

Antitrust News & Notes

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China Exercises New Antitrust Enforcement Powers in Reviewing Panasonic-Sanyo Deal

By Ge Li and Qianqian Wang

The conditioned approval late last year of a major merger in the electronics sector by the Anti-Monopoly Bureau of China's Ministry of Commerce (MOFCOM) may signal that Chinese antitrust regulators are becoming more confident, more sophisticated, and more aggressive in asserting a role in international commerce. On October 30, 2009, MOFCOM announced that it would approve the acquisition of Sanyo Electric Co., Ltd. (Sanyo) by Panasonic Corporation (Panasonic) subject to requirements that the combined entities divest certain overlapping business units. The vigorous review process carried out under China's new antitrust statute and the remedial structure adopted provide important insights for future transactions involving companies that do business in China.

Background

Both Panasonic and Sanyo are Japanese companies with diversified businesses and operations worldwide, including the development, manufacture, and sale of batteries to consumers and original equipment manufacturers (OEMs). Panasonic and Sanyo entered into an agreement on December 19, 2008, under which Panasonic made a tender offer of approximately US\$9 billion to acquire majority control of Sanyo, subject to regulatory approval in a number of jurisdictions. Competition concerns were raised by the European Commission, the Japanese Fair Trade Commission, MOFCOM, the U.S. Federal Trade Commission,

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and government authorities in seven other jurisdictions with respect to the concentration of certain products resulting from the combination.

Process

The review process carried out by Chinese regulators was unusually extended and detailed by local standards. On January 21, 2009, Panasonic and Sanyo initiated their request for regulatory approval with MOFCOM, but MOFCOM would not accept their original filing as fully complete without additional information. After Panasonic and Sanyo made certain supplementary submissions, MOFCOM officially accepted the application on May 4, 2009, which triggered a 30-day investigation period as set out in China's Anti-Monopoly Law (adopted August 1, 2008). Following expiration of the 30-day first phase investigation period, MOFCOM initiated a second phase investigation and set September 3, 2009, as the deadline

for completion. On August 26, the parties applied to extend the second phase investigation period, and MOFCOM approved an additional 60-day period. On October 30, 2009, four days before the extended final deadline, MOFCOM announced its decision to clear the transaction with conditions. This decision was made after conditional clearance by the Japanese Fair Trade Commission and the European Commission, but before the U.S. Federal Trade Commission had acted.

During the investigation, MOFCOM required the applicant parties to submit documents and data relating to the categories of products manufactured by both companies, including information with respect to their sales; product differences; pricing methodologies and strategies; distribution channels; negotiating leverage with downstream customers; production capacity and output; and any existing vertical relations with suppliers and customers. The investigation also involved feedback from 39 competitors and downstream customers (some of whom were interviewed directly by MOFCOM) as well as an on-site investigation at a facility in Shenzhen, China. According to MOFCOM's published announcement, the final decision was reached after extensive discussions with the applicant parties.

MOFCOM's Decision

MOFCOM explained its decision in considerable detail, providing valuable information about the review process, investigation methods, competition concerns, and remedies for the transaction. MOFCOM concluded that the concentration of business between Panasonic and Sanyo would eliminate or restrict competition in three product markets: (i) rechargeable coin-shaped lithium batteries (for mobile devices such as mobile phones and video cameras); (ii) consumer nickel-metal hydride batteries; and (iii) nickel-metal hydride batteries for automobile use. As to the geographic markets, MOFCOM concluded that the geographic markets of both rechargeable coin-shaped lithium batteries and consumer nickel-metal hydride batteries are global markets. MOFCOM identified the following competitive concerns and imposed the following remedies:

- In the rechargeable coin-shaped lithium battery market, MOFCOM expressed concern that the combined Panasonic/Sanyo would control 61.6

percent of the market and would have the power to increase product prices unilaterally, with impacts that could not be eliminated by customer power.

MOFCOM therefore required that Sanyo's rechargeable coin-shaped lithium battery business in Japan be sold to an independent third party.

- In the consumer nickel-metal hydride battery market, MOFCOM expressed concern that the combined entity would control 46.3 percent of the market, a share far higher than that held by other competitors. MOFCOM also expressed concern that the transaction would restrict competition, as slow development of the nickel-metal hydride battery market discourages new entry.

MOFCOM therefore required that Sanyo transfer its consumer nickel-metal hydride battery business in Japan to an independent third-party buyer, and convert its factory in Suzhou to an OEM supplier that would supply certain batteries to the buyer. Alternatively, Panasonic could transfer its corresponding business in China to an independent third-party buyer.

- In the automotive nickel-metal hydride business, MOFCOM expressed concern that the combined Panasonic/Sanyo, together with Panasonic EV Energy Co., Ltd. (PEVE), a joint venture between Panasonic and Toyota, would control 77 percent of the market.

MOFCOM therefore required that Panasonic sell its automotive nickel-metal hydride battery business to an independent third-party buyer. In addition, Panasonic was required to reduce its ownership stake in PEVE from 40 percent to 19.5 percent, waive its rights to appoint PEVE directors and vote in shareholders meetings, and drop the name "Panasonic" from the PEVE name.

Moreover, as to each required divestiture, MOFCOM required that the proposed transfer include all production facilities, sales, R&D, and customer service units as well as the intellectual property rights required for the operation of the business. Each divestiture must be approved by

MOFCOM based on whether the transfer is beneficial from a competitive standpoint in China. If the transfers are not completed within six months following the completion of the acquisition (subject to an extension of another six months at MOFCOM's discretion), MOFCOM will appoint an independent trustee to dispose of the assets. Until the fulfillment of the conditions, MOFCOM prohibited Panasonic and Sanyo from disclosing to the other any price, customer, or market-sensitive information with respect to the products at issue.

Observations

MOFCOM's review process and its final decision suggest that MOFCOM will play an increasingly significant and effective role in monitoring offshore transactions with a China dimension. Milestone developments include:

- The MOFCOM review and remedial process was surprisingly in-depth. The Panasonic/Sanyo merger represents the first time in which MOFCOM's merger review required an extension period beyond the second review period. During the review period, MOFCOM sought opinions from government authorities, chambers of commerce, and trade associations, and conducted investigations through questionnaires, telephone interviews, and on-site investigations. Additionally, MOFCOM held five meetings with the applicant parties to negotiate the conditions for approval.
- MOFCOM issued a public decision that was more detailed and more transparent than past decisions have been. In this decision, MOFCOM analyzed relevant markets, disclosed specific market-share figures for each relevant product, and stated the factors it considered in the review process, indicating a new level of openness regarding its review process and decision-making.
- The decision also revealed MOFCOM's intent to exercise its authority to review international mergers between non-Chinese companies. Before Panasonic/Sanyo, MOFCOM had generally treated China as the relevant geographic market for its competitive analysis and focused only on the merging entities' assets and interests in China

in imposing conditions on the approval of offshore transactions. In this decision, MOFCOM concluded that the geographic market for two of the three product segments it addressed was worldwide in nature. Its remedies were likewise more international in nature: the requirement that the parties divest businesses located in Japan and restrict their conduct in offshore entities like PEVE represent the first time that MOFCOM has so directly addressed overseas assets.

The new decision reveals that MOFCOM, building on its new antitrust statutory regime, intends to be a major player on the global stage in competition law and international transactions. Companies doing business in China will need to account for the impact of an increasingly confident and vigorous MOFCOM when structuring transactions that impact Chinese interests, regardless of where those transactions may take place. ■

Tenth Circuit Holds That a Hospital Has No Antitrust Duty to Share Facilities

By Dionne C. Lomax and Robert P. Boxie, III

The recent decision from the Tenth Circuit Court of Appeals in *Four Corners Nephrology Assocs., P.C., v. Mercy Medical Center of Durango*¹ extends the reasoning of two Supreme Court cases — *Pacific Bell*² and *Trinko*³ — to the healthcare antitrust context. In *Four Corners*, the Tenth Circuit held that a hospital has no antitrust duty to deal or share its facilities with a competing physician, and such exclusion is not deemed a violation of the antitrust laws.

Plaintiff, Dr. Mark Bevan, a successful nephrologist in Farmington, New Mexico, brought claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, and the Colorado Antitrust Act, alleging that Mercy Medical Center's (Mercy) decision to exclude him and other nephrologists from admitting patients to the hospital amounted to the unlawful monopolization, or attempted monopolization, of the market for nephrology physician services in the

¹ 582 F.3d 1216 (10th Cir. 2009).

² *Pac. Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S.Ct. 1109 (2009).

³ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

Durango, Colorado, area.⁴ Defendant Mercy, after having invested a considerable amount of money to ensure the success of its nephrology practice, denied that its decision to deal exclusively with its in-house nephrologist and refusal to deal with Dr. Bevan constituted anticompetitive conduct in violation of Section 2 of the Sherman Act. The Tenth Circuit agreed.

In order to provide Colorado residents and the members of the Southern Ute Indian Tribe with greater access to kidney dialysis and other nephrology services in the Durango area, Mercy and the Tribe decided to join efforts and open a nephrology practice as the sole provider of nephrology services at the hospital. After having tried, unsuccessfully, for several years to woo Dr. Bevan and his associates to relocate to Durango, Mercy hired another doctor to fill that role. As a result, Dr. Bevan's privileges to practice at Mercy were terminated, consistent with the hospital's bylaws. He then applied to be part of the hospital's active staff, but was denied. Mercy concluded that having additional doctors would reduce the number of patients for its newly-hired doctor and cause the practice to become unprofitable if other doctors had the same privileges.⁵

In response to Mercy's actions, Dr. Bevan filed a lawsuit alleging violations of federal and state antitrust law. The district court granted summary judgment to Mercy on the basis that it lacked monopoly power in the relevant market.⁶ On appeal, the Tenth Circuit affirmed, but on different grounds. In rejecting Dr. Bevan's claims, the court stated that Mercy had no antitrust duty to share its facilities with Dr. Bevan at the expense of its own nephrology practice. Moreover, the court relied on recent Supreme Court precedent that a business (and even a putative monopolist) has "no antitrust duty to deal with its rivals," and that businesses are generally "free to choose the parties with whom they deal, as well as the prices, terms, and conditions of that dealing."⁷

⁴ Both Durango and Farmington are located in the Four Corners area, which encompasses the common border between Colorado, Utah, New Mexico, and Arizona.

⁵ As an incentive to lure physicians to reside in Durango, the hospital and the Tribe agreed to underwrite up to \$2.5 million in losses they expected the practice to incur.

⁶ *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr.*, No. 05-CV-2084, 2008 Dist. LEXIS 41164 (D. Colo. May 22, 2008).

⁷ *Pac. Bell Tel. Co.*, 129 S.Ct. at 1115, 1118; see also *Trinko*, 540 U.S. at 407 (Sherman Act does not restrict the right of a private business "freely to exercise his own independent discretion as to parties with whom he will deal"). See also *Christy Sports, LLC v. Deer Valley*

However, the right to refuse to deal with a competitor is not without its limitations. The court recognized an exception to the general rule in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*⁸ That case represented the "outer boundary" of Section 2 liability, in that a duty to deal may be imposed (cautiously) when a business has terminated a profitable relationship for an anticompetitive reason. Those facts were not present in Mercy's actions: the hospital refused to deal with Dr. Bevan to avoid an unprofitable relationship in order to protect and maximize its chances of making money, rendering the exception in *Aspen Skiing* inapplicable.

Furthermore, the court also stated that granting Dr. Bevan access to Mercy's facilities, and thus sharing in its "putative monopoly," is not required by the antitrust laws, in that such an action would not advance competition, but rather advantage competitors. After rejecting Dr. Bevan's antitrust claim, the court found that Dr. Bevan failed to show any legally cognizable antitrust injury that the court could remedy for a monopolization claim. The court, emphasizing that antitrust laws are not concerned with a producer's loss, stated that the law "protect[s] consumers from suppliers rather than suppliers from each other,"⁹ and affirmed summary judgment in favor of Mercy. ■

Proposed Legislation Seeks to Overturn Supreme Court's *Twombly* and *Iqbal* Decisions

By Kathleen Spangler

In the 2007 antitrust conspiracy case *Bell Atlantic v. Twombly*,¹⁰ the U.S. Supreme Court held that a complaint failed to state a claim, and therefore could be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, if it failed to set forth factual allegations sufficient to raise a "plausible" inference that the defendants are liable for the claim.¹¹ The Court, stressing that the plaintiff's alleged facts must "nudge[] their claims across the line from conceivable

Resort Co., Ltd., 555 F.3d 1188, 1194 (10th Cir. 2009) (reiterating that the "Supreme Court has recognized the economic value of allowing businesses to decide with whom they deal").

⁸ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁹ *Stamatakis Indus., Inc. v. King*, 965 F.3d 469, 471 (7th Cir. 1992).

¹⁰ 550 U.S. 544 (2007).

¹¹ *Id.* at 556, 570.

to plausible,¹² rejected the view enunciated in the 1957 decision *Conley v. Gibson*,¹³ which had permitted dismissal only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”¹⁴ The *Twombly* Court held that the *Conley* “no set of facts standard” “has earned its retirement” because it is “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”¹⁵ Two years later, in *Ashcroft v. Iqbal*,¹⁶ the Court reaffirmed the *Twombly* plausibility standard and confirmed that it applied to cases outside of the antitrust context.¹⁷

As district courts grapple with how to apply *Twombly*’s plausibility standard, some in Congress seek to overturn it and to return to the pre-*Twombly* framework. In July 2009, Senator Arlen Specter (D-PA) introduced Senate Bill 1504, the Notice Pleading Restoration Act of 2009, which provides that a federal court “shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”¹⁸ When he introduced the bill, Senator Specter argued that in deciding *Twombly*, the Court circumvented the Rules Enabling Act and effectively amended Rule 8 of the Federal Rules of Civil Procedure without proposing a formal rule change to Congress for approval.¹⁹ Specter urged passage of the bill, noting that “to deny many plaintiffs with meritorious claims access to the Federal courts” is “an especially unwelcome development” when smaller litigation budgets in the executive branch will mean that “enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants.”²⁰

A similar effort in the House of Representatives was introduced by Representative Jerry Nadler (D-NY) and other co-sponsors on November 19, 2009. House Bill 4115, the Open Access to Courts Act of 2009, prohibits dismissal of a complaint “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim

which would entitle the plaintiff to relief.”²¹ The bill specifically provides that “[a] court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.”²²

Proponents of the legislation argue that the *Twombly* standard makes it too difficult for plaintiffs to proceed to discovery on valid claims and that, often, the factual details needed to meet the *Twombly* pleading standard are solely within the defendants’ knowledge and possession.²³ Opponents argue that the *Twombly* standard is supported by precedent, safeguards against speculative claims, and that without it, defendants may be subjected to expensive and protracted discovery based on the mere possibility that wrongdoing occurred.²⁴

At present, the Specter bill has been referred to the Senate Judiciary Committee, while the Nadler bill has been referred to House Judiciary Committee’s Courts and Competition Policy Subcommittee. ■

Ninth Circuit Reverses Itself, Affirms Dismissal of Claims Against Major Oil Companies

By Jeffrey S. Johnston and Stacy M. Neal

A new Ninth Circuit opinion shows that *Twombly*-style pleadings scrutiny may help energy producers defend antitrust claims premised on common practices such as locational swaps and price reporting.

On December 2, 2009, the Ninth Circuit surprisingly reversed its own prior decision and affirmed a district court’s dismissal of a putative antitrust class action against

²¹ H.B.4115.

²² *Id.*

²³ See, e.g., Statement of Professor Eric Schnapper, University of Washington School of Law before the Subcommittee on Courts and Competition Policy of The House Committee on the Judiciary, Hearing on H.R. 4115, Open Access to The Courts Act of 2009, Dec. 16, 2009 (available at http://judiciary.house.gov/hearings/hear_091216_1.html).

²⁴ Statement of Gregory G. Katsas, Partner, Jones Day and Former Assistant Attorney General, Civil Division, Department of Justice before the Subcommittee on Courts and Competition Policy of The House Committee on the Judiciary, Hearing on H.R. 4115, Open Access to The Courts Act of 2009, Dec. 16, 2009 (available at http://judiciary.house.gov/hearings/hear_091216_1.html).

¹² *Id.* at 570.

¹³ 355 U.S. 41 (1957).

¹⁴ *Id.* at 47.

¹⁵ *Twombly*, 550 U.S. at 563.

¹⁶ 129 S. Ct. 1937 (2009).

¹⁷ See *Id.* at 1953.

¹⁸ S.1504.

¹⁹ See 154 Cong. Rec. S789 (July 22, 2009).

²⁰ *Id.*

several major oil companies. *William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co.*, No. 06-56059, 2009 WL 4282914 (9th Cir. 2009). Originally having reinstated the plaintiff's case over a strongly-worded dissent, a Ninth Circuit panel revisited its prior *Twombly* analysis and concluded that the plaintiff's allegations that the major oil producers in California had colluded to raise the price of gasoline were insufficient to state a viable claim under Section 1 of the Sherman Act.

At the time of the Ninth Circuit's decision, *Gilley* had been pending for more than a decade. In 1998, William Gilley filed a class action against several major oil producers on behalf of himself and other wholesale purchasers of CARB gasoline (a clean-burning fuel required only in California). Gilley alleged that the defendants had conspired to limit the supply and raise the prices of CARB gasoline in California through, among other things, the use of exchange agreements.²⁵ These allegations were substantially similar to those made in *Aguilar v. Atlantic Richfield Co.*,²⁶ a class action filed in California state court in 1996 on behalf of retail gasoline purchasers. As a result of these similar allegations, the federal district court stayed *Gilley* pending the outcome of *Aguilar*. After extensive discovery and briefing, the *Aguilar* court granted summary judgment in favor of the defendants, ruling that there was insufficient evidence that the defendants had conspired to restrain trade.

In *Aguilar*, the California Supreme Court affirmed the trial court's decision, holding that the oil companies had presented evidence that their pricing and production decisions were the result of independent, and not collusive, conduct.²⁷ The California Supreme Court held that, in contrast, the plaintiff did not carry her burden to make a *prima facie* showing of collusion. The California Supreme Court rejected plaintiff's arguments that the following constituted evidence of collusion:

²⁵ "An exchange agreement is an agreement by which one company's refined petroleum products are exchanged with those of another company at widely disparate locations. Theoretically, on the supply side, exchange agreements afford a means for a producer of motor gasoline to enter and compete for sales in geographic areas where that producer possesses no physical distribution facilities. On the demand side, exchange agreements provide purchasers with wide geographic areas from which to secure supplies of motor gasoline." *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 321 n.9 (D. Ohio 1981).

²⁶ 92 Cal. Rptr. 2d 351 (Cal. Ct. App. 2000).

²⁷ *Aguilar v. Atlantic Richfield Co.*, 107 Cal. Rptr. 2d 841 (Cal. 2001).

- *The gathering and dissemination of capacity, production, and pricing information by each oil company through sources such as OPIS.* The court noted that widespread dissemination of this type of market information serves the public interest, tends to stabilize markets and prices, and generally leads to freer competition, and thus did not imply collusion.²⁸
- *The use of common consultants.* The court noted that there are very few consultants who possess the expertise necessary to advise on CARB production, capacity, and pricing issues and thus it was merely practical that defendants would use the same consultants. The court also noted that the consultants typically signed confidentiality agreements with each defendant and there was no evidence that the consultants shared confidential information with other defendants.²⁹
- *The use of exchange agreements.* The court noted that exchange agreements are common in the petroleum industry and are generally "procompetitive in purpose and effect," as they allow companies to compete in markets "in which they otherwise could not or would not compete as efficiently or at all." The exchange agreements were thus not evidence of collusion.³⁰

After the decision in *Aguilar* and related motions practice, Gilley amended his claim to avoid the collateral impact of *Aguilar*, and newly alleged that 44 bilateral exchange agreements between the defendants and others had the cumulative effect of restraining competition for CARB, in violation of Section 1. The district court granted the defendants' motion to dismiss, ruling that *Gilley* had still failed to allege that the exchange agreements, when considered individually, produced any anticompetitive effects; indeed, the district court noted that Gilley had not alleged any theory as to how the individual exchange agreements, each of which reflected only a small portion of the CARB market, could impact the price of CARB gasoline.

The Ninth Circuit initially reversed and remanded, holding that because *Aguilar* only addressed a conspiracy to fix prices, the judgment did not preclude a claim that the

²⁸ *Id.* at 862.

²⁹ *Id.* at 863.

³⁰ *Id.*

exchange agreements, individually or in the aggregate, adversely affected competition under the rule of reason.³¹ Judge Callahan, dissenting, pointed out that the California Supreme Court had also rejected a conspiracy claim under California's unfair competition law, holding that there was no triable issue of fact on this claim. Judge Callahan argued that this holding was broad enough to preclude any conspiracy claim under Section 1, whether premised on a *per se* violation or a claim under the rule of reason.³²

Defendants then moved for rehearing, and on December 2, 2009, the Ninth Circuit withdrew its April 3, 2009, opinion and issued a new, *per curiam* opinion affirming the dismissal.³³ In this opinion, the court held that *Aguilar* barred all conspiracy claims, and because Gilley had not alleged that the bilateral exchange agreements individually restrained trade, the court affirmed the trial court's dismissal of the claims under *Twombly*. The court stated simply that the "pleading requirements stated in *Twombly* apply in all civil cases, including this one" and that, under *Twombly*, a plaintiff's allegations must raise the plaintiff's right to relief "above the speculative level."³⁴

Together, *Aguilar* and *Gilley* should give energy companies important tools to contest speculative antitrust conspiracy claims, especially where those claims arise out of common efficiency-enhancing practices such as exchange agreements with competitors and the gathering and disseminating of data to price reporting agencies. ■

Masimo v. Tyco – The Ninth Circuit's Latest Pronouncement on Bundling

By Veronica Smith Lewis

*Masimo Corp. v. Tyco Health Care Group*³⁵ re-affirms that plaintiffs seeking to challenge "bundled discounting," or the sale of a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually, as constituting predatory pricing faces a high hurdle in the Ninth Circuit.

In 2008, that court, only the second circuit court of appeals to recognize bundling as a possible predatory act, soundly rejected the reasoning the *en banc* Third Circuit had announced in *LePage's Inc. v. 3M*.³⁶ In *Cascade Health Solutions v. PeaceHealth*,³⁷ the Ninth Circuit explained that while bundled discounts can "at least in theory" be used to exclude "a competitor who sells only a single product in the bundle (and who produces that single product at a lower cost than the defendant)," such discounts are "pervasive" and offer significant procompetitive benefits as well.³⁸ The court concluded that, given these factors and the "measured concern" reflected in Supreme Court precedent "to leave unhampered pricing practices that might benefit consumers, absent the clearest showing that an injury to the competitive process will result," illegal bundling claims must meet a rigorous test.³⁹ The Ninth Circuit established a discount attribution test:

To prove that a bundled discount was exclusionary or predatory for the purposes of a monopolization or attempted monopolization claim under § 2 of the Sherman Act, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or

³¹ *Gilley v. Atlantic Richfield Co.*, 561 F.3d 1004, 1014 (9th Cir. 2009).

³² *Id.* at 1015 (Callahan, dissenting).

³³ *Gilley*, 2009 WL 4282014.

³⁴ *Id.* at * 7.

³⁵ Nos. 07-55960, 07-56017, 2009 WL 3451725 (9th Cir. Oct. 28, 2009).
³⁶ 324 F.3d 141 (3d Cir. 2003).

³⁷ 515 F.3d 883 (9th Cir. 2008).

³⁸ *Id.* at 894-97. The court noted that "[b]undled discounts generally benefit buyers because the discounts allow the buyer to get more for less" and "[b]undling can also result in savings to the seller because it usually costs a firm less to sell multiple products to one customer at the same time than it does to sell the products individually." *Id.* at 895.

³⁹ *Id.* at 902.

products below its average variable cost of producing them.⁴⁰

In *Masimo*, the Ninth Circuit applied this test and concluded that “the district court did not err in vacating the jury’s verdict regarding Tyco’s bundling agreements under § 2 of the Sherman Act,” explaining that because “Masimo did not allege anticompetitive tying or pricing, Tyco’s bundled discounts cannot, as a matter of law, violate § 2.”⁴¹ The court also rejected Masimo’s alternative argument “that Tyco’s bundling practices were actually illegal market-share discounts” under which “receipt of the discount was conditioned upon customers purchasing 90-95 percent of their requirements” for the bundled products, concluding that Masimo had failed to establish an exclusive dealing claim since “the evidence in the trial record concerning the pervasiveness and effects of Tyco’s varied bundling arrangements was insufficient to support a finding that the arrangements foreclosed competition in a substantial share of the relevant market.”⁴²

The Ninth Circuit’s message on bundling claims is clear: all such claims will be subjected to the discount attribution test established in *PeaceHealth*. However, the scope of application for that test outside the bundling context remains an open question. In *Masimo*, the court noted that “*PeaceHealth* did leave open the possibility that application of the discount attribution test may be inappropriate “outside the bundling pricing context, for

example, in tying or exclusive dealing cases.”⁴³ However, it was careful not to decide that issue in *PeaceHealth*, since the parties had neither briefed it nor raised it with the district court.⁴⁴ Thus, those challenging bundled discounts, in at least the Ninth Circuit, may now be more inclined to assert tying claims — that the bundled discounts leave purchasers with no rational economic choice other than purchasing the bundle — to avoid the discount attribution test. The proper cost-analysis to be used to assess this type of tying claim remains an open question.

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⁴⁰ *Id.* at 910. In contrast, in *LePage’s*, the Third Circuit rejected the proposition that a plaintiff must demonstrate below cost pricing to establish that bundled discounts are predatory. 324 F.3d at 147, 151-52. The Third Circuit affirmed the bundling principles announced in *LePage’s* in *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005).

⁴¹ *Masimo*, 2009 WL 3451725, at *1.

⁴² *Id.* at *1-*2 (emphasis in original).

⁴³ *Id.* at *1 (quoting *PeaceHealth*, 515 F.3d at 916 n.27) (emphasis added).

⁴⁴ 515 F.3d at 916 n.27.

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Antitrust Practice Contacts

Name	Office	Email	Phone
Alden L. Atkins	Washington	aatkins@velaw.com	+1.202.639.6613
Bruce A. Blefeld	Houston	bblefeld@velaw.com	+1.713.758.3610
Neil W. Imus	Washington	nimus@velaw.com	+1.202.639.6675
Jeffrey S. Johnston	Houston	jjohnston@velaw.com	+1.713.758.2198
William E. Lawler III	Washington	wlawler@velaw.com	+1.202.639.6676
Cathy A. Lewis	Washington	clewis@velaw.com	+1.202.639.6537
Veronica S. Lewis	Dallas	vlewis@velaw.com	+1.214.220.7757
Dionne C. Lomax	Washington	dlomax@velaw.com	+1.202.639.6610
Jason M. Powers	Houston	jpowers@velaw.com	+1.713.758.2522
Harry M. Reasoner	Houston	hreasoner@velaw.com	+1.713.758.2358
James A. Reeder, Jr.	Houston	jreeder@velaw.com	+1.713.758.2202
Brian E. Robison	Dallas	brobison@velaw.com	+1.214.220.7770
Kathleen B. Spangler	Houston	kspangler@velaw.com	+1.713.758.2853
Walter B. Stuart	Houston	wstuart@velaw.com	+1.713.758.1086
William R. Vigdor	Washington	wvigdor@velaw.com	+1.202.639.6737
David R. Woodcock, Jr.	Austin	dwoodcock@velaw.com	+1.512.542.8637

Vinson & Elkins LLP Attorneys at Law Abu Dhabi Austin Beijing Dallas Dubai Hong Kong
Houston London Moscow New York Palo Alto Shanghai Tokyo Washington www.velaw.com