

No. 92-55134

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LOS ANGELES LAND COMPANY, SIERRA PALM PARTNERS,
AND WEST LANES, INC., Plaintiffs-Appellees

v.

BRUNSWICK CORPORATION, Defendant-Appellant

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
U.S.D.C. No. 88-05285 MRP

REPLY BRIEF FOR DEFENDANT-APPELLANT
BRUNSWICK CORPORATION

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**REPLY BRIEF FOR DEFENDANT-APPELLANT
BRUNSWICK CORPORATION**

The premise of plaintiffs' antitrust claim is so bizarre and unprecedented as to require comment at the outset. Plaintiffs conceded below that they would not "purport to show" a Brunswick monopoly in the sale of bowling equipment. DSER 738; see Brun. Br. 4 n.1.¹ Neither does Brunswick's relationship with DCC, the lender, constitute a competitive bottleneck: in the relevant year, 1988, 45 new bowling centers were built in the United States, only 12 of them with DCC financing. DSER 989-990; see also DSER 986-987. Thus, it is undisputed that Brunswick had no obligation under the antitrust laws to sell plaintiffs equipment for their bowling center so that they could compete against Brunswick in Palmdale, and Brunswick certainly had no obligation to guarantee financing by DCC so that plaintiffs might be able to purchase the Brunswick equipment. In other words, if Brunswick had simply refused to sell LA Land any bowling equipment, or if it had simply refused to guarantee LA Land's equipment loan from DCC, LA Land would have had no antitrust claim — even if Brunswick thereby intended to make it more difficult for LA Land to enter the Palmdale market. Nonetheless, plaintiffs contend in this case (LAL Br. 30) that Brunswick violated the Sherman Act by *agreeing* to sell and guarantee the purchase of bowling equipment but by then not moving fast enough in submitting financial information to DCC and by "signaling" DCC not to make the loan. That contention cannot possibly be right.

Equally bizarre are plaintiffs' repeated efforts (LAL Br. 16, 17 n.18, 35 n.44, 36, 38-39) to paint Brunswick as an outsider inter-

¹ In this reply brief, "E.R." refers to the Excerpts of Record filed with Brunswick's opening brief on July 29, 1992, "SER" refers to the Supplemental Excerpts of Record filed with LA Land's brief on October 7, 1992, and "DSER" refers to Defendant's Supplemental Excerpts of Record, submitted (accompanied by motion for leave to file) simultaneously with this reply brief. For the convenience of the Court, we are also submitting revised copies of our opening brief, which are unchanged from those submitted on July 29 except that citations to "SER" and "DSER" have been added where appropriate.

fering in what otherwise would have been a smooth relationship between LA Land and DCC. Plaintiffs assert that they “did not willingly seek Brunswick’s assistance in obtaining equipment financing from” DCC (LAL Br. 36) and that Brunswick wrongfully “inject[ed] itself into the financing process as an intermediary * * * even though [LA Land] would prefer to deal directly with” DCC. LAL Br. 38-39. The record makes clear, however, and plaintiffs nowhere deny, that DCC *would not be in the business of making bowling loans at all* if Brunswick did not routinely gather its equipment customers’ financial information, prepare market surveys, and guarantee the loans. DSER 909-914, 926-929; RT 2343; Ex. 76, DSER 83. Plaintiffs’ brazen effort to win this case on the theory that Brunswick should not have been involved at all, should not have prepared a market survey, or should not have served as a conduit for financial information asks the Court to ignore the very essence of the relationship between Brunswick and DCC.

Finally, the peculiar nature of plaintiffs’ antitrust claim is further shown by their attempt to sweep under the rug their demand for a “San Dimas letter” — a letter assuring them of no new competition by Brunswick — as an absolute precondition to their purchase of equipment from Brunswick. See Ex. 1000-1, DSER 113; DSER 364-366. Plaintiffs do not contend in this Court, as they did below, that they withdrew that request. Rather, the best they can do is to assert that “there was * * * ample evidence” that “L.A. Land was willing to proceed with the Twin Cities Bowl without a San Dimas letter.” LAL Br. 40. LA Land’s *willingness*, however, is not the point. LA Land never *expressed* that willingness to Brunswick, and thus Brunswick was fully justified in operating on the assumption that LA Land would not purchase equipment from Brunswick without a no-competition agreement. The antitrust laws, of course, *favor* competition and in no circumstances require an agreement *not* to compete in order to escape liability for monopolization.

We now turn to the specific issues raised by our opening brief and plaintiffs’ responses to those issues.

I. THE MONOPOLIZATION JUDGMENT SHOULD BE REVERSED

A. The Record Shows No Actionable "Exclusionary" Acts

Plaintiffs' allegations of "delay" and "false market survey" have little precedent in antitrust law. What is quite familiar to antitrust courts, however, is the situation plaintiffs allege that Brunswick tried to bring about through those means. Plaintiffs' allegations (whether or not supported by the record) amount to this: Brunswick was engaged in the manufacture of equipment for sale to bowling-center operators and in the operation of bowling centers itself; plaintiffs wanted to buy bowling equipment from Brunswick in order to enter the Palmdale market; Brunswick chose to enter the Palmdale market itself instead of selling to plaintiffs so that plaintiffs could enter; and Brunswick took steps to bring about that result. Ordinarily, the step a manufacturer takes in order to preserve a market for itself is to refuse to sell its product to the would-be buyer. In this case, plaintiffs do not allege that Brunswick refused to sell them equipment; they allege only that Brunswick brought about the same result by more indirect means. There is no allegation that Brunswick blocked plaintiffs from obtaining equipment from *other* manufacturers.

There can, accordingly, be no antitrust liability in this case unless Brunswick would have violated the antitrust laws by refusing to sell equipment to plaintiffs. Yet there is, and can be, no contention that Brunswick had a duty under the antitrust laws to sell equipment to plaintiffs. Antitrust law does *not* impose such duties whenever the manufacturer is already participating in a market at the retail level and someone else wants to buy the manufacturer's product in order to compete in that retail market. If that were the law, then vertical integration and dual distribution would be virtually per se illegal, whereas in fact the law generally *encourages* vertical integration and dual distribution.² Rather, antitrust law —

² See, e.g., P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 723.1 (Supp. 1992); *id.* ¶ 729.3, at 748; *id.* ¶ 729.4b, at 753 ("vertical integration, even with a refusal to deal * * *, should ordinarily be lawful"); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1356-1357 (9th Cir.

because its "primary concern" is with *interbrand* competition (*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977)) — imposes a duty to deal on manufacturers only when they have a monopoly (indeed, usually an "essential facility") *at the supply level*. See generally ABA Antitrust Section, Monograph No. 9, *Refusals to Deal and Exclusive Distributorships* ch. V (1983); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 736.2 (Supp. 1992). But in this case the allegation that Brunswick has monopoly power in supply was explicitly abandoned at trial.³

Construed most generously, plaintiffs' allegations are that Brunswick used various means to prevent plaintiffs from purchasing equipment from Brunswick. Because Brunswick had every legal right to achieve that end directly, it should be an easy matter to reverse the antitrust judgment below even taking all of plaintiffs' allegations (proven or unproven) as true.

Plaintiffs' detailed allegations also fail one by one. In reviewing those allegations, it is essential to bear in mind the governing legal standards (see Brun. Br. 24-27, 36-37). Contrary to plaintiffs' insistence that every breath a "monopolist" takes must have an efficiency justification (LAL Br. 32 & nn.40-41, 37), "antitrust law must be concerned lest the mere possibility of an exclusionary tendency permit interminable lawsuits inquiring into the 'reasonableness' of every utterance or 'ordinary' act of the

1982); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 753 (7th Cir. 1989).

³ It is mystifying, therefore, why plaintiffs now attempt to describe Brunswick as the "dominant" equipment seller and "the only game in town" and attribute to Brunswick a market share as high as 93%. LAL Br. 6, 7 & n.3, 12. Plaintiffs persuaded the district court *not* to present this theory to the jury at trial. See Brun. Br. 4 n.1; see also, *e.g.*, DSER 738 ("The Court: And I wouldn't be looking for a monopoly in equipment. [Plaintiffs' counsel]: And we are not going to purport to show it * * *"). Even if this issue were in the case, the record would not support plaintiffs' contentions. In particular, the author of the affidavit on which they rely explained at trial that the affidavit did *not* state Brunswick's market share. DSER 993-995, 1005; RT 2448-2449. Brunswick's market share in 1988 was approximately 40%. DSER 989-990; see also DSER 748-749, 792.

monopolist.” 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 739, at 287 (1978). It is particularly wrong to assert that a monopolist must have an efficiency justification for every alleged failure to *assist* (or alleged failure adequately to assist) a competitor. “Consumers would be worse off if a firm with monopoly power had a duty to extend positive assistance to new entrants, or having extended it voluntarily a duty to continue it indefinitely. * * * [M]onopolists are not required to help their competitors, but need only refrain from anticompetitive acts such as denial of access to essential facilities * * *.” *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379-380 (7th Cir. 1986). The point is not that the antitrust laws rank other values higher than efficiency in this situation but that too readily imposing affirmative duties of assistance will hurt rather than promote efficiency in the long run: “Although a monopolist can (like the rest of us) be expected to act selfishly, and in some cases consumers will be hurt, in the long run they will be hurt more if juries are allowed to burden a monopolist with a positive duty of assisting competitors.” *Id.* at 378.

1. The Market Survey

Although plaintiffs’ brief tries to obscure the point, their entire case depends on the validity of their assertion that Brunswick’s market survey violated the antitrust laws. At the time LA Land sought an equipment loan from DCC, Brunswick had already decided to enter the Palmdale market. See p. 11, *infra*. Thus, DCC would not have made the loan unless it were convinced that the market could support *two* new bowling centers.⁴ Brunswick’s market survey reached the opposite conclusion. In short, regardless of the merit of plaintiffs’ “delay” and “Timberlake” allegations, their case would fail for lack of causation unless the market survey was *also*

⁴ DSER 972-973 (statement by *plaintiffs’* counsel, with which DCC witness agreed: “without a San Dimas type letter from BRC you could not get around the Brunswick market survey conclusion that there was room for only one bowling center in Palmdale no matter what financing arrangement you made[;] [t]hat was a deal breaker”); see also DSER 948, 950, 954-957, 972-973, 976-978; Oseland Dep. (Ex. 500) 56-57, 60-61, 63, 71-72, 137-138, DSER 501-505, 509-510, 521-522.

actionable, because plaintiffs were not going to build a bowling center in Palmdale without a loan from DCC. Plaintiffs effectively concede this point. LAL Br. 41 n.49.

The law applicable to the market-survey allegations was accurately analyzed in our opening brief, and plaintiffs' effort to refute our legal analysis is unconvincing in the extreme. Without explaining *why* Professor Areeda is wrong in stating that "[o]ne who seeks the opinion of a monopolist about a rival product is entitled merely to an opinion, regardless of how sound or objective it is" (P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 738 m, at 867 (Supp. 1992)), plaintiffs label his position "preposterous." LAL Br. 38.⁵ But the supposedly contrary authorities on which plaintiffs rely are themselves quite instructive. In 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738c (1978), the authors were discussing false statements about a rival (not debatable opinions about the capacity of a market) made to potential customers (not potential lenders), so their analysis is less closely on point than the passage we have quoted. The Areeda/Turner *conclusion* in that paragraph (as opposed to the preliminary observation that plaintiffs quote), however, is devastating to plaintiffs' position: "Essential, therefore, is a serious *de minimis* test. We would go further and suggest that such claims should presumptively be ignored * * *." *Id.* ¶ 738c, at 281.

Perhaps even more instructive is the only case plaintiffs cite, *National Association of Pharmaceutical Manufacturers v. Ayerst Laboratories*, 850 F.2d 904, 916 (2d Cir. 1988). The court did not, as plaintiffs claim, "f[i]nd" (LAL Br. 38) that a letter constituted a violation of Section 2 of the Sherman Act. Rather, the court reversed the grant of a motion to dismiss and remanded — "without prejudice to the filing of a motion for summary judgment at some future stage" (850 F.2d at 917) — because it thought that the plaintiffs should have an opportunity to prove that a letter asserting the inferiority of a competitor's product met a six-part test derived from Areeda: "a plaintiff may overcome the *de minimis* presump-

⁵ This Court, by contrast, has recognized that Professor Areeda's analysis provides a sound guide when the Court considers novel antitrust theories. *E.g.*, *Universal Analytics, Inc. v. MacNeal-Schwendler Co.*, 914 F.2d 1256 (9th Cir. 1990).

tion ‘by cumulative proof that the representations were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals.’” *Id.* at 916 (quoting 3 P. Areeda & D. Turner, *supra*, ¶ 738a, at 279).⁶

Plaintiffs’ proof in this case, even when given the benefit of every reasonable inference, did not come within light years of meeting those standards.⁷ Indeed, at trial, plaintiffs did not even seriously pursue the “false market survey” theory. Rather, they expressly admitted that “the actual words in it [the market survey] are true” (DSER 427) and pursued the theory that a “monopolist” violates the antitrust laws by providing *truthful* information to a lender who asks for it. Plaintiffs’ current claims of a “false market survey” are nothing more than a trumped-up string of complaints

⁶ Moreover, because this test was formulated in the context of commercial disparagement, it presupposes that the negative statements about a rival were *intentionally* made to deter others from doing business with the rival. In the market-survey context, such an intention can hardly be presupposed but must be proved. It is not enough to show that the opinion given of the rival’s prospects was imperfectly, or even negligently, formed. P. Areeda & H. Hovenkamp, *supra*, ¶ 738’m, at 867.

⁷ We do not respond separately in this reply brief to plaintiffs’ contrived “signaling” theory, which was adequately addressed in our opening brief. The record does not support plaintiffs’ factual allegations, for reasons that we elaborated in our opening brief and that plaintiffs’ record citations hardly refute. Indeed, the “signaling” theory simply makes no sense. Why would Brunswick — the guarantor of the loan — have to “signal” DCC not to make the loan rather than lawfully telling DCC that it chose not to guarantee this loan? Beyond this, the “signaling” theory fails as a matter of law. The theory turns on the mention of Brunswick’s plans in the McGann market survey and thus amounts to an assertion that Brunswick had a duty to keep DCC *ignorant* of its plans to enter the Palmdale market. Antitrust law imposes no duty to falsify or conceal material information. See *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1129 (7th Cir. 1983) (announcement of plans to introduce new product, even if the product never materializes, “can[not] amount to an exclusionary practice” unless “knowingly false or misleading”).

second-guessing the *standard* techniques of survey writer Steve McGann and carping about completely immaterial inaccuracies that were corrected before they had any consequence.

Plaintiffs argue that the market survey should have concluded that Palmdale could support two new 40-lane bowling centers, not one. In assessing plaintiffs' contention, the Court should be aware at the outset that *no one* expressed the opinion before this litigation that the market could support two new centers.

LA Land prepared its own market survey (Ex. 1005), which did *not* state that conclusion. DSER 331-332 (author claims to have held this view in 1988 but admits that he never stated it to anyone). Throughout 1988, LA Land maintained its demand for a "San Dimas" letter that would assure that the market would have only *one* new bowling center, behavior strikingly inconsistent with its present assertion that the market could support two new centers. LA Land even came to court and expressly asserted that the market could support only one new center and that Brunswick was required as a matter of law to cede that market opportunity to LA Land. See Brun. Br. 11. Only after the district court rejected that "astound[ing]" theory (9/13/88 RT 8) did plaintiffs dream up their current, diametrically opposite position. Finally, the market survey prepared for Brunswick's own internal use reached the exact same conclusion as the survey prepared for LA Land: "the market cannot support two new bowling centers." Ex. 70 at 4-06959; *id.* at 4-06960, SER 137; see RT 1738.

Plaintiffs never even attempted (see generally RT 551-565, 2485-2490) to "neutraliz[e]" (*Pharmaceutical Manufacturers*, 850 F.2d at 916) what they now claim was an egregiously false market survey. The LA Land witness who principally dealt with DCC acknowledged that, "to [his] knowledge, nobody on behalf of L.A. Land or any of its affiliated entities ever expressed one word of criticism about the methodology, the data or the conclusions in the Brunswick market survey to [DCC]." DSER 367-368. Plaintiffs nevertheless contend that they presented after-the-fact evidence of falsification sufficient to create a jury issue. But plaintiffs' claims crumble on examination.

Plaintiffs assert that the survey “failed to reasonably account for future population growth.” LAL Br. 17 n.18. There was, however, no evidence that McGann *ever* accounted for future population growth in any survey. The only industry expert who testified at trial opined that McGann’s approach was sound in this regard. DSER 1048.⁸ Failure to invent an entirely new approach to market surveys is hardly evidence of falsification or monopolization.

Plaintiffs complain that the survey failed to account for the imminent closure of the Antelope Valley Bowl. LAL Br. 17 n.18. McGann, however, did not know of that closing (McGann Dep. (att. to 14 RT) 131-132, DSER 495-496), and Brunswick’s Roach corrected the error – which was immaterial to the ultimate conclusion – before the survey reached DCC (Ex. 54A at 4, DSER 71; DSER 907).

Plaintiffs also complain that the survey erred by concluding that a population-to-lane ratio of 857:1 was unacceptable. LAL Br. 17 n.18. There is, however, widespread (even if not unanimous) agreement in the bowling industry, *including LA Land’s own market-survey writer* (see DSER 327-328), that a ratio of at least 1000:1 is necessary to justify a new bowling center.⁹

⁸ Indeed, the expert testified that McGann’s approach was sound in all respects. DSER 1038-1052.

⁹ Thus, plaintiffs in their own opening statement below conceded that the 857:1 ratio “probably posed an unacceptable risk for Deutsche Credit.” DSER 321. Accord McGann Dep. (Ex. 500) 87-88, 126-127, 133-134, 170, DSER 476-477, 493-494, 497-499; McGann Dep. (att. to RT 14) 106; Oseland Dep. (Ex. 500) 66-67, DSER 507-508; DSER 965. Plaintiffs note a few places in the record where some persons opined that a ratio below 1000:1 *might* be acceptable in some circumstances, but it hardly follows that a jury may be permitted to infer that McGann (who is *not* one of the witnesses who ever endorsed a ratio below 1000:1 in *any* circumstances) violated the antitrust laws by failing to make this case an exception to the usual 1000:1 rule. Plaintiffs’ reliance on Ex. 70, the internal Brunswick market survey for Palmdale, is particularly misplaced because that survey unambiguously *agreed* with McGann’s conclusion: “the market cannot support two new bowling centers.” SER 137. The 801:1 population-to-lane ratio found “acceptable” in that survey was the

Finally, plaintiffs complain that McGann “used population statistics that dramatically understated the actual population of the area.” LAL Br. 17 n.18. Whatever after-the-fact complaints plaintiffs may have about McGann’s population data, however, there is *no evidence* here of *any* departure from normal, legitimate business procedure. McGann obtained population statistics the same way he did in each and every survey he ever conducted: he obtained a report from Donnelley Marketing Information Services. See McGann Dep. (Ex. 500) 78, DSER 474; DSER 719-720. Other companies are in the business of providing population statistics, and apparently plaintiffs believe that McGann had a duty to search for more favorable statistics from one of those other companies. But monopolization law imposes no such duty to make special efforts for competitors. That is particularly so on the facts of this case, because *plaintiffs’ own market-survey writer* obtained population statistics from a different company that were no more favorable than those McGann used. RT 222, 295, 1514-1516, 2566-2568.

It would be a travesty to let the monopolization verdict stand on the ground that the market survey was actionably false. With lawyerly inventiveness, plaintiffs have nitpicked McGann’s survey, but even with the benefit of hindsight all they have identified are debatable judgment calls about how to perform a market survey — not departures from standard procedures, much less falsehoods. Contemporaneously, plaintiffs *never once* questioned the conclusion of McGann’s survey or produced a survey reaching a different conclusion. On the contrary, they insisted on a “San Dimas letter” assuring that the market would have only *one* new center. If a jury can be allowed to find a violation of the antitrust laws on facts like these, then every “monopolist” who ever expresses an opinion adverse to a competitor will be in grave danger. As a result, lenders like DCC will no longer be able to turn to large companies for opinions, and the efficiency of the market will suffer from the reduc-

ratio of the population *within a five-mile radius* of the proposed bowling center to the number of lanes, whereas McGann looked at the ratio of the population *within a ten-mile radius* to the number of lanes. The conclusion that 801:1 is acceptable within a five-mile radius in no way impeaches the conclusion that 857:1 is unacceptable within a ten-mile radius. See DSER 723.

tion in information. That is why Professor Areeda states that allegations like these must be treated with great skepticism, and that is why plaintiffs' "false market survey" claim cannot prevail in this case under the appropriate legal standard.

2. Delay

It does not matter whether the Brunswick Division's Roach took three months (as plaintiffs claim, LAL Br. 18 n.19, 38) or three weeks (as Roach testified, DSER 867-872, 904-906) to forward to DCC the incomplete financial information that plaintiffs provided to him.¹⁰ The "delay" made no difference to plaintiffs' ability to build a bowling center; the law does not impose a duty to move with any particular speed in helping a rival obtain financing, certainly not any duty that was breached here; and there was ample justification for waiting even longer because the financial information was incomplete.

The alleged delay made absolutely no difference to plaintiffs' ability to build a bowling center. BRC made the irrevocable decision to build *its* new bowling center on May 10, 1988. Ex. 141, DSER 106; Fogel Dep. (Ex. 500) 337-338, 354-355, DSER 839-842.¹¹ There is no contention that plaintiffs' financial materials should have been processed so fast (after allegedly being sent by Levine "around the beginning of May 1988," RT 772) that they

¹⁰ Plaintiffs claim that "there was controverting evidence that the materials were sent months earlier." LAL Br. 39. There was indeed evidence, which the jury was entitled to believe, that Perry Levine of LA Land sent materials "around the beginning of May 1988." RT 772. But Levine's own testimony shows that Roach did not *receive* what he sent. RT 775. There was no *conflict* in the evidence: Roach first *received* the necessary materials - which even then were incomplete - on July 7, 1988. Ex. 56, DSER 80; RT 777-779, 2140-2145, 2207-2209.

¹¹ Plaintiffs' contrary assertion (LAL Br. 18 n.20) ignores the witness's precision in stating that BRC would have abandoned its plans "if I was assured that somebody else had totally committed to build * * * before we did." RT 1809, SER 608. As that witness explained (DSER 728), plaintiffs were nowhere close to being "committed to build," in the sense in which he used that phrase.

would have arrived on Oseland's desk at DCC before May 10, 1988. But DCC was not going to make a loan to LA Land as long as Oseland believed that the market would support only one new center and that BRC would not commit not to build one. See note 4, *supra*. Thus, the loan would have been no more forthcoming than it was if the financial materials had been forwarded faster. Equally important, lining up construction financing was — as plaintiffs' chief witness admitted — the "necessary first step" to obtaining equipment financing from DCC. DSER 394. Yet LA Land had no construction financing until July 5, 1988 (see Ex. 1034-2, DSER 133; Brun Br. 8), and furnished DCC no evidence of construction financing until *August 22, 1988*, well after the end of *Brunswick's* alleged "delay." DSER 383, 397-401, 406, 448, 902-903. "Delay" is (to use plaintiffs' favorite phrase) a "red herring."

In addition, we explained in our opening brief why there is never a legal duty to assist a rival's financing and, *a fortiori*, no duty to adhere to a particular timetable in doing so. Brun. Br. 28-29 & n.15. Plaintiffs respond that assisting a competitor's financing is not at issue here because this is a case of "sabotag[ing] the lending process by delay[]" (LAL Br. 39), but there is no evidence of such "sabotage."¹² Plaintiffs' principal theory to justify the word "sabotage" is that Brunswick should not have been involved in the lending process at all: they assert that Brunswick "inject[ed] itself into the financing process as an intermediary between the

¹² Citing *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 840-841 (9th Cir. 1980), and *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987), plaintiffs appear to dispute our statement of the law applicable to efforts to assist a rival's financing. LAL Br. 37 n.47. Those cases, however, are entirely consistent with our position. *Hahn* upholds a cause of action for bringing baseless lawsuits unprotected by the *Noerr-Pennington* doctrine in order to *prevent* a rival from obtaining financing in the bond market. Obviously, it does not support the contention that there is a duty to move with particular speed in order to *assist* a rival's financing. *Hartz* involved not the initial attempt of a rival to obtain financing for a new venture but a manufacturer's sudden and drastic alteration of established credit terms, on which its longstanding distributor had detrimentally relied for many years, as a vindictive response to the distributor's attempt to deal in a rival product.

competitor and the lender, even though the competitor would prefer to deal directly with the lender.” LAL Br. 38-39. If plaintiffs’ case turns on that view of the parties’ relationships, however, it must surely fail. Brunswick was an “intermediary” (gathering and forwarding necessary documents and preparing a market survey) because DCC would not be in the business of making equipment loans if Brunswick did not furnish those services and guarantee the resulting loans. DSER 908-914, 926-929, 953; Ex. 76, DSER 83.

Plaintiffs’ entire “delay” case, to the extent it goes beyond complaints about the established and legitimate Brunswick-DCC relationship, consists of a footnote comparing the time Roach took to process the Palmdale package with the time he took to process *one* other package. LAL Br. 18 n.19.¹³ The time taken to process the Palmdale package, however, was well within the *range* of time that it has taken to process other such cases. See Brun. Br. 29 & nn.16-17. That is evidence of a failure to act with the utmost possible speed, perhaps, but not of “sabotage.”

We also explained in our opening brief that Roach’s actions were justified — as a matter of law — because the financial information he received from plaintiffs was incomplete in critical respects. Brun. Br. 29 n.17, 30. Plaintiffs respond that “[t]he information that Brunswick claimed was missing was also ‘missing’ from the San Dimas package which *was* submitted to [DCC] and eventuated on [*sic*] the requested loan” (LAL Br. 39), but that statement is false. There was no construction loan commitment in the Palmdale package, and indeed (as noted above) plaintiffs never *furnished* anyone evidence of such a commitment until August 22, 1988. There *was* a construction loan commitment in the San Dimas package. See Ex. 20 (August 11, 1987, Sumitomo letter), DSER

¹³ Plaintiffs also try (LAL Br. 18 n.19, 30) to make something of McMaster’s instruction to Oseland to put plaintiffs’ application “on hold” or “on the back burner,” without noting that the application was so held only for two days (August 8 to August 10, 1988), while McMaster obtained information Oseland had requested about BRC’s plans in Palmdale. See DSER 944-947, 960; Oseland Dep. (Ex. 500) 134-135, DSER 518-519.

15; Oseland Dep. (Ex. 500) 109-111, DSER 512-514.¹⁴ As also noted above, plaintiffs themselves even admitted that construction financing was the "necessary first step" before DCC would make an equipment loan. The inference of "pretext" and intentional delay that plaintiffs seek to draw is completely bogus.

3. Timberlake

Timberlake is another "red herring." Unless Brunswick unlawfully prevented plaintiffs from obtaining financing, plaintiffs were not going to build a bowling center with or without Timberlake's services and cannot recover damages; indeed, plaintiffs admitted at trial that lack of equipment financing, not failure to secure construction services, was fatal to their ability to build a bowling center. DSER 432. What is more, the Timberlake allegations cannot withstand scrutiny under the well-established body of law covering exclusive-dealing arrangements, a body of law that is adequately covered in our opening brief (at 35-36) and that plaintiffs completely fail to address.¹⁵ See also *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981) (upholding one-time agreement between supplier and purchaser that supplier would not deal with a competing purchaser). It is undisputed that there were many competent builders other than Tim-

¹⁴ Moreover, the San Dimas package was in such bad shape that Oseland of DCC was admonished by his credit committee never again to send a similarly incomplete package. DSER 943, 963-964; see also DSER 908 (Roach); Oseland Dep. (Ex. 500) 126-127, DSER 515-516.

¹⁵ Plaintiffs seek to invent a new and completely open-ended body of antitrust law, under which every agreement between one competitor and its supplier not to deal with another competitor would be scrutinized for "reasonableness," and indeed for an "efficiency" justification, by asserting that what is at issue here is *not* exclusive dealing but "a furtive arrangement that gave Brunswick veto power over Timberlake's dealings with competitors of Brunswick." LAL Br. 34. What plaintiffs have described, however (leaving aside the irrelevant and inaccurate, see Ex. 163, assertion that there was something "furtive" about Timberlake's established and well-publicized policy not to build in BRC market areas), is *precisely* what an exclusive-dealing arrangement is: an agreement that a

berlake (see, *e.g.*, DSER 407-408; see also RT 1134-1136), and that fact completely defeats plaintiffs' claim both as a matter of substantive antitrust law and as a matter of causation.

Given the irrelevance of this issue and the inadequacy of plaintiffs' response, we note in reply only one point. Plaintiffs have completely misrepresented the record by their repeated assertions that Timberlake "renege" on an understanding that it would build plaintiffs' bowling center. LAL Br. 17, 29, 32, 33. On January 11, 1988, Timberlake sent plaintiffs a letter expressing a tentative interest in building the Palmdale center *provided* that "a contract shall be negotiated between our companies within the next sixty days." Ex. 189, SER 208. No such contract was negotiated within 60 days, and Timberlake "renege" on nothing by refusing to build plaintiffs' bowling center. See also Timberlake Dep. (Ex. 500) 113, 169-180, 186-188, DSER 565, 571-582, 594-586; Timberlake Dep. (att. to 14 RT) 108-112, 122-124, DSER 560-564, 566-568.

B. The Record Shows No Monopoly Power

Although we believe that a showing of *supply* monopoly was necessary in order for plaintiffs to win this case, the only monopoly they even attempted to show at trial was a *retail* monopoly, and it is clear that the monopolization verdict cannot be sustained unless plaintiffs succeeded in showing such a monopoly. We demonstrated in our opening brief (at 18-24) that they did not succeed, both because the "100% market share" of a single retail outlet does not represent the kind of monopoly power with which antitrust law is concerned and because uncontradicted evidence showed that Brunswick *lacked* the power to exclude competition or control prices of retail bowling services in Palmdale, California, or anywhere else.

Despite their highly rhetorical effort to answer our argument (LAL Br. 22-29), plaintiffs have effectively conceded that we are right. They admit, in particular, that "[a] high market share does not 'give rise to an *irrebuttable* presumption of monopoly power.'" *Id.* at 25 (emphasis in original); see also *id.* at 26. Yet a high market share is *all* plaintiffs relied on in the trial court to "prove" monopoly power. Plaintiffs' closing argument amply confirms our point. 4/25/91 RT 43-44 (Entire discussion of monopoly power: "They have a hundred percent of the relevant product market * * *").

Now, if Brunswick has market power, meaning it has one hundred percent of the market, [you will have to consider] the next question * * *"). Plaintiffs now seek to resuscitate the finding of monopoly power on a ground that they *never* argued to the jury.¹⁶

On appeal, plaintiffs have dredged the record for supposed evidence of power to control price and to exclude competition, but their efforts fall woefully short. Plaintiffs correctly observe (LAL Br. 9) that BRC's Vista Lanes in Palmdale *opened* in 1989 with the highest prices of any BRC center (as one would expect from the newest facility in a chain), and from that fact they leap to the conclusion (*id.* at 24, 29) that BRC had the "power to control price" that reflects monopoly. In fact, the record compels the opposite inference. If BRC had the power to control price in Palmdale, Vista Lanes would have been able to *sustain* higher prices than

¹⁶ Citing only a jury *instruction*, plaintiffs describe as "simply false" our observation that plaintiffs relied on an irrebuttable presumption based on market share to prove monopoly power. LAL Br. 25 n.29. Our point, however, which is confirmed by plaintiffs' jury *argument*, is not that the jury was improperly instructed but that there was no *evidence* beyond market share of power to control price or exclude competition. In this regard, we also note plaintiffs' halfhearted argument (LAL Br. 21, 25) that *defendants* failed to preserve the issue of monopoly power for appellate review. Plaintiffs apparently would have this Court construe the absence of a "monopoly power" argument heading in defendants' post-trial briefs as a complete abandonment of the point notwithstanding the clarity with which defendants argued (CR 356 at 18; RT 1633) that there was no evidence of power to exclude competition, which is essential to a finding of monopoly. That is sufficient. See, *e.g.*, *Fineman v. Armstrong World Industries*, 1992-2 Trade Cas. ¶ 70,010, at 68,923 (3d Cir. Oct. 28, 1992) (although antitrust defendant's "counsel could more clearly have identified the grounds for directed verdict by intoning [particular] words, * * * or more elaborately arguing that ground," the issue was preserved because defense counsel "raised the factual components"). Indeed, the district court expressly recognized that Brunswick's lack of power to exclude competition was at the heart of defendants' directed-verdict argument. RT 1648-1649, E.R. 101-102 ("what bothers me is that there were other lenders and there were other builders, and * * * because there were other lenders and there were other builders available, you just wonder if they couldn't have gone to those builders or those lenders").

other BRC and non-BRC bowling centers that face bowling-center competition, but it was *not* able to do so. The record shows that over time Vista Lanes' prices were the same as or lower than several such centers' prices (DSER 706-709), and indeed were lower than the prices *LA Land* charged (DSER 846-854).¹⁷

Plaintiffs' "evidence" of the ability to exclude competition is equally deficient. It is surely *conclusive* proof of Brunswick's inability to exclude competition, unless there is some special entry barrier unique to Palmdale, that up to 100 new bowling centers open in the United States every year, many of them competing directly with nearby Brunswick centers. See Brun. Br. 20-21 & n.9 (citing evidence).¹⁸ Unable to respond to that evidence, plaintiffs assert in great detail (generally citing portions of the record for propositions that they do not support) that *one person* sought without success to enter the Palmdale market (LAL Br. 9-11, 27,

¹⁷ Plaintiffs also cite the testimony of Dave Osborn, an LA Land employee formerly employed by Brunswick, to the effect that *when he managed the Sands Bowl* in Lancaster, employment that he left in 1986 (RT 187), the Sands Bowl charged prices "comparable" to those of other bowling centers with arguably nicer facilities. LAL Br. 9; RT 269, SER 507. Outdated evidence of the ability to charge the *same* — not higher — prices as other bowling centers hardly shows the ability to charge a supra-competitive price. Cf. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2081, 2083 (1992) (charging *higher* prices for service of lower quality is evidence of market power); *Greyhound Computer Corp. v. IBM*, 559 F.2d 488, 497 (9th Cir. 1977) (inference of market power was reasonable because IBM "never set a price simply to meet competition, and * * * its prices were 5 to 15 percent above those of the best of its competition").

¹⁸ Plaintiffs try to paint Brunswick as controlling a bottleneck on new entry by asserting that, "other than [DCC], there were no viable lenders willing to finance the purchase of bowling equipment for new bowling centers" in 1988. LAL Br. 27 n.34. The record shows no such thing. The record does not *identify* (because Brunswick does not know) all of the sources of money for bowling centers, but it unequivocally shows that 45 new bowling centers were built in the United States in 1988, only 12 of them with DCC financing. DSER 989-990; see also DSER 986-987.

29). But none of that proof is relevant to the contested issue.¹⁹ “The power to exclude competition must be read as the power to exclude competition generally as opposed to the power to exclude a single competitor.” Hay, *Market Power in Antitrust*, 60 *Antitrust L.J.* 807, 820 n.50 (1992).²⁰

Because the evidence plaintiffs cite does not show, or give rise to a reasonable inference of, power to control prices or exclude competition, what remains is the uncontradicted evidence of *lack* of such power cited in our opening brief. Plaintiffs dismiss that evidence on the ground that it was “self-serving” and that “the jury was entitled to give [it] no weight.” LAL Br. 28 n.35. If judicial review of jury determinations is to have any meaning, however, a

¹⁹ Because plaintiffs’ summary of the “Gelber” evidence has little to do with any of the genuine issues on appeal, we do not pause to respond to every misstatement of the record, but the misstatements are numerous and egregious. To take just one example, plaintiffs insist that Brunswick in early 1985 tried to create “the false notion that Brunswick was planning to build a new bowling center in the relevant market.” LAL Br. 10. They then argue that Gelber’s May 1985 decision not to build was a response to Brunswick’s “false threat to build a new bowling center in Palmdale.” *Id.* at 11. Contrary to their unsupported assertion that this was a “false threat,” however, plaintiffs acknowledge that Brunswick’s decision *not* to build did not come until June 1985 (*id.* at 11 n.9). Gelber later sued Brunswick for an antitrust violation and lost. Exs. 2339-2340, DSER 236, 253.

²⁰ Plaintiffs also miss the mark completely when they dismiss AMF and Fair Lanes as potential entrants because those large companies expressed no interest in entering the Palmdale market. LAL Br. 27 & n.33. What is at issue here is the *ability* to exclude competition, which Brunswick certainly lacks as long as AMF, Fair Lanes, and a multitude of others build and operate new bowling centers. Whether a specific competitor was *interested* in entering a particular market under existing competitive conditions has nothing to do with the *ability* to block entry. Rather, as we previously observed (Brun. Br. 21 n.9), the absence of entry strongly suggests the absence of supracompetitive pricing. See *United States v. Waste Management*, 743 F.2d 976, 984 (2d Cir. 1984) (Winter, J.) (“The fact that such entry has not happened more frequently reflects only the existence of competitive, entry-forestalling prices * * *”).

finding of monopoly power cannot be sustained when *all* of the probative evidence in the record – other than the “100% market share” that plaintiffs admit is *not* controlling – shows the absence of power to control price or exclude competition.²¹ The finding of monopoly power should be reversed and the case remanded with directions to dismiss the monopolization count.

II. THE TORT JUDGMENT SHOULD BE REVERSED

Plaintiffs’ defense of the \$5 million tort judgment is cursory. LAL Br. 45-48. It is also unconvincing.²²

Plaintiffs first deny that there is a principle of California law requiring that the alleged tortfeasor be a stranger to the relationship allegedly disrupted. Plaintiffs are wrong. The tort of intentional interference with prospective economic advantage deals with the situation in which “the third party, a stranger to the economic relationship,” *i.e.*, an “interloper,” wrongfully and intentionally acts with the purpose to disrupt that relationship. *Buckaloo v. Johnson*,

²¹ Plaintiffs make little effort to refute the legal points made in our opening brief about the lack of monopoly status accorded a single retail outlet. Suffice it to say (1) that *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 392-393 (1956), strongly supports our position for reasons stated in our opening brief, notwithstanding plaintiffs’ correct but irrelevant observation (LAL Br. 27 n.31) that the case concerned market definition as well as the issue for which we cited it; (2) that our argument has nothing to do with “natural monopolies” notwithstanding plaintiffs’ characterizations (LAL Br. 26, 27); and (3) that *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), cited in LAL Br. 27 n.32, involved “a substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character” (342 U.S. at 147) – a far cry from owning the only gas station, drug store, or bowling center in a town.

²² Plaintiffs make a preliminary observation that “Brunswick’s defenses are inapplicable in circumstances of malicious conduct.” LAL Br. 46 n.59. They provide no authority for that statement, however, other than a “*Cf.*” citation to a case that provides neither direct nor inferential support. In any event, no reasonable jury could find malicious conduct in this case for all the reasons given in our opening brief and throughout this reply brief.

14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 752, 537 P.2d 865, 872 (1975). It has no application to a tripartite relationship such as the one in this case, where, by longstanding practice (without which DCC would not be making bowling loans at all, DSER 926), the borrower deals with Brunswick and Brunswick deals with DCC and guarantees the loans. Cf. *Gianelli Distributing Co. v. Beck & Co.*, 172 Cal. App. 3d 1020, 1052, 219 Cal. Rptr. 203, 220 (1985) ("there was no independent third party relationship between wholesalers and plaintiffs with which to interfere").²³

Plaintiffs next assert that Brunswick's status as guarantor of a loan to plaintiffs does not preclude the imposition of tort liability under *Hamro v. Shell Oil Co.*, 674 F.2d 784, 789-790 (9th Cir. 1982), because that status "played absolutely no role in the motivation behind the interference" (LAL Br. 47) and because Brunswick acted with the *sole* purpose to harm plaintiffs (*ibid.*). That statement, however, finds no support in the record and embodies an erroneous understanding of the long-established procedure by which DCC makes loans. The record amply shows that the Brunswick guarantee underlies the entire Brunswick-DCC relationship, including the requirement that Brunswick prepare a market survey and gather the client's financial information for transmission to DCC. E.g., DSER 926, 931-933, 966-971, 974-975. Roach's and McGann's jobs exist *only* because of that relationship, and it would be absurd to suggest that liability attaches unless Roach and McGann had that relationship specifically in mind when they took each step plaintiffs regard as having harmed them. And, of course, the record does not come close (for reasons discussed above and in our opening brief) to showing that Brunswick's routine actions were undertaken with the sole intent to harm plaintiffs.²⁴

²³ Plaintiffs also argue that this point should be disregarded as "moot" (LAL Br. 46) because defendants requested no jury instruction to this effect. It is settled, however, that following the denial of a motion for JNOV this Court applies "the law truly applicable to the case" without regard to the jury instructions. *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 182 n.5 (9th Cir. 1989).

²⁴ Michael Roach, who allegedly "delayed" transmission of plaintiffs' financial information to DCC so that BRC could "race" ahead of plaintiffs,

Plaintiffs next assert that they showed untruthfulness in the market survey. LAL Br. 47. That assertion is incorrect for reasons fully discussed above in connection with the market survey and the antitrust allegations.

Plaintiffs finally assert that the "privilege of competition" applies only to competition for *customers*, not suppliers or contractors" (LAL Br. 47) and only when the supplier cannot work for more than one company at a time (LAL Br. 48 n.63). They provide no support for those illogical legal theories, and they are adequately answered by *Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc.*, 46 Or. App. 199, 611 P.2d 658 (1980), which is discussed in our opening brief (at 41 & n.26) but which plaintiffs have ignored. See also *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981).

The tort judgment should be reversed for all the reasons given in our opening brief and in this reply brief. Most particularly, it should be reversed because Brunswick was a necessary participant in the LA Land-DCC relationship and, in that context, there is no evidence from which a rational jury could conclude that Brunswick did anything wrong. Plaintiffs have, as discussed above, done nothing but second-guess a standardized market survey and the speed with which Brunswick processed their financial information. As to Timberlake, Brunswick's alleged actions were undeniably protected by the "privilege of competition." Plaintiffs' allegations do not make out a tort any more than they make out an antitrust violation.

is a commission-compensated employee of the Brunswick Division and testified without contradiction that he had every incentive to assist his customers (such as plaintiffs) to move as rapidly as possible and no incentive to delay his customers so as to help BRC. See RT 2126-2128, 2160-2161, 2164-2165, 2171, 2173-2174. He has never even met or spoken to anyone at BRC. RT 2126-2127. Although Roach works for "Brunswick" in a sense, an "employee's position within the organization can[not] be entirely ignored when we are attempting to determine whether antitrust [or tort] activity was afoot at all." *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1370 (9th Cir. 1992).

III. BOTH OF PLAINTIFFS' CLAIMS FAIL FOR LACK OF CAUSATION

We explained in our opening brief (at 42-44) three reasons why, either as a matter of law or as a matter of sufficiency of the evidence, causation cannot be established in this case. Each of our assertions stands essentially un rebutted.

The chain of causation was broken because *both* plaintiffs and DCC made a "San Dimas letter" – which Brunswick had no obligation to give – a precondition to plaintiffs' project. The *lawful* failure to give that letter, not the alleged unlawful acts, absolutely precluded plaintiffs' proposed project. Plaintiffs' only answer is that they were *willing* to go ahead without a San Dimas letter. LAL Br. 40-41. The point, however, is not what hypothetical deal plaintiffs *might have* been willing to make with Brunswick, but why the deal that plaintiffs *did* make with Brunswick did not come to fruition. The only deal that plaintiffs *did* make with Brunswick – an agreement to buy equipment *if and only if* Brunswick agreed not to build a new bowling center in Palmdale – failed because Brunswick lawfully declined to refrain from competing.

The absence of *committed* equity investors also is fatal to plaintiffs' causation case. Plaintiffs now argue that they were "fully capable of raising the equity capital" (LAL Br. 41), but that is insufficient under *Bubar v. Ampco Foods, Inc.*, 752 F.2d 442, 452 (9th Cir. 1985). Plaintiffs are precisely analogous to "the management group" held not to have an antitrust cause of action in that case. Their claim of being *capable* of raising equity fails for the same reason that the *Bubar* court rejected "the management group's" argument that "they and the venture capital groups eventually *could have* * * * produced the required [money]": "the lack of *commitment* of the venture capital groups * * * [is] undisputed" (*ibid.* (emphasis added)).²⁵

²⁵ Plaintiffs' semantic argument (LAL Br. 41) that *Bubar* concerns "standing" whereas this case concerns causation is immaterial. *Bubar* holds as a matter of law that shareholders in a potential corporation cannot maintain an antitrust action unless they have commitments from those who will provide the remaining equity in the corporation. That holding is fatal

Finally, it is fatal to plaintiffs' case that *they chose* — and were not forced by Brunswick — to refuse to depart from their “business plan” and in particular refused to buy bowling equipment elsewhere or to finance the Brunswick equipment with their own funds when the DCC loan fell through. There indisputably were other ways to buy equipment, and plaintiffs indisputably had the money. See Brun. Br. 2, 4 n.1, 44 (citing evidence). But they preferred to argue to a jury that \$1 million spent on bowling equipment would turn into \$5 million of profits, instead of spending the money and confronting the realities of the market. Because it was *their* decision — not induced by Brunswick — to eschew spending the money, Brunswick's actions did not *cause* them any loss.²⁶

IV. THE DAMAGES AWARDED ARE IMPERMISSIBLY SPECULATIVE

Plaintiffs' liability case depends on the proposition that there was room for both plaintiffs and Brunswick to build new bowling centers in Palmdale in 1988. Their damages case, however, depends on the proposition that *only* plaintiffs would have built a new bowling center. Their damages expert admitted that the results would be “speculative and unknowable” if both centers were built. DSER 632-633. Plaintiffs now seek to resuscitate their damages study on the ground that their expert “did take the possibility of new competition into consideration in several respects.” LAL Br. 43. But their expert's way of taking new competition “into consideration” was simply to conclude that plaintiffs would achieve *the*

to plaintiffs' case. Whether the test plaintiffs fail is *labeled* “standing” or “causation” makes no difference. Defendants have consistently argued that *Bubar* requires rejection of plaintiffs' claim in its entirety. *E.g.*, CR 356 at 59-60 & n.27; CR 368 at 7-8 n.5.

²⁶ The point has nothing to do with mitigation of damages. We are not arguing that plaintiffs had a duty to make other use of resources they had committed to this project, but that they cannot recover damages when the only reason they did not build a bowling center is that they were unwilling to commit additional resources to this supposedly highly profitable project. Plaintiffs' response to our argument (LAL Br. 41-42), therefore, addresses an issue we have not raised.

exact same results with new competition as without it. DSER 634-635. Antitrust law, however, is premised on the principle that competition affects businesses' operating results. A fatally flawed damages study cannot be saved by contradicting that fundamental premise.

The damages study also was fatally flawed because plaintiffs used Brunswick's highly profitable Vista Lanes as a "yardstick" when plaintiffs' own management experience reflects a complete inability to make profits at a bowling center. See Brun. Br. 47 (citing *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 866 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981)).²⁷ Plaintiffs invite this Court to deem their bowling centers profitable on the ground that they made "substantial *cash flow* profits." LAL Br. 44 n.53. But there is neither legal nor accounting support for equating cash flow and profits.²⁸

Finally, the damages study was fatally flawed because, in contravention of every antitrust authority (see Brun. Br. 47-48), it awarded plaintiffs their "lost cash flow" rather than their lost profits. Whether an antitrust plaintiff can recover "lost cash flow" is an issue of *law*, and the established law reflects the considered judgment of the accounting community that depreciation is necessary in order to avoid gross overstatement of profits. The contrary opinion testimony of one expert for the plaintiffs in one case that cash flow is "better" because depreciation is "artificial" (see LAL Br. 44-45) is not a sufficient basis to *change the law*.

²⁷ It may be true, as plaintiffs say, that "[a] history of profitability is not required to prove profitability with 'reasonable certainty.'" LAL Br. 44 n.53. That has nothing to do with the issue here, however, which is whether another's profitable business is an appropriate "yardstick" to use to estimate the profitability of a business run by those who have been unable to make profits at other similar ventures. *Murphy Tugboat* addresses that precise question.

²⁸ Plaintiffs' major support for their position is a citation to testimony by defendants' expert (RT 2950-2951, SER 669-670), but the testimony says nothing supporting the proposition for which plaintiffs cite it.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case remanded with directions to enter judgment for defendants on plaintiffs' claims of monopolization and tort.

Respectfully submitted,

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