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FEDE AL ADE COMMI IO
Washingt n, D.C. 205 0

PE I IO FO ULEMAKI

BY

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A IO OF FLO IDA, FOOD & WA E AC IO , F IE D OF FAMILY FA ME , F IE D OF E EA , EAL, I E PUBLIC I E E , I I IA IVE FO MEDL, OKLA OMA EWA D

IP COU CIL, O A I A IO FO COMPE I IVE MA KE , PEOPLE PA I Y P O EC , PUBLIC U ICE, U AL ADVA CEME FOU DA IO I E A IO AL-U A (AFI-U A), A LUI VALLEY LOCAL FOOD COALI IO , E VICE EMPLOYEE I E A IO AL U IO , OCIALLY E PO IBLE A ICUL U AL P O EC & WA E OU E WO KE E OU CE CE E

A D I EI I DIVIDUAL CAPACI IE

B IA CALLACI, MA ALL EI B - e Y e A U K Y - e A & e Y e A b A K & - e

Petiti n f ule a ing

T e Open M rket In titute, t irty f rm n foo ju tice, in epen ent bu ine , l bor, public intere t, n worker rig t org niz tion n five c ol r ubmit t i petition, pur u nt to t e A mini tr tive Proce ure Act n t e Fe er l Tr e Commi ion Act, to reque t t e Fe er l Tr e Commi ion (“FTC”) initi te rulem king to pro ibit bu ine e from u ing e clu ive e ling, e clu ion ry p yment , n ot er imil r pr ctice (ere fter “e clu ion ry contr ct ” or “e clu ive rr ngement ”) t t ub t nti lly foreclo e riv l from cu tomer , i tributor , or upplier of critic l input . Un er t e reque te rule, t e FTC coul bring enforcement ction g in t firm t t eng ge in ny of t e con uct e cribe below.

Int ducti n

Monopoli t n ot er omin nt firm cro t e economy u e e clu ive rr ngement to m rgin lize riv l n pre erve t eir own power over cu tomer , i tributor , upplier , n worker . Firm wit omin nce c n coerce or in uce cu tomer , i tributor , n upplier into limiting t eir e ling wit riv l or not e ling wit riv l ltoget er. In concentr te m rket , monopoli t n oligopoli t c n u e e clu ive e ling, e clu ion ry p yment , n rel te pr ctice to t w rt t e entry n ucce of new n m ll firm n to re trict t e free om of t eir tr ing p rtner . T i e clu ion ry con uct, by tifling or re ucing bu ine riv lry on t e merit , c n inflict ub t nti l injury on con umer n eller , in t e form of ig er price , lower qu lity pro uct for purc er n lower price n ot er le f vor ble term of tr e for upplier .

In t e p t two ec e , t e FTC, t e ep rtment of Ju tice (“ OJ”), n priv te ntitru t enforcer ve ucce fully litig te n ettle m ny monopoliz tion uit lleging

improper e clu ion ry contr ct , inclu ing g in t omin nt firm in cre it c r network ,[1] o pit l ,[2] iron pipe fitting ,[3] microproce or ,[4] per on l computer oper ting y tem ,[5] pet i gno tic equipment,[6] n tr n mi ion for l rge truck .[7] A of June 2020, t e FTC t ree pen ing c e involving e clu ion ry contr ct by omin nt firm m nuf cturing or offering nti-p r itic me ic tion, pre cription routing,[9] n wirele mo em c ip .[10] In ition to t e e litig te ot

of re on ppro c to ry contr cting by omin nt m by citing t e purporte

benefit of e clu ive

Given t e pr f e clu ive rr ngement by min nt firm , t e FTC oul

initi te rulem ki bit t i pr ctice u ing it unf i et o of competition ut o

n t e A mini tr ure Act.[17] T e FTC oul b on t e implicit rule of f i

competition embo erm n Act c e l w n t e FT e plicit ut ority to i entif

pro ibi unf ir m ompetition.[1] Bec u e of t e very re l rm from e clu ivity

limite n unpe tific tion , t e FTC oul pro ibit, per e viol tion of t

Act, e clu ive lu ion ry p yment , n rel te pr ctice t t ub t nti lly forecl

riv l from cu tributor , or upplier of e enti l input . T e Supreme Court, in

interpreting t e Act re triction on e clu ive e ling, opte t i te t in t e 1 4

eci on *St n o. o li orni v. nite St tes*.[1] To provi e gui nce to bu ine

t e public, t e l efine " ub t nti l foreclo ure" n e t bli t t it c n be ow

t rong firm e, qu ntit tive foreclo ure, or qu lit tive foreclo ure. T i rule woul

pro i e gre t rity to bu ine e of ll ze . It woul encour ge omin nt firm t

compete t ro ot er t n be i e e clu ive e ling n oci te pr ctice . At t

me time, t ru oul llow m ll or non- min nt firm to u e e clu ivity t ey e it,

in ig t of t mi l ri k of e clu ion of riv l n coercion of tr ing p rtner .

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[16] *See Z Mer* , 6 F.3 t 271 "Due to t e potenti lly proco petitive benefit of e clu ive e ling greement , t eir leg lity i j g un er t e rule of re on.").
[17] *See* 1 U.S.C. 4 gr nting Co i ion power to ecl re n pro ibit "unf ir et o of co petition in or ffecting co erce").
[1] T e M gnu on-Mo W rr nty Act impo e peci l proce ure on FTC rule on unf ir or eceptive ct n pr ctice but it e ot pply to rule on unf ir met o of competition. 1 U.S.C. 7) 2). A re ult, FTC rule on unf ir et of co petition re governe by t e A ini tr tive Proce ure Act gener l notice- n -comment requirement for rulem king . N t'l Petroleum efiner A 'n v. FTC, 4 2 F.2 672 D.C. Cir. 1 73).
[1] 337 U.S. 2 3 4).

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t e i tributor purc e 100 ton per ye r. If it purc e 0 ton from t e omin nt firm, it

will p y tot l of $ 0,000. If, owever, it purc θ

wit t e centr l policy of bot 1 of t e S erm n Act n 3 of t e Cl yton Act *inst contr cts hich t e y reedom o rch sers to b y in n o en m r et*."4

In trilogy of c e reg r ing t e prev iling tying greement [49] between in epen ent e ler , m jor oil upplier , n tire, b ttery, n cce orie ("TBA") m nuf cturer , t e Supreme Co f o

ub t nti l common l w b ckgroun , e pre e n nti- omin tion principle n e ire to re i t concentr tion of economic power t roug ntitru t l w.[57]

In imil r pirit, t e r fter of t e Fe er l Tr e Commi ion Act of 1 14 e pre e n nti- omin tion principle n import nt objective of ntitru t l w.[5] For e mple, Sen. Cummin urge i colle gue eliber ting on t e FTC Act t t:

> We mu t o omet ing to pre erve t e in epen ence of t e m n i tingui e from t e power of t e corpor tion; t t we c

In re pon e to incre e competition n t e t re t of mi lew re, Micro oft forme e clu ive e l wit 14 of t e top 15 internet cce provi er (“IAP ”), w ic inclu e internet ervice provi er (“ISP ”) n online ervice (“OLS ”) uc AOL.[66] Micro oft greement pro ibite OLS from promoting or provi ing ltern tive to Micro oft Internet plorer.[67] Micro oft l o eng ge in e clu ive e l wit Apple, w ic w Micro oft prim ry, lbeit muc m ller, riv l in oper ting y tem for e ktop computer .[6] In t e greement, Micro oft woul evelop Office (wor proce ing uite) for t e M c OS oper ting y tem.[69] In e c nge, Apple w pro ibite from in t lling competitor internet brow er on Apple oper ting y tem n from encour ging con umer to u e brow er ot er t n Internet plorer.[7] Micro oft l o eng ge in e clu ive e l wit in epen ent oftw re ven or (“ISV ”). Micro oft greement require ISV to u e Internet plorer t e ef ult brow er for ny oftw re evelope wit “ yperte t-b e u er interf ce” n require t e u ge of ot er Micro oft tec nologie for t eir pplic tion .[71] Micro oft greement wit ISV were me nt to en ure t t current n future web-centric pplic tion woul only rely on brow ing tec nologie foun in Win ow n provi e by Micro oft.[72]

Micro oft greement pro ibite riv l brow er from obt ining ufficient c le nee e to become vi ble long-term mi lew re competitor. Tuɒ) t , Wo l O . 6 e S e W. MO e L O e r

U d a s v V sa U A , I c

Vi n M terC r were n rem in two of t e four omin nt provi er of network y tem in t e p yment c r in u try.[74] T e p yment c r in u try ever 1 1 yer . Vi n M terC r re open joint venture t t re compri e of t ou n of member b nk .[75] B nk c n be member of bot network .[76] T e member b nk ct i uer of c r , cquirer of t e tr n ction l inform tion, or bot .[77] Vi n M terC r re network t t receive t e tr n ction l inform tion n t en pprove or eny t e u er tr n ction for t e i uing b nk.[7] T e i uing b nk t en en t e pprov l to t e cquiring b nk rel ying t e tr n ction to t e merc nt ccepting t e con umer tr n ction wit t e c r t ey u e .[79] At t e time t e government file it l w uit, Vi n M terC r 47% n 26% m rket re, re pectively, for p yment c r tr n ction .

Vi in 1991, n M terC r in 1996, opte policie t t pro ibite t eir member b nk from i uing Americ n pre or i cover c r .[1] Americ n pre n i cover were t e only ot er competitor in t e p yment c r in u try. A ition lly, Vi n M terC r lly, r rn

re pectively. No b nk in t e Unite St te w willing to give up it member ip in t e Vi n M terC r network . [4] T roug t e e greement , Vi n M terC r re tricte competition on fee for merc nt bu ine e , limite con umer c oice of c i r F 0 i t i b F ν i i i

t eir i count by e ling e clu ively wit 3M n purc ing goo from m ny 3M pro uct line po ible.[91]

3M greement foreclo e LeP ge n prevente ot er firm from obt

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river to fin p rt n o component m nuf cturer rely on t eir pro uct bein

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for [illegible]cotine n opi te wit r w l.[126] To m nuf cture t e e rug , m nuf cturer mu t be ble to [illegible]t in t e ctive p rm ceutic l ingre ient (“API”).[127]

Seeking to r i e price in t e b ence of p tent protection n ot er m rket e clu ivitie ,[12] Myl n entere into erie of e clu ive greement wit API upplier in 1[illegible]7.

m rket ince 1 .[137] Intel re o t e revenue in t e e m rket con i tently e cee e 0%,

n Intel i not f ce effective competition from ny CPU m nuf cturer.[13] Intel w t e only firm wit t e bre t of CPU pro uct to meet ll t e requirement of, n be t e ole upplier to, mo t per on l computer O M .[13] Intel w l o t e only CPU upplier t en wit t e c p bility to upply ll or ne rly ll of t e requirement of t e l rge t O M .[14]

To m int in it monopoly po ition, Intel eng ge in o w p v i . 0 y %. o U i v i .

p yment were contingent on t e O M purc ing CPU e clu ively or lmo t e clu ively from Intel.[149]

Intel ction foreclo e t le t 60% of t e i

ervice n Wic i ll , Te .[166] Unite Region l m int ine 0% m ket re in inp tient

o pit l ervice on , Unite Region l l o monopoly power in tp tient urgic l

ervice [167] Uni egion l m int ine t le t 65% m rket re for tp tient urgic l

ervice [16]

nite on l entere into e clu ion ry contr ct wit e lt in urer t t e clu e

Unite egion competitor in t e relev nt m rket of Wic it F ll .[16] T e contr ct require

in ure o p ub t nti l pricing pen lty of 13% to 27% for Unite Region l ervice if t ey

inclu e co titor of Unite Region l in t eir provi er network.[170]

Unite egion l greement foreclo e t le t 35% of t e m rket.[171] T e greement

likel e ye n prevente competitor from e p n ing in, or entering, t e relev nt m rket ,

le ng r e lt c re co t n ig er e lt in ur nce premium .[172] By re tricting

in u er fr om to contr ct wit riv l o pit l n clinic , Unite Region l contr ct

n pen petition on price n qu lity wit e i ting provi er .[173] Unite greement

ob le iv effort to grow n obt in nece ry c le.[174]

P l r

Po Corp. w t e worl l rge t i tributor of pool pro uct .[175] i tributor purc e

pr uct m m nuf cturer n re ell t em to e ler .[176] Pool Corp. n tion l m rket

re of pro im tely 50% n w t e n tion l rge t buyer of pool pro uct , repre enting

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[166] *Id.*
[167] *Id.* t 1.
[16] *Id.* t 2.
[16] *Id.* t 2.
[170] *Id.*
[171] *Id.* t 1 .
[172] *Id.* t 21.
[173] *Id.* t 24–25.
[174] *Id.* t 25–26.
[175] Compl int t *3, Pool Corp., 2011 WL 5 1164 No. 101-0115).
[176] *Id.* t *3–4.

30% to 50% of m nuf cturer tot l le .[177] In ome loc l m rket , Pool Corp. m rket re of t le t 0% or ig er n m int ine it monopoly power for t le t five ye r .[17]

After Pool Corp. cquire competitor n oon fter ut it own, former e ler entere into t e i tribution bu ine in loc l m rket to compete wit Pool Corp.[179] In re pon e to t i new competition, Pool Corp. notifie ll t e m jor m nuf cturer (t ree of w ic repre ente 50% of t e m rket) in 2003 t t Pool Corp. woul top e ling wit ny m nuf cturer t ol ny of it pro uct to t e new entr nt n t re tene to termin te t e purc e n l of ll m nuf cturer pro uct n tionwi e.[1 0] T e m nuf cturer woul not be ble to repl ce t e volume of lo t le to Pool Corp. wit incre e le to not er i tributor.[1 1]

ue to Pool Corp. e clu ion ry term wit m nuf cturer , Pool Corp. i tributor riv l were foreclo e from 70% of t e m rket.[1 2] Pool Corp ction l o incre e t e price n re uce t e output of pool pro uct ; eterre , el ye , n impe e t e bility of ctu l or potenti l competitor to enter or to e p n t eir le in t e w ole le i tribution m rket; n re uce t e c oice of upplier v il ble to pool e ler .[1 3]

IDE Lab , I c

I XX L bor torie (“I XX”) 70% m rket re in t e evelopment, m nuf cture n le of point-of-c re (“POC”) i gno tic pro uct u e by veterin ri n w o tre t comp nion nim l for cert in e lt con ition .[1 4] T e POC m rket five i tributor

[177] *Id.* t *3.
[17] *Id.*
[179] *Id.* t *4.
[1 0] *Id.* t *4.
[1] *Id.*
[1] *Id.*
[1] *Id.* t *5.
[1 4] *Idexx La* , 155 F.T.C. 241 (2013), 2013 WL 364 97, *1–3.

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ctre be llowe m int in monopoli tic price , re uce con umer c oice, n imp e riv l coming ctive competitor .[207] Victre offere no cre ible bu ine ju tific on .[20]

D al v N s

New Corp. t e omi provi er in t e in- tore promotion m rket, ving m rke re over .[20] In- to omoter provi e irect m rketing m teri l for ret iler , w ic nclu e pri n electro ign ge, en -of- i le i pl y , elf-mounte i pl y , freeze i pl y , loor ign [10] Ret iler purc e in- tore promotion from provi er i pl y t e e m t to con r .

T e pl in llege t New Corp. eng ge in erie of e clu ive e l wit ret er . T roug e e contr New Corp. llege ly prevente competitor from obt in criti l m of ribution ne ry to become vi ble competitor.[211] T e pl intiff lleg t t e greem foreclo e 3% of t e m rket.[212] A ition lly, t e greement were t gere o t only 1 %-2 of t e tot l bu ine w v il ble in ny given ye r.[213]

Since t court coul t conclu e m tter of l w t t t e con umer benefit o g eement ou eig t e to competitor n con umer , t e court enie New Cor motion for u m ry ju gme t.[214] New Corp. oon fter ettle t e m tter wit t e pl int for $250 million.[2]

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[207] *Id.* t *5.
[20] *Id.*
[20] Di l Corp. v. New Corp., 165 F. Supp. 3 25, 2 S.D.N.Y. 2016).
[210] Di l Corp. v. New Corp., 314 F.R.D. 10 , 111 S.D.N.Y. 2015), *amended*, No. 13-6 02), 2016 WL 6 5 S.D.N.Y. Feb. , 2016).
[211] *Dial or* ., 165 F. Supp. t 2 , 31.
[212] *Id.* t 33.
[213] *Id.*
[214] *Id.* 33–34.
[215] N te R ymon , *New or to Settle In-Store romotion Liti ation for $280 Million*, REUTERS Feb. 2 , 2016), ttp ://www.reuter .com/ rticle/u -new -corp-l w uit-i USKCN0W2224.

C. Pen ing C e

T e c e t t follow in t i ection re ongoing n re t ifferent t ge of litig tion.

FT v Q alc mm, I c

Qu lcomm m nuf cture b eb n proce or n ot er emicon uctor evice u e in cell p one n t blet (collectively " n et ") n own n licen e relev nt p tent .[216] uring t i time, Qu lcomm m rket re of 100% for t e Premium LT mo em c ip et.[217]

In 2011, Qu lcomm offere Apple reb te to m ke Qu lcomm it ole upplier of c ip .[21] Qu lcomm w focu e oA *Q* e reb 1 b A *u* i o " e " *c* e *c* A L i m b A *u* i A i *I* A

power in t e C MA n premium LT mo em c ip m rket n m int in unre on bly ig roy lty r te .[224]

T e i t ict court gr nte perm nent injunctive relief.[225] T e court el t t Qu lcomm viol te Section 5 of t e FTC Act.[226] T e c e i currently pen ing on ppe l before t e Nint Circuit.[227]

FT v r scr s LL

Sure cript i e lt inform tion tec nology comp ny t t monopoly power in two ep r te but complement ry m rket : electronic pre cription routing ("routing")[22] n eligibility,[229] w ic re often collectively referre to "e-pre cribing."[23] -pre cribing i n ccur te n more efficient me n for pre criber , p rm cie , n p rm cy benefit m n ger to file n proce p tient pre cription .[231] In 2 9, Sure cript m rket re of 95% (of tr n ction volume) in bot t e routing n t e eligibility m rket .[232]

In re pon e to t e t re t of competition, Sure cript eng ge in e clu ion ry pr ctice beginning in 2 9. Fir t, Sure cript c nge it pricing policie to encour ge long-term e clu ivity.[233] T e contr ct term of t ree ye r n renewe utom tic lly.[234]

[224] *Id.* t 762–63.

[225] *Id.* t 1 2–13. [illegible]

[226] *Id.*

[227] i clo ure: T e Open M rket In titute file brief in upport of t e Fe er l Tr e Commi ion. *See* Brief of Amicu Curi e Open M rket In titute in Support of Pl intiff-Appellee, *Qualcomm*, 411 F. Supp. 3 65 , ttp :// t tic1. u re p ce.com/ t tic/5e449c c3ef6 752f3e7 c/t/5e 173111eef77c b33cf47/15 2 536923 /OMI-Brief-in-FTC-v.-Qu lcomm-FIL .p f.

[22] Sure cript Compl int t 1 (t ting routing i t e tr n mi ion of pre cription n pre cription-rel tel v S 4 m n 6 L N P

Sur

FT v Vy ra Pharmac cals, LL

Vyer P rm ceutic l (“Vyer ”) ol r prim,[245] life- ving rug for t e tre tment of To opl mo i . To opl mo i i p r itic infection t t fflict p tient wit HIV/AI S n c ncer n org n tr n pl nt recipient .[246] Vyer monopoly power in t e m rket for r

E r a mm ss D c s Aga s G gl A dr d

Google greement foreclo e riv l e rc engine from t le t 40%-50% of t e

m rtp one ol in

For t e evice to re c t e relev nt m rket, it mu t g in contr ct t roug t ir p rty entitie uc in ur nce comp nie , p rm cy benefit m n ger , n t te-b e Me ic i gencie . After t e l unc of Auvi-Q, Myl n offere l rge reb te to t ir p rtie . T e e reb te were offere on t e con ition t t t ir p rtie e clu e t e option to offer me ic l evice from ot er comp nie , uc S nofi.[275] Bec u e of t i e clu ion ry reb te c eme, Myl n prevente Auvi-Q from cce to 50% of t e uto-injector m rket. A it on lly, Myl n prevente c ool from igning contr ct wit S nofi by con itioning c ool contr ct on e clu ivity.[276] S nofi note in it compl int t t, w en it l unc e it injector in C n , it c pture 21% of t e m rket by t e en of it fir t ye r.[277] S nofi note t t bec u e C n i n provinci l ut oritie ve control over rug pl n , Myl n w not ble to u e monopoli tic pr ctice to e clu e S nofi from t e relev nt m rket.[278] In Augu t 201 , t e U.S. i trict Court for t e i trict of n gr nte Myl n motion to i mi in p rt but refu e to i mi ever l e clu ive e ling lleg tion .[279] In Febru ry 2020, t e court rule t t t e l w uit coul continue cl ction.[280]

Mar D ag s c r LLP v B c , D ck s &

Becton ickin on 60% m rket re in convention yringe , 60% re in fety yringe , n 55% m rket re for fety IV c t eter .[281] Group purc ing org niz tion (GPO) negoti te me ic l upply price wit m nuf cturer . T e GPO Vizient n Premier

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[275] *Id.*
[276] *Id.*
[277] *Id.* t *4
[278] *Id.* t *1 .
[279] *Id.* t *19.
[280] n M rgolie , *A Kan a it , Kan a , Rulin Allow Million to Join a Law uit ver the Hi h o t of E i en* , KCU (Feb. 27, 2020), ttp ://www.kcur.org/ e lt /2020-02-27/ k -city-k n ruling- llow -million -to-join- -l w uit-over-t e- ig -co t-of-epipen .
[281] Amen e Cl Action Compl int t 9, M rion i gno tic Ctr. LLC v. Becton, ickin on, & Co., 201 WL 6266751 (S . Ill. Nov. 30, 201) (No. 1 -01059), *vacated and re an ded u nom. M rion Healthcare*, 952 F.3 2 [erein fter Beckton ickin on Compl int].

g rner 75% of ye rly pen ing on me ic l evice n up e lt c re provi er .

A

L v Z ffa LL

UFC i mi e m rti l rt (MMA) promotion comp ny t t po e e 0% m rket re in t e m rket for t e promotion of lite Profe ion l MMA bout well monop ony for live lite Profe ion l MMA fig ter ervice .[2]

T e pl intiff llege t t t e UFC u e it monopoly n monop ony power to prevent MMA fig ter from p rticip ting in fig t for riv l promoter .[2] Specific lly, t e UFC greement inclu e e clu ivity provi ion t t pro ibit t e fig ter from p rticip ting in fig t t t re televi e or org nize by competm ein ***f*** y P u ***f*** g n 2 n u f ***f*** P u O i

Ant em, Actn , Cign , well numerou region l in urer .[3 5] J&J gr nt refu e to gr nt reb te to in urer for Remic e if t e e in urer covere Pfizer Inflectr . J&J greement l o require bun ling rr ngement in w ic t e corpor tion only offer reb te on t eir ot er pro uct if Inflectr w not covere in t e in ur n n of ot er in urer .[3 6] J&J m n te t t in urer eny cover ge for Inflectr or re f il fir t provi ion t t m n te t t t e p tient be pre cribe t e lower-co t me ic tion.[3]

J&J greement ve prevente lmo t ll n tion l in ur nce c er from c rrying Inflectr .[3] A re ult, J&J w ble to incre e t e price of Remic e e lt in urer n con umer wit out ver ely ffecting em n for t e rug.[3 9]

In Augu t 2 1 , U.S. i trict Court in Penn ylv ni enie J motion to i mi t e l w uit. T e c e i till ongoing.[31] In 2 19, J&J i clo e t t it w rt of civil inve tig tion by t e Fe er l Tr e Commi ion reg r ing it contr cting pr ctice wit Remic e.[311]

h r U , I c v All rga , I c

Allerg n Re t i , rug u e to tre t ry eye i e e, el 0% of t e m rket for ry eye i e e in t e Me ic re P rt pre cription rug m rket in 2 1 tnou , q e Reeq er&Jr u , . , 1 1 1

w ic t e F A pprove in 2016.[314] T e e rug re t e only two F A pprove tre tment for ry eye i e e.[315] Re t i i pprove for ymptom of ry eye i e e uc re uce te r flui volume, w ile Xii r been pprove for ign n ymptom .[316] In it fir t two ye r on t e m rket, Xii r el 35% of t e commerci l ry eye i e e m rket but only 10% of t e Me ic re P rt m rket.[317] T e Me ic re P rt m rket ccount for 40% of ll t e pre cription given for ry eye i e e.[31]

S ire l w uit g in t Allerg n llege t g fA*w* S F %l M*w* F u t f r f *w* S F %l M*w*

Id rs v Lv Na E r a m

Ticketm ter LLC 70% m rket re of t e prim ry ticketing in u try for m jor concert .[325] Live N tion ntert inment Inc. 60% m rket re in t e concert promotion in u try.[326] In 2010, Ticketm ter merge wit Live N tion, n ev

T roug e clu ive e ling rr ngement , Live N tion uppre e to Ticketm ter n m int ine it monopoly in t e m rket for prim ry ticket Con umer ve been force to p y e ce ive fee for prim ry ticket n ticket in t e n ry m rket.[334]

F s El All ars v Vars y Bra ds

V r ity Br n org nize competitive c eerle ing n nce compe on , l o known All-St r C eer, n ell pecific pp rel for t o e competition . V r ity n ol "All-St r Competition " w ere te m m e up of c eerle er compete g in t o er te m by performing c oreogr p e gymn tic n nce routine t t re core by ju ge . All-St r Gym , ome owne by V r ity n ome in epen ent, org nize te m for t e All-St r Competition . Report in ic te t t V r ity Br n ol two monopolie : 0% of t e All-St r Competition m rket n over 0% of t e All-St r App rel m rket, me ning t e pecific pp rel require for c eer competition .[335]

Accor ing to cl ction l w uit broug t by n All-St r Gym, V r ity Br n u e e clu ivity requirement , loy ty reb te , n i loy lty pen ltie , well tool uc cqui ition n copyrig t, to ntrenc it monopoly over t e All-St r Competition m rket n t e All-St r App rel m rket. V r ity llege ly u e it monopoly over All-St r Competition to enter into re trictive contr ct it All-St r Gym . Some of t e e contr ct commit gym n te m to p rticip te e clu ivel in V r ity All-St r Competition well purc e pp rel e clu ively from V r ity.[336] V r ity l o llege ly u e i loy lty pen ltie wit gym ; gym n te m ve to p y ig er fee r competition well ig er price for pp rel until t ey

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[334] *Id.*
[335] Compl int t 20, 25, Fu ion Elite ll-St r v. V r ity Br n No. 20-03521) [erein fter V r ity Br n Compl int], ttp ://bergermont gue. m/wp-content/uplo /2020/05/Fu ion-Elite-All-St r -v-V r ity-Br n -et- l-COMPLAINT-FILED-05-26-20.p f.
[336] *Id.* t 3.

meet minimum nnu l purc ing requirement .[337] Some rr ngement require gym to buy ll t eir pp rel from V r ity.[33] T e l w uit cl im t t V r ity even u e it control over u ge t All-St r Competition to re uce core for te m t t o not go to V r ity competition or u e V r ity pp rel e clu ively.[339]

T e e e clu ive rr ngement prevent riv l competition org nizer from putting on t eir own event , well prevent riv l pp rel comp nie from re c ing potenti l cu tome . T e e rr ngement t u pre erve V r ity monopolie in two m rket : t e All-St r Competit on m rket n t e All-St r App rel m rket. Ultim tely, t e pl intiff uing V r ity rgue t t V r ity e clu ive rr ngement rove up t e co t of p rticip ting in c eerle ing, w c t ey e tim te r nge from $3,000 to $6,000 per e on.[340] T e c e i currently pen ing in fe er l court in C liforni .

Da ry Pr c ss g Agr m s

omin nt cooper tive iry F rmer of Americ (" FA"), control roug ly 30 % of t e U.S. r w milk upply n ggreg te , m rket , n ometime proce e iry f rmer milk.[341] In ition to proce ing in ou e, t e co-op ell r w milk to equ lly l rge proce or , uc e n Foo , w ic ell 12% of ll U.S. milk.[342]

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[337] *Id.* t 3, , 27.
[33] *Id.* t 34.
[339] *Id.* t 17.
[340] *Id.* t 2.
[341] *D A re ort 2018 finan ial re ult ,* AI YBUSINESS (M r. 2 , 2019), ttp ://www. irybu ine .com f - report -201 -fin nci l-re ult -2/.
[342] Ameli Luc , *5 hart That Show How Milk Sale han ed and Made it Tou h for Dean ood to A ert ank u t y,* CNBC (Nov. 13, 2019), ttp ://www.cnbc.com/2019/11/13/ -c rt -t t- ow- ow-milk- e - ve- c nge . tml.

In t e e rly 2000 FA llege ly entere into 20-ye r greement to become t e e clu ive upplier of r w milk for e n Foo in e c nge for not competing wit e n in t e milk proce ing m rket.[343]

T i e clu ive upplying greement rme bot iry f rmer n con umer . Two ep r te c e broug t on be lf of iry f rmer llege t t FA u e it e clu ive upply greement to force non- FA member to join FA or u e it m rketing ervice to ell to critic l proce or e n. T i woul limit non- FA f rmer m rket cce n lower over ll price p i to f rmer .[344] A recent uit l o llege FA n e n greement to voi competing in e c nge for e clu ive ourcing l o r i e price c rge to milk buyer , uc grocery tore .

. Ot er Public Alleg tion of Improper clu ive Arr ngement

On top of t e e litig te , ettle , n pen ing c e , t e me i reporte ot er lleg tion of improper e clu ion ry contr ct .

F d rv c Ma ag m

Ar m rk, Comp Group, n So e o ol more t n t ree-qu rter of ll contr ct in t e foo ervice m n gement (“FSM”) in u try. T ey oper te c feteri n provi e ot er foo ervice t in titution uc college , port t ium , bu ine e qu rter , n pri on .[345]

[343] Compl int t 1, Foo Lion, LLC v. iry F rmer of Americ , Inc., No. 20-442) [erein fter FA Compl int], ttp ://www.courtli tener.com/ ocket/17175947/1/foo -lion-llc-v- iry-f rmer -of- meric -inc/.
[344] Se. Milk Antitru t Litig., 801 F. Supp. 2 705 . . Tenn. 2011); Al n I. Greene & Jo n S. ee, *rie ixin and Enforcement of the Antitru t Law in the Dairy Indu try,* 4 BLOOMB G L. P. – ANTIT UST &re

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$ # %&'()* $ + ,

- .

III. he ustificati ns f E clusi na y C nt acts A e Li ited and Unpe suasive

T e ju tific tion for e clu ive e ling re unper u ive, e peci lly for omin nt firm . Four gener l e pl n tion re often pre ente in efen e of e clu ivity, prim rily in t e conte t of e clu ivity wit w ole ler n ot er i tributor c rrying t e pro uct of ingle m nuf cturer. Fir t, m nuf cturer c n in uce loy lty n e ic tion from e ler bec u e e ler re eprive of t e free om to c rry competing pro uct n promote t em t t e e pen e of t e m nuf cturer goo .[377] Secon , m nuf cturer c n u e e clu ive e ling to protect t eir inve tment in e ler , uc tr ining of e ler t ff, from free ri ing.[37] In t e b ence of e clu ivity, e ler c n u e t i inve tment by one m nuf cturer to m rket n ell t e pro uct of t e m nuf cturer competitor .[379] T ir , m nuf cturer c n employ e clu ive e ling to prevent i tributor from p ing off t e pro uct of riv l g

even feel compelle to c rry pro uct t t it mig t not ot erwi e tock n ell.[35] T e loy lty r tion le f il to gr pple wi t e e ltern tive met o for ecuring iligent, committe i tributor n u e "loy lty" cover for in ul ting t e e clu ivity-con itione pro uct from e -to- e competition.[36]

In t e c e of omin nt firm , t e e ler loy lty problem i e peci lly unlikely. i tributor re typic lly compelle to c rry n ell t e pro uct of le ing firm , given own tre m purc er epen ence. A e ler t t f il to c rry n ell t e pro uct of le ing m nuf cturer ri k lo ing cu tomer .[37] clu ive e ling, me n of obt ining ition l e ler loy lty n e ic tion, i unnece ry n unw rr nte for omin nt firm bec u e of t eir t tu in t e m rket n bility to ecure loy lty t roug competition on t e merit .

To t e e tent t t m nuf cturer w nt i tributor to un ert ke peci l promotion l effort , t ey c n contr ct for t em.[38] M nuf cturer c n irectly rr nge for peci l m rketing by e ler n p y for ition l le ctivitie .[39]

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[35] *See* obert L. teiner, *Exclu ive Dealin + Re ale rice Maintenance: A owerful Anticom etiti e om ination*, 33 .W. U. L. v. 447, 457–5 2004) e cribing ow i count n ig -en ret iler c rrie t e eorge Forem n grill).

[36] erek Bok e pl ine t e t eoretic l problem wit t e loy lty ju tific tion:

> oug "loy l" e ler y ee ore efficient to t e eller, in t e en e t t t ey m rket more of i p rticul r pro uct, it oe not follow t t uc e ler re more efficient from t e t n point of t e public. ince e ler will gener lly be n iou to m ke muc money t ey c n, t ey not likely to pu t e goo of ot er pro ucer unle t e public e ire t e ot er goo or unle t e w ole le price on t e e gmt l " *A* mi - A *A l* mt o " *A* mi *A l* mt y " *A* mi I *A l*

Free ri in on m n ct rer investments in istrib tors

T e free ri er tory i l o of limite relev n e in t e re l worl . It re t on ever l que tion ble umption n ignore t e v il bilit of le re trictive ltern tive .

A ge er l principle, t e free-ri ing ju tific tion incorrectly ume t t p rty t t inve t in pro cing n ring knowle ge n ot r int ngible oul be entitle to m im l return on it in e tment. Accor ing to neocl ic l economic from w ic t e free ri ing ju tific tion i erive , l w oul llow cre tor of int ngible to cover it co t n obt in f ir return— return t t i ufficient to in uce t e effort in t e fir t pl ce.[39] n uring n *eq te* return i ifferent from provi ing *m xim l* return.[391] Any return bove t e equ te return i unnec ry n con titute "rent" (in t e ngu ge of neocl ic l economic).[392] For pre ent purpo , if m nuf cturer c n obt in n equ te return on it tr ining n ot er inve tment in e ler wit out e clu ivity, it oe not nee e clu ivity wit Ftnw e n A 3 - F c I e F c

fr nc i e fee.[39] T roug t e e p yment , m nuf cturer re compen te for t e provi ion of t e e ervice n o e ler c n no longer free ri e on t em.

Protection inst ssin o

T e p ing off ju tific tion for e clu ive e ling i we k. T e rgument i t t i tributor , in t e b ence of e clu ivity, c n p off ig er-m rgin but inferior pro uct lower-m rgin, ig er qu lity br n , problem for pro uct t t purc er c nnot e ily ifferenti te on f ce v lue. T i ju tific tion ro e in t e 1922 Supreme Court eci ion *FT v. Sincl ir Re inin o.*[399] In t t c e, t e oil comp ny efen nt (Sincl ir) in i te t t g t tion t t purc e it pump mu t e clu ively purc e it br n e g oline.[4] T e Court v c te t e FTC or er g in t Sincl ir, in p rt, bec u e t e e clu ivity g ve Sincl ir " mple ur nce of it [g oline] genuinene ."[4 1]

clu ivity, owever, oe not olve t i p ing-off t re t n remove t e nee for irect monitoring of e ler . ven un er e clu ivity, e ler etermine to p off, for e mple, c e p r n ig er m rgin g oline br n e ver ion c n m ke te lt purc e from riv l oil comp ny. Wit or wit out e clu ivity, ome m nuf cturer monitoring of

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[39] n y C.M. C e & Keit N. ylton, *Procom etitive Theories o Vertic l ontrol*, 5 STINGS L.J. 574, 6 7 (1999). For in t nce, in t e FTC eci ion i mi ing compl int g in t e ring i m nuf cturer, t e Commi ion re o e t t t e m nuf cturer nee e e clu ivity wit e ler to en ure t t t ey i not free ri e on t e le le t t e m nuf cturer provi e t em. Beltone lectronic Corp., 1 F.T.C. 6 , 1 1– 2 (19 2). T e m nuf cturer coul ve c rge e ler for t e e le le upfront bec u e t ey ppe re to be of v lue to e ler . By c rging for t e le , Beltone coul ve elimin te t e t re t of free ri ing irectly. In concurring t tement, Commi ioner B iley e pre e keptici m bout t e free-ri ing tory Beltone pre ente n wrote:

> Bec u e t e Commi ion' n ly i went beyon t e imple e ment of competitive effect t t interbr n level, it Opinion mig t be re to nitize y tem of irtig t intr br n re tr int in l interbr n competitive itu tion long ome ort of ig ly pre ict ble free ri e nger or ot er e cu e i rown up to ju tify t e re triction . I o not believe t i recor ow t t y tem of irtig t re tr int re on bly nece ry to c ieve Beltone' competitive go l . Beltone' le gener tion y tem w not unique to Beltone, n t e recor ow no pr ctic l free ri er t re t w et er re l or t eoretic . *Id.* t 1 7.

[399] *Sincl ir Re inin* , 261 U.S. t 463.
[4] *Id.* t 472.
[4] *Id.* t 475.

i tributor i nece ry. An oil comp ny concerne bout p ing off mu t till rely

on un c e ule n un nnounce in pection .[42] If e le n to be p ing off inferior

pro uct , it c n be termin te n ubject to ny contr ct ie . T i type of monitoring

ctivity i common in m nuf cturer- i tributor rel tion nece ry to en ure i tributor

compli nce wit contr ctu l term .[43]

At more fun ment l level, t e p ing-off ju n overlook t e pro ibition

g in t eceptive m rketing n t e m ny l w n ren v il ble to top n eter t i

con uct. Multiple bo ie of l w, inclu ing unf ir comp , con umer protection, n

tr em rk, pro ibit p ing off. Congre recognize t m from m rketpl ce eception (n

t e l ck of off etting ju tific tion) n outl we t e e t roug multiple t tute .[44] For

in t nce, p ing off c n viol te t e L n m Act n C Act b n on unf ir n eceptive

ct n pr ctice .[45] On top of reput tion l m ge lo of future bu ine , eller t t

eng ge in eception uct6cTz l4c/h6D4)u5 ,nA4 Tu1 E4C 6 D 8ur, y Cz1l uT G D6uu[4 b T 1DV1 u ,u3T T

conomies o sc le

clu ive e ling i not t e only, or even le t re trictive, w y for m nuf cturer to c ieve economie of c le. A f ctu l m tter, omin nt firm m y often lre y oper te t or ne r t e level t w ic it minimize t e ver ge tot l co t of pro uction. Given it ignific nt m rket po ition, omin nt firm i typic lly in very ifferent po ition t n new entr nt or m ll riv l t t m y be oper ting t uboptim l c le.

Firm l o ve le re trictive me n of c ieving economie of c le. Fir t, firm c n grow n c ieve pro uction t c le by elling t eir output t f ir price n wit re on ble non-price term .[407] Firm ve bro free om to i count n c pture re t roug ggre ive pricing, o long it rem in bove t e co t of pro uction. Secon , t ey c n l o offer true volume i count , w ic re b e on t e lower co t of pro ucing or i tributing l rger or er , t t encour ge purc er to buy l rge qu ntity of pro uct.[40]

In ee , e clu ive rr ngement , by blocking competitor entry n growt , c n impe e t e in u try-wi e tt inment of c le economie . T e e mple i cu e in Section II ow t t omin nt firm c n prevent t e growt of riv l . To t e e tent t t competitor e i t n rem in in t e m rket, e clu ive e ling m y confine t em to m ll perip er l po ition in t e m rket n tifle t eir growt . A re ult, e clu ive e ling c n ffirm tively t w rt entr nt n m ller riv l from e p n ing c p city n c ieving c le. clu ive e ling m y pro uce m rket omin te by one or few firm n fringe by et of non-t re tening, tunte riv l .

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n m rketing tr tegie . T eir w rene of unf ir competition pr ctice m y be f r more imme i te n ccur te t n t t of gency rulem ker n regul tor . L n m Act uit r w upon t i m rket e perti e by empowering priv te p rtie to ue competitor to protect t eir intere t on c e-by-ca e a i .).

[407] *See Grinnell or* ., 384 U. . at 71 per itting onopolie , nder t e er an ct, if t ey are “a con e ence of a perior prod ct, ine ac en, or i toric accident).

[40] Tom et l., *su r* note 2 , t 629 n.39.

!"#$%&'#(!) ' %' #%$'## +, % , +*, -. #$%$, " # ! #+$% *!" &' #, ! */ &$% ! "0

-! $' # $' - ! %1 #' ! %2[345] 6' 7! " " $' 8 -, ", . , ($9! #$, " ! " 0 ! ## -. # 0 -, ", . , ($9! #$, " : #

; %: " < * #($$ # # *, -. #$%$= #. * #$' ' # ! #-, ", . , ($# ! " 0 ! ' . $%$' 8 -, ", . , ($# * ! " &'

! " 0 +&" * #$, " ' ! ' ! *, 0 , ++! $%*, -. #$%$, " +, %# $ ' &7' #, +*, %, %#$, " ' 2>, % ?! -. (:

-, ", . , ($# * ! " ", #&' ?* (&' $= 0 ! ($' 8) $# *&' #, - %: ' & . ($ %: ! " 0 0$ #%$7&#, %: ' , - +, %

, +7 (,) @, ' #. %$* $' 8: ! " 0 #, %#$, &' . %* #$' ' ' &* ! ' 0 * . #$, " ! " 0 $' 0&' #%$ (' ! 7, #. 8 #,

-! $' # $' , %1 &8- "## $%,) %2 > A < * # $' 7! " " $' 8 &" +! $%' # , 0' , +*, -. #$%$, " : 8, '

+&%# %7B=$%#& , +$# $' * $ $ " * B' # " 0! %0 2 6#. %, 7# # ' ($ # 0 . %* #$' ' : ! ') ((, # %&" +! $%

*, -. #$%$= #. * #$' ' : = ") " &" 0 %#1 " 7B+$% ", #. , ' ' ' ' $' 8 -, ", . , (B, %' ! %@, ", . , (B

. ,) %2

<2 ; %: " < * #CDE! " , " F, ", . , ($9! #$, "

; %: " < * # ' #7($ ' %&(' , ++! $%*, -. #$%$, " +, %1 * #&! (! " 0) , &(0@

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! " 0 *, " ' . $%$' 8 #, -, ", . , ($9 -! %1 # 2[3 4] (!) . %, 7# ! * #&! (! " 0 . , # " #$ (-, ", . , ($#

HIJK LMNOP QRRSRTUVSQQQQ WJI KT QWQWTWQJHWWTWXJP OYZ[3] < * * , %0$' 8(B: ; * #$, " G7! %

-, ", . , ($# ! " 0 ! ' . $%$' 8 -, ", . , ($# +%- &' $' 8 * %#$' *, -. #$%$= #. * #$' ' #, -! $' # $' , %

[345] [UUJI\ QY] M MNOUJW OWQ WTRP QQ JK_ MNOTWQQWSDMRP DLXIJMQUMUJKX OMQQ W_WJMUJKX OMQMIDZ [MWTWQQ
` $' +$ (0 A, 2=2a ; < b #%(&- A, 2 35c a 2, 2dGe: dde f 554gf/ &, #$' 8 E%) " ; , A, 2=2a " $# 0 ; ## ' : dh4 a 2, 2
G53: dG4 f 5 Ggf -. ! ' $ $' , %8$' ! (gg2 $ * (! $ - [illegible]

cquire monopoly. At t e me time, t e t tute permit firm to compete t roug pro uct improvement even if t i con uct re ult in or m int in monopoly.[412]

Congre , in en cting t e S erm n Act, rew i tinction between growt t roug unf ir met o ver u growt t roug f ir met o . It ime to pro cribe t e former monopoliz tion n permit t e l tter f ir n benefici l competition on t e merit .[413] In congre ion l eb te over t e S erm n Act, Sen . enn , mun , n Ho r offere gui nce on t e me ning of monopoliz tion, employing t e e mple of ypot etic l c ttle monopoli t to i tingui f ir from unf ir met o of competition n to i entify t e circum t nce un er w ic t e cqui ition of monopoly woul *not* viol te t e oon-to-be-p e S erm n Act.[414]

T e S erm n Act, interprete by t e court , re trict ctu l n woul -be monopoli t from u ing t eir m rket omin nce, uperior fin nci l power, or tortiou n unet ic l pr ctice to e clu e n n ic p riv l . W et er cert in con uct run foul of t e S erm n Act epen on w et er firm i or i not monopoli t. T i i tinction between monopoli t n non-monopoli t i import nt. Con uct un ert ken by monopoli t c n be illeg l even if t e me con uct i benign w en un ert ken by firm wit out ignific nt m rket power.[41]

bot ge or ot er ct of property e truction.[427] For e mple, t e N tion l C Regi ter Comp ny— omin nt firm century go—m int ine it monopoly, in p rt, t roug ct of bot ge g in t t e m c ine of riv l .[42] Among ot er form of tortiou or unet ic l e clu ion ry con uct, eception c n l o be t e b i for ntitru t li bility.[429]

ven t e S erm n Act pro ibit monopoli t from cquiring, m int ining, or e ten ing t eir power t roug e clu ion ry, pre tory, n ot er unf ir met o , it llow t em to compete t roug non-pre tory price cutting n pro uct improvement . Monopoli t re, in gener l, free to cut price (o long t ey rem in bove co t), improve t eir pro uct , n inve t in pl nt n re e rc n evelopment.[43] In ot er wor , t e S erm n Act re trict growt t roug t e u e of m rket omin nce, below-co t pricing, n tortiou con uct but permit , even for monopoli t , growt t roug new n improve pro uct n inve tment in pro uctive c p city.

B. T e FTC Act Pro ibition on clu ion ry n Pre tory Pr ctice in T eir Incipiency

T e FTC Act pro cribe pr ctice t t re ten to viol te t e S erm n n Cl yton Act . Buil ing on norm embe e in t e common l w n e pre e in t e congre ion l eb te over t e S erm n Act, t e r fter of t e FTC Act took n e pre ly mor l view of m rket competition n i entifie ever l competitive ct n t ctic , inclu ing preferenti l contr ct ,

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[427] Conwoo Co. v. U.S. Tob cco Co., 29 F.3 76 , 7 7– (6t Cir. 2 2); By r v. Bluff City New Co., 6 9 F.2 43, 54 n.3 (6t Cir. 1979).
[42] Kennet P. Brevoort & ow r P. M rvel, *Su e ful Mono olization Throu h redation: The National a h Re i ter om any*, *in* ANTITRUST LAW AN CONOMICS 5 (Jo n B. Kirkwoo e ., 2 4).
[429] Allie Tube & Con uit Corp. v. In i n e , Inc., 4 6 U.S. 492, 5 (19); W lker Proce quipment, Inc. v. Foo M c inery & C emic l Corp., 3 2 U.S. 172, 176–7 (1965); *Mi ro oft*, 253 F.3 t 76–77.
[43] *See Grinnell*, 3 4 U.S. t 57 –71 " e offen e of onopoly nder [ection 2] of t e er an ct a two element : (1) t e po e ion of monopoly power in t e relev nt m rket n (2) t e willful cqui ition or m inten nce of t t power i tingui e from growt or evelopment con equence of uperior pro uct, b ine ac en, or i toric accident.); United tate v. l in Co. of erica, 148 F.2d 416, 430 2d Cir. 194) and, J.) " ingle prod cer ay be t e rvivor o t of group of ctive competitor , merely by virtue of i perior kill, fore ig t and ind try.

unf ir. Like t e ot er l n m rk ntitru t t tute of 1 14 (t e Cl yton Act), t e FTC Act i n incipiency t tute n ccor ingly pro ibit unf ir competitive pr ctice well before t ey ctu lly re tr in tr e or cre te, m int in, or e ten monopoly. Con equently, t e FTC c n i entify n pro ibit unf ir competitive pr ctice before t ey ri e to t e level of illeg l monopoliz tion un er t e S erm n Act. T e Supreme Court pplie t i legi l tive purpo e in it interpret tion of t e FTC Act. Accor ingly, pr ctice like e clu ive e ling n tying c n viol te t e FTC Act wit out nece rily viol ting t e S erm n Act. A re on ble po ibility of unf irly e clu ing riv l or injuring con umer i enoug .[431]

In t e legi l tive eb te over t e FTC Act, t e elimin tion of unf ir competitive pr ctice w n import nt t eme. r fter n proponent of t e bill tre e t e nee for en uring f ir n one t pr ctice in t e m t eixpinrpo) rg). nS.eS) j m). T S.oO) t T c. p O r e p) n g p r) r g . S r j) T . O

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[34Z] f /mi % 344 Va

[33a] S= kno UT =d =3 e3 :=Z=3;

[T] e e enti l nticompetitive vice of uc n rr ngement i t e utiliz tion of economic power in one m rket to curt il competition in not er. Here t e TBA m nuf cturer purc e t e oil comp ny economic power n u e it p rti l ub titute for competitive merit in g ining m jor re of t e TBA m rket.[46]

T e Fift Circuit, in reviewing t e FTC ce e- n - e i t or er, ecl re t t t e FTC Act pro ibit pr ctice t t *co*omin 6Mi. ,) n *l* **h** n t bg lyiSnyeCic ,n

1) T e power of t e firm or firm u ing e clu ivity,

2) T e fr ction of cu tomer , i tributor , or upplier boun by e clu ivity, or

3) T e ignific nce of t e cu tomer , i tributor , or upplier boun by e clu ivity.

T i rule woul cl rify t e l w on e clu ive rr ngement , encour ging omin nt firm to compete on t e merit n llowing mo t firm to u e e clu ivity in t eir contr ct .

W ile enforcer c n n ve ucce fully c llenge e clu ive rr ngement un er t e rule of re on,[464] t i prev iling leg l t n r multiple eficiencie . Fir t, t e rule of re on, wit it f ct-inten ive inquiry,[465] i poor n lytic l fit for e clu ion ry contr ct by omin nt firm . T e rm from e clu ion ry contr cting n rel te pr ctice re re l n ocumente w ere t e ju tific tion re of e peci lly limite relev nce to omin nt firm .[466] Accor ingly, ntitru t l w oul e vily re trict t e pr ctice.[467] Secon , t e rule of re on, by pl cing mo t of t e leg l bur en on t e pl intiff, require t e government n ot er enforcer to evote e ce ive time n re ource to eveloping n litig ting c e.[46] Bec u e [illegible]

ntitru t l w uit un er t e rule of re on i e tr or in rily ifficult to pro ecute n win. In ee , t e recor ugge t t t t e rule of re on ppro im te t n r of pr ctic l leg lity.[469] In pr ctice, t e rule of re on me n t t omin nt firm c n u e e clu ion ry n ot er unf ir competitive pr ctice wit out t e fe r of ignific nt leg l con equence .

T ir , even t e rule of re on free l rge corpor tion wit op i tic te coun el to eng ge in e clu ion ry contr cting, it offer little gui nce to ri k- ver e bu ine e t t c nnot pen ub t nti l um on out i e coun el. W ile it offer ome m rker on w en e clu ive e ling m y viol te t e S erm n Act, t e rule of re on oe not provi e pro pective cl rity to firm t t w nt to u e e clu ivity for benefici l or innocuou en .[47]

Congre in ee rejecte t e pplic tion of t e rule of re on to cert in e clu ive rr ngement . It en cte t e Cl yton Act to en ure t t e clu ive rr ngement in t e le of goo re governe by impler n tronger leg l t n r t n t e rule of re on.[471]

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[469] *See* Mic el A. C rrier, *The Rule of Rea on: An Em irical U date for the 21 t entury*, 16 EO. MASON L. EV. 827 2 9) fin ing t t, for ntitru t c e pro *n : T R T “ l* C e j “ c *l T f f f* T “ c : *T o : A* T *R* T “ *l* C i j

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VI. C nclusi n

T e FTC oul initi te rulem king to pro ibit e clu ive rr ngement by omin nt firm . Wit t e pre ent rule of re on ppro c , ntitru t enforcer mu t evote un ue time n re ource eveloping n pro ecuting c e g in t omin nt firm e clu ion ry con uct, me ning t t m ny omin nt firm likely voi li bility for rmful e clu ive e ling. At t e me time, t i t n r oe not provi e muc gui nce to bu ine e n t e public. Bec u e of t e very re l rm from e clu ivity n it limite n unper u ive ju tific tion , t e FTC oul pro ibit, per e viol tion of t e FTC Act, e clu ive e ling, e clu ion ry p yment , n rel te pr ctice t t ub t nti lly foreclo e riv l from cu tomer , i tributor , or upplier . To provi e leg l gui nce, t e FTC oul efine " ub t nti l foreclo ure" n ol t t it c n be own t roug firm omin nce, qu ntit tive foreclo ure, or qu lit tive foreclo ure. Rel tive to e i ting leg l t n r , t i rule woul provi e gre ter leg l cl rity to bu ine e of ll ize . It woul encour ge omin nt firm to compete t roug me n be i e e clu ive e ling n rel te pr ctice n , t t e me time, woul llow m ll n non- omin nt firm to u e e clu ivity t ey ee fit.

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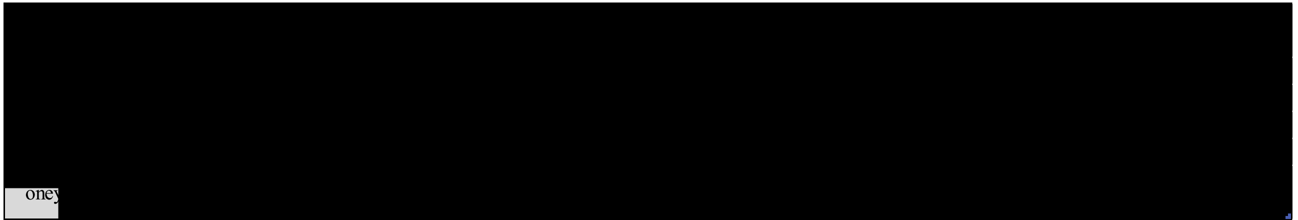
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O ganizati nal Petiti ne s

T e **Open Ma ets Institute** (OMI) i non-profit org niz tion e ic te to promoting f ir n competitive m rket . It oe not ccept ny fun ing or on tion from for-profit corpor tion . It mi ion i to fegu r our politic l economy from concentr tion of priv te power t t un ermine f ir competition n t re ten liberty, emocr cy, n pro perity. OMI regul rly provi e e perti e on ntitru t l w n competition policy to Congre , fe er l gencie , court , journ li t , n member of t e public.

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T e **De and P g ess Educati n Fund** e uc te it two million member n t e gener l public bout m tter pert ining to t e emocr tic n ture of our n tion communic tion infr tructure n govern nce tructure , n t e imp ct of corpor te power over our economy n emocr cy.

T e **Fai W ldtuh u** n , f c **y u** y **E** l **y h u** n , , l c **y u** y **d** l **y h u** n **y u**

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i las uggenbe ge i t e ecutive irector of t nform tion Society Project n Lecturer t Y le L w Sc ool. Hi re e rc focu e on t, contr ct , n con umer protection t t e inter ection of l w n tec nology.

anju ta Paul i A i t nt Profe or of L w t W yn Univer ity, currently Vi iting Profe or t Univer ity of Minne ot L w Sc ool. S e n te c e in t e re of l bor n ntitru t l w, well corpor tion . Her work e re or i fort coming in, mong ot er , t e UCLA L w Review, L w & Contempor lem , n t e Berkeley Journ l of