The FAC also alleges that the Manufacturer Defendants had an “opportunity” to conspire, through unnamed trade association meetings and through NOCSAE. *Id.* ¶¶168-171, Page ID ## 1390-1391. But virtually all competitors are in trade associations. That fact is irrelevant to whether a conspiracy is plausibly alleged. *See, e.g., In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 878 (7th Cir. 2015). As the District Court explained, “mere presence on either a board or at a trade association meeting, without further factual allegations, does not amount to a conspiracy claim.” Order, RE 68, Page ID # 1965 (citing *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (the allegation “is in entirely general terms without any specification of any particular activities by any particular defendant; it is nothing more than a list of theoretical possibilities . . . .”)).

Mayfield’s allegations about market structure (FAC ¶¶110-111, RE 61, Page ID # 1371) also fail to suggest anything other than the mere *possibility* of collusion, which is insufficient to state a claim. In *Reserve Supply Corp. v. Owens-Corning*



*Fiberglas Corp.*, 971 F.2d 37, 50, 53 (7th Cir. 1992), the Seventh Circuit rejected conspiracy allegations, stating *inter alia* that “the mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws . . . . A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader.” Evidence of “an oligopolistic market which is . . . conducive to parallel pricing . . . does nothing to explain whether the parallel pricing was achieved by agreement or mere interdependent decisions.” *White v. R.M. Packer Co., Inc.* 635 F.3d 571, 580 (1st Cir. 2011).<sup>4</sup> In *Washington County Health Care Authority, Inc. v. Baxter International Inc.*, 328 F. Supp. 3d 824 (N.D. Ill. 2018), the court dismissed a complaint with similar market allegations, noting that if such allegations were sufficient, “an antitrust complaint targeting an industry with those features would survive a motion to dismiss regardless of whether there were any additional facts suggesting an agreement.” *Id.* at 841.

None of these allegations move the needle from “neutral territory.” They are as consistent with no conspiracy as conspiracy. *Twombly*, 550 U.S. at 557. The allegations are therefore inadequate to state a conspiracy claim, and the District Court’s dismissal of Count II thus should be affirmed.

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<sup>4</sup> In this case, as explained above, there are not even alleged facts plausibly suggesting parallel behavior.

**C. The FAC Fails To Allege Facts Establishing A *Per Se* Violation Of The Antitrust Laws**

Mayfield also misstates the antitrust law applicable to conspiracies in restraint of trade. As a result, even if a conspiracy were properly alleged here, which it was not, there were not adequate allegations of a violation of the law.

First, the Supreme Court has made clear (and Mayfield agrees, Appellant's Br. at 32, RE 25, Page ID # 40) that "the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . . ." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986). But there are no allegations in the FAC that the Manufacturer Defendants refused to buy from their suppliers or to sell helmets to customers. The District Court thus properly found that the FAC did not allege a *per se* violation of the antitrust laws. Order, RE 68, Page ID # 1968.

Appellant's Brief argues that there was somehow a boycott here because the Manufacturer Defendants did not sell helmets with the S.A.F.E.Clip attached, and refused to certify helmets with the S.A.F.E.Clip. But this is not a refusal to sell helmets to customers who purchased the S.A.F.E.Clip, and thus not a "boycott" as that term has been used in antitrust jurisprudence.

While Mayfield relies on *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), that case precedes the modern Supreme Court boycott cases such as *Indiana Federation*, which Mayfield endorses. Appellant's Br. at 32,

RE 25, Page ID # 40. As the Supreme Court noted, “we have been slow to condemn rules adopted by professional associations as unreasonable *per se*.” *Indiana Fed’n*, 476 U.S. at 458. Additionally, in *Radiant Burners*, there was a classic refusal to sell, since the defendants were alleged to have “refus[ed] to provide gas for use in plaintiff’s Radiant Burners . . . petitioner’s gas burners have been effectively excluded from the market, as its potential customers will not buy gas burners for which they cannot obtain gas . . . .” 364 U.S. at 658. Here, there is no similar refusal to sell.

The Manufacturer Defendants are alleged only to have refused to take affirmative steps that would have benefited Mayfield, i.e., to certify their helmets for use with the Mayfield S.A.F.E.Clip, or to warrant their products if the Mayfield S.A.F.E.Clip is added. But, as noted, since these steps would involve encouraging consumers to use a modified helmet despite significant concerns about its safety, that cannot constitute a *per se* illegal refusal to deal. As the Supreme Court explained in *NW Wholesale Stationers v. PAC. Stationery*, 472 U.S. 284, 296 (1985), organizations which “must establish and enforce reasonable rules in order to function effectively” do not engage in *per se* illegal activity.

**D. The FAC Fails To Allege Facts Establishing A Violation Of The Antitrust Laws Under The Rule Of Reason**

Mayfield has also failed to allege any violation under the “rule of reason,” as is required for any action that is not a *per se* violation. *Care Heating & Cooling, Inc.*

*v. Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005). A rule of reason violation must involve harm to competition, not merely to the plaintiff. The antitrust laws were enacted for “the protection of competition, not competitors.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Given that “Plaintiff has failed to demonstrate how NOCSAE’s policy change unreasonably restrained trade or fostered an anticompetitive market,” the District Court properly found that the FAC failed to allege a violation of the antitrust laws under the rule of reason. Order, RE 68, Page ID # 1968.

Mayfield fails to defend its speculative allegations that, if the add-on products were being sold successfully, they would “put competitive pressure” on the OEMs. FAC ¶¶190-191, 193-194, RE 61, Page ID ## 1397-1401. This is a purely theoretical, generic argument that could be hypothesized when any individual competitor is not active in a market. Moreover, even Mayfield’s speculation is illogical; since these products are “add-ons,” the Manufacturer Defendants could eliminate any alleged pressure simply by allowing the add-ons to be used with their helmets.

Additionally, Mayfield relies on allegations concerning various third-party add-on products. *Id.* ¶192, Page ID ## 1399-1400, *id.* ¶194, Page ID # 1401. But, as noted above, such other products are irrelevant to Mayfield’s claims.

**E. The District Court Properly Dismissed The Tortious Interference Claims**

The District Court properly dismissed Mayfield's bare-bones claim of "tortious interference with a business relationship or expectancy" against each of the Defendants (Counts III-VI of the FAC). Order, RE 68, Page ID ## 1969-1971. The court found that the FAC's tortious interference counts were deficient on two separate grounds: (1) the insufficiency of the FAC's allegations regarding the existence of valid business relationships or expectancies and (2) the insufficiency of the FAC's allegations regarding improper motive or interference by the Manufacturer Defendants. *Id.* at Page ID # 1970.

Michigan law provides that "[t]he expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v. Pontiac Osteopathic Hosp.*, 135 Mich.App. 361, 377; 354 N.W.2d 341 (1984). Mayfield asserts that the "allegations are sufficient to state a plausible claim that there was an identifiable class of S.A.F.E.Clip purchasers (i.e., football teams and equipment dealers), some of whom would have made purchases but for Appellees' interference." Appellant's Br. at 45, RE 25, Page ID # 53. In other words, Mayfield alleges that it had an expectancy with regard to all current and future business relations with football teams, players and equipment distributors, representing "thousands of additional customers." FAC ¶239, RE 61, Page ID # 1411; *id.* ¶246, Page ID # 1412; *id.* ¶253, Page ID # 1413; *id.* ¶260, Page ID # 1415. But there are *no facts* alleged that indicate that Mayfield would likely have been able to sell its S.A.F.E.Clip to this vast group.

While Mayfield asserts that it had “discussions” with certain football teams and equipment dealers (Appellant’s Br. at 45, RE 25, Page ID # 53), the relevant precedent requires far more than Mayfield has alleged. For example, in *Saab Auto AB v. Gen. Motors Co.*, 953 F. Supp. 2d 782 (E.D. Mich. 2013), *aff’d*, 770 F.3d 436 (6th Cir. 2014), a reasonable expectancy was not shown where there were “no facts presented that indicated that any of the various agreements were close to or in the process of being negotiated or approved.” *Saab Auto AB*, 953 F. Supp. 2d at 790. There are no allegations here that Mayfield was “close to” an agreement with the group of consumers of football helmets or had been placed in a preferred vendor group.<sup>5</sup> As the District Court correctly noted:

As in *Saab*, Plaintiff presents no facts “that indicate that any of the various agreements were close to or in the process of being negotiated or approved.” *Id.* Plaintiff thus fails to meet its initial burden in the tortious interference analysis.

Order, RE 68, Page ID # 1970.

Other Michigan case law supports the same conclusion. In *Cedroni Assocs. v. Tomblinson, Harburn Assocs., Architects & Planners, Inc.*, 492 Mich. 40, 45 (2012), the fact that the plaintiff was the “lowest bidder on a public contract” was

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<sup>5</sup> While Mayfield cites to *Lucas v. Monroe Cty.*, 203 F.3d 964 (6th Cir. 2000), a reasonable expectancy was found in that case only because of evidence that “but for the ... unlawful . . . conduct . . . plaintiffs would have been placed on the regular rotation” to receive customers for towing. *Lucas*, 203 F.3d at 979. Mayfield had no similar expectancy here.

insufficient. Mayfield cannot even meet this standard; it does not claim to be the lowest bidder on any business. *See also Midfield Concessions Enters. v. Areas USA, Inc.*, 130 F. Supp. 3d 1122 (E.D. Mich. 2015) (expectancy only found because previous sales supported an expectancy for a new contract). Mayfield does not claim previous sales of the S.A.F.E.Clip to the thousands of persons for which it claims an expectancy.

The District Court also properly held that Mayfield had failed to allege “that Defendants acted either maliciously or improperly.” *Id.* It is well-settled that “[i]ntentional interference requires more than just purposeful or knowing behavior on the part of the defendant. [A] plaintiff must also allege that the interference was either (1) a per se wrongful act or (2) a lawful act done with malice and unjustified in law for the purpose of invading the ... business relationship of another.” *Saab Auto. AB*, 770 F.3d at 441. (Citation omitted). “To establish that a lawful act was done with malice and without justification, [a] plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference.” *Id.* at 442. Mayfield has alleged no such facts here.

“Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” *Id.* As discussed above, the FAC’s own allegations establish that the Manufacturer Defendants had legitimate business reasons for declining to adopt the S.A.F.E.Clip.

As the District Court noted, “Defendants have emphasized their prioritization of safety and credibility in the helmet manufacturing space.” Order, RE 68, Page ID # 1971 (citing FAC, RE 62, Page ID # 1599).

## **VII. CONCLUSION**

For the foregoing reasons, the Order of the District Court dismissing the FAC should be affirmed.

Date: September 9, 2021

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 8,859 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Local Rule 32(b)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Respectfully submitted on September 9, 2021, Detroit, Michigan.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 9, 2021, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/David A. Ettinger

**ADDENDUM**

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Defendants-Appellees have designated the following docket entries from E.D. Michigan Docket No. 2:19-12712.

<b>DOCKET ENTRY NUMBER</b>	<b>DESCRIPTION OF ITEM</b>	<b>FILING DATE</b>	<b>PAGE ID #</b>
57	Plaintiff's Reply to Defendants' Combined Opposition to Plaintiff's Motion for Leave to Amend the Complaint	9/25/2020	1279-1292
61	Plaintiff's First Amended Complaint	10/20/2020	1338-1568
62	Defendants' Motion to Dismiss Plaintiff's First Amended Complaint	11/20/2020	1569-1603
63	Plaintiff's Response to Defendants' Motion to Dismiss First Amended Complaint	12/11/2020	1604-1649

<b>DOCKET ENTRY NUMBER</b>	<b>DESCRIPTION OF ITEM</b>	<b>FILING DATE</b>	<b>PAGE ID #</b>
65	Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss	12/28/2020	1935-1945
68	Order Granting Defendants' Motion to Dismiss	4/22/2021	1950-1972
69	Judgment in Favor of Defendants	4/22/2021	1973
70	Notice of Appeal	5/3/2021	1974
72	Motion to Dismiss Hearing Transcript	7/1/2021	1976-2012