NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUMOTEXT CORP., Plaintiff-Appellant, v. ZOOVE, INC., DBA Starstar Mobile; et al., Defendants-Appellees.	No. 20-17245 D.C. No. 5:16-cv-01370-BLF MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Submitted October 22, 2021**
San Francisco, California

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,*** District Judge.

Sumotext Corp. appeals the district court's dismissal of Mblox, Inc. at the pleadings stage and the district court's entry of judgment, after a jury trial, in favor of Zoove, Inc., Virtual Hold Technology, LLC

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

("VHT"), StarSteve, LLC, and VHT StarStar, LLC (collectively, the "Joint Defendants"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court properly dismissed Sumotext's claims against Mblox under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. To withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Sumotext's complaint had to plead "enough facts to state a claim to relief that [was] plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To state a § 1 claim, Sumotext needed to plead evidentiary facts establishing (1) an agreement or conspiracy, (2) to harm or restrain trade, (3) which injured competition. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). To state a plausible claim under § 2, Sumotext had to allege "(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003).

Sumotext's complaint is devoid of evidentiary facts which, if true, would establish that Mblox joined a conspiracy to restrain trade. Sumotext argues that a letter of intent executed by Mblox and StarSteve is "direct evidence" that Mblox entered an anticompetitive agreement. But the terms that Sumotext complains of were part of a "proposal" for a "Possible Acquisition," and nothing suggests that those terms were incorporated into a definitive agreement or that Mblox otherwise agreed to be bound by them. *See*

Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint."). Mblox's decision to assign its contracts to Zoove and then sell the company to VHT could just as easily suggest a lawful, arms-length transaction as it could an illegal conspiracy. *See Kendall*, 518 F.3d at 1049 ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws."). And Sumotext's allegation that Mblox engaged in a horizontal restraint on trade does not save its claim from dismissal. *See William 0. Gilley Enters., Inc. v. Atl. Richfield, Co.*, 588 F.3d 659, 663 (9th Cir. 2009) ("Whether a plaintiff pursues a per se claim or a rule of reason claim under § 1, the first requirement is to allege a contract, combination in the form of trust or otherwise, or conspiracy." (internal quotation marks omitted)).

Sumotext's § 2 claim is also deficient because the complaint does not adequately allege that Mblox joined a conspiracy to monopolize. Sumotext baldly alleges that Mblox "joined, furthered, [and] profited from a Conspiracy to monopolize the national Market for dial codes." But the complaint is "devoid of further factual enhancement," and thus fails to "state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Sumotext's arguments against dismissal are not well taken. Sumotext contends "the district court failed to even address [its] separate § 2 allegations," but this contention is baseless. The district court addressed both of Sumotext's antitrust claims against Mblox and dismissed the claims because Sumotext "failed to allege facts showing that Mblox joined the alleged conspiracies." Sumotext's argument suggesting Mblox withdrew from the alleged conspiracy misconstrues the district court's order. The district court did not assess whether Mblox withdrew from an alleged conspiracy to monopolize; instead, the district court correctly found that Sumotext did not allege facts showing that Mblox joined the alleged conspiracy in the first place. Therefore, dismissal of Sumotext's claims against Mblox was warranted.

2. The district court applied the correct legal standard when resolving Sumotext's motion to exclude the testimony of Debra Aron, Ph.D., the Joint Defendants' expert witness. Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (en banc), *overruled on other grounds by United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020) (en banc). To satisfy Rule 702, expert testimony must be relevant and reliable. *Id.* The district court acknowledged these requirements and performed a "flexible inquiry" because "Sumotext's challenges [were] not framed in terms of the four factors discussed in *Daubert*." *See Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (noting the Rule 702 "inquiry is flexible" and "should be applied with a liberal thrust favoring admission"

(internal quotation marks omitted)). The district court therefore applied the correct legal standard when resolving Sumotext's motion to exclude.

The district court did not abuse its discretion in finding Dr. Aron's testimony to be sufficiently reliable. *Barabin*, 740 F.3d at 460 (reviewing the admission of expert testimony for an abuse of discretion). Dr. Aron's testimony had a "reliable basis in the knowledge and experience of [her] discipline." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993)). She formed her opinions based on a variety of sources, including industry publications and industry executives' deposition testimony.

Even assuming the district court abused its discretion by failing to make an express relevancy finding, the error was harmless. *See United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007). Dr. Aron's testimony did not prejudice Sumotext because "it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Barabin*, 740 F.3d at 465 (quoting *Jules Jordan Video, Inc. v. 144942 Can. Inc.*, 617 F.3d 1146, 1159 (9th Cir. 2010)). Moreover, "the record shows that [Dr. Aron's] testimony satisfied the requirements for admission." *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190 (9th Cir. 2019) (internal quotation marks omitted). Expert testimony is relevant if "it logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995). By highlighting alleged flaws in Dr. Sullivan's methodology and market definitions, Dr. Aron's testimony undermined Sumotext's antitrust claims and "logically advance[d]" the Joint Defendants' defense. *Id.* Her testimony thus clears relevancy's low bar. *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

We also reject Sumotext's argument that Dr. Aron improperly testified as a summary witness. "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Fed. R. Evid. 703. Dr. Aron formed her opinions based on, inter alia, her experience as an economist, her review of customer data and financial data provided by the parties, independent industry research, and her review of deposition testimony. Synthesizing that information, Dr. Aron criticized Dr. Sullivan's opinions. Dr. Aron did not simply repeat testimony offered by lay witnesses at trial. Accordingly, the district court did not commit reversible error.[1]

3. The district court properly required Sumotext to prove by a preponderance of the evidence a relevant antitrust market. Sumotext challenges the application of the burden of proof on three grounds, none of which are persuasive. First, Sumotext's argument that the

[1] Sumotext identifies three objections that it made at trial, but it does not develop an argument based on those objections. We conclude that Sumotext has abandoned the issue, and our refusal to review the issue will not result in manifest injustice. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *see also* Fed. R. App. P. 28(a)(8)(A).

district court required it "to prove the existence of the relevant market circumstantially" is belied by the record. The district court instructed the jury to consider both direct and circumstantial evidence, and Sumotext presented what it describes as "direct evidence" of harm to competition and supracompetitive prices to the jury.

Second, Sumotext contends "the district court erroneously heightened [its] burden of proof" by "making the relevant market definition a threshold issue at trial." We construe this argument as a challenge to the jury instructions and verdict form and conclude that Sumotext waived its objections. Sumotext stipulated to a jury instruction that stated it was Sumotext's "burden to prove the existence of a relevant market," and Sumotext proposed the verdict form that listed the relevant market definitions as threshold questions. Consequently, Sumotext waived review of its challenges to the jury instruction and verdict form. *See Crowley v. Epicept Corp.*, 883 F.3d 739, 748 (9th Cir. 2018) (per curiam) ("Waiver of a jury instruction occurs when a party considers the controlling law . . . and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction." (internal quotation marks omitted)); *see also United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998) ("Verdict forms are, in essence, instructions to the jury.").

Sumotext's third argument—that the district court "heightened [its] burden of proof by requiring it to disprove a scattershot of economic theories asserted without economic evidence or expert foundation"—fares no better. An antitrust plaintiff generally bears the burden of proving a relevant market. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284-85 (2018). A "relevant market is defined as the area of effective competition." *Id.* at 2285 (internal quotation marks omitted). It includes "the product at issue as well as all economic substitutes for the product." *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (citing *Brown Shoe Co. v United States*, 370 U.S. 294, 325 (1962)). Sumotext's expert, Dr. Sullivan, offered two market definitions, both narrowly construed to include only StarStar numbers. The Joint Defendants called witnesses at trial who testified about various products that compete with StarStar numbers and criticized Dr. Sullivan's market definitions. The district court properly allowed the Joint Defendants to rebut Dr. Sullivan's opinion. We reject Sumotext's attempt to disclaim its burden of proof.

4. The jury's verdict is supported by substantial evidence. *See Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002) ("A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion."). The jury found that Sumotext failed to prove by a preponderance of the evidence a relevant market for leasing or servicing StarStar numbers in the United States. Testimony from industry executives provided substantial evidence showing that the relevant markets were broader than Sumotext proposed. Dr. Aron's testimony

criticizing Dr. Sullivan's market definitions, as well as his methodology, provided additional support for the jury's verdict. *See Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001) ("Authority to determine the victor in such a 'battle of expert witnesses' is properly reposed in the jury."). Thus, because the jury's verdict is supported by substantial evidence, it must stand.

5. The district court did not abuse its discretion in denying Sumotext's motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure. *Flores v. City of Westminster*, 873 F.3d 739, 755-56 (9th Cir. 2017) (reviewing a "district court's denial of a motion for new trial for abuse of discretion"). When evaluating Sumotext's Rule 59 motion, the district court properly weighed the evidence presented at trial, including expert testimony, evidence of price increases, evidence of reduced output, evidence of excluded competitors, and other restraining factors. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (noting that when assessing a "Rule 59 motion of the party against whom a verdict has been returned, the district court has the duty . . . to weigh the evidence as [the court] saw it" (alterations in original) (internal quotation marks omitted)). After conducting a thorough analysis, the district court concluded that the jury's verdict was not against the clear weight of the evidence. *Flores*, 873 F.3d at 748 ("We will grant a new trial only if the verdict is against the clear weight of the evidence, and not simply because the evidence might have led us to arrive at a different verdict."). Sumotext has not

demonstrated that this decision was "a plain error, discretion exercised to an end not justified by the evidence," or "clearly against the logic and effect of the facts as are found." *Rabkin v. Or. Health Scis. Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (internal quotation marks omitted).

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SUMOTEXT CORP., Plaintiff, v. ZOOVE, INC; VIRTUAL HOLD TECHNOLOGY, LLC; VHT STARSTAR LLC; and STARSTEVE, LLC, Defendants.	Case No. 16-cv-01370-BLF **ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL** [Re: ECF 495] (Filed Nov. 6, 2020)

Plaintiff Sumotext Corporation ("Sumotext") claims that Defendants Zoove, Inc. ("Zoove"), Virtual Hold Technology, LLC ("VHT"), VHT StarStar LLC ("VHT StarStar"), and StarSteve, LLC ("StarSteve") violated federal antitrust laws by seeking to exclude it from two distinct markets, one for leasing StarStar numbers in the United States and the other for servicing StarStar numbers in the United States. Following a two-week trial, a jury rendered a verdict for Defendants. Judgment was entered for Defendants and against Sumotext on March 6, 2020.

Sumotext moves for a new trial under Federal Rule of Civil Procedure 59(a), arguing that (1) the jury's verdict is against the clear weight of the evidence and (2) the verdict was procured through defense counsel's misconduct. Defendants oppose the motion, asserting that the verdict is not against the clear weight of the evidence and was not procured through counsel's misconduct. The Court has considered the briefing and evidence submitted by the parties, the oral argument of counsel, the trial record, and the applicable legal authorities.

The motion for a new trial is DENIED for the reasons discussed below.

I. BACKGROUND

The parties and the Court are familiar with the history of this case, which need not be set forth in detail here. The Court recounts only those facts relevant to Sumotext's motion for a new trial.

Sumotext tried two claims to the jury: (1) a claim "[t]hat VHT and StarSteve conspired to unreasonably restrain trade in a defined relevant market in violation of Section 1 of the Sherman Act"; and (2) a claim "[t]hat StarSteve, VHT, VHT StarStar, and Zoove conspired to monopolize a defined relevant market in violation of Section 2 of the Sherman Act." Jury Instr. 21, ECF 468. The jury was advised that Sumotext asserted the existence of two relevant markets, a market for leasing StarStar numbers and a market for servicing StarStar numbers. *See* Jury Instr. 35, ECF 468. The jury also was advised that Defendants disputed Sumotext's market definitions. *See id.* The Court instructed the jury that Sumotext had the burden to prove the existence of a relevant market, and that if Sumotext failed to meet that burden, the jury was required to find for Defendants. *See* Jury Instr. 28 & 35, ECF 468.

Sumotext was afforded a full opportunity to persuade the jury of its proposed relevant market definitions over the course of the two-week trial. Trial witnesses included Tim Miller, Sumotext's President; Michael Caffey, a long-time executive of Zoove; Bruce Bales of Mblox, a company that owned Zoove for a brief period; Tim Keyes, the COO of VHT StarStar; Ronald Levitt, the Director of Finance and Accounting for VHT StarStar; Wes Hayden, the CEO of VHT and VHT StarStar; Greg Garvey, VHT's Chairman; Dr. Ryan Sullivan, Sumotext's economics expert; Dr. Debra Aron, Defendants' rebuttal economics expert; Dr. Alan Goedde, Plaintiffs' damages expert; and Greg Regan, Defendants' rebuttal damages expert. The jury also viewed videotaped depositions of Steven Doumar of StarSteve; Tom Cotney of Mblox; and Spero Georgedakis, a StarStar customer.

Sumotext relied primarily on the testimony of its expert economist, Dr. Sullivan, to prove its asserted relevant market definitions. Dr. Sullivan opined that there is a distinct market for leasing StarStar numbers in the United States and a separate, distinct market for servicing StarStar numbers in the United States. *See* Trial Transcript ("Tr.") 694:18-25. Defendants countered Dr. Sullivan's testimony with that of their rebuttal expert economist, Dr. Aron, who opined that Dr. Sullivan had not used accepted methodology in limiting the relevant markets to StarStar numbers, and had not plausibly excluded numerous other products from the relevant markets. *See* Tr. 1483:6-1572:2.

The jury was provided with a verdict form divided into two sections, the first addressing Sumotext's leasing market claims and the second addressing Sumotext's servicing market claims. *See* Verdict Form, ECF 470. The first question in Section I read as follows:

> **1. Did Sumotext prove by a preponderance of the evidence a relevant market for *leasing* ** numbers in the United States?**
>
> Yes ___ ("Yes" is a finding for Sumotext)
>
> No ___ ("No" is a finding for Defendants)
>
> If you answered "Yes" to Question 1, proceed to Question 2.
> If you answered "No" to Question 1, you have found no liability for Sumotext's Leasing claims. Do not answer any other questions in Section I. Please proceed to Section II (Question 8).

Verdict Form at 2, ECF 470.

The first question in Section II, addressing the servicing market claims, read as follows:

> **8. Did Sumotext prove by a preponderance of the evidence a relevant market for *servicing* ** numbers in the United States?**

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for Defendants)

> If you answered "Yes" to Question 8, proceed to Question 9.
> If you answered "No" to Question 8, you have found no liability for Sumotext's Servicing Market claims. Do not answer any other questions in Section II. Please proceed to Section III (page 9).

Verdict Form at 6, ECF 470.

During deliberations, the jury sent a note to the Court, asking for clarification regarding question number 1. *See* Note No. 1, ECF 469-1. The note read, "Is question no. 1 asking: 'Did Sumotext prove by a preponderance of the evidence a relevant market for leasing ** numbers in the United States' and ONLY ** numbers?" *Id.* After conferring with counsel, and with counsel's agreement, the Court sent the following response to the jury: "yes." *Id.*

Approximately four hours later, the jury returned its verdict. *See* Civil Minutes, ECF 469. The jury marked "No" on question 1, thus finding no liability for Sumotext's leasing market claims, and also marked "No" on question 8, thus finding no liability for Sumotext's servicing market claims. *See* Verdict Form at 2, 6, ECF 470. Having found that Sumotext failed to prove either of its asserted relevant markets, the jury properly did not answer any other questions on the verdict form. *See* Verdict Form, ECF 470.

Sumotext moves for a new trial on two grounds, first that the verdict is contrary to the clear weight of the evidence, and second that defense counsel engaged in misconduct throughout the trial. Defendants contend that Sumotext has not shown a basis for a new trial.

II. LEGAL STANDARD

"The court may, on motion, grant a new trial on all or some of the issues . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1). The Ninth Circuit has construed Rule 59 to permit a new trial "only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quotation marks and citation omitted).

A. Clear Weight of the Evidence

"Upon the Rule 59 motion of the party against whom a verdict has been returned, the district court has the duty . . . to weigh the evidence as [the court] saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in [the court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence." *Molski*, 481 F.3d at 729 (quotation marks and citation omitted). "[D]etermining 'the clear weight of the evidence' is a fact-specific endeavor." *Id.* In undertaking that endeavor, "[t]he judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Landes Const. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). However, "a district court may not grant or deny a new trial merely because it would have arrived at a different verdict" from that reached by the jury. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). A new trial should be granted only if the court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Landes*, 833 F.2d at 1372 (citation omitted).

B. Miscarriage of Justice / Attorney Misconduct

"A miscarriage of justice can occur where there is prejudicial misconduct from opposing counsel or where legal error was unduly prejudicial to the opposing party." *J.N. v. Hendrickson*, No. 2-14-cv-02428-DDP (PLAx), 2017 WL 2539390, at *2 (C.D. Cal. June 12, 2017). "To receive a new trial because of attorney misconduct in the civil context, [the moving party] must meet a high standard: the moving party must demonstrate adverse counsel's misconduct . . . substantially interfered with the moving party's interest." *S.E.C. v. Jasper*, 678 F.3d 1116, 1129 (9th Cir. 2012) (quotation marks and citation omitted). "Further, [t]o warrant reversal on grounds of attorney misconduct, the flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Id.* (quotation marks and citation omitted). "Where misconduct permeates the proceeding, the jury is necessarily prejudiced." *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 346 (9th Cir. 1995) (quotation marks and citation omitted).

"[W]hile constant objections are certainly not required, as they could antagonize the jury," a party's failure to object is a factor that may be considered when evaluating a motion for new trial based on attorney misconduct. *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984) (citation omitted). Other relevant factors include whether the asserted misconduct was ameliorated by curative instructions and whether the party seeking a new trial had an opportunity to rebut opposing counsel's allegedly improper statements. *See Maxwell v. Cty. of San Diego*, 714 F. App'x 641, 645 (9th Cir. 2017).

III. DISCUSSION

As noted above, Sumotext moves for a new trial on two grounds. First, Sumotext argues that the jury's verdict is contrary to the clear weight of the evidence. Second, Sumotext argues that defense counsel engaged in misconduct that infected the jury's deliberations and was directly related to the jury's adverse verdict. Defendants assert that both arguments are without merit.

A. The Verdict is Not Contrary to the Clear Weight of the Evidence

Sumotext devotes the bulk of its briefing to the first asserted ground for a new trial, that the verdict was contrary to the clear weight of the evidence. Before turning to the parties' arguments on that ground, the Court finds it necessary to clarify the scope of the issues properly encompassed by Sumotext's motion.

The *only* determinations made by the jury were that Sumotext failed to meet its burden to prove a relevant market for leasing StarStar numbers, and that Sumotext failed to meet its burden to prove a relevant market for servicing StarStar numbers. *See* Verdict Form at 2, 6, ECF 470. As a result, Sumotext's challenge to the jury verdict necessarily is limited to a showing that those determinations were in error. To show that the jury's determinations were in error under the standards set forth above, Sumotext must demonstrate that it actually did meet its burden to prove its asserted relevant markets and that its proof was so strong that the jury's adverse determinations must be set aside as contrary to the clear weight of the evidence.

Sumotext goes well beyond challenging the jury's adverse determinations on relevant market, addressing other elements of its antitrust claims including monopoly power and injury to competition. Most notably, Sumotext argues that an antitrust plaintiff need not prove a relevant market if the plaintiff presents "direct evidence" of injury to competition. *See* Mot. at 6 n.1, ECF 495; Reply at 12-14, ECF 505. Sumotext acknowledges that the Court ruled that Sumotext must prove a relevant market in this case, and that "[t]he scope of that ruling, which was addressed and preserved by the parties, is not before the Court on this motion." Mot. at 6 n.1, ECF 495. Sumotext nonetheless asserts that "in evaluating Sumotext's motion for new trial, the Court must weigh the direct evidence that was presented at trial." Reply at 13, ECF 505. Sumotext devotes two pages of its reply to a section titled "Direct Evidence Shows the Defendants Exercised Market Power," which includes citations to numerous legal authorities addressing direct evidence, market power, and injury to competition, as well as a recap of Sumotext's trial evidence on those issues. *See* Reply at 12-14, ECF 505.

Sumotext does not challenge the jury instructions or the verdict form in this motion, both of which required the jury to determine as a threshold matter whether Sumotext proved its asserted relevant markets. Because it found that Sumotext did not prove a relevant market for leasing StarStar numbers or a relevant market for servicing StarStar numbers, the jury could not and did not determine any other issues in the case. Accordingly, Sumotext's argument that it proved injury to competition by direct evidence, and other arguments in Sumotext's briefs that are not directed to Sumotext's proof of a relevant market at trial, are outside the scope of Sumotext's motion.

Having clarified the issues properly before it, the Court takes up Sumotext's assertion that the jury verdict is against the clear weight of the evidence.

Sumotext advances eleven arguments in support of its assertion, which are addressed in turn as follows.

1. Legal Standard

The Court has summarized the applicable legal standard in Section II.A, above. The Court's summary is drawn from controlling Ninth Circuit authority, including *Molski*, 481 F.3d 724, *Landes*, 833 F.2d 1365, and *4.0 Acres of Land*, 175 F.3d 1133. The parties do not dispute that those authorities govern, and in fact they cite the same authorities in their briefs. *See* Mot. at 5 (citing *Molski* and *Landes*), ECF 495; Opp. at 2 (citing *Landes* and *4.0 Acres of Land*), ECF 500. Sumotext nonetheless argues in its reply that Defendants ask the Court to alter the applicable standards under Rule 59. *See* Reply at 5, ECF 505. Sumotext construes Defendants' citation to additional authorities from outside the Ninth Circuit as an improper suggestion that this Court need not independently weigh the evidence as required under Ninth Circuit law. *See id.* at 5-6.

The Court does not read Defendants' brief as suggesting a legal standard different from that articulated in *Molski, Landes*, and *4.0 Acres of Land.* In any event, the Court is well aware of its obligation and authority to conduct an independent evaluation of the evidence in deciding Sumotext's motion for a new trial. The Court has reviewed those portions of the record highlighted by the parties and, in addition, it has reviewed the entirety of the trial testimony given by both Dr. Sullivan and Dr. Aron. And, of course, the undersigned judge sat through the entire trial and has a clear recollection of the evidence. As discussed herein, the Court has formed its own view regarding the credibility of the witnesses and the weight properly accorded to the record evidence.

2. Mr. Hayden's Asserted Admission to Acquiring Market Power

As its first argument, Sumotext asserts that Defendants expressly admitted to acquiring market power. Specifically, Sumotext asserts that Wes Hayden made "a series of powerful and case dispositive admissions" when he testified that VHT StarStar acquired the power to control prices in the StarStar market, as well as the power to determine who may lease or service StarStar numbers. *See* Mot. at 5, ECF 495.

As Defendants point out, Mr. Hayden actually did not admit that Defendants acquired "market power." What Mr. Hayden said was that VHT StarStar had the ability to control prices and participants in the market for its own products. *See* Tr. 1340:7-1341:10, ECF 478. That is hardly surprising, as every company has a "natural monopoly" in its own products. *Dang v. San Francisco Forty Niners*, 964 F. Supp. 2d 1097, 1105 (N.D. Cal. 2013). Defendants cite *Trinko* for the proposition that, "[A]s a general matter, the Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Verizon Commc'ns Inc.*

v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (quotation marks and citation omitted). Defendants argue that Mr. Hayden's testimony regarding VHT StarStar's control over its own products is not probative of "market power" absent a showing that VHT StarStar's products constitute the relevant market.

Sumotext characterizes Defendants' argument as a refusal to acknowledge that a company's own products or services can be a relevant market. Sumotext directs the Court's attention to *Eastman Kodak*, in which the Supreme Court expressly rejected the notion that "a single brand of a product or service can never be a relevant market under the Sherman Act." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). The Supreme Court held that "in some instances one brand of a product can constitute a separate market." *Id.* at 482. Once again, Sumotext's reading of Defendants' brief does not square with the Court's. Defendants do not argue that a single brand of a product or service *never* can be a relevant market. They argue that in *this* case Sumotext failed to meet its burden to prove that StarStar numbers are the relevant market, and that as a result Mr. Hayden's testimony did not admit to market power.

Having reviewed Mr. Hayden's testimony against the backdrop of *Trinko* and *Eastman Kodak*, the Court concludes that Mr. Hayden did not admit to acquiring "market power." Mr. Hayden testified that VHT StarStar had the power to control prices and participants in the market for its own products. A company's power over its own products could equate to market power if those products comprise the market. *See Eastman Kodak*, 504 U.S. at 481-82. However, without knowing the scope of the relevant market, Mr. Hayden's testimony is insufficient to establish market power. Dr. Aron's trial testimony illuminated this point very well. She explained that whether a company's power over the price of its own product constitutes market power "depends on what the market is." Tr. 1546:12-16, ECF 479. Dr. Aron elaborated that, "you have to identify what the market is and what the competitive products are before you can ask the question of, can this company control a market or control a market price?" Tr. 1546:17-20, ECF 479. On cross-examination, Dr. Aron again explained that "companies have the control over the price and output of their own product. That's not determinative of what those products compete with, though." Tr. 1562:21-24, ECF 479.

The Court finds Dr. Aron's testimony on this point to be consistent with applicable case law and persuasive as a matter of common sense. While Mr. Hayden's testimony could be characterized as powerful admissions if the relevant market were limited to StarStar numbers, Sumotext failed to prove that the relevant market is so limited. Absent proof of the relevant market, Mr. Hayden's testimony cannot be viewed as an admission of market power. More to the point for purposes of the present motion, Mr. Hayden's testimony does not support Sumotext's asserted relevant market definitions. In the Court's view, all Mr. Hayden meant by his testimony was that he, as the boss, sets the price for his own products. Considering his testimony as a whole, Mr. Hayden's testimony cannot reasonably be interpreted as tantamount to admitting monopoly power.

3. Dr. Sullivan's Testimony Regarding the Asserted Relevant Markets

Sumotext contends that Dr. Sullivan's testimony was sufficient to prove that the relevant markets are those for leasing and servicing StarStar numbers. *See* Mot. at 6, ECF 495. Sumotext asserts that Dr. Sullivan performed a market analysis and articulated a market definition, while Dr. Aron neither performed a market analysis nor offered an alternative market definition. *See id.* Sumotext argues that, "Because Dr. Aron was unable to define a single alternative market where significant substitution in consumption or production occurred, this Court is required to analyze the challenged conduct in the only two relevant markets defined in this case (by Dr. Sullivan): 1) a market for *leasing* StarStar numbers in the U.S., and 2) a market for *servicing* StarStar numbers in the U.S." Mot. at 6, ECF 495.

Sumotext's argument misses the mark. As reflected in the jury instructions and verdict form, *Sumotext* had the burden to prove its asserted relevant markets by a preponderance of the evidence. Defendants were not required to offer an alternative market definition. Defendants properly could, and did, offer a rebuttal expert to testify that Dr. Sullivan's methodology was flawed. *See TCL Commc'ns Tech. Holdings Ltd. v. Telefonaktenbologet LM Ericsson*, No. CV 1502370 JVS, 2016 WL 7042085, at *5 (C.D. Cal. Aug. 17, 2016) (rebuttal expert may either challenge the methodology of the plaintiff's expert or offer alternative methodology leading to different result). After considering both experts' opinions, the jury was free to credit *or* decline to credit Dr. Sullivan's market definitions. *See Bell Atl. Bus. Sys. Servs., Inc. v. Hitachi Data Sys. Corp.*, No. C93-20079 JW, 1995 WL 798932, at *1 (N.D. Cal. Sept. 28, 1995) ("No authority has been presented to support the contention that the jury must accept either party's definition of how the market is to be defined and in fact, case law is clear that the jury is given great leeway in defining the relevant market."). The jury apparently did not credit Dr. Sullivan's opinions, as it found that Sumotext did not prove its asserted relevant markets.

Pursuant to its obligations under Rule 59, the Court has conducted an independent evaluation of Dr. Sullivan's testimony. That evaluation is informed by the Court's review of the entirety of Dr. Sullivan's trial testimony, as well as the entirety of Dr. Aron's trial testimony. The key portions of both experts' testimony are summarized below. Thereafter, the Court sets forth its independent determinations regarding the credibility of the experts and the weight properly assigned to their testimony.

a. Market for Leasing StarStar Num- bers

Dr. Sullivan opined that there is a distinct relevant market for leasing StarStar numbers. Tr. 694:18-25. He explained that "the products that should be within a relevant market are only those products that are economic substitutes." Tr. 666:23-25. "These are products that are reasonably interchangeable for the use that they provide, as well as on pricing in terms and availability." Tr. 666:25-667:2. In Dr. Sullivan's view, "there are no other economic substitutes that are reasonably interchangeable" with StarStar numbers. Tr. 694:24-25.

Dr. Sullivan testified that StarStar numbers are an aspect of "mobile engagement," which he also called "consumer engagement." Tr. 668:3-20, 701:4-7. He identified several other forms of mobile engagement, including ten-digit telephone numbers, 1-800 numbers, short codes, text messaging, and intemet access. Tr. 669:13-670:14, 701:4-17. However, he found that no other mobile engagement products belong in the same market as StarStar numbers. Tr. 694:18-25. Dr. Sullivan testified that four factors influenced his opinion: price, the unique nature of the StarStar registry, functional distinctions between the products, and the marketing advantages provided by StarStar numbers. Tr. 668:6-20.

i. Price

With respect to the first of these factors, price, Dr. Sullivan compared the average monthly price of a StarStar number with that of a ten-digit telephone number, a 1-800 number, and a short code. Tr. 669:13-670:14. He testified that the monthly price is $1,500 for a StarStar number, $0.50 for a ten-digit telephone number, $5 for a 1-800 number, and $500-$1,000 for a short code. *Id.* Dr. Sullivan indicated that the wide pricing disparity between StarStar numbers and the other products indicates that they are not in the same market, citing guidelines issued by the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") for the proposition that "when economists are looking at the effects of pricing to determine a relevant market, typically the threshold is 5 percent to 10 percent." Tr. 669:20-670:1. Dr. Sullivan elaborated that "the issue is whether a 5 to 10 percent price change would cause customers to go to a different product. Here we are so far beyond 5 to 10 percent in terms of the price differential that there is no measurable or meaningful effect that a change in price, say, [of] 1-800 numbers is going to have on StarStar quantity use or vice versa." Tr. 670:2-8.

On cross-examination, Dr. Sullivan clarified that the FTC and DOJ guidelines discussed use of a particular methodology – a "SSNIP test"[1] – to define a relevant market, and that he had *not* performed a SSNIP

[1] SSNIP is an acronym that stands for "small but significant nontransitory increase in price." Tr. 702:9-12.

test. Tr. 702:1-21. He explained that a SSNIP test evaluates "the effects of changes in pricing of one product on sales of another product." Tr. 703:14-18. Instead of a SSNIP test, Dr. Sullivan performed something he called a "natural SSNIP test" by comparing, over time, prices of StarStar numbers and prices for ten-digit telephone numbers, 1-800 numbers, and short codes. Tr. 702:13-704:23. His natural SSNIP test did not include MMS or SMS texting, social networks, web and search, or other abbreviated dial codes such as Pound numbers or Star numbers, even though industry witnesses testified that those products compete with StarStar numbers. Tr. 705:23-707:9.

Dr. Aron opined that the "natural SSNIP test" Dr. Sullivan said he performed "isn't a thing." Tr. 1532:21-23. She testified that "to determine what is in the market and what competes for a product, one does what is called a market definition analysis," and that the standard methodology for performing such an analysis is a SSNIP test. Tr. 1531:11-22. Dr. Aron explained that "SSNIP test means that you assess whether an increase in price of a product would cause so much defection from that product to other things that it would not be profitable." Tr. 1532:10-13. She emphasized that the test must be run with real information, and "those things that customers deviate to, those things become candidates for being in the market, and you run the test again, and it's an iterative process, until you figure out what is the boundary of the market and what is outside of it." Tr. 1532:14-20.

Dr. Aron indicated that in some circumstances an economist might rely on a "natural experiment." Tr. 1532:24-25. She described a hypothetical scenario in which both Coke and Pepsi are sold in multiple states, and in one state a tax is imposed that causes the price of Coke to go up but not the price of Pepsi. Tr. 1532:24-1533:6. Dr. Aron explained that in such a scenario, an economist could apply statistical analysis and methodology to determine whether the increase in the price of Coke caused consumers to defect and, if so, to what other product. Tr. 1533:10-15. She distinguished a natural experiment, in which the change in price results from an outside cause, from Dr. Sullivan's natural SSNIP test, in which "he just looked at the actual prices and said they're very far apart, so this can't be a market." Tr. 1533:7-19. In Dr. Aron's opinion, Dr. Sullivan "did not apply any accepted or standard or recognizable methodology." TR 1534:4-6.

ii. Nature of StarStar Registry

With respect to the second factor identified by Dr. Sullivan, the nature of the StarStar registry, he stated that the registry for StarStar numbers is "separate" and "unique as compared to a registry for 1-800 numbers, for toll numbers, and for short codes." Tr. 670:18-21. He went on to state, "That means that the inventory and the supply of the numbers that can be provided to customers is all handled separately. There's no overlap." Tr. 670:22-24. Dr. Sullivan opined that "this is part of what indicates and is consistent with the fact that these different forms of consumer engagement are complements and not substitutes." Tr. 671:3-6. Dr. Sullivan stated that 1-800 numbers are not substitutes for StarStar numbers, because "companies keep both and they use both, and they're not dropping one thing for another." Tr. 676:15-18.

Dr. Aron testified that a company's purchase of two consumer engagement products does not necessarily mean that those products do not compete. Tr. 1542:15-18. She used the example of a family that has two cars in its garage, a Ford and a Toyota. Tr. 19-1543:1. That the family purchased both cars does not mean that Ford and Toyota do not compete with each other in a relevant market. *Id.*

iii. Functional Distinctions

With respect to the third factor identified by Dr. Sullivan, functional distinctions between consumer engagement products, Dr. Sullivan testified that StarStar codes "have flexibility between two digits and ten digits, that provides a nice opportunity to use succinct terms that can resonate with a consumer." Tr. 671:9-13. He opined that it is more difficult to make a 1-800 number memorable, and noted that there are toll numbers that begin with 877, 855, 844, and 833, "so now a consumer has to recognize all of those as well." Tr. 671:13-672:6. Similarly, Dr. Sullivan stated that short codes are less flexible than StarStar numbers, because a short code must be five or six digits. Tr. 672:9-14. Dr. Sullivan also testified that "with StarStar numbers, there's an ability to connect with a consumer in multiple ways, voice, multimedia, text, and that is unique to StarStar numbers as compared to the other alternatives." Tr. 672:15-19. In his view, these functional distinctions between StarStar numbers and other products explain why StarStar numbers command much higher prices than other products. Tr. 673:4-8.

On cross-examination Dr. Sullivan conceded that he had not performed any surveys to determine whether and to what extent the functional distinctions he identified are important consumers. Tr. 720:18-721:1. Dr. Aron testified that merely observing that a product has unique characteristics is insufficient to show that it is in a distinct market. Tr. 1543:5-14. She explained that one must "do a market definition analysis to figure out whether those differences are meaningful enough that customers view the products as so different that they don't view them as reasonably substitutable." Tr. 1534:17-21. She also observed that Dr. Sullivan had done no surveys of any kind, and opined that "it's uncommon to not have some kind of customer data or information." Tr. 1554:19-1555:2. In fact, Dr. Aron opined that Dr. Sullivan had "zero . . . evidence that is acknowledged and recognized by the economics profession." Tr. 1555:14-19.

iv. Marketing Advantages

Finally, with respect to the fourth factor identified by Dr. Sullivan, he opined that the functional differences between StarStar numbers and other consumer engagement products "provide some very unique marketing advantages" to StarStar numbers. Tr. 672:22-25. He stated that StarStar numbers' functional differences "allow engagement directly with the consumer. It allows it on a voice basis, it allows it to connect with text and with other multimedia." Tr. 672:23673:1.

On cross-examination, Dr. Sullivan admitted that a consumer to business voice connection could be obtained with a Pound number, a ten-digit telephone number, and a toll-free number. Tr. 707:21-708:10.

b. Market for Servicing StarStar Numbers

Dr. Sullivan opined that there is a separate relevant market for servicing StarStar numbers. Tr. 666:8-12. He stated that "leasing is different from servicing. So leasing gets you to the number, but it doesn't provide you the services." Tr. 673:16-18. When asked to identify particular services that would be in the relevant market, Dr. Sullivan identified geofencing and MMS, among others. Tr. 695:6-15. Dr. Sullivan provided very little additional information regarding his determination that servicing StarStar numbers is a distinct market. His direct testimony on that issue spans only a few pages of the transcript, culminating with the following question from Sumotext's counsel: "And without rehashing the same analysis that you described with respect to leasing, are you confident in your opinion that the servicing of StarStar numbers constitutes a separate relevant market?" Tr. 675:44-7.

Dr. Sullivan responded in the affirmative, stating, "I am. I, in my view, performed very thorough work, and there is substantial underlying economic data demonstrating that StarStar servicing is a distinct product market." Tr. 675:8-10.

Dr. Aron testified that Dr. Sullivan did not perform the sort of analysis that an economist would perform to determine if StarStar servicing is a distinct market. Tr. 1544:4-12. She stated that "he didn't identify the prices of those products, and he didn't even mention or purport to do a market definition analysis like an SSNIP test." Tr. 1544:8-10. Dr. Aron emphasized that Dr. Sullivan "didn't mention that in his reports, and he didn't mention that at trial." Tr. 1544:10-12. She also stated that Dr. Sullivan did not perform any surveys or other research to determine market demand for the identified StarStar services. Tr. 1544:13-16.

c. The Court's Evaluation

With respect to the asserted leasing market, Dr. Sullivan's "natural SSNIP test" does not appear to be grounded in any accepted methodology for conducting a market analysis. Even assuming that a natural SSNIP test properly could have been used in this case, Dr. Sullivan did not explain why he limited such test to ten-digit telephone numbers, 1-800 numbers, and short codes. Dr. Sullivan's failure to include other forms of mobile engagement appears to have been arbitrary. Moreover, while Dr. Sullivan testified that he relied in part on StarStar numbers' unique features to conclude that StarStar numbers are a separate market, he did not perform any market surveys to determine that consumers value those unique features. These weaknesses in Dr. Sullivan's testimony were ably highlighted in cross-examination.

The Court also credits Dr. Aron's testimony critiquing Dr. Sullivan's methodology. Dr. Aron identified many products that appear to perform a similar function, and meet a similar need, to StarStar numbers. Tr. 1534:18-20. Among those products were 1-800 numbers, vanity text codes, vanity ten-digit telephone numbers, Facebook advertising, search engine optimization, Star numbers, and Pound numbers. Tr. 1534:3-1536:3. Dr. Aron made clear that she was not offering an affirmative opinion that all of those products are in the same relevant market as StarStar numbers. Tr. 1538:14-20. However, she expressed her view that "it's not plausible that none of these calls to action compete with StarStar numbers," and that Dr. Sullivan simply had not undertaken the necessary rigorous analysis to exclude all other products from the relevant market. Tr. 1538:21-1543:21. The Court finds Dr. Aron's opinion persuasive, and in particular the Court credits Dr. Aron's testimony that Dr. Sullivan did not use any recognized methodology to define the relevant markets. Tr. 1544:4-16.

With respect to the asserted servicing market, the Court reviewed Dr. Sullivan's testimony carefully and was unable to locate any description of his methodology to determine that there is a separate, distinct relevant market for leasing StarStar numbers. The Court finds Dr. Sullivan's testimony on the asserted servicing market to be unpersuasive. The Court also credits Dr. Aron's testimony that Dr. Sullivan did not perform the type of analysis required to determine that StarStar servicing is a distinct market.

Sumotext relied primarily on Dr. Sullivan to prove the asserted relevant markets in this case. Because the Court declines to credit Dr. Sullivan's market definitions, the Court concludes that Sumotext failed to satisfy its burden to prove the relevant markets by a preponderance of the evidence.

4. Defendants' Acquisition of Zoove Registry

Sumotext asserts that "Defendants knew full well, from the very outset when VHT and StarSteve came together to acquire the Zoove Registry, they were doing so to take complete control of the defined relevant markets to minimize competition." Mot. at 6, ECF 495. Sumotext quotes documents and testimony showing that Defendants intended to, and did, obtain complete control of the StarStar registry. Mot. at 6-8, ECF 495. Sumotext uses bold, italics and underlining to highlight certain words in the quoted evidence, such as "control" and "market." *Id.*

This argument assumes the very fact that Sumotext must prove to prevail on its motion, namely, that "the defined relevant markets" are limited to StarStar numbers. None of the cited evidence regarding Defendants' acquisition of the Zoove registry shows that the relevant markets are limited to StarStar numbers.

5. Evidence of Price Increases

Sumotext next argues that its asserted market definitions are supported by evidence of price increases after Defendants acquired Zoove. Sumotext focuses on price increases with respect to four StarStar numbers: the price for **CRASH was raised from $1,000 per month for the entire United States to $5,000 per month for South Florida only; the price for **KIA was went from $3,000 per month for the entire United States to $2,000 per month for a single territory in Naussau County; the price for **CASH was raised from $3,000 per month to $12,000 per month, and then again to $20,000 per month; and the price for **MOVE was raised 10% the first year and an additional 10% for every year thereafter. Tr. 1344:19-1350:16. Defendants do not dispute the four price increases, but they direct the Court to Wes Hayden's testimony that overall prices of StarStar numbers stayed the same or went down. Tr. 1273:20-1274:24, 1353:12-17.

Sumotext does not explain how evidence of price increase supports its asserted market definitions. Price increases can be evidence of monopoly power. *See* Jury Instr. 36, ECF 468 ("[M]onopoly power is the power to control prices and exclude competition in a relevant market."). However, the jury was instructed to determine whether Defendants had monopoly power only if Sumotext proved a relevant market: "*If* you find that Sumotext has proven a relevant market, *then* you should determine whether Defendants have monopoly in that market." *Id.* (emphasis added). The jury never got to price increase, because it determined that Sumotext did not prove a relevant market.

The jury was instructed that price could play a part in defining a relevant market under SSNIP principles: "To determine whether products or services are reasonably interchangeable substitutes for each other, you may consider whether a small but significant permanent increase in the price of one product would result in enough customers switching from that product to another product such that the price increase would not be profitable." Jury Instr. 35, ECF 468. A "small but significant and non-transitory price increase" was defined as approximately a five percent increase in price not due to cost factors. *Id.* The jury was instructed that if such an increase would cause consumers to switch from one product to another, the jury could conclude that the two products were in the same market. *See id.* Here, the four price increases identified by Sumotext exceed five percent and it is unclear if any consumers switched to another product. Moreover, neither expert conducted a SSNIP test and the jury certainly was not instructed to construct its own. Thus, the evidence of price increases is not determinative of a relevant market.

Sumotext's evidence of price increases does not support Sumotext's contention that the jury's determinations on relevant market were against the clear weight of the evidence.

6. Evidence of Reduced Output

Sumotext argues that its market definitions are supported by evidence of reduced output in both the StarStar leasing market and the StarStar servicing market. *See* Mot. at 9-12, ECF 495. Defendants dispute that output was reduced and, more to the point, assert that Sumotext has not explained how evidence of reduced output would support its market definitions. *See* Opp. at 7, ECF 500.

The Court agrees that Sumotext has not explained how Defendant's alleged reduced output support its market definitions. Reduced output could be probative of injury to competition. *See* Jury Instr. 28, ECF 468. But Sumotext has cited no authority for the proposition that a company's reduction in output bears on the definition of the relevant market.

7. Evidence of Excluded Competitors

Sumotext contends that its market definitions are supported by Defendants' exclusion of competitors. *See* Mot. at 12-13, ECF 495. As with evidence of reduced output, Sumotext has not explained how exclusion of competitors supports its market definitions. Evidence that an accused monopolist excluded competitors from a defined relevant market would be probative of market power. *See* Jury Instr. 36 ("If the evidence establishes that Defendants have the power to control prices and exclude competition in the relevant antitrust market, then you may conclude that Defendants have monopoly power in the relevant market."). But Sumotext has cited no authority showing that such evidence is relevant to defining the relevant market in the first instance.

Moreover, Sumotext did not identify any such excluded competitors, and no such competitors testified at trial. Sumotext asserts that ASPs competed with Zoove, and that Sumotext eliminated ASPs by discontinuing the Toolkit in 2016. However, Bruce Bales of Mblox testified that there were about a dozen ASPs when Mblox owned Zoove in 2015, *see* Tr. 395:10-15, and Mr. Caffey testified that there were ten new resellers in May 2016, *see* Tr. 344:19-345:6. Moreover, Mr. Caffey testified that after the Toolkit was discontinued, businesses were still able to lease and service StarStar numbers. *See* Tr. 330:4-8. Finally, while Sumotext relied on a marketing document indicating that Zoove had a "strategy to take back numbers," Mr. Hayden testified that the "strategy" was really "what the marketing team had come up with to analyze the disposition of every number that we were inheriting and what we should be doing with it." Tr. 1364:13-19. The marketing team helped divided the StarStar numbers into "four categories, category A, category B, category C, category D." Tr. 1364:1-7. Some StarStar numbers "were on hold and had no call volume, so those were treated one way." Tr. 1364:11-13. Other StarStar numbers were "operative effectively," and as to those "there was really nothing to do." Tr. 1364:14-15. Thus, there was ample evidence in the record refuting Sumotext's position that Defendants excluded competitors in the alleged relevant markets.

The Court finds that Sumotext's asserted evidence of excluded competitors does not undermine the jury's verdict that Sumotext failed to meet its burden to establish a relevant market. In order to show that competitors were excluded from a relevant market, Sumotext first had to prove its market definitions, which it failed to do so. Moreover, the Court agrees with Defendants that Sumotext has not established that any actual competitors were excluded from the alleged relevant markets.

8. Contemporaneous Evidence

Sumotext asserts that two trial exhibits, which it characterizes as "contemporaneous evidence," support its asserted market definitions. The first document, JX831, is dated September 17, 2009. *See* Kesselman Decl. Exh. N, ECF 495-1. It is Zoove's response to a request for proposal from the Cellular Telecommunications Industry Association ("CTIA"), which was considering operating the registry for StarStar numbers and was looking for vendors to provide assistance. *See id.*; Tr. 288:12-289:2. Zoove proposed an economic model based on "code utilization and campaign fees," where "[c]ode leasing is uniform and open," and where "[c]ode leasing is independent of campaign management." JX-831.013-014. The CTIA ultimately decided not to operate the StarStar registry, so Zoove's proposal did not lead to any agreement. Tr. 288:12-289:2. Sumotext argues that language in the proposal supports its market definitions.

The second document, PX005, is dated June 28, 2010. *See* Kesselman Decl. Exh. P, ECF 4951. It is a press release about the availability of StarStar numbers. *See id.* Sumotext argues that language in the press release supports its market definitions.

The Court is perplexed by Sumotext's reliance on these documents. Both were created years prior to the events giving rise to this lawsuit. Sumotext's expert, Dr. Sullivan, testified that the relevant markets did not even come into existence until around 2012. Tr. 698:13-25. Under these circumstances, the Court finds the evidence to be neither contemporaneous nor relevant to the market definitions in this case.

9. Entry and Exit of Competitors

Sumotext next contends that its market definitions are supported by the history of competitors' entry and exit from those markets. Jury Instruction 36 states that the history of entry and exit of competitors in the relevant market may be helpful to determining whether Defendants have monopoly power. *See* Jury Instr. 36. "Entry of new competitors or expansion of existing competitors may be evidence that Defendants lacked monopoly power." *Id.* "On the other hand, departures of competitors from a market, or the failure of competitors to enter the market . . . may support an inference that Defendants have monopoly power." *Id.*

As discussed above, the jury never reached the issue of monopoly power because it determined that Sumotext failed to meet its burden to prove its asserted relevant markets. The question before the Court on this motion is whether the jury's determinations on relevant market are contrary to the clear weight of the evidence. Nothing in the jury instructions suggests, and Sumotext has not shown, that the history of competitors' entry and exit from the relevant markets is probative of the market definition in the first instance.

10. Other Restraining Forces

Sumotext next argues that Defendants failed to show the existence of any restraining forces. Jury Instruction 35 discussed economic forces that restrain a defendant's freedom to set prices or restrict output in the defined relevant market. *See* Jury Instr. 35, ECF 468. The jury was instructed that the most likely and important restraining force will be "actual and potential competition from other firms and their products." *Id.* "This includes all firms and products that act or likely could act as restraints on the defendant's power to set prices as it pleases because customers could switch to them if defendant sets its own prices too high." *Id.* "All the firms and products that exert such restraining force are within what is called the relevant market." *Id.*

Sumotext argues that "Defendants provided no evidence of any firm, product, or service capable of restraining their ability to exercise their monopoly powers to harm competition in the defined markets." Mot. at 17, ECF 495. According to Sumotext, Defendants merely elicited unsubstantiated testimony from lay witnesses that StarStar numbers compete with all "calls to action," including web/search/internet, web/mobile apps, social networks/platforms, text messages, 10-digit telephone numbers, and other abbreviated dial codes ("ADCs"). *Id.* Sumotext addresses these each of these products in turn, arguing that they are not interchangeable with StarStar numbers.[2]

In response, Defendants correctly point out that Sumotext is attempting to shift the burden of proof. Sumotext's argument assumes that Defendants had the burden to prove that particular firms or products exerted restraining forces in the relevant market, and Sumotext attempts to show that Defendants failed to meet such burden. However, Defendants did not have any burden to demonstrate the existence of restraining forces. *Sumotext* had the burden to prove that all other products properly are excluded from the relevant markets.

Sumotext devotes substantial briefing to summarizing the trial evidence presented with respect to each

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[2] After briefing was completed on the motion for a new trial, but before the hearing on the motion, Sumotext filed a request for judicial notice that was opposed by Defendants. *See* Plf.'s RNJ, ECF 507; Defs.' Opp. to RJN, ECF 508. Sumotext asks the Court to take judicial notice of "certain content on Defendant VHT StarStar LLC's web site." Plf.'s RJN at 1. According to Sumotext, this content disproves Defendants' contention at trial that abbreviated dial codes ("ADCs") compete with StarStar numbers in a broader relevant market than that asserted by Sumotext. The request for judicial notice is DENIED. *See Phillips v. P.F. Chang's China Bistro, Inc.*, No. 5:15-CV-00344-RMW, 2015 WL 4694049, at *2 (N.D. Cal. Aug. 6, 2015) ("The contents of websites generally are not a proper subject of judicial notice.").

of the products listed above. While not entirely clear from Sumotext's briefs, it appears that Sumotext may be asking the Court to make an independent determination that each of the products listed above does not compete in the same market with StarStar numbers. The Court is not qualified to make such a determination. While the Court has a duty to weigh the evidence in evaluating Sumotext's motion for a new trial, the Court cannot render expert opinion regarding the proper market definition in this case. The Court can only weigh the expert opinions offered by the parties' experts on the question of relevant market. The Court has weighed those opinions and, as discussed herein, has found that Dr. Sullivan's market definitions are not credible.

Further, Sumotext ignores the direct testimony of a number of trial witnesses who worked in the business and who testified that, in their view, StarStar numbers compete with these other products. Mr. Caffey testified that StarStar numbers compete with Internet, web search, mobile apps, and social networks, *see* Tr. 311:9-11, 312:14-17, 313:1-5; SMS text messages, *see* Tr. 312:23-25; 10-digit phone numbers, *see* Tr. 312:19-22; and other abbreviated dial codes, *see* Tr. 316:8-12. Tim Keyes, VHT StarStar's COO, testified that StarStar numbers compete with Internet, web searches, mobile apps and social networks. *See* Tr. 518:17-22, 651:11-15. Wes Hayden testified that StarStar numbers compete with SMS/Text messages, *see* Tr. 1290:3-4, 1293:4-6; and other abbreviated dial codes, *see* Tr. 1290:22-1292:23. Mblox's Bruce Bales testified that StarStar numbers compete with SMS/Text messages. *See* Tr. 452:17 to 453:2. Mblox's CEO, Tom Cotney, also testified that StarStar numbers compete with SMS/Text messages. *See* Tr. 71:23-25, 77:1-4.

This abundance of evidence coupled with Dr. Aron's persuasive testimony further supports the Court's conclusion that Dr. Sullivan's market definition was not credible.

11. Importance of Evidence Re Other Restraining Forces

Sumotext asserts that although Defendants argued at trial that "a vast buffet" of "call to action" technologies compete in the same market as StarStar numbers, "Dr. Sullivan expressly rejected this assertion based on his market analysis." Mot. at 21-22, ECF 495. According to Sumotext, "the Court must now weigh the evidence and determine if, as Defendants assert, there was evidence to suggest that these 'call to action' technologies act as restraints on the defendant's power to set prices as it pleases because customers could switch to them if defendant sets its own prices too high." Mot. at 22, ECF 495. Sumotext goes on to argue that the record is devoid of such evidence "because, as Defendants admit, their own expert failed to conduct a market analysis." *Id.*

Sumotext's arguments are without merit. Again, the Court's task is not to determine whether Defendants presented evidence sufficient to prove that one or more call to action technologies should be included in the relevant market. Defendant had no burden to prove anything at trial. Nor was Defendants' expert, Dr. Aron, required to conduct a market analysis. Sumotext had the burden to prove the relevant markets by a preponderance of the evidence. Because Sumotext asserted that the relevant markets were limited to StarStar numbers, Sumotext had the burden to show that all other call to action technologies must be excluded. The jury determined that Sumotext failed to meet its burden of proof. And this Court agrees.

12. Conclusion

The Court concludes for the reasons discussed herein that Sumotext has not shown that the jury's verdict is against the clear weight of the evidence, and it therefore DENIES Sumotext's motion for a new trial on this basis.

B. Defense Counsel's Asserted Misconduct Does Not Warrant a New Trial

As a separate basis for a new trial, Sumotext argues that defense counsel engaged in misconduct that infected the jury's deliberations. To obtain a new trial on this basis, Sumotext must show that defense counsel's misconduct "substantially interfered" with its interests. *See Jasper*, 678 F.3d at 1129. Sumotext also must show that the misconduct permeated the entire trial to such an extent that "the jury was influenced by passion and prejudice in reaching its verdict." *Id.* (quotation marks and citation omitted).

Sumotext argues that these standards are satisfied by defense counsel's conduct in repeatedly eliciting testimony from witnesses, and making statements to the jury, indicating that there were alternative relevant market definitions upon which the jury could rely. *See* Mot. at 23, ECF 495. Sumotext focuses on statements and testimony referring to a "calls to action" market, a "mobile marketing" market, and a "mobile engagement" market. As Sumotext correctly points out, Defendants did not present expert opinion establishing any of these as relevant markets. Sumotext asserts that defense counsel's purpose in using these terms was to give the jury the false impression that Dr. Aron had done a market analysis and identified an alternative relevant market when in fact she had done neither of these things. *Id.* at 26. In opposition, Defendants argue that neither its counsel nor its expert, Dr. Aron, offered an affirmative relevant market definition, and that there was no misconduct. Opp. at 18, ECF 500. Defendants argue that even if the Court were to find misconduct, Sumotext had an opportunity to cure any resulting prejudice, because Sumotext reserved substantial time for its rebuttal closing argument and therefore had the last word with the jury. Opp. at 22, ECF 500.

The Court has reviewed the portions of the trial transcript identified by Sumotext in order to determine whether defense counsel engaged in misconduct and, if so, whether Sumotext had the opportunity to cure any resulting prejudice. In the Court's view, it is useful to begin its discussion of these issues by briefly highlighting the manner in which both Dr. Sullivan and Dr. Aron used terms such as “mobile engagement,” “consumer engagement,” and “calls to action” throughout their testimony. The Court then addresses the specific excerpts of the record that Sumotext offers to show defense counsel’s asserted misconduct. Finally, the Court discusses Sumotext’s opportunity to cure any prejudice arising from the asserted misconduct.

1. Experts’ Testimony

On behalf of Sumotext, Dr. Sullivan testified that StarStar numbers are an aspect of “mobile engagement,” which he also called “consumer engagement.” Tr. 668:3-20, 701:4-7. Dr. Sullivan identified several other products that he classed as forms of mobile engagement, including ten-digit telephone numbers, 1-800 numbers, short codes, text messaging, and internet access. Tr. 669:13-670:14, 701:4-17. In categorizing a myriad of products as “mobile engagement” and “consumer engagement,” Dr. Sullivan clearly was not attempting to define a relevant market; to the contrary, he opined that none of the other mobile engagement products belong in the same relevant market as StarStar numbers. Tr. 694:18-25. Dr. Sullivan appeared to use the terms “mobile engagement” and “consumer engagement” as a kind of shorthand to identify a group of products that could be viewed as competing with StarStar numbers.

Like Dr. Sullivan, Dr. Aron used the term “consumer engagement” and “mobile engagement” when referring to products, such as short codes, that could be viewed as competing with StarStar numbers. Tr. 1537:2-9, 1556:15-18. Dr. Aron also referred to such products as "call to action mechanisms." Tr. 1535:3-13. Dr. Aron appeared to use these terms to loosely identify products that might belong in the same relevant market as StarStar numbers.

2. Defense Counsel's Conduct

Sumotext contends that defense counsel's use of the same terms used by the experts, and similar terms, constituted misconduct. Specifically, Sumotext asserts that counsel referred to a "Calls to Action Market" in the opening statement; elicited testimony from witnesses regarding a "Mobile Marketing Market"; elicited testimony from Dr. Aron regarding "mobile engagement"; and asserted during closing argument that Dr. Aron had identified a "mobile engagement market." *See* Mot. at 23-26.

a. Opening Statement – "Calls to Action Market"

In Defendants' opening statement, defense counsel told the jury that "StarStar numbers compete with a wide variety of calls to action, and virtually every witness that you hear who is in this market in the next two weeks will say that to you." Tr. 137-5-7. Defense counsel also stated, "there is no relevant market for StarStar numbers. StarStar numbers compete in a much larger market for calls to action and consumer engagement." Tr. 138:23-25. Defense counsel did not attempt to define the outer boundaries of the "much larger market."

b. Witness Testimony – "Mobile Marketing Market"

Sumotext directs the Court's attention to defense counsel's questioning of Bruce Bales of Mblox, a company that owned Zoove for a brief period. Mr. Bales testified that a StarStar numbers and many other products are "mobile marketing tools." Tr. 493:16-18. Defense counsel drew Mr. Bales out on the subject, asking whether 1-800 numbers compete with StarStar numbers, whether vanity numbers compete with StarStar numbers, and whether short codes compete with StarStar numbers. Tr. 493:19-494:22. In making those inquiries, defense counsel asked whether each product could be a competitor with StarStar numbers in the "mobile marketing marketplace," also referred to as the "mobile marketing market." *Id.* Counsel did not attempt to define the "mobile marketing marketplace" or "mobile marketing market" any further, but instead appeared to be using the phrases as shorthand for a group of products that potentially compete with StarStar numbers. *Id.*

c. Dr. Aron's Testimony – "Mobile Engagement Market"

Sumotext cites to defense counsel's questioning of Dr. Aron, and specifically a question asking whether

Dr. Aron believed "there is something called mobile engagement." Tr. 1556:1518. Dr. Aron answered that question in the affirmative. *Id.* As discussed above, Dr. Sullivan actually used the term "mobile engagement" in his testimony before Dr. Aron was called to the stand. Tr. 701-19. Sumotext nonetheless argues that by asking Dr. Aron about "mobile engagement," defense counsel "laid the poisonous seed" that allowed counsel to assert during closing argument that Dr. Aron had defined an alternative relevant market called "mobile engagement." *See* Mot. at 26, ECF 495. This argument is unpersuasive. Dr. Aron was clear in her testimony that she did not do a market analysis. When asked "Q. Okay. Have you done a market definition analysis in this case?" Dr. Aron responded "A: No, I haven't." Tr. 1533:20-22.

d. Closing Argument – "Mobile Engagement Market"

During closing argument, defense counsel argued that Dr. Aron "was very clear that there's some sort of mobile engagement market, that the people who are the customers, they wanted to use this service to reach out to consumers to get them to dial the StarStar number. That's what this is. Mobile engagement." Tr. 1706:16-20. Sumotext contends that counsel's argument was a blatant attempt to mislead the jury into believing that Dr. Aron had defined an alternative relevant market that the jury could credit over the markets defined by Dr. Sullivan.

e. Court's Conclusion

In the Court's view, defense counsel used the phrases "calls to action market," "mobile marketing market," and "mobile engagement market" in much the same way as *both* parties' experts, that is, as a shorthand for a group of products that potentially could compete with StarStar numbers. Sumotext argued that those products do not belong in the same relevant market as StarStar numbers, while Defendants argued that Sumotext had not plausibly excluded all of those products from the relevant markets. Viewing the record as a whole, the Court does not find it plausible that defense counsel was attempting to mislead, or did mislead, the jury as to the existence of a specific alternative relevant market.

With respect to Sumotext's assertion that defense counsel suggested to the jury that Dr. Aron defined an alternative relevant market, Dr. Aron testified expressly that she was not retained to perform a market analysis, she had not performed a market analysis, and she had not offered an alternative market definition. Tr. 1533:20-1534:1. When asked whether she was affirmatively opining that all the "call to action technologies" discussed throughout her testimony were in the same relevant antitrust market as StarStar numbers, Dr. Aron answered in the negative. Tr. 1538:14-22. Dr. Aron made clear that she was not offering such an opinion, but rather was opining that "it's not plausible that none of these calls to action compete with StarStar numbers." *Id*.

When referencing Dr. Aron's testimony during closing argument, defense counsel reiterated that while Dr. Aron had testified that the "two little circles" of products identified by Dr. Sullivan did not properly define the relevant markets, Dr. Aron "didn't draw it and tell you how much bigger is the circle." Tr. 1706:10-15. Counsel accurately stated that Dr. Aron's testimony was that the relevant market was "different" from the markets defined by Sumotext. Tr. 1706:14-16.

The Court expressly ruled that Dr. Aron was permitted to offer such opinion when Sumotext sought an *in limine* ruling, the day before Dr. Aron testified, precluding Dr. Aron from offering an alternative market definition. The Court ruled that although Dr. Aron could not offer an affirmative alternative market definition, she could offer the opinion that Dr. Sullivan had not adequately excluded all products that potentially could be in the relevant market. Tr. 1217:12-21. The Court does not find that defense counsel engaged in misconduct. To the extent counsel may have crossed the line in closing argument, the Court is satisfied that the effect of his argument was minor when compared to Dr. Aron's clear testimony that she did not develop an alternative opinion on the contours of the relevant market.

Accordingly, the Court DENIES Sumotext's motion for a new trial on the basis of defense counsel's asserted misconduct.

3. Sumotext's Opportunity to Cure

Because it concludes that Sumotext has not established that defense counsel engaged in misconduct, the Court need not determine whether Sumotext had an opportunity to cure any resulting prejudice. The Court notes, however, that to the extent defense counsel's closing argument suggested that Dr. Aron offered an opinion on an alternative market definition, the effect of such suggestion was minor, and the jury clearly was instructed that "[a]rguments and statements by lawyers are not evidence." Jury Instr. 3, ECF 468. Moreover, Sumotext reserved ample time for rebuttal to address the issue, and in fact did address it by arguing expressly that Dr. Aron did *not* conduct a market analysis or offer an affirmative market definition. *See* Tr. 1721:17-1722:7.

IV. ORDER

(1) Sumotext's motion for a new trial is DENIED;

(2) This order terminates ECF 495.

Dated: November 6, 2020

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SUMOTEXT CORP., Plaintiff, v. ZOOVE, INC., dba STARSTAR MOBILE; VIRTUAL HOLD TECHNOLOGY, LLC; STARSTEVE, LLC; and VHT STARSTAR LLC, Defendants.	Case No. 16-cv-01370-BLF **ORDER DENYING PLAINTIFF'S *DAUBERT* MOTIONS RE DEFENSE EXPERTS DR. DEBRA ARON AND GREG J. REGAN** [Re: ECF 339-4, 347-4] (Filed Jan. 17, 2020)

Jury selection in this antitrust case is scheduled to commence on February 21, 2020. In preparation for trial, Plaintiff Sumotext Corporation has filed *Daubert* motions with respect to certain opinions offered by Dr. Debra Aron and Greg J. Regan, experts retained by Defendants Zoove, Inc., Virtual Hold Technology, LLC, and VHT StarStar LLC ("Defendants").[1] Following completion of the briefing, the Court vacated the December 12, 2019 hearing and took the motions under submission without oral argument.

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[1]While StarSteve, LLC also is a defendant in this case, it is not clear whether Dr. Aron and Mr. Regan have been retained on his behalf as well.

The motions are DENIED for the reasons discussed below.

I. LEGAL STANDARD

Federal Rule of Evidence 702 provides that a qualified expert may testify if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Supreme Court held that Rule 702 requires the district court to act as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The Supreme Court discussed four factors that may be used to determine reliability: (1) whether the theory or technique used by the expert "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) whether there is "general acceptance" of the theory or technique in the "relevant scientific community." *Id.* at 593-94; *see also Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (reciting factors).

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999), the Supreme Court clarified that the "basic gatekeeping obligation" articulated in *Daubert* applies not only to scientific testimony but to all expert testimony. The Supreme Court also made clear that the reliability inquiry is a flexible one, and "whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id.* at 153.

The Ninth Circuit has emphasized that "[u]nder *Daubert*, the district judge is a gatekeeper, not a fact finder." *Primiano v. Cook*, 598 F.3d 558, 564-65 (9th Cir. 2010) (internal quotation marks and citation omitted). "When an expert meets the threshold established by Rule 702 as explained in *Daubert*, the expert may testify and the jury decides how much weight to give that testimony." *Id.* at 565. "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id.* at 564.

II. DISCUSSION

Dr. Debra Aron is an antitrust expert retained by Defendants to respond to the opinions of Sumotext's antitrust expert, Dr. Ryan Sullivan. Dr. Aron received a Ph.D. in economics from the University of Chicago in 1985, with honors. Aron Report ¶ 3, Exh. 1 to Kesselman Decl. She is a vice president at Charles Rivers Associates, an international economics and finance consulting firm that provides economic expertise for litigation, regulatory proceedings, policy debates, and business strategy. *Id.* ¶ 2.

Greg J. Regan is a damages expert retained by Defendants to respond to the opinions of Sumotext's damages expert, Dr. Alan G. Goedde. Mr. Regan is a certified public accountant, licensed in California and New York. Regan Report ¶ 8, Exh. 2 to Stockinger Decl. He has worked as an auditor at Ernst & Young LLP, as the controller of a publicly traded company, and as a consultant. *Id.* ¶ 9. Mr. Regan has worked on many complex litigation matters, analyzing lost business value, lost profits, and other forms of economic damage involving entities in the tech industry, retail, health care, and real estate. *Id.*

Sumotext does not challenge these experts as unqualified to give their respective opinions, and the Court finds that Dr. Aron and Mr. Regan are qualified in their respective fields. Sumotext challenges certain of these rebuttal experts' opinions as lacking in foundation and/or based on unsound methodology. The Court notes that Sumotext's challenges are not framed in terms of the four factors discussed in *Daubert*. However, it does not appear that the *Daubert* factors would be a particularly good fit in this case, given the nature of the opinions offered by Dr. Aron and Mr. Regan. The Court therefore conducts the flexible inquiry mandated under *Daubert* and its progeny by determining whether Sumotext's asserted bases for exclusion are sufficient to show that challenged opinions fail to meet the threshold established by Rule 702.

A. Motion to Exclude Certain Opinions of Dr. Debra Aron

Sumotext objects to two aspects of Dr. Aron's opinions. First, Sumotext argues that Dr. Aron opines on the scope of the relevant markets in this case but has not performed the necessary foundational market analysis to offer such opinions. Second, Sumotext argues that Dr. Aron's opinions regarding application of the "single monopoly profit" theory must be excluded, on the basis that Dr. Aron has not undertaken a market analysis and or defined a relevant market. In response, Defendants argue that Dr. Aron appropriately criticizes the market definitions offered by Sumotext's expert, Dr. Sullivan, and that Dr. Aron – a rebuttal expert – need not offer her own market definitions in order to offer such criticism. Defendants also argue that Dr. Aron properly applies the single monopoly profit critique to Dr. Sullivan's market definition, and that she need not offer her own market definition to do so.

1. Dr. Aron's Criticisms of Dr. Sullivan's Market Definitions

Sumotext's antitrust expert, Dr. Sullivan, opines that there are two relevant markets in this case: the market for leasing StarStar numbers in the United States, and the market for servicing StarStar numbers in the United States. *See* Pl.'s Motion at p.3 n.1, ECF 347-4; Aron Report ¶¶ 12, 43, Exh. 1 to Kesselman Decl. Dr. Aron criticizes Dr. Sullivan's market definitions, stating that "[h]e not only failed to demonstrate the existence of a distinct market for StarStar numbers; he also failed to provide any fact-based economic analysis that could demonstrate the existence of such a market." Aron Report ¶ 1, Exh. 1 to Kesselman Decl. Sumotext contends that Dr. Aron not only criticizes Dr. Sullivan's market definitions but also offers her own affirmative market definitions without laying a foundation for doing so. In response, Defendants argue that Dr. Aron's criticisms of Dr. Sullivan's market definitions constitute proper rebuttal opinions. The Court agrees with Defendants for the reasons discussed below.

In her report, Dr. Aron cites a number of sources, including deposition testimony and industry publications, indicating that StarStar number technology is one of several direct marketing channels that marketers can use to reach potential consumers. Aron Report ¶¶ 13-15, 27-35, Exh. 1 to Kesselman Decl. She observes that the record evidence shows that direct marketing channels available to advertisers include toll-free phone numbers, vanity 10-digit phone numbers, mobile short codes, text messages, Quick Response ("QR") codes, and search engine optimization ("SEO"). *Id.* Dr. Aron opines that "[a]s an economic matter, the goals and perceived strengths and weaknesses of each marketing tool (including the return on investment perceived by the marketer) would determine the extent to which marketers may treat each as a suitable economic substitute for other means to reach their targeted audience." *Id.* ¶ 31.

Dr. Aron opines that Dr. Sullivan has not given adequate consideration to each identified direct marketing channels as a suitable economic substitute for StarStar numbers, and has not utilized any valid methodology in excluding all such channels from the relevant markets. Aron Report ¶ 12.G, Exh. 1 to Kesselman Decl. Specifically, Dr. Aron states that Dr. Sullivan "has provided no economic evidence that StarStar numbers constitute an antitrust market or that other forms of Call to Action marketing such as 1-800 numbers, texts, and emails are not adequate substitutes in the eyes of customers." *Id.* Dr. Aron suggests that Dr. Sullivan based his market definitions on the deposition testimony of Tim Miller, Sumotext's President and CEO, rather than conducting a valid or accepted economic analysis of the market. *Id.* ¶ 12.A.

A defendant may present expert rebuttal of the plaintiffs expert "by putting forth its own expert who either claims that (1) the plaintiff's expert's methodology was conducted improperly in some way; or (2) the ultimate conclusion the plaintiff's expert makes is flawed because a superior methodology provides a different result." *TCL Commc'ns Tech. Holdings Ltd. v. Telefonaktenbologet LM Ericsson*, No. CV 15-02370 JVS, 2016 WL 7042085, at *5 (C.D. Cal. Aug. 17, 2016). Dr. Aron's opinions fall into the first category, as she identifies numerous potential substitutes for StarStar numbers based on record evidence, and concludes that

Dr. Sullivan has not used any legitimate methodology to exclude those potential substitutes from his market definitions.

Sumotext argues that Dr. Aron goes beyond criticizing Dr. Sullivan's methodology and offers affirmative opinions regarding the scope of the relevant markets and what products constitute substitutes for StarStar numbers. Sumotext contends that Dr. Aron cannot opine on the latter topics without conducting an independent market analysis, citing numerous cases discussing the required foundation for expert testimony. *See*, *e.g.*, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002). At her deposition, Dr. Aron testified expressly that she was not asked to perform an independent market analysis or to define the relevant markets in this case, and that she did not engage in either task. *See* Aron Dep. 36:9-38:20, Exh. 3 to Kesselman Decl. After reviewing Dr. Aron's report, the Court concludes that she does not offer her own market definitions or opine as to which products constitute adequate substitutes for StarStar numbers; instead, Dr. Aron challenges Dr. Sullivan's methodology in excluding all potential substitutes from his market definitions. Dr. Aron is qualified to challenge Dr. Sullivan's methodology in this manner, and such challenge constitutes proper rebuttal opinion. Sumotext has offered no authority for the proposition that Dr. Aron must offer her own market definitions in order to criticize Dr. Sullivan's market definitions.

Sumotext identifies several statements in Dr. Aron's report that could be construed as affirmative statements regarding the scope of the relevant markets or the suitability of certain products as substitutes for StarStar numbers. For example, Sumotext points to Dr. Aron's statement that "[t]he evidence I discuss below indicates that the relevant market is much larger than StarStar numbers and StarStar services and includes a much broader set of consumer engagement products." Aron Report ¶ 145, Exh. 1 to Kesselman Decl. Read in context, however, the identified statements do not appear to be independent determinations regarding the scope of the relevant markets, but merely part of Dr. Aron's commentary on asserted deficiencies in Dr. Sullivan's opinions. For example, immediately after the language quoted above, Dr. Aron points to evidence that a decrease in the price of StarStar numbers did not result in increased demand, and opines that "[W. StarStar numbers constituted a market, a decrease in price would result in an increase in sales of the product." *Id.* ¶¶ 145-47. Highlighting Dr. Sullivan's failure to address this and other record evidence is proper rebuttal. "The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party." *Huawei Techs., Co, Ltd v. Samsung Elecs. Co, Ltd.*, 340 F. Supp. 3d 934, 996 (N.D. Cal. 2018) (internal quotation marks and citation omitted). Dr. Aron's opinions do just that. To the extent Dr. Aron offers affirmative market definitions at trial, Sumotext may raise an appropriate objection based on Dr. Aron's testimony that she did not conduct an independent market analysis or to define the relevant markets.

In its reply brief, Sumotext argues that Defendants' opposition inappropriately attacks Dr. Sullivan's report as unreliable and factually unsupported. Sumotext correctly points out that Defendants have not filed a *Daubert* motion with respect to Dr. Sullivan, and that an opposition brief is not a proper vehicle to do so. The Court has disregarded Defendants' attacks on Dr. Sullivan arguments except as relevant to the reliability and admissibility of Dr. Aron's opinions. As stated above, the Court finds Dr. Aron's criticisms of Dr. Sullivan's report to be appropriate expert rebuttal. To the extent Sumotext believes Dr. Aron has mischaracterized Dr. Sullivan's report, that argument goes to the weight of Dr. Aron's opinions and not their admissibility. *Perez v. State Farm Mut. Auto. Ins. Co.*, No. C 06-01962 JW, 2011 WL 8601203, at *8 (N.D. Cal. Dec. 7, 2011) ("Whether Bashline's analysis and conclusions misrepresent or mischaracterize the Cripe and Rubinfeld Reports goes to the weight of his testimony rather than its admissibility.").

Accordingly, the Court DENIES Sumotext's motion to exclude Dr. Aron's opinions regarding Dr. Sullivan's market definitions.

2. Dr. Aron's Single Monopoly Profit Critique

Dr. Aron concludes that if Dr. Sullivan's market definitions are accepted, then Dr. Sullivan's opinion that Defendants excluded Sumotext as a reseller is internally inconsistent under the "single monopoly profit" principle of economics. *See* Aron Report ¶ 12.E., Exh. 1 to Kesselman Decl. Dr. Aron explains that principle in her report as follows:

> Economics teaches that even if VHT**/SSM were a monopolist as Dr. Sullivan opines, a monopolist has no short-run or long-run incentive to exclude efficient resellers, dealers, and retailers from the market. This is because an upstream monopolist can extract all of the monopoly profits available without controlling the retailing function, and would only seek to control the retailing function if it were a more efficient retailer than existing retailers. An upstream monopolist has no incentive to attempt to "leverage" or extend its upstream monopoly into downstream sales because there are no additional profits to be had; on the contrary, if the downstream dealers or resellers were more efficient at selling, the upstream monopolist would earn more profits by encouraging resellers and dealers. The upstream monopoly would have an incentive to operate the retailing function itself only if it were more efficient at doing so (because it could share in the efficiency gains), and operating the downstream function itself would not harm, and may rather benefit, consumers. This economic principle is known as the "single monopoly profit" critique.

Id. ¶ 104 (footnotes excluded), Exh. 1 to Kesselman Decl.

Sumotext argues that Dr. Aron may not offer testimony based on a theory that requires analysis of conduct in two defined markets when she has not defined a relevant market or undertaken a market analysis. That argument is not well-taken. Dr. Aron offers the "single monopoly profit" critique to show that if Dr. Sullivan's market definitions are accepted, his report is internally inconsistent. Dr. Aron need not establish that Dr. Sullivan's market definitions are correct – in fact she has sought to establish just the opposite – in order to argue that *if* they are correct then Dr. Sullivan's report is flawed under a particular economic principle.

Sumotext also argues that to the extent Dr. Aron opines that upstream monopolists cannot be liable for antitrust violations arising from refusal to deal with downstream resellers, Dr. Aron's opinion is contrary to Supreme Court precedent. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992). Sumotext's argument is inapposite, as Dr. Aron does not opine that the "single monopoly profit" principle renders upstream monopolists immune from antitrust liability. Dr. Aron merely opines that if Dr. Sullivan's market definitions are accepted, then his report is internally inconsistent.

Finally, Sumotext cites economic literature for the proposition that the "single monopoly profit" theory has been discredited, and it argues that Dr. Aron's opinions based on the theory therefore should be excluded. In response, Defendants cite other economic literature and case law recognizing the validity of the "single monopoly profit" theory. Sumotext has not provided the Court with an adequate basis to determine that the "single monopoly profit" theory has been uniformly rejected in the field of economics such that Dr. Aron's application of the theory is inherently unreliable. Where, as here, two qualified economists espouse conflicting views about the effect of a particular economic principle on the case, a "battle of the experts" arises. The proper course is to allow each side to attack the other's with contrary expert opinion, other contrary evidence, and cross-examination. *See Primiano*, 598 F.3d at 564-65. Dr. Sullivan in fact takes on Dr. Aron's application of the "single monopoly profit" principle in his reply report, asserting that Dr. Aron's approach is erroneous. Sullivan Reply Report ¶¶ 32-37, Exh. 2 to Kesselman Decl. It will be up to the jury to decide which expert to believe.

The Court DENIES Sumotext's motion to exclude Dr. Aron's opinions regarding the "single monopoly profit" principle.

B. Motion to Exclude Certain Opinions of Greg J. Regan

Sumotext challenges two aspects of the opinions offered by Defendants' rebuttal damages expert, Greg J. Regan. First, Sumotext seeks to exclude Mr. Regan's opinion that Sumotext's lost profits, if any, total approximately $1.1 million rather than the $9.2 million calculated by Sumotext's damages expert, Dr. Alan G. Goedde. Second, Sumotext seeks to exclude Mr.

Regan's opinions regarding Sumotext's lease cancellations. Sumotext asserts that these opinions are based on unreliable and inconsistent methodology. In response, Defendants argue that Mr. Regan's opinions are based on sound methodology and are admissible.

1. Mr. Regan's Damages Calculation

Sumotext's damages expert, Dr. Goedde, opines that the present value of Sumotext's lost profits resulting from Defendants' alleged anticompetitive conduct totals $9,223,500. Goedde Report ¶ 44, Exh. 1 to Stockinger Decl. Mr. Regan criticizes Dr. Goedde's methodology on a number of grounds, including Dr. Goedde's asserted failure to adequately account for the impact of lease cancellation by Sumotext's customers, overstatement of projected growth rate, dismissal of the Verizon VoLTE issue, and failure to account for all of Sumotext's variable costs. Regan Report vi 46-56, 73-77, 89-92, 93-96, Exh. 2 to Stockinger Decl. Mr. Regan provides an alternative calculation of $1,105,200 for the present value of Sumotext's lost profits, if any, resulting from Defendants' alleged anticompetitive conduct. Regan Report ¶¶ 115, 128-33 & Sched. 3. Sumotext moves to exclude Mr. Regan's alternative damages model and damages calculation.

As noted above, a defendant may present expert rebuttal of the plaintiffs expert by putting forth its own expert who either (1) challenges the methodology of the plaintiff's expert, or (2) claims that the ultimate conclusion reached by the plaintiff's expert is flawed because a superior methodology provides a different result. *See TCL Commc'ns Tech. Holdings Ltd.*, 2016 WL 7042085, at *5. Mr. Regan's opinions satisfy both categories, as he challenges Dr. Goedde's methodology and offers a different damages calculation based on what he claims is superior methodology.

Sumotext argues that Mr. Regan's alternative damages model is unreliable because it is dependent on a 75% lease cancellation rate that Sumotext contends is unsupported by the record and based solely on Mr. Regan's *ipse dixit*.[2] "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire*, 526 U.S. at 157 (internal quotation mark and citation omitted). However, as discussed below, the Court finds that Mr. Regan adequately explains how he arrived at the 75% lease cancellation rate and used the rate in his damages calculation.

Mr. Regan observes that Sumotext's StarStar leases typically were for a fixed initial term such as three months, with the leases thereafter renewing on a month-to-month basis. Regan Report ¶ 48, Exh. 2 to Stockinger Decl. Sumotext experienced significant lease cancellations over the period it operated its StarStar business. *Id.* ¶¶ 49-52. Mr. Regan calculated that the average duration of Sumotext's leases at the

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[2] An *ipse dixit* is "an assertion made but not proved." See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/ipse%20dixit (last visited December 30, 2019).

time of cancellation was 6.4 months. *Id.* ¶ 62. Based on leases in service as of September 15, 2015, which was 6.4 months prior to the termination of all of Sumotext's StarStar numbers, Mr. Regan calculated that Sumotext had a lease cancellation rate of 82%. *Id.* ¶ 65. Mr. Regan did not include leases commencing after September 15, 2015 when calculating Sumotext's cancellation rate, because in his opinion those leases had not been in service long enough for complete cancellation data to emerge. *Id.* ¶ 67. Mr. Regan also determined the average duration of StarStar Mobile's leases and StarStar Mobile's cancellation rate based on leases commencing after January 2016. *Id.* ¶ 64. Mr. Regan found that the average duration of StarStar Mobile's leases at the time of cancellation was 8 months and that StarStar Mobile's lease cancellation rate was 67%. *Id.*

Mr. Regan used these lease cancellation rates in his lost profits calculation as follows. First, he calculated Sumotext's gross revenue based on its active StarStar leases as of December 31, 2015. Regan Report ¶ 128, Exh. 2 to Stockinger Decl. Mr. Regan then calculated Sumotext's future gross revenue based on growth rates identified and explained in his report. *Id.* vi 128-29. However, those calculations did not take into account the impact of lease cancellation. *Id.* *¶* 130. As noted above, Mr. Regan determined that Sumotext's lease cancellation rate was 82%. However, he applied a lower cancellation rate of 75% for purposes of his analysis. *Id.* Mr. Regan stated in his report that "[t]his reduced cancellation rate considers the cancellation experience of StarStar Mobile (*i.e.*, approximately 67%)." *Id.* Applying the 75% cancellation rate and deducting operating costs, Mr. Regan concludes that the present value of Sumotext's lost profits, if any, total $1,105,200. Regan Report Schedule 3.

Sumotext contends that Mr. Regan's explanation of why he applied a 75% cancellation rate is inadequate, and it asserts that Mr. Regan conceded in his deposition that the 75% rate is based solely on his *ipse dixit* judgment. Sumotext mischaracterizes Mr. Regan's testimony. Mr. Regan testified that although he could have used the 82% cancellation rate he had determined for Sumotext, he made a judgment that cancellation rates might decline somewhat over time and thus that a lower rate of 75% was more appropriate. Regan Dep. 131:17-25, Exh. 4 to Stockinger Decl. Mr. Regan's judgment was based in part on StarStar Mobile's 67% cancellation rate. *Id.* Mr. Regan also considered the abatement of the Verizon VoLTE issue and he anticipated that Sumotext might get better at avoiding cancellations as it gained experience in the business. Regan Dep. 132:3-9, Exh. A to Bloch Decl. Based on all of those factors, Mr. Regan decided to apply a more conservative cancellation rate of 75% rather than the rate of 82%. Regan Dep. 132:9-17. Mr. Regan's downward adjustment of Sumotext's actual 82% cancellation rate to an estimated 75% cancellation rate, based on his professional judgment that the factors identified above might cause a decline in cancellation rates over time, is an appropriate exercise of his expertise that meets the threshold of Rule 702.

See Fed. Judicial Ctr. Reference Guide on Estimation of Economic Damages 432-33 (3d Ed. 2011), 2011 WL 7724259, *4 ("Relatively few economists serving as damages experts succumb to Daubert challenges, because most damages analyses operate in the familiar territory of measuring economic values using a combination of professional judgment and standard tools.").

The Court DENIES Sumotext's motion to exclude Mr. Regan's damages model and lost profits calculation on the ground that the 75% lease cancellation rate is based solely on *ipse dixit*.

2. Mr. Regan's Opinions Re Sumotext's Lease Cancellations

In addition to challenging the 75% estimated lease cancellation rate used by Mr. Regan, Sumotext also challenges the actual 82% lease cancellation that was Mr. Regan's starting point.

First Sumotext contends that the 82% cancellation rate is inflated by inclusion of leases cancelled on March 31, 2016 – the effective date of Defendants' termination of Sumotext – as a result of Defendants' anticompetitive conduct. Sumotext argues that it is improper to calculate lost profits based on data affected by Defendants' alleged anticompetitive conduct, because "[a] plaintiff's antitrust damages are to be calculated by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions." *Los Angeles Mem? Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986) (internal quotation marks and citation omitted).

Mr. Regan expressly recognized in his deposition testimony that his goal was to determine what Sumotext's baseline performance was prior to the alleged bad acts, and to use that baseline to estimate Sumotext's hypothetical performance had the bad acts not occurred. Regan Dep. 32:176, Exh. A to Bloch Decl. Mr. Regan acknowledged that in determining the 82% lease cancellation rate, he considered leases that were cancelled on March 31, 2016. *Id.* 150:16-25. He explained that he did so to increase his data pool. *Id.* More specifically, the leases terminated on March 31, 2016 generally were cancelled more quickly than other leases, and thus including those leases brought down the average months to termination figure, which enabled a deeper pool of leases to be analyzed. *Id.* Mr. Regan confirms the 82% cancellation rate by looking at other data, such as how many of Sumotext's StarStar numbers leased in 2012 were still leased in 2015. Regan Report ¶¶ 49-50, Exh. 2 to Stockinger Decl. That data shows a cancellation rate of 80%. *Id.* Mr. Regan also analyzes data on usage of StarStar numbers and concludes that there is a strong correlation between low or declining call volume and cancellation. *Id.* ¶¶ 56-61. Mr. Regan indicates that most of leases cancelled on March 31, 2016 had low call volume and therefore likely would have been cancelled in any event. *Id.* ¶¶ 67-70. Mr. Regan looks to the call usage activity as a crosscheck for his lease cancellation rate and concludes that Defendants' alleged bad acts did not affect the analysis. Regan Dep. 165:17-167:1, Exh. A to Bloch Decl.

Based on the foregoing, the Court is satisfied that Mr. Regan has articulated a reasonable methodology grounded in the record evidence which is sufficient to satisfy the threshold of Rule 702. Sumotext's assertions that the methodology of its expert is superior, or that Mr. Regan's 82% lease cancellation rate is inaccurate, may be addressed at trial through presentation of Dr. Goedde's testimony and cross-examination of Mr. Regan.

Sumotext argues that Mr. Regan acted inconsistently by excluding all Sumotext leases in effect for less than 6.4 months when calculating the lease cancellation rate, but applying the cancellation rate to new leases on a trailing 6.0 month basis. Sumotext argues that had Mr. Regan used a 6.0 month term for the average lease duration, the cancellation rate would have been 41% – half of the 82% rate he reached. Mr. Regan explains the basis for his determination that the average duration of Sumotext's leases at the time of cancellation was 6.4 months. Regan Report ¶ 62, Exh. 2 to Stockinger Decl. Using the 6.4 figure, Mr. Regan calculates a lease cancellation rate of 82%. It is not apparent that use of the 6.4 month average lease duration figure in calculating the lease cancellation rate is inconsistent with Mr. Regan's subsequent application of the reduced lease cancellation rate of 75% "on a trailing two quarter basis" as disclosed in the portions of Mr. Regan's testimony cited by Sumotext. Regan Dep. 127:14-20, Exh. 4 to Stockinger Decl. Even if there were an inconsistency in the manner in which Mr. Regan applies the lease cancellation rate, that inconsistency would not dictate reduction of the average lease duration from 6.4 months to 6.0 months or render unreliable Mr. Regan's calculation of the lease cancellation rate. Sumotext is free to challenge Mr. Regan's calculations regarding average lease duration, lease cancellation rate, or any other of his results at trial through presentation of competing expert opinion or cross-examination. However, Sumotext has failed to establish that the asserted inconsistency described above renders Mr. Regan's opinions unreliable and thus excludable under Rule 702 and *Daubert*.

The Court notes that the parties engage in substantial debate as to whether and which portions of Mr. Regan's report may be irrelevant now that Sumotext has dismissed its state law claims. The Court is confident that any testimony offered at trial will be relevant to the remaining antitrust claims. If that is not the case, Sumotext may raise an appropriate objection.

Accordingly, the Court DENIES Sumotext's motion to exclude Mr. Regan's opinions regarding Sumotext's lease cancellations.

III. ORDER

Sumotext's *Daubert* motions regarding defense experts Dr. Aron and Mr. Regan are DENIED.

Dated: January 2, 2020

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SUMOTEXT CORP., Plaintiff, v. ZOOVE, INC., dba STARSTAR MOBILE; VIRTUAL HOLD TECHNOLOGY, LLC; STARSTEVE, LLC; and VHT STARSTAR LLC, Defendants.	Case No. 16-cv-01370-BLF **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** [Re: ECF 336, 338] **[CONDITIONALLY UNDER SEAL]** (Filed Dec. 20, 2019)

This antitrust action arises from alleged misconduct relating to the leasing and servicing of "StarStar numbers," also referred to by the parties as "**numbers." A StarStar number is a mobile dial code that lets a user call a short code – e.g., "**CASH" or "**LAW" – from a mobile telephone and be connected to a ten-digit telephone number. Defendant Zoove, Inc., now doing business as StarStar Mobile, has the exclusive right to operate StarStar numbers for all major mobile carriers.[1]

Plaintiff Sumotext Corporation ("Sumotext") built up a successful business leasing StarStar numbers from Zoove and re-leasing them to end users while also

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[1] This order refers to the entity as both "Zoove" and "StarStar Mobile."

selling the users related add-on services. After Sumotext built up its business, Zoove was acquired by Defendant VHT StarStar, a company then owned by Defendant Virtual Hold Technology LLC ("VHT"). Defendant StarSteve, LLC ("StarSteve") subsequently became a shareholder in VHT StarStar. Shortly after the acquisition, Zoove terminated Sumotext's existing StarStar leases and offered new leases on less advantageous terms. Sumotext contends that the offered terms were so unreasonable as to amount to a refusal to deal, with the result that Sumotext was excluded from two distinct markets, one for leasing StarStar numbers in the United States and the other for servicing StarStar numbers in the United States.

Sumotext filed suit against Sumotext for breach of contract and related state law claims, but ultimately the case has morphed into federal antitrust suit. Two claims remaining in the operative third amended complaint ("TAC"): Claim 4 for restraint of trade in violation of Section 1 of the Sherman Act, and Claim 5 for conspiracy to monopolize and monopolization in violation of Section 2 of the Sherman Act. Defendants seek summary judgment on both claims.

For the reasons discussed below, Defendants' motion is DENIED.

I. BACKGROUND

The chronology of events set forth below is undisputed, although there is substantial dispute whether those events give rise to antitrust liability on the part of Defendants.

Zoove's Creation of the StarStar Registry

Zoove created and launched the national registry of StarStar numbers, giving it complete control over distribution of StarStar numbers in the United States. Miller Dep. 123:11-124:12, Greathouse Decl. Exh. 61. Sumotext began leasing StarStar numbers from Zoove in 2012 and releasing them to users while providing add-on services such as mobile messaging. Miller Dep. 79:6-19, Greathouse Decl. Exh. 61.

Zoove was not successful in monetizing its StarStar registry despite investments of tens of millions of dollars of venture capital. Cotney Dep. 66:19, Bloch Decl. Exh. B. Zoove was on the brink of bankruptcy when Mblox, Inc. ("Mblox") became interested in acquiring it. Cotney Dep. 29:2-5, Bloch Decl. Exh. B. Mblox's CEO, Tom Cotney, thought Zoove might be a good complement to Mblox's text messaging business. Cotney Dep. 66:17-19, Bloch Decl. Exh. B.

Mblox's Acquisition of Zoove

Mblox acquired Zoove in 2014, thereby gaining control of the StarStar registry. Caffey Dep. 13:23-14:4, Greathouse Decl. Exh. 56. Mblox's business model "was to primarily sell and service its products and services indirectly through ASPs." Bales Dep. 18:16-19, Greathouse Decl. Exh 52. The term "ASPs" refers to "application service providers," entities like Sumotext that re-leased StarStar numbers while providing add-on services to the end user. Bales Dep. 18:20-20:10, Greathouse Decl. Exh. 52. Entities that simply re-leased StarStar numbers without adding any value were referred to as "resellers." Bales Dep. 19:1-14, Greathouse Decl. Exh. 52.

Mblox supported ASPs by providing them access to application programming interfaces ("APIs"). Bales Dep. 25:10-22, Greathouse Decl. Exh.52. Mblox also created the "StarStar Toolkit" in 2015, which was specifically designed to help ASPs provide add-on services when they re-leased StarStar numbers to downstream customers. Bales Dep. 16:1-17:15. Mblox viewed ASPs as "partners" that would "add value and create a StarStar ecosystem." Bales Dep. 17:2518:5.

Sumotext thrived during Mblox's ownership of Zoove. Sumotext leased dozens of StarStar numbers under a master contract that gave it a 25% discount on the list price of all StarStar numbers. Miller Dep. 177:18-178:2, Bloch Decl. Exh. P. As a result, Sumotext could release any StarStar number at Zoove's list price but still "have a 25 percent profit margin in that fee." *Id.* 202:2-11. And on certain StarStar numbers, Sumotext made a much greater profit. For example, Sumotext made a profit of $8,700 per month on **BOSS, **CASH, **CRUISE, and **TRAVEL. Miller Dep. 177:3-6, Bloch Decl. Exh. P. On **MOVE, Sumotext incurred $3,500 in monthly costs but charged $16,200 per month. Miller Dep. 178:8-16, Bloch Decl. Exh. P.

Mblox, in contrast, was losing money on Zoove. Cotney Dep. 172:6-15, Bloch Decl. Exh. B. Mblox also was having trouble with a major carrier, Verizon. *Id.* Mblox's CEO, Cotney, testified, "I wanted to move those risks out of my portfolio." *Id.* Mblox approached StarSteve's president, Steve Doumar, to ask whether StarSteve was interested in buying Zoove. Doumar Dep. 116:2-24, Bloch Decl. Exh. E.

VHT StarStar's Acquisition of Zoove

StarSteve was created in early 2015, when it leased some StarStar numbers from Zoove and attempted to become a reseller. Doumar Dep. 93:1-21, Greathouse Decl. Exh. 51. StarSteve was unsuccessful – it never had any StarStar customers and never generated any revenue from StarStar numbers. Doumar Dep. 51:6-21, Greathouse Decl. Exh. 53. StarSteve gave up trying to re-lease StarStar numbers after approximately four months, and instead it considered acquiring the StarStar registry when approached by Mblox. Doumar Dep. 51:6-23, 116:2-24, Greathouse Decl. Exh. 53; Garvey Dep. 30:10-12, Greathouse Exh. 20.

StarSteve's President, Steve Doumar, approached VHT's Chairman, Greg Garvey, about investing in an acquisition venture. Garvey Dep. 30:2-21:12, Greathouse Exh. 20. At that time, VHT was a successful company with a product that enabled companies to monitor hold times and offer callers the option of hanging up and being called back when they got to the top of the hold queue. Garvey Dep. 16:3-17:4, Bloch Dep. Exh. F. Garvey determined that StarSteve was not in a financial position to lead the acquisition of Zoove, but Garvey became interested in acquiring the StarStar registry on behalf of VHT. Garvey Dep. 45:1-46:4, Bloch Dep. Exh. F. VHT formed VHT StarStar, which acquired 100% of Zoove from Mblox in December 2015 without StarSteve's participation. Garvey Dep. 54:2-6, 56:6-13, 77:20-78:5. Bloch Decl. Exh. F.

After VHT StarStar acquired Zoove, Garvey allowed StarSteve to acquire a 49% share of VHT StarStar, with VHT retaining the other 51% share. Garvey Dep. 49:1-6, Bloch Dep. Exh. F; Garvey Dep. 154:2-13, Greathouse Decl. Exh. 50. Since then, StarSteve essentially has been a holding company for its shares of VHT StarStar, and its president, Steve Doumar, became the president of VHT StarStar. Doumar Dep. 50:1-24, Greathouse Dep. Exh. 51.

Restructuring of StarStar Business

Executives at VHT StarStar, Zoove, and StarSteve began to discuss restructuring the StarStar business which, as noted, had never made money. Email, Greathouse Decl. Exh. 27. Email exchanges from mid-December 2015 show that Wes Hayden and Steve Garvey of VHT, Steve Doumar of StarSteve, and Mike Caffey of Zoove decided to "take back" the StarStar numbers that had been leased to Sumotext. Email, Greathouse Decl. Exh. 27. They also planned to contact each of Sumotext's customers to "onboard them."

Email, Exh. 28 to Greathouse Decl. Steve Doumar met with Sumotext's four largest customers and signed non-disclosure agreements with some of them. Doumar Dep. 85:22-93:10, Greathouse Decl. Exh. 53.

As Sumotext's customers learned about the restructuring of the StarStar business, they began expressing concern that Sumotext would not be able to renew their StarStar licenses. Some felt that Sumotext's President and CEO, Tim Miller, had lied regarding the longevity of the StarStar licenses, and some threatened to sue Sumotext. Miller Dep. 227:7-25, 228:1-229:25; 255:14-256:20, Greathouse Decl. Exh. 60. On February 29, 2016, Tim Keyes, the COO of Zoove, StarSteve, and VHT StarStar, sent an email to Wes Hayden, the CEO of VHT and acting CEO of VHT StarStar and Zoove. Email, Greathouse Decl. Exh. 25. The email content read, "Audience D – Strategy to Take Back Numbers," and indicated that an attachment was "the letter to Sumotext." *Id.*

February 29, 2016 Notice to Sumotext re Termination of Existing Leases

On February 29, 2016, Tim Keyes informed Tim Miller of Sumotext via email that Zoove had been acquired. Email, Bloch Decl. Exh. N. The email stated that it served as a thirty-day termination notice of all of Sumotext's StarStar leases, and that Sumotext would be given an opportunity to enter into new StarStar leases. *Id.* The email advised that StarStar numbers no longer would be leased nationally but only regionally, and that a new pricing model would "be made available no later than March 15th, and we hope you will want to participate in this new model." *Id.* Keyes recognized that Sumotext was a "long time partner" and that Miller's "feedback and knowledge is vital as we finalize a model that will work for everyone." *Id.* Keyes invited Miller to set up a time to meet and go over the new plan. *Id.*

March 7, 2016 Notice to Sumotext of New Terms

On March 7, 2016, Keyes sent Miller another email, stating that the new pricing model was still being revised, but that the plan was to price by county with prices dependent on county population. Email, Bloch Decl. Exh. JJ. Keyes included a chart showing a range of prices from $150 per month, for a county with 0 to 99k residents, to $5,000 per month, for a county with 3m to 3.99m residents. *Id.* Keyes also advised that StarStar numbers could be re-leased only to end customers – not to entities who themselves wished to release the numbers. *Id.* Any such releasing had to be approved by StarStar Mobile. *Id.* Under the new plan, resellers would receive a flat 15% commission. *Id.*

Email Correspondence March 8, 2016 – March 10, 2016

Miller responded by email the following day, March 8, 2016, stating that Sumotext previously had nationwide leases of StarStar numbers, and asking that Sumotext's 54 existing StarStar leases be "grandfathered" in under the prior terms. Email, Greathouse Decl. Exh. 20. Miller opined that "nobody would or could" afford nationwide leases under the new pricing plan, because "[s]ome quick math shows your charges would be $200,750 per month just to lease a phone number in the top 100 counties of the 3,144 counties of the U.S., along with $150,000 in setup fees." *Id.*

Further email communication ensued. *See* Email, Bloch Decl. Exh. KK. In a March 10, 2016 email from Wes Hayden of VHT StarStar to Tim Miller of Sumotext, Hayden stated that the prior Zoove business model had failed; StarStar Mobile had tried to engage with Sumotext regarding its new business model; and Sumotext's only response "is apparently focused on Sumotext continuing a failed business concept that only benefits you." *Id.* Hayden reiterated that Sumotext's existing StarStar leases were terminated effective April 1, 2016, and advised Miller that "[a]s details of a new reseller program are developed, we will make this program available to Sumotext for your consideration and participation." *Id.* Miller responded immediately on behalf of Sumotext, asking for a "standstill agreement" extending the lease termination date from April 1, 2016 to May 1, 2016 to allow negotiation of a resolution that would avoid the necessity for Sumotext to file a lawsuit. Email, Bloch Decl. Exh. KK.

Email Correspondence on March 11

Hayden responded on March 11, 2016, indicating that Miller should speak with Keyes immediately to try to negotiate a plan going forward, and advising that "[a] standstill can be part of that discussion if done in the framework of an overall agreement to move forward." Email, Bloch Decl. Exh. KK. Miller wrote back the same day stating that there was no point in negotiating without a 30-day extension of the termination date for Sumotext's StarStar numbers. *Id.* Miller indicated that if Sumotext were not granted the 30-day extension, it would "spend the next week solely dedicated to preparing the legal filings to protect SUMOTEXT and its customers from the pending deadline." *Id.* Hayden declined to grant the 30-day extension, but indicated that he and Keyes would be "available to meet with you via phone or face to face from tomorrow through end of day Tuesday," and would be "happy to provide concentrated time to determine if we can come to an agreement in short order." *Id.*

Miller's same-day response on behalf of Sumotext consisted of two sentences: "I don't negotiate with terrorists. When all of this comes out, Mr. Garvey is going to be shocked to learn how you have bungled this whole thing." *Id.*

Termination of Toolkit

In restructuring of the StarStar business, StarStar Mobile eliminated the Toolkit. Caffey Dep. 23:11-22, Greathouse Decl. Exh. 56. StarStar Mobile still uses the underlying software for certain tasks, but it does not provide a means by which third parties can access the Toolkit. Caffey Dep. 25:10-19, Greathouse Decl. Exh. 56. Mr. Keyes testified that "[w]e don't have ASPs today." Keyes Dep. 160:25-161:2, Greathouse Decl. Exh. 59. Instead, StarStar Mobile and VHT StarStar provide almost all add-on services associated with StarStar numbers that previously were provided by Sumotext and other ASPs. Caffey Dep. 68:15-69:11, 74:17-75:22, Bloch Decl. Exh. A. Occasionally, a StarStar customer will request to use a third party for a mobile web service, and in those instances StarStar Mobile generally agrees to use the third party. Caffey Dep. 76:9-77:11, Bloch Decl. Exh. A.

This Lawsuit

Sumotext filed this suit on March 21, 2016. The original complaint asserted breach of contract and related state law claims. Compl., ECF 1. Substantial motion practice resulted in the operative TAC, containing claims for: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) tortious interference with contract, (4) restraint of trade in violation of Section 1 of the Sherman Act, and (5) conspiracy to monopolize and monopolization in violation of Section 2 of the Sherman Act. TAC, ECF 251. The TAC names Zoove, VHT, VHT StarStar, StarSteve, and Mblox. *Id.* The Court dismissed Mblox, and Sumotext dismissed the three state law claims. Order on MTD, ECF 251; Order Approving Joint Stipulation of Dismissal, ECF 335. Defendants Zoove, VHT, and VHT

StarStar have filed a motion for summary judgment on the remaining two antitrust claims. MSJ, ECF 336. That motion is joined by StarSteve. Joinder, ECF 338.

II. LEGAL STANDARD

"Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Stanislaus Food Prod. Co. v. USS-POSCO Indus.*, 803 F.3d 1084, 1088 (9th Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* "[T]he non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.*

The court must view the facts and draw all factual inferences in favor of the non-moving party. *Stanislaus*, 803 F.3d at 1088. However, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Id.*

(internal quotation marks and citation omitted). Moreover, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 587-88. Thus, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588.

III. DISCUSSION

Sumotext asserts that Defendants conspired to, and did, exclude it from two distinct markets: the market for leasing StarStar numbers in the United States, and the market for servicing StarStar numbers in the United States.

Claim 4 is for restraint of trade in violation of Section 1 of the Sherman Act. That section provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To prevail, Sumotext must prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Sumotext claims that Defendants conspired to and did monopolize the StarStar market through acquisition and control of Zoove, excluded Sumotext and others from the relevant markets for leasing and servicing StarStar numbers, and thereby imposed dramatically higher prices for StarStar numbers and reduced the related services available to the public. *See* TAC, ¶¶ 263-91, ECF 185-4.

Claim 5 is for conspiracy to monopolize and monopolization in violation of Section 2 of the Sherman Act. That section provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony." 15 U.S.C. § 2. To prevail on a claim for monopolization, Sumotext must prove: (1) the possession of monopoly power in the relevant market; (2) the willful acquisition or maintenance of that power; and (3) causal antitrust injury. *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013). To prevail on a claim for conspiracy to monopolize, Sumotext must prove: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). Sumotext claims that Defendants conspired to, and did, acquire monopoly power in the StarStar leasing and servicing markets by acquiring control of the StarStar registry and refusing to deal with Sumotext in violation of the essential facility doctrine. *See* TAC ¶¶ 293-316.

Defendants argue that they are entitled to summary judgment on these claims for four reasons. First, Defendants argue that they are entitled to judgment on both the Section 1 and the Section 2 claims because Sumotext cannot establish that there is a distinct market for StarStar numbers. Second, Defendants contend that they are entitled to judgment on both claims because Sumotext cannot demonstrate injury to competition. Third, Defendants assert that they are entitled to judgment on the Section 2 claim because the StarStar registry is not an essential facility. And fourth, Defendants argue that they are entitled to judgment on the Section 1 claim because they are the same entity under *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

Sumotext contends that there are disputed, material facts that preclude summary judgment on any of these bases. In their reply brief, Defendants argue that Sumotext has not established that any material facts are in dispute. Defendants identify five facts that they assert are undisputed and entitle them to summary judgment. Those facts are: (1) Zoove has always been the only provider of StarStar numbers; (2) the Mblox business model, which Sumotext seeks to preserve, existed for less than a year and a half; (3) that business model was unprofitable for Zoove; (4) Zoove's new owners were interested in a continued business relationship with Sumotext at roughly the same prices, but Sumotext rejected their overtures; and (5) StarStar numbers are not a distinct antitrust market but instead one company's service, which competes with a myriad of readily apparent consumer alternatives for customer engagement. For the reasons discussed below, the Court concludes that these facts either are disputed or do not entitle Defendants to summary judgment.

A. Relevant Market (Claims IV and V)

In order to prevail on a claim under the Sherman Act, a plaintiff must demonstrate that the defendant has market power within a "relevant market." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008). The plaintiff must show both that a relevant market exists and that the defendant has power within that market. *Id.* "The 'relevant market' and 'market power' requirements apply identically under the two different sections of the Act," Section 1 and Section 2. *Id.* at 1044 n.3; *see also Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (A plaintiff asserting a § 1 claim "has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."); *Somers*, 729 F.3d at 963 (A plaintiff asserting monopolization under § 2 must show "the possession of monopoly power in the relevant market").

As noted above, Sumotext asserts that Defendants have market power in two relevant markets, the markets for leasing and servicing StarStar numbers in the United States. Defendants contend that Sumotext cannot prove that StarStar numbers comprise a distinct market under relevant antitrust law. Sumotext responds by arguing that record evidence supports its market definitions and that in any event it need not define a relevant market because it has produced direct evidence of injury to competition. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (formal market analysis not required where the plaintiff presents "direct evidence of the injurious exercise of market power" such as "evidence of restricted output and supracompetitive prices").

Addressing the latter argument first, this Court notes that under *Ohio v. Am. Express Co.* – a case not cited by either side – it appears that "an accurate definition of the relevant market" is required even where the plaintiff relies on direct evidence, at least in the context of a Section 1 claim. *Ohio*, 138 S. Ct. at 2285 & n.7. When questioned by the Court at the hearing, Sumotext's counsel represented that there is disagreement among scholars whether the requirement for a market definition applies to all Sherman Act claims or is limited to the unique facts of the *Ohio* case. *See* Hrg. Tr. 50:25-51:14, ECF 371. Although Sumotext submits some direct evidence of injury to competition, it also relies on indirect evidence. A jury potentially will be presented with both direct and indirect evidence and thus Sumotext will be required at trial to establish the relevant market.

"[T]he term 'relevant market' encompasses notions of geography as well as product use, quality, and description." *Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001) (citation omitted). "The geographic market extends to the area of effective competition . . . where buyers can turn for alternative sources of supply." *Id.* (internal quotation marks and citation omitted). "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Id.* (citation omitted). In general, "the definition of the relevant market is a factual inquiry for the jury, and the court may not weigh evidence or judge witness credibility." *Rebel Oil*, 51 F.3d at 1435.

Defendants do not challenge the geographic aspect of Sumotext's asserted market definitions. However, Defendants contend that Sumotext's proposed product markets are too narrow, arguing that StarStar numbers are part of a broader market for "mobile engagement" that includes 10-digit telephone numbers, 800 numbers, text messages, SMS codes, and MMS codes.

"The principle most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291-92 (9th Cir. 1979); *see also United States v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 380 (1956) ("Every manufacturer is the sole producer of the particular commodity it makes but its control in the above sense of the relevant market depends upon the availability of alternative commodities for buyers: *i.e.*, whether there is a cross-elasticity of demand between cellophane and the other wrappings."). "[I]nterchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." *E. I. Du Pont*, 351 U.S. at 380-81. "Commodities which are 'reasonably interchangeable' for the same or similar uses normally should be included in the same product market for antitrust purposes." *Kaplan*, 611 F2d at 292.

Keeping these standards in mind, the Court must determine whether Defendants have submitted evidence that Sumotext's proposed product markets are too narrow and, if so, whether Sumotext has submitted evidence sufficient to create an issue of fact as to the plausibility of its market definitions.

Defendants submit testimony from a plethora of company executives involved in the StarStar business, all opining that there are alternative communication methods that are the equivalent of StarStar numbers. For example, Tom Cotney of Mblox testified that StarStar numbers could be used "to replace some vanity short codes." Cotney Dep. 70:18-71:24, Bloch Decl. Exh. B. Bruce Bales of Mblox testified that StarStar numbers are not the only type of mobile dial codes, because there also are Star codes, Pound codes, PoundPound codes, and short access codes of just two or three digits. Bales Dep. 104:25-105:16, Bloch Dep. Exh. S. Bales also identified other alternatives to StarStar numbers, including SMS and MMS services. Bales Dep. 116:6-16, Bloch Decl. Exh. S. Sumotext's own executive vice president, John Styers, characterized StarStar codes, text messages, MMS, click to text, and the like as "just another call to action. They're all the same." Styers Dep.32:8-33:10, Bloch Decl. Exh. D. If all of these products actually are alternatives to StarStar codes, Sumotext's market definitions are too narrow. *See E. I. Du Pont*, 351 U.S. at 394 ("In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal."). Defendants' evidence is sufficient to meet their initial burden on summary judgment, shifting the burden to Sumotext to provide specific evidence supporting its proposed market definitions.

Sumotext submits the opinions of its expert economist, Ryan Sullivan, Ph.D. Dr. Sullivan concludes that "[t]here are two relevant markets for analysis in this case: (1) the market for leasing StarStar numbers in the United States, and (2) the market for servicing StarStar numbers in the United States." Sullivan Report ¶ 43, Greathouse Decl. Exh. 4. Dr. Sullivan provides a cogent explanation for his conclusion that StarStar numbers are not reasonably interchangeable with other types of consumer engagement products. *Id.* ¶¶ 85-99. Dr. Sullivan considered the historical price gap between StarStar numbers and other products, noting that the average monthly lease fee for a StarStar number is $1,500 while the average monthly price of short text codes is $500-$1,000 and the average monthly price of a 1-800 number is $0.50-$5.00. *Id.* ¶ 89. Dr. Sullivan explains that this price gap indicates that StarStar numbers have features that the alternatives do not, and that those features are so highly valued by StarStar customers that "substitution, if any, between StarStar numbers and other forms of consumer engagement is limited." *Id.* Dr. Sullivan considers the lack of operation connection between the

StarStar registry and registries for other products. *Id.* ¶ 90. He also devotes several paragraphs of his report to the functional differences between StarStar numbers and other forms of consumer engagement, including short codes for texting, apps and websites, phone numbers, and 1-800 numbers, and in particular the unique nature of StarStar dial code experiences as compared to other products. *Id.* ¶¶ 91-97. Dr. Sullivan also indicates that he conducted a significant non-transitory increase in price ("SSNlP") test, commonly used in economic analysis of antitrust to define the relevant market, to determine that the relevant markets in this case are the StarStar leasing and servicing markets. *Id.* ¶¶ 103-09.

Dr. Sullivan's opinions constitute evidence sufficient to meet Sumotext's burden at this stage. "[E]xpert opinion is admissible and may defeat summary judgment if it appears that the affiant is competent to give an expert opinion and that the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not." *Rebel Oil*, 51 F.3d at 1435.

Defendants argue that Dr. Sullivan's opinion "is not evidence" and "therefore it cannot create a triable issue of fact in the face of admissible evidence to the contrary." Defs.' Reply at 5, ECF 361. Defendants rely on *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993), and *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 607 (9th Cir. 2002). In *Brooke*, the Supreme Court determined that the opinion of the plaintiff's economic expert was insufficient to support the jury's verdict, noting that "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke*, 509 U.S. at 242. In *Domingo*, the Ninth Circuit affirmed the district court's exclusion of the plaintiff's expert under *Daubert*. *Domingo*, 289 F.3d at 607.

Neither case advances Defendants' position here. Defendants have not challenged Dr. Sullivan's qualifications, moved to exclude Dr. Sullivan's opinion under *Daubert*, or objected to any specific portions of Dr. Sullivan's report. Defendants have articulated general criticisms regarding Dr. Sullivan throughout their briefs, asserting for example that his opinions are "not supported by economic analysis," Defs.' Motion at 9, ECF 336, and chastising him for failing to "discuss[ ] a single price that was actually charged by StarStar Mobile to resellers or end-users," Defs.' Motion at 22, ECF 336. At the hearing, the Court noted that Defendants' general criticisms did not constitute evidentiary objections upon which the Court could rule. *See* Hrg. Tr. 5:18-6:3, ECF 371. When defense counsel indicated that Defendants had intended to challenge Dr. Sullivan's opinions for lack of foundation, the Court advised counsel that it was impossible to tell from the briefing which paragraphs of Dr. Sullivan's "hefty" report Defendants sought to exclude. *See* Hrg. Tr. 9:7-17. The Court declined defense counsel's offer to submit particularized objections after the hearing, indicating "that time has come and gone." Hrg. Tr. 9:18-21. Further, Defendants' general criticisms of Dr. Sullivan's opinions are more appropriately addressed in cross-examination. Dr. Sullivan's opinions therefore are admissible for purposes of the present summary judgment motion and, as discussed above, are sufficient to defeat Defendants' summary judgment motion based on market definition.

Defendants argue that even if it were plausible that StarStar numbers constitute a distinct market, Sumotext has not shown that StarStar Mobile exercised market power. Market power "has been defined as the ability of a single seller to raise price and restrict output." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992). Defendants contend that none of the record evidence shows that StarStar Mobile profitably raised prices or restricted output. However, Dr. Sullivan opines that "Defendants have possessed and exerted market power by way of the alleged anticompetitive conduct." Sullivan Report ¶ 47, Exh. 4 to Greathouse Decl. Dr. Sullivan specifically states that Defendants have increased prices for StarStar numbers. *Id.* ¶¶ 61-65. He also states that output of StarStar numbers has been restricted. Sullivan Reply Report ¶¶ 56-58, Exh. 39 to Greathouse Decl. Defendants argue that Dr. Sullivan's opinions on these topics are unsupported and unreliable. However, for the reasons stated herein, Dr. Sullivan's opinions are admissible for purposes of summary judgment, and they are sufficient to create disputed facts as to whether Defendants exercised market power.

Defendants argue that Sumotext cannot assert a viable monopolization claim based on Defendants' conduct with respect to StarStar numbers, because such conduct "implicates only StarStar Mobile's ability to control the distribution of its own product." Defs.' Motion at 8-9, ECF 336. That argument is addressed in section III.C. below, in the context of Defendants' essential facility argument.

In summary, having considered the parties' arguments, the relevant legal authorities, and the record evidence, the Court concludes that Sumotext has demonstrated the existence of disputed facts precluding summary judgment based on an inadequate market definition. This case falls within the ordinary rule that "the definition of the relevant market is a factual inquiry for the jury." *Rebel Oil*, 51 F.3d at 1435. It will be up to the jury to determine whether StarStar numbers are so unique as to comprise a distinct market as argued by Sumotext, or whether StarStar numbers are part of a broader market of mobile engagement as argued by Defendants.

B. Injury to Competition (Claims IV and V)

Defendants next argue that they are entitled to summary judgment on the basis that Sumotext cannot establish injury to competition. Injury to competition is required under both Section 1 and Section 2. *See Kendall*, 518 F.3d at 1047 (injury to competition is element of Section 1 claim); *Somers*, 729 F.3d at 963 (causal antitrust injury is element of Section 2 claim for monopolization); *Paladin*, 328 F.3d at 1148 (causal antitrust injury is element of Section 2 claim for conspiracy to monopolize). "The antitrust laws . . . were enacted for the protection of competition not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks and citation omitted). "Injury that flows from aspects of a defendant's conduct that are beneficial or neutral to competition is not 'antitrust injury.'" *Paladin*, 328 F.3d at 1145. "Where the defendant's conduct harms the plaintiff without adversely affecting competition generally, there is no antitrust injury." *Id.* Defendants argue that there is no evidence in the record showing that consumers have suffered due to Defendants' conduct.

Before turning to Defendants' evidence on that point, the Court notes that under their motion brief's subheading "The defendants did not injure competition," Defendants also argue that there could not have been a group boycott or conspiracy to deny Sumotext access to StarStar numbers, because StarStar Mobile was the only entity operating the StarStar registry, and it had the right to terminate an unprofitable distribution agreement. *See* Defs.' Motion at 12-13, ECF 336. Defendants also advance the related argument that there could not have been a conspiracy because Defendants are part of the same entity under *Copperweld. See* Defs.' Motion at 13-14, ECF 336. In the Court's view, the latter two arguments bear more directly on other elements of Sumotext's claims, and more properly are addressed in sections III.C and III.D below, discussing the essential facility doctrine and *Copperweld.* However, Defendants' remaining arguments and evidence are sufficient to meet their initial burden with respect to the element of injury to competition, as discussed below.

Defendants present evidence that many of Sumotext's former customers now have direct leasing relationships with StarStar Mobile. *See* Doumar Dep. 79:8-12, Bloch Decl. Exh. E. Defendants also show that there are at least six StarStar resellers in the market who are allowed to re-lease StarStar numbers. *See* Summary of VHT**/SSM Reseller Agreements, Bloch Decl. Exh. FF. StarStar Mobile has entered into referral-based StarStar marketing agreements with at least seventeen entities. *See* Summary of VHT**/SSM Referral Agreements, Bloch Decl. Exh. GG. Defendants assert that StarStar Mobile offers all the services Sumotext offered when it was an ASP. *See* Caffey Dep. 68:15-69:11, 74:17-75:22, Bloch Decl. Exh. A. Finally, Defendants point to the absence of a single declaration or deposition showing the existence of customers who are dissatisfied by StarStar Mobile's current business model and services. Based on this evidence, a reasonable jury could conclude that Defendants' conduct did not injury competition. Thus, the burden shifts to Sumotext to show the existence of disputed facts.

Sumotext relies primarily on Dr. Sullivan's opinion to show that after VHT StarStar acquired Zoove, pricing for StarStar numbers increased and output decreased. Dr. Sullivan analyzed StarStar Mobile's pricing and concludes that Defendants controlled and increased prices. *See* Sullivan Report ¶¶ 59-67 and C-1, Greathouse Decl. Exh. 4. Dr. Sullivan states that after the acquisition of Zoove, the output of StarStar number leasing decreased. *Id.* ¶ 142 and B-1. Dr. Sullivan also opines that innovation in the marketplace decreased after the acquisition of Zoove, because ASPs were eliminated. *Id.* ¶ 80. This evidence is sufficient to meet Sumotext's burden on summary judgment. As discussed above, Defendants contend that Dr. Sullivan's opinions are not adequately supported and in fact are plain wrong. However, Defendants have not made *Daubert* motion or a proper evidentiary objection with respect to Dr. Sullivan. Dr. Sullivan is a qualified economist and he states the factual bases for his opinions. Moreover, these general objections are more properly addressed through cross-examination. Under these circumstances, the Court cannot simply discount Dr. Sullivan's opinions as urged by Defendants.

Dr. Sullivan's opinions regarding increased prices, restricted output, and decrease in innovation are sufficient to create a factual dispute whether Defendants' conduct caused injury to competition.

C. Essential Facility (Claim V)

Defendants argue that Sumotext cannot establish that the StarStar registry is an "essential facility," as necessary to make out antitrust claims based on StarStar Mobile's business decisions with respect to its own product. Sumotext contends that the StarStar registry is an essential facility and that Defendants have denied it access.

"[A]s a general matter, the Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (internal quotation marks and citation omitted). However, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Trinko*, 540 U.S. at 408. The "essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991). To establish a claim under the essential facilities doctrine, the plaintiff must show that: (1) the defendant is a monopolist in control of an essential facility, (2) the plaintiff, as the monopolist's competitor, is unable reasonably or practically to duplicate the facility, (3) the defendant refuses to provide the plaintiff with access to the facility, and (4) it is feasible for the defendant to provide such access. *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, F.3d 1171, 1184 (9th Cir. 2016). Defendants argue that Sumotext cannot establish any prong of this test.

1. Monopolist in Control of Essential Facility

On the first prong, requiring a showing that the defendant is a monopolist in control of an essential facility, Defendants argue StarStar Mobile is not a monopolist because StarStar numbers are not a properly defined market. Defendants cannot prevail on that argument at this stage, because as discussed above there is a factual dispute whether the relevant markets properly are restricted to StarStar numbers.

Defendants also argue that the StarStar registry is not essential to consumers, because StarStar numbers remain available today. The question is whether the facility is essential to competitors, not to the general public. *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1129 (9th Cir. 2004) ("The doctrine makes a facility that is essential to competition in a given market available to competitors so that they may compete in that market."). Access to StarStar numbers clearly is essential for Sumotext to compete in the StarStar leasing market. Defendants argue that, with respect to the StarStar servicing market, there is no evidence that the APIs and Toolkit were essential facilities. Defendants suggest that Sumotext could compete in the StarStar servicing market by using web access. *See* Defs.' Motion at 19, ECF 336. Defendants do not cite to any evidence showing how a service provider such as Sumotext could obtain access to StarStar lessees to offer or provide servicing products now that Defendants have discontinued the Toolkit and APIs. The evidence that Defendants cite for the proposition that web access is now available for servicing is the deposition testimony of Michael Caffey, who stated that StarStar Mobile now provides virtually all services to StarStar lessees through web access set up with the lessees. Caffey Dep. 74-77, Bloch Decl. Exh. A. That evidence actually supports Sumotext's position that StarStar Mobile eliminated facilities necessary for Sumotext and other ASPs to service StarStar numbers, as it makes clear that third parties no longer have access to information regarding StarStar numbers. Absent such access, ASPs have been eliminated from the StarStar servicing market. *See* Keyes Dep. 160:25-161:2, Greathouse Decl. Exh. 59.

Accordingly, Defendants have failed to demonstrate that Zoove is not a monopolist with control over an essential facility.

2. Duplication of Facility

On the second prong, requiring a showing that the plaintiff cannot reasonably or practically duplicate the facility, Defendants argue that "[t]here is nothing in the record to indicate why Sumotext could not develop its own techniques for communicating with customers via phone or text message. . . ." Defs.' Motion at 19, ECF 336. Defendants' argument is dependent on a market definition that includes text messages, mobile phone shortcuts, and apps. As discussed above, there is a factual dispute as to whether the market properly is limited to StarStar numbers. Defendants do not argue, nor does it appear that they could on this record, that

Sumotext could duplicate a facility that would give them access to StarStar numbers. Dr. Sullivan opines that because Zoove has exclusive agreements with the major mobile carriers, "it is not practical for any competitor to try to enter the marketplace as a competing registry or duplicate the registry." Sullivan Report ¶ 60, Exh. 4 to Greathouse Decl.

Thus, there is a factual dispute whether Sumotext could reasonably or practically duplicate the StarStar registry.

3. Denial of Access to the Essential Facility

Defendants' strongest argument on the essential facility doctrine arises in connection with the third prong, requiring a showing that the defendant refused to provide the plaintiff access to the essential facility. Defendants argue that the email exchanges between the parties in February and March 2016 make clear that StarStar Mobile wanted to lease to Sumotext and held itself willing and ready to negotiate. Those email exchanges are described in detail above. In particular, Defendants point to the last exchanges, in which StarStar Mobile offered to meet with Sumotext to negotiate resolution over their dispute regarding lease terms. *See* Emails, Bloch Decl. Exh. KK. Wes Hayden of StarStar Mobile suggested that Tim Miller of Sumotext speak with Tim Keyes of StarStar Mobile, and when that suggestion was rebuffed, Hayden advised Miller that he (Hayden) and Keyes would hold themselves available to meet via telephone or face to face. *Id.* It was *Miller* who broke off communication at that point, stating that he would not "negotiate with terrorists." *Id.* Defendants argue that Sumotext cannot prove that *Defendants* refused to provide Sumotext access to the StarStar registry on this record. If Defendants provided access to Sumotext, even if it was not on the terms that Sumotext wanted, Sumotext cannot maintain a claim under the essential facilities doctrine, because "[t]he doctrine does not guarantee competitors access to the essential facility in the most profitable manner." *MetroNet*, 383 F.3d 1124, 1130 (9th Cir. 2004). Where "reasonable access to the essential facility exists – even if not in a way that is conducive to [the plaintiff's] existing business model – [the plaintiff] cannot establish an essential facilities claim." *Id.*

Sumotext argues that the terms offered by StarStar Mobile were so unreasonable as to constitute a denial of access. They point to Tim Miller's email in which he calculated what he would have to pay under the new pricing plan in order to obtain the same national coverage as Sumotext had under the terminated StarStar leases. *See* Emails, Greathouse Decl. Exh. 20. Miller opined that "nobody would or could" afford nationwide leases under the new pricing plan, because "[s]ome quick math shows your charges would be $200,750 per month just to lease a phone number in the top 100 counties of the 3,144 counties of the U.S., along with $150,000 in setup fees." *Id.* Sumotext relies on *Safeway Inc. v. Abbott Labs.*, No. C 07-05470 CW, 2010 WL 147988, at *7 (N.D. Cal. Jan. 12, 2010), holding that a 400% price increase could amount to a refusal to deal implicating *Trinko*. "An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal." *MetroNet*, 383 F.3d at 1132.

Sumotext also argues that there is a genuine factual dispute as to the parties' negotiations. According to Sumotext, the March 2016 email exchanges described above "shows that Sumotext repeatedly sought clarity from the Defendants regarding their notice of termination, they refused to answer Miller's questions, and VHT's CEO refused to provide additional time for a good faith negotiation." Opp. at 19-20, ECF 355-4.

The Court concludes that it cannot determine as a matter of law that StarStar Mobile's conduct fell on the "reasonable" side of the line, so as to preclude Sumotext's essential facilities claim. In the Court's view, a jury easily could find that the offered terms were reasonable, and/or that Sumotext pulled the plug on the negotiations prematurely. However, it is possible that a reasonable jury could agree with Sumotext's view of the negotiations, and conclude that StarStar Mobile offered unreasonable terms or refused to deal. Miller has extensive experience as a participant in the StarStar market, and it appears that his calculations as to what he would have to pay to maintain national StarStar leases are correct based on the price chart provided to him by Defendants. Hayden and Keyes did not indicate that Miller's calculations were incorrect when they responded to his email, they simply indicated that

StarStar Mobile was pursuing a new business model. *See* Emails, Bloch Decl. Exh. KK.

Defendants present evidence showing that no lessee ever paid anything close to the numbers set forth in Miller's calculations, and that at the end of the day StarStar Mobile's pricing for nationwide contracts did not change much, staying somewhere between $10,000 to $15,000 per number. *See* Levitt Dep. 99:17-100:14, Bloch Decl. Exh. LL. However, Defendants do not present evidence that Miller was informed he could obtain nationwide contracts in the $10,000 to $15,000 range during the parties' March 2016 email communications, and in fact a review of the email exchanges shows that Hayden and Keyes let Miller's calculations stand. It may be that Sumotext could have obtained the nationwide prices that StarStar Mobile has offered to other customers had he met with Keyes or other executives to negotiate. However, it may be that StarStar Mobile would not have offered Sumotext those prices, in light of evidence that StarStar Mobile had deliberately sought to take back Sumotext's numbers and that Defendants in fact had met with Sumotext's largest customers around the time of the acquisition.

The Court concludes that a jury viewing this record could find that StarStar Mobile refused to deal with Sumotext and thus cut off Sumotext's access to an essential facility, StarStar numbers.

4. Feasibility of Access to the Essential Facility

On the fourth prong of the essential facilities test, whether it was feasible for the defendant to provide access to the essential facility, Defendants argue that it was not feasible for them to do so on the terms Sumotext wanted. Defendants contend that Sumotext has not cited any authority for the proposition that the essential facilities doctrine can lock a company into an unprofitable business relationship forever. While Defendants are correct, this argument assumes that the offered terms were reasonable, and that the terms Sumotext wanted were unreasonable. While a jury certainly could find as much, the reasonableness of the offered terms presents a question of fact for the reasons discussed above.

Accordingly, Defendants' motion for summary judgment on the ground that it did not deny Sumotext access to an essential facility must be denied.

D. *Copperweld Doctrine* (Claim IV)

Finally, Defendants argue that they are immune from suit under Section 1, because they were a single entity under *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). Plaintiffs argue that the record evidence does not support Defendants' assertion.

Section 1 "does not reach conduct that is wholly unilateral." *Copperweld*, 467 U.S. at 768 (internal quotation marks and citation omitted). "Unilateral conduct by a single firm, even if it appears to restrain trade unreasonably, is not unlawful under section 1 of the Sherman Act." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988) (internal quotation marks and citation omitted).

In determining what constitutes unilateral conduct, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." *Copperweld*, 467 U.S. at 771. In a later decision, *American Needle*, the Supreme Court clarified that the appropriate inquiry "is one of competitive reality," and that "it is not determinative that two parties to an alleged § 1 violation are legally distinct entities." *Am. Needle, Inc. v. Nat, Football League*, 560 U.S. 183, 196 (2010).

Defendants argue that at all times during the alleged conspiracy period, VHT, StarSteve, VHT StarStar (once it was formed), and Zoove (now StarStar Mobile) were working with such a unity of purpose that they should be treated as a single entity. Sumotext argues that the collaborative conduct described by Defendants is not evidence that Defendants acted as a single entity, but rather shows that Defendants – separate entities – conspired to restrain trade.

The Court concludes that Defendants have not established that they should be considered a single entity. "[T]he single-entity inquiry is fact-specific." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 (9th Cir. 2003). As Sumotext points out, StarSteve and

VHT were separate entities when VHT acquired Zoove. In fact, StarSteve originally sought to acquire Zoove, approached VHT for investment, and was cut out of the deal when VHT went forward unilaterally with the creation of VHT StarStar and acquisition of Zoove. *See* Garvey Dep. 45:146:4, 54:2-6, 56:6-13, 77:20-78:5, Bloch Dep. Exh. F. After VHT StarStar acquired Zoove, Garvey permitted StarSteve to acquire a 49% share of VHT StarStar, with VHT retaining the other 51% share. Garvey Dep. 49:1-6, Bloch Dep. Exh. F; Garvey Dep.154:2-13, Greathouse Decl. Exh. 50. The Court is unaware of any authority holding that a stock purchase occurring *after* the allegedly anticompetitive acts can trigger application of the *Copperweld* doctrine.

"[T]he fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a single entity." *Freeman*, 322 F.3d at 1148. Where, as here, a substantial portion of the conduct giving rise to Sumotext's Section 1 claim occurred before VHT created VHT StarStar, and before StarSteve acquired its interest in VHT StarStar, the Court cannot find as a matter of law that Defendants may be viewed as a single entity for purposes of the *Copperweld* doctrine. That determination is consistent with district court cases within the Ninth Circuit declining to apply *Copperweld* to corporations that are less than 100% in common. *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987).

E. Business Justification

Although they have not sought summary judgment based on business justification, *see* Defs.' Motion at 1, ECF 336 (setting forth "Statement of Issues to be Decided"), Defendants argue throughout their briefing that Zoove has never made money, Defendants made a legitimate business decision to pivot to a different business model, and such a decision cannot give rise to antitrust liability. Defendants may well be able to persuade a jury of that version of events. However, Sumotext has submitted sufficient evidence in opposition to the grounds for summary judgment raised in this motion to preclude summary judgment.

IV. ORDER

Defendants' motion for summary judgment is DENIED.

Dated: December 20, 2019

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SUMOTEXT CORP., Plaintiff, v. ZOOVE, INC., et al., Defendants.	Case No. 16-cv-01370-BLF **ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE MOTION FOR RELIEF FROM DISMISSAL ORDER** [Re: ECF 274] (Filed Sep. 18, 2018)

On April 19, 2018, the Court issued an order dismissing Plaintiff's claims against Defendant Mblox without leave to amend ("Dismissal Order"). *See* Dismissal Order, ECF 251. Plaintiff has filed a motion pursuant to Civil Local Rule 7-9, seeking leave to file a motion for relief from the Dismissal Order. *See* Motion for Leave, ECF 274. Mblox has filed an opposition, which was not authorized by the Court and has not been considered. *See* Civ. L.R. 7-9(d).

Civil Local Rule 7-9 provides that, "[b]efore the entry of a judgment adjudicating all of the claims and the rights and liabilities of all the parties in a case, any party may make a motion before a Judge requesting that the Judge grant the party leave to file a motion for reconsideration of any interlocutory order on any ground set forth in Civil L.R. 7-9(b)." Civ. L.R. 7-9(a).

"No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion." *Id.*

In order to obtain leave to file a motion for reconsideration, the moving party must show one of the following: (1) a material difference in fact or law exists from that which was presented to the court, which, in the exercise of reasonable diligence, the moving party did not know at the time of the order for which reconsideration is sought; (2) the emergence of new material facts or a change of law; or (3) a manifest failure by the court to consider material facts or dispositive legal arguments. Civ. L.R. 7-9(b).

The Court granted Mblox's motion to dismiss Claims 4 and 5 under the Sherman Act – the only claims asserted against Mblox – based on Plaintiff's failure to allege facts showing that Mblox joined the alleged conspiracies. Dismissal Order at 13-15, ECF 251. In its motion for leave, Plaintiff asserts that reconsideration of that ruling is warranted based on Defendant StarSteve's recent production of a signed letter of intent ("LOI") executed by Defendants Mblox and StarSteve. An unsigned version of the LOI was presented to and considered by the Court prior to its dismissal of Mblox. Plaintiff asserts, however, that the Court gave little weight to the unsigned LOI, and that the signed LOI constitutes new and material evidence of Mblox's participation in the alleged conspiracies.

The Court accepts Plaintiff's representation that the signed LOI was produced to Plaintiff only recently and could not previously have been presented to the Court in the exercise of reasonable diligence. However, the signed LOI does not constitute evidence of a material difference in fact than was considered by the Court when it issued the Dismissal Order. While Plaintiff cites to excerpts of the transcript of the oral argument in which the Court questioned the weight to be accorded the unsigned LOI, the Court's written Dismissal Order makes clear that it assumed for purposes of analysis that Mblox and StarSteve in fact entered into the LOI. *See* Dismissal Order at 2 ("StarSteve entered into a letter of intent ("LOI") with Mblox in September 2015, outlining a deal in which StarSteve would acquire Mblox, StarSteve and Mblox would divide StarStar customers and territories, and other competitors would be barred from the market."); Dismissal Order at 14 (referring to "the September 2015 LOI between Mblox and StarSteve"). The Court found Plaintiff's allegation that Mblox and StarSteve had entered into the LOI – which the Court accepted as true – to be insufficient to suggest Mblox's participation in the alleged conspiracies, noting that "StarSteve did not go forward with the purchase of Zoove pursuant to the LOI," and that "the portion of the LOI referenced in the TAC is designated as non-binding." Dismissal Order at 14.

Ultimately, the Court concluded that Plaintiff was attempting to hold Mblox "liable for selling Zoove with knowledge that the buyers intended to breach Sumotext's contracts." Dismissal Order at 15. The Court noted that Plaintiff had not cited, and the Court had not discovered, any case imposing antitrust liability in similar circumstances. *Id.* Absent such authority, the Court was "not persuaded that a seller's knowledge that the buyer may engage in illegal conduct renders the seller culpable." *Id.* Plaintiff's current offer of a signed version of the LOI does not undermine the Court's reasoning, as the Court accepted that Mblox and StarSteve had entered into the LOI. Because the signed version of the LOI does not constitute a material difference in fact, it does not satisfy the requirements of Civil Local Rule 7-9.

Accordingly, Plaintiff's motion for leave to file a motion for relief from the Dismissal Order is DENIED.

IT IS SO ORDERED.

Dated: September 18, 2018

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SUMOTEXT CORP., Plaintiff, v. ZOOVE, INC., et al., Defendants.	Case No. 16-cv-01370-BLF **ORDER DENYING MOTION TO DISMISS BROUGHT BY ZOOVE, VHT, VHT STARSTAR, AND STARSTEVE; GRANTING MOTION TO DISMISS BROUGHT BY MBLOX WITHOUT LEAVE TO AMEND; DENYING MBLOX'S MOTION FOR SANCTIONS; AND SETTING CASE MANAGEMENT CONFERENCE** [Re: ECF 220, 221, 222, and 224] (Filed Apr. 19, 2018)

Plaintiff Sumotext Corporation ("Sumotext") brought this action to enforce its alleged rights to lease StarStar numbers – vanity mobile dial codes such as "**LAW" and "**MOVE" – from Defendant Zoove, Inc. ("Zoove").[1] Zoove administers the national mobile dial

[1] It appears that Zoove now does business as "StarStar Mobile." For the sake of simplicity, the Court will refer to the Zoove/StarStar Mobile entity as "Zoove."

code registry ("the registry"), and it has exclusive rights to operate StarStar numbers for all major carriers, including AT&T, Verizon Wireless, T-Mobile, and Sprint. Sumotext built a business around leasing StarStar numbers from Zoove and subleasing them to customers while providing related software and services. That business was successful until Zoove was acquired by Defendant VHT StarStar, after which Zoove terminated all Sumotext's existing StarStar leases and offered new leases at rates 1,000 times what Sumotext had been paying. Zoove's acquisition and subsequent dealings with Sumotext allegedly were in furtherance of an unlawful conspiracy to monopolize the StarStar market. Sumotext asserts claims against Zoove, VHT StarStar, and others for violations of federal antitrust law and state common law.

This order addresses two motions to dismiss Sumotext's third amended complaint ("TAC") pursuant to Federal Rule of Civil Procedure 12(b)(6) and a motion for sanctions against Sumotext pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. For the reasons discussed below, the motion to dismiss brought by Defendants Zoove, VHT StarStar, Virtual Hold Technology LLC ("VHT"), and StarSteve, LLC ("StarSteve") is DENIED[2]; the motion to dismiss brought by Defendant Mblox, Inc. ("Mblox") is GRANTED WITHOUT LEAVE TO AMEND; and the

[2] Zoove, VHT StarStar, and VHT filed a motion to dismiss (ECF 222) which was joined by StarSteve (ECF 224).

motion for sanctions brought by Mblox is DENIED. A Case Management Conference is set for May 24, 2018.

I. BACKGROUND[3]

Sumotext began leasing StarStar numbers from Zoove in 2012. TAC ¶¶ 22-24. Sumotext struggled initially, but eventually it built up a successful business based on subleasing StarStar numbers to customers while also providing related software and services. *Id.* ¶¶ 27-28. In 2014, Mblox acquired Zoove as a wholly owned subsidiary. *Id.* ¶¶ 7, 29. During Mblox's ownership, Sumotext continued with its successful business model. *Id.* ¶¶ 29-35. By that time, many competitors had followed Sumotext into the StarStar product/service market, which Sumotext describes as containing three segments: the leasing segment, the reselling (subleasing) segment, and the servicing segment. *Id.* ¶¶ 28, 106, 116-18.

One such competitor, StarSteve, decided to combine with Zoove in order to monopolize the StarStar market. *Id.* ¶¶ 65-67. In pursuit of that goal, StarSteve entered into a letter of intent ("LOI") with Mblox in September 2015, outlining a deal in which StarSteve would acquire Mblox, StarSteve and Mblox would divide StarStar customers and territories, and other competitors would be barred from the market. *Id.*

[3] The background section is drawn from Sumotext's factual allegations, which are accepted as true for purposes of evaluating the Rule 12(b)(6) motions to dismiss. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

¶¶ 68-69. However, StarSteve determined that it lacked the capital and expertise to go forward with the acquisition of Zoove on its own. *Id.* ¶ 70. StarSteve ultimately entered into a joint venture with VHT to create a new limited liability company, VHT StarStar, for the purpose of acquiring Zoove, monopolizing the StarStar market, and eliminating Sumotext as a competitor. TAC ¶¶ 71-73. As part of the pre-acquisition due diligence for VHT StarStar's purchase of Zoove, Mblox disclosed all of its customer agreements, including its contracts with Sumotext. *Id.* ¶ 75. VHT, StarSteve, and VHT StarStar used that confidential information to target Sumotext's customers, approaching them and representing that Sumotext did not have the right to renew its StarStar leases and that those leases would be terminated upon VHT StarStar's purchase of Zoove. *Id.* ¶ 76. According to Sumotext, those representations were false and were made to persuade Sumotext's customers to abandon it and lease StarStar numbers directly from Zoove and VHT StarStar. *Id.* ¶¶ 76-77.

Sumotext became aware of the above-described conduct and informed Mblox that it objected to the sale of Zoove. TAC ¶¶ 79-81. Sumotext "warned Mblox from completing the transaction – thus furthering, joining, and profiting from the conspiracy – in the face of known unlawful schemes." *Id.* ¶ 81. Mblox nonetheless went forward with the sale of Zoove to VHT StarStar in December 2015. *Id.* ¶ 97.

After the sale, Zoove – controlled by StarSteve, VHT, and VHT StarStar – terminated all of Sumotext's

StarStar leases in breach of written contracts. TAC ¶¶ 100-01. Sumotext was informed that it could lease StarStar numbers only if it agreed to onerous new leasing terms which included an increase in rates from an average of $500 per month per StarStar number to an average of $500,000 per month per number. *Id.* ¶ 102. Others in the market were targeted as well. *Id.* ¶ 104. For example, Dawson Law Firm's lease fee for **CRASH was raised from $1,000 per month for a nationwide lease to $5,000 per month for just the South Florida Region. *Id.* Another lessee, A-Z Lock and Key, was not permitted to renew its lease of **LOCKS. *Id.*

Sumotext, then under the belief that VHT had acquired Zoove, filed this action against VHT and Zoove in March 2016 for breach of contract and related state law claims. Compl., ECF 1. Sumotext later added StarSteve, VHT StarStar, and Mblox as defendants and expanded its pleading to assert federal antitrust claims as well as state law claims. The operative TAC contains claims for: (1) breach of contract against Zoove; (2) breach of the implied covenant of good faith and fair dealing against Zoove; (3) tortious interference with contract against VHT, StarSteve, and VHT StarStar; (4) restraint of trade in violation of Section 1 of the Sherman Act against VHT, StarSteve, VHT StarStar, Zoove, and Mblox; and (5) conspiracy to monopolize and monopolization in violation of Section 2 of the Sherman Act against VHT, StarSteve, VHT StarStar, Zoove, and Mblox. TAC, ECF 185-4.

Two separate Rule 12(b)(6) motions are pending before the Court, one brought by Zoove, VHT, VHT

StarStar, and StarSteve, and the other by Mblox. Both motions are limited to Sumotext's federal antitrust claims (Claims 4 and 5). Sumotext's state law claims (Claims 1, 2, and 3) are not at issue. Mblox also has filed a motion for sanctions against Sumotext.

II. MOTIONS TO DISMISS

A. Legal Standard

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

B. Zoove, VHT, VHT StarStar, and StarSteve

Zoove, VHT, VHT StarStar, and StarSteve (collectively, "Moving Parties") contend that Sumotext has failed to state a claim against them for violation of the Sherman Act under either Section 1 (Claim 4) or Section 2 (Claim 5).

1. Sherman Act Section 1 (Claim 4)

Claim 4 alleges restraint of trade in violation of Section 1 of the Sherman Act. That section provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To plead a Section 1 claim, a plaintiff "must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

Moving Parties argue that Sumotext fails to meet this pleading standard in two respects. First, they assert that Sumotext does not plausibly allege injury arising from a combination or conspiracy between two or more entities, because the facts upon which the Section 1 claim is based are equally consistent with unilateral business decisions by Zoove. To the extent that other entities were involved in Zoove's decisions, Moving Parties assert that the common ownership of those entities dictates that they be viewed as a single enterprise which cannot collude with itself. Second, Moving Parties contend that the TAC does not contain sufficient factual particularity as to who at each of the defendant companies did what, and when, to join and further the conspiracy. *See Kendall*, 518 F.3d at 1048 (finding Section 1 claim deficient where it did not "answer the basic questions: who, did what, to whom (or with whom), where, and when?"). The Court addresses those arguments in turn.

a. Unilateral Business Decisions

Section 1 "does not reach conduct that is wholly unilateral." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (internal quotation marks and citation omitted). "Unilateral conduct by a single firm, even if it appears to restrain trade unreasonably, is not unlawful under section 1 of the Sherman Act." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988) (internal quotation marks and citation omitted). Moving parties contend that all of the conduct of which Sumotext complains, e.g., Zoove's termination of Sumotext's StarStar leases and increased pricing for new leases, are just as consistent with unilateral business decisions by Zoove as they are with an unlawful conspiracy. Under those circumstances, Moving Parties argue, Sumotext does not plausibly allege a Section 1 violation. *See Twombly*, 550 U.S. at 557 (discussing "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement"); *Kendall*, 518 F.3d 1049 ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

Moving Parties' argument might be persuasive were Sumotext relying solely on allegations that Zoove terminated its StarStar leases and increased its pricing. However, the TAC contains other allegations that plausibly suggest an agreement by VHT and StarSteve – two separate entities – to acquire Zoove for the purpose of monopolizing the StarStar market and eliminating Sumotext as a competitor. Prior to Mblox's sale of Zoove, Sumotext was the strongest competitor in the StarStar market by volume of StarStar leases and revenue. TAC ¶ 103. As soon as StarSteve and VHT agreed to form VHT StarSteve for the purpose of acquiring Zoove, they went after Sumotext's customers aggressively. *Id.* ¶¶ 71-78. Steve Doumar of StarSteve, Wes Hayden of VHT, and Greg Garvey of VHT told Sumotext's customers that Sumotext did not have the right to renew its StarStar leases and that those leases would be terminated once VHT StarStar acquired Zoove. *Id.* ¶¶ 76-79. Those communications interfered with Sumotext's relationships with its customers, making it difficult for Sumotext to collect on outstanding invoices and thus affecting Sumotext's cash flow. *Id.* ¶¶ 77-78. Once VHT StarStar acquired Zoove, Hayden and Garvey replaced Zoove's directors and senior officers with themselves. *Id.* ¶ 271. Doumar, Hayden, and Garvey, acting on behalf of VHT, StarSteve, and VHT StarStar, caused Zoove to terminate Sumotext's StarStar leases and offer new leases "so onerous that it would have prevented Sumotext from reselling its StarStar numbers." *Id.* ¶¶ 99-102. For example, the rate for Sumotext to lease a StarStar number was increased from \$500 per month per number to \$500,000 per month per number. *Id.* ¶ 102.

The Court concludes that these allegations constitute "enough factual matter (taken as true) to suggest that an agreement was made." *See Twombly*, 550 U.S. at 556. "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* Such a reasonable expectation is raised here. Of course, Sumotext will have to prove the illegal agreement in order to prevail on its Section 1 claim, and proof may be difficult to muster. However, Sumotext's ability to prove its claims is a question for another day. *See Twombly*, 550 U.S. at 556 (a complaint that alleges facts sufficient to suggest an anticompetitive agreement "may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") (internal quotation marks and citation omitted).

Relying on *Copperweld*, Moving Parties argue that to the extent other entities were involved in Zoove's business decisions, the Zoove-related entities constitute a single enterprise which cannot collude with itself. In *Copperweld*, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." *Copperweld*, 467 U.S. at 771. In a later decision, *American Needle*, the Supreme Court clarified that the appropriate inquiry "is one of competitive reality," and that "it is not determinative that two parties to an alleged § 1 violation are legally distinct entities." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010). "The key is whether the alleged contract, combination . . . , or conspiracy is concerted action – that is, whether it joins together separate decisionmakers." *Id.* at 195.

Based on the allegations of the TAC, *Copperweld* does not appear to be applicable. Sumotext alleges that StarSteve and VHT initially formed the conspiracy to monopolize at a time when the two companies were entirely separate entities which were horizontal competitors of Sumotext. Compl. at 2:17-23, ¶¶ 71-73. Moving Parties argue that those allegations are factually incorrect, and that "VHT ultimately bought Zoove outright through a wholly owned subsidiary, rather than in a joint venture with StarSteve." Motion to Dismiss at 8, ECF 222. Moving Parties also dispute Sumotext's characterization of VHT as a horizontal competitor. *Id.* at 14. While Moving Parties ultimately may disprove Sumotext's allegations, at this stage in the proceedings the Court's role is not to resolve factual disputes but to determine whether the TAC states a viable Section 1 claim. It does for the reasons discussed herein.

It is unclear which, if any, of the defendant entities may be viewed as a single enterprise after Zoove was acquired. While it is alleged that VHT StarStar wholly owned Zoove after the acquisition, StarSteve and VHT remained distinct entities with StarSteve owning a minority of the shares in VHT StarStar and VHT owning a majority. TAC ¶¶ 7, 71-72. Some district courts within the Ninth Circuit have held that minority ownership in a corporation is insufficient to trigger *Copperweld*. See, e.g., *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987) ("[O]nly corporations which are owned 100% in common, or a de minimis amount less than 100%, are covered by the *Copperweld* rule.").

Moving Parties rely on *Freeman*, in which the Ninth Circuit held that the single-entity rule may apply to "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147-48 (9th Cir. 2003) (internal quotation marks and citation omitted). However, "the fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a single entity." *Id.* at 1148. "[T]he single-entity inquiry is fact-specific." *Id.* In *Freeman*, the case had reached the summary judgment stage and thus that fact-specific inquiry was resolved on a fully developed record. It may be that once the record in this case is fully developed, Moving Parties will be able to demonstrate that the single-entity rule does apply. Because application of the rule is not apparent from the TAC, however, the rule does not constitute a basis for dismissal of Sumotext's Section 1 claim at the pleading stage.

Moving Parties' arguments based on Zoove's asserted unilateral business decisions and on the single-entity rule thus do not warrant dismissal of Sumotext's Section 1 claim.

b. Factual Particularity

Nor is the Court persuaded by Moving Parties' assertion that the TAC lacks sufficient factual particularity as to the role of each defendant. The Court dismissed Sumotext's prior iteration of its pleading in part because of a failure to distinguish between defendants that Sumotext referred to as the "VHT StarStar Parties." Order of June 26, 2017 ("June 2017 Order") at 16, ECF 175. The Court noted that allegations which lump multiple defendants together are insufficient to put any one defendant on notice of the conduct upon which the claims against it are based. *See Chuman v. Wright*, 76 F.3d 292, 295 (9th Cir. 1996). Moving Parties contend that the TAC does not cure this defect, and that it fails to allege each defendant's role in the conspiracy. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008) (complaint "must allege that each individual defendant joined the conspiracy and played some role in it"). However, the TAC distinguishes between the defendants, identifies the individuals who acted on behalf of the entity defendants, and explains each defendant's role in the alleged conspiracy. For example, Sumotext identifies the founders of the conspiracy as Doumar, Hayden, and Garvey; explains which entities those individuals represented and in what capacity, and describes the conduct each individual undertook on behalf of his corporate entity. TAC ¶¶ 65-68, 70-78, 133-41. Claims 4 and 5 break down the antitrust claims element by element, identifying by name each individual and entity whose conduct forms the basis of the claims. While Moving Parties do cite some instances where Sumotext used terms such as "monopolists" and "members of the joint venture," the Court has no difficulty concluding that the TAC as a whole identifies each defendant's role with adequate particularity.

Accordingly, Moving Parties' motion to dismiss Sumotext's Section 1 Claim (Claim 4) is DENIED.[4]

2. Sherman Act Section 2 (Claim 5)

Claim 5 alleges conspiracy to monopolize and monopolization in violation of Section 2 of the Sherman Act. That section provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony." 15 U.S.C. § 2. To state a civil claim

[4] In setting forth its reasoning for this ruling, the Court has touched on only those portions of the TAC necessary to dispose of the grounds for dismissal argued in the motion: that Sumotext's allegations are equally consistent with unilateral business decisions by Zoove and that Sumotext has failed to allege each defendant's role in the conspiracy with adequate particularity. The Court need not, and does not, address every issue raised in the parties' briefing, for example, whether Sumotext's group boycott theory properly is evaluated as per se unlawful or under the rule of reason.

for conspiracy to monopolize, the plaintiff must allege facts showing: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). To state a civil claim for monopolization under this provision, the plaintiff must allege facts showing: (1) the possession of monopoly power in the relevant market; (2) the willful acquisition or maintenance of that power; and (3) causal antitrust injury. *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013).

Sumotext alleges a "successful conspiracy to monopolize." TAC ¶ 302. Moving Parties contend that Sumotext has not made out a claim of monopolization for several reasons. First, they argue that Sumotext does not adequately plead a relevant market, because Sumotext defines the relevant market as the market for Zoove's StarStar leases. Second, even assuming that the relevant market is the StarStar market as alleged by Sumotext, Moving Parties assert that Sumotext does not allege facts showing that Defendants' conduct resulted in monopolization of the market. Moving Parties also dispute Sumotext's position that the StarStar numbers are an essential facility, and they argue that absent application of the essential facilities doctrine, Sumotext's monopolization claim against Zoove is inadequate. And finally, Moving Parties argue that if Defendants are treated as a single entity, Defendants cannot be liable simply because it holds a natural monopoly on its own product (StarStar numbers).

For the most part, Moving Parties' arguments are merely a rehash of arguments previously rejected by the Court in its order addressing motions to dismiss the second amended complaint. *See* June 2017 Order, ECF 175. No party sought reconsideration of that ruling, and the Court sees no need to revisit it in detail here. Moving Parties' arguments regarding the Section 2 claim therefore are addressed briefly as follows.

a. Relevant Market

"In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a relevant market." *Solyndra Residual Trust v. Suntech Power Holdings Co.*, 62 F. Supp. 3d 1027, 1044 (N.D. Cal. 2014) (internal quotation marks and citation omitted). "A relevant market has two dimensions: the relevant geographic market and the relevant product market." Id. (internal quotation marks and citation omitted). Where the complaint's definition of relevant market is facially unsustainable, the antitrust claim may be dismissed. *Id.* (internal quotation marks and citation omitted).

Sumotext alleges that "[t]he relevant product/service market is the national market for mobile dial codes, which is comprised of three segments: leasing, reselling, and servicing (collectively, the "Market"). TAC ¶ 106. Sumotext also alleges that "[t]he relevant geographic market for mobile dial codes is the United States because mobile dial codes are: a. Registered and leased from the Registry on a nationwide basis; b.

Supported by all major wireless carriers in the U.S.; and c. Called from and interconnected to phone lines throughout all the fifty states." *Id.* ¶ 107.

The Court previously found this market definition to be adequate for pleading purposes, rejecting the argument that Sumotext cannot define the relevant market to comprise a commodity controlled solely by Zoove. June 2017 Order at 16, ECF 175. While recognizing that the Sherman Act generally does not restrict a private business from exercising its own independent discretion as to parties with whom it will deal, *see Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 408 (2004), the Court found that Sumotext had alleged facts sufficient to bring this case within a narrow exception to the general rule on the basis that the registry is an "essential facility." June 2017 Order at 16. The Court acknowledged the defense argument that Sumotext had not alleged facts showing that StarStar numbers cannot be reasonably or practically replicated, and considered Defendants' speculation that StarStar numbers are interchangeable with all telephone numbers, with 800 numbers, and with web-based links. *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1129-30 (9th Cir. 2004) ("A facility is essential only if it is otherwise unavailable and cannot be reasonably or practically replicated.") (internal quotation marks and citation omitted). However, the Court concluded that Sumotext had alleged facts sufficient to support its position that the registry is an essential facility. June 2017 Order at 16. The Court noted that whether Sumotext's definition ultimately will stand was not a question to be answered on a motion to dismiss. *Id.*

Moving Parties simply ignore the Court's prior ruling, repeating arguments that the Court already has rejected, for example, that Zoove has a unilateral right to choose with whom it deals; and that Sumotext has not alleged facts showing that StarStar numbers are not reasonably interchangeable with 10-digit phone numbers, 5-digit common short codes, and internet domain names. Repetition of arguments previously considered and rejected by the Court does not constitute a basis for dismissal under Rule 12(b)(6).

b. Monopolization

Moving Parties argue that Sumotext has not alleged facts showing specific intent to control prices or destroy competition in the relevant market as required for a monopolization claim. They argue that Zoove's conduct was motivated by legitimate business reasons, and that Zoove's unilateral decision to change its business model cannot give rise to a Section 2 claim regardless of who owns it.

As an initial matter, specific intent is required only for the claim of conspiracy to monopolize, not for a claim of monopolization itself. *See Somers*, 729 F.3d at 963 (listing elements of claim for monopolization); *Paladin*, 328 F.3d at 1158 (listing elements of conspiracy to monopolize). Moreover, the Court cannot make a factual finding that Zoove's conduct was motivated by unilateral, legitimate business justifications as

Moving Parties seem to want. Moving Parties urge the Court to disregard as irrelevant Sumotext's allegations regarding the change in ownership of Zoove, because Zoove always had and still has sole authority with respect to StarStar leases and could have engaged in exactly the same conduct even if it had been retained by Mblox. The fact that Zoove *could* have made a unilateral business decision to terminate Sumotext's StarStar leases even if Doumar, Hayden, Garvey, and their respective companies had never entered the picture is not relevant. As discussed in Section II.B.1.a above, it is alleged that StarSteve and VHT entered into a joint venture to acquire control of Zoove and eliminate Sumotext as a competitor, and that they succeeded in both goals. Those allegations, and the supporting facts discussed above, are sufficient to make out a Section 2 claim.

c. Essential Facilities Doctrine

Moving Parties dispute the application of the essential facilities doctrine. That argument is addressed in part above in connection with Sumotext's market definition.

The Court addresses one additional argument made by Moving Parties: that even if the registry is an essential facility, Sumotext has not alleged that Zoove refused to deal with Sumotext. Moving Parties argue that it appears on the face of the complaint that Zoove did offer to deal with Sumotext, pointing to allegations that Zoove offered StarStar leases to Sumotext at approximately a 10,000% mark-up. "An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal." *MetroNet*, 383 F.3d at 1132. Another court in this district has held that a 400% price increase was tantamount to a refusal to deal. *See Safeway Inc. v. Abbott Labs.*, No. C 07-05470 CW, 2010 WL 147988, at *7 (N.D. Cal. Jan. 12, 2010). This Court concludes that Sumotext's allegation of the mark-up in the lease rate from $500 per month per StarStar number to $500,000 per month per StarStar number, along with allegations regarding other new lease conditions, are sufficient to allege a practical refusal to deal. *See* TAC ¶¶ 102, 167.

d. Single Entity Monopolization

Finally, Moving Parties argue that if all Defendants are viewed as a single entity, there can be no viable Section 2 claim. However, a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability. *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 448 (2009); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-611, (1985).

Accordingly, Moving Parties' motion to dismiss Sumotext's Section 2 Claim (Claim 5) is DENIED.

C. Mblox

Mblox moves to dismiss Claims 4 and 5 under the Sherman Act – the only claims asserted against it – on three grounds. Mblox argues that the TAC does not contain facts showing that Mblox: (1) joined in the alleged conspiracies, (2) had specific intent to seize monopoly power, or (3) caused Sumotext antitrust injury. Because the first ground is dispositive, the Court need not reach the other two.

The Court granted Mblox's motion to dismiss the second amended complaint on the basis that Sumotext had not alleged facts showing that Mblox had joined the alleged conspiracies to restrain trade under Section 1 of the Sherman Act or monopolize under Section 2 of the Sherman Act. June 2017 Order 8-10, ECF 175. The Court summarized the evidentiary facts that had been alleged, namely, that Mblox: failed to enforce a confidentiality agreement with the VHT StarStar parties; sold Zoove for a premium price, and assigned Sumotext's contracts, with knowledge that Sumotext's contracts would be terminated after the sale; and retained certain of its existing customers when it sold Zoove. *Id.* The Court found that although those factual allegations perhaps could give rise to an inference that Mblox entered into the alleged conspiracies, they just as easily give rise to an inference that Mblox made a legitimate business decision to sell Zoove and retain certain of its customers. *Id.* at 9. The Court relied on *Syufy Enterprises* in concluding that Mblox's participation in the conspiracy could not be inferred from Mblox's knowledge that the other defendants intended to terminate Sumotext's contracts following Mblox's sale of Zoove. *See Syufy Enterprises v. Am. Multicinema, Inc.*, 793 F.2d 990, 1000 (9th Cir. 1986) ("[A] supplier who licenses a product to another does not join the licensee in a conspiracy to monopolize merely because the licensee turns around and exploits the license for its own monopolistic purposes.").

With respect to Sumotext's arguments that Mblox's retention of certain StarStar numbers supported its Section 2 claim, the Court agreed that the type of carve-out referenced by Sumotext might give rise to a plausible inference that Mblox joined the alleged conspiracies, but it indicated that it could not draw such an inference from the bare-bones allegations provided in the second amended complaint. The Court granted Sumotext leave to amend its Sherman Act claims against Mblox on that basis.

In the TAC, Sumotext repeats the allegations previously found to be deficient by the Court regarding Mblox's failure to enforce the confidentiality agreement and sale of Zoove with knowledge that Sumotext's contracts would be terminated after the sale. TAC ¶¶ 142-66. Sumotext does expand on its allegations regarding Mblox's alleged carve-out, alleging that Tom Cotney of Mblox "inserted language in the agreements" to (1) "carve out exclusive rights to lease StarStar numbers to a list of over 30 marquee prospective StarStar customers"; and (2) "block Mblox's rivals from leasing, reselling or servicing mobile dial codes." TAC ¶ 166; 287. Those allegations do not specify which "agreements" contained the language in question. In fact, the quoted language is drawn from the September 2015 LOI between Mblox and StarSteve, which never came to fruition, and a November 2015 draft of the Stock Purchase Agreement ("SPA") between Mblox and

VHT StarStar, which was not the final version executed. TAC Exhs. 9, 12. As discussed above, StarSteve did not go forward with the purchase of Zoove pursuant to the LOI. Moreover, the portion of the LOI referenced in the TAC is designated as non-binding. The Final SPA between Mblox and VHT does not contain any of the language quoted in the TAC regarding the alleged carve-out and horizontal restrictions. Final SPA, ECF 208-3. Although the Final SPA is not attached to Sumotext's pleading, it is referenced in the TAC and the Court considers it under the incorporation by reference doctrine. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

Sumotext argues that the Court should not assume that the carve-out and horizontal restrictions negotiated by Mblox in earlier, non-final documents were abandoned just because those provisions were not included in the Final SPA between Mblox and VHT StarStar. Sumotext speculates that the parties may have secretly entered into carve-out and horizontal restriction provisions despite the fact that it appears from the Final SPA that Mblox actually exited the StarStar market. The Court finds Sumotext's theory to be implausible. Certainly it is not more plausible than the other possibility, which is that the Final SPA actually contains the whole of the parties' agreement and Mblox actually left the StarStar market. Consequently, Sumotext has failed to allege facts showing that Mblox joined the alleged conspiracies. *See Twombly*, 550 U.S. at 557 (discussing "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement"); *Kendall*, 518 F.3d 1049 ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

For these reasons, Sumotext's claims against Mblox are subject to dismissal. In reaching this conclusion, the Court has paid particular attention to Sumotext's contention that Mblox may be liable for selling Zoove with knowledge that the buyers intended to breach Sumotext's contracts. Sumotext has not cited, and the Court has not discovered, a single case imposing antitrust liability in similar circumstances. Absent such authority, the Court is not persuaded that a seller's knowledge that the *buyer* may engage in illegal conduct renders the seller culpable.

A district court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, and (5) futility of amendment. *Foman v. Davis*, 371 U.S. 178 (1962); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (discussing *Foman* factors). While the Court finds no undue delay (factor 1) or bad faith (factor 2), the other factors favor dismissal without leave to amend. Despite multiple opportunities to amend its pleading, Sumotext has failed to allege a viable claim against Mblox (factor 3). Sumotext's repeated attempts to cure the defects in its claims against Mblox have prejudiced Mblox's ability to obtain resolution (factor 4). And finally, the Court is satisfied that Sumotext has made its best efforts to state a viable claim against Mblox and it has come up short; any further opportunity to amend likely would be futile (factor 5).

Accordingly, Mblox's motion to dismiss Claims 4 and 5 (the only claims against it) is GRANTED WITHOUT LEAVE TO AMEND.

III. MOTION FOR SANCTIONS

Mblox moves for sanctions against Sumotext for continuing to assert claims against Mblox in the TAC. Mblox's motion is brought under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927.

A. Legal Standards

Rule 11 of the Federal Rules of Civil Procedure imposes upon attorneys a duty to certify that they have read any pleadings or motions they file with the court and that such pleadings and motions are well-grounded in fact, have a colorable basis in law, and are not filed for an improper purpose. Fed. R. Civ. P. 11(b). If a court finds a violation of this duty, it may impose appropriate sanctions to deter similar conduct. Fed. R. Civ. P. 11(c)(1); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) ("[T]he central purpose of Rule 11 is to deter baseless filings in district court."). However, "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution." *Operating Eng'rs Pension Trust v. A-C Co.*, 859 F.2d 1336, 1345 (9th Cir. 1988). Rule 11 sanctions should be reserved for the "rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *Id.* at 1344. "Where, as here, the complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually 'baseless' from an objective perspective, and (2) if the attorney has conducted 'a reasonable and competent inquiry' before signing and filing it." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002).

Under 28 U.S.C. § 1927, a court may impose sanctions on an attorney who unreasonably and vexatiously multiplies the proceedings. The statute is intended to deter harassing legal tactics and to compensate their victims. *See Haynes v. City and Cty. of San Francisco*, 688 F.3d 984, 987-88 (9th Cir. 2012). A court may award sanctions under § 1927 if the moving party shows (1) that opposing counsel acted unreasonably; (2) that, by doing so, counsel multiplied proceedings; and (3) that counsel acted with subjective bad faith. *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1121 (9th Cir. 1991).

B. Discussion

The Court is quite familiar with the parties, counsel, and the claims in this action, having presided over significant motion practice since the complaint was filed more than two years ago. The Court has no difficulty in concluding that the requirements for sanctions under Rule 11 and § 1927 are not present here. Although the Court ultimately has dismissed Sumotext's claims against Mblox without leave to amend, the Court cannot say that any iteration of the complaint was objectively baseless. Mblox was in the thick of the transaction that led to the exclusion of Sumotext from the StarStar market, and the Court was not satisfied until this last round of motion practice that Sumotext ultimately could not state a claim against Mblox.

It is clear that Sumotext's counsel conducted a reasonable and competent inquiry before filing each of the pleadings, including the operative TAC. The fact that the Court was not persuaded by Sumotext's arguments regarding the significance of Mblox's alleged knowledge of the other defendants' intentions does not mean that those arguments were frivolous. The Court is satisfied that counsel did not violate Rule 11 by filing the TAC, or act with subject bad faith as required for sanctions under § 1927.

Mblox's motion for sanctions against Sumotext is DENIED.

IV. ORDER

(1) The motion to dismiss brought by Defendants Zoove, VHT StarStar, VHT, and StarSteve is DENIED;

(2) The motion to dismiss brought by Mblox is GRANTED WITHOUT LEAVE TO AMEND;

(3) The motion for sanctions brought by Mblox is DENIED; and

(4) A Case Management Conference is set for 11:00 a.m. on May 24, 2018 to discuss the case schedule in light of the Court's rulings on the motions to dismiss.

Dated: April 19, 2018

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUMOTEXT CORP., Plaintiff-Appellant, v. ZOOVE, INC., DBA Starstar Mobile; et al., Defendants-Appellees.	No. 20-17245 D.C. No. 5:16-cv-01370-BLF Northern District of California, San Jose ORDER (Filed Nov. 12, 2021)

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,* District Judge.

Appellant's petition for rehearing and request for publication are DENIED. (Dkt. 78.)

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

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September 2, 2015

Zoove Corp.
c/o Tom Cotney, CEO
mBlox Incorporated
1901 S. Bascom Avenue, Suite 400
Campbell, CA 95008

Re: <u>Proposal to Purchase Stock of the Company</u>

Dear Mr. Cotney:

This letter (this "Letter of Intent") is intended to summarize the principal terms of a proposal being considered by StarSteve, LLC. a Florida limited liability company and/or its corporate assignee or designee (the "Buyer"), regarding its possible acquisition of all of the outstanding capital stock of Zoove Corp., a Delaware corporation (the "Company"), from its parent company, mBlox Incorporated, a Delaware corporation (the "Seller"). In this Letter of Intent, (i) the Buyer. the Seller and the Company are sometimes called the "Parties" and (ii) the Buyer's possible acquisition of the capital stock of the Company is sometimes called the "Possible Acquisition".

I. <u>Acquisition Terms</u>

The Parties wish to commence negotiating a definitive written acquisition agreement providing for the Possible Acquisition (a "Definitive Agreement"). To facilitate the negotiation of a Definitive Agreement, the Parties request that the Buyer's counsel prepare an initial draft. The execution of any such Definitive Agreement would be subject to the satisfactory completion of the Buyer's ongoing investigation/due diligence of the Company's business, and would also be subject to approval by the Buyer's board of directors.

Based on the information currently known to the Buyer, it is proposed that the Definitive Agreement include the following terms:

1. Basic Transaction

The Seller would sell all of the outstanding capital stock of the Company to the Buyer at the price (the "Purchase Price") set forth in Paragraph 2 below. The closing of this transaction (the "Closing") would occur on or before November 20. 2015 [/s/ Steve Love /s/ Steve Doumar].

2. Purchase Price

The Purchase Price would be $4,500,000.00 (four million five hundred thousand dollars) (subject to adjustment as described below), payable in full by Buyer to Seller in cash, by wire transfer of immediately available funds, at the Closing. The Purchase Price assumes that the Company has net working capital as of the Closing equal to the average net working capital of the month end April to July 2015. The Purchase Price would be adjusted based on changes in the Company's net working capital as of the Closing, on a dollar-for-dollar basis.

3. <u>Due Diligence</u>

Buyer shall have forty-five (45) days (the "Due Diligence Period") from the signing of this Letter of Intent to have its agents or designees perform all inspections and due diligence activities deemed necessary or appropriate to Buyer to determine in Buyer's sole discretion whether Buyer wishes to proceed to the closing the transaction at issue. During the Due Diligence Period, Buyer shall have the absolute right to terminate this Letter of Intent, at which point Buyer, Seller and the Company shall be relieved of all obligations to one other, and Seller shall retain full ownership of the capital stock of the Company.

4. <u>Other Terms</u>

The Seller would make mutually agreeable representations and warranties to the Buyer that are customary with a transaction of this size and nature and would provide standard covenants, indemnities and other protections for the benefit of the Buyer. The consummation of the contemplated transactions by the Buyer would be subject to the satisfaction of various conditions, including:

(a) Approval by the Seller's Board of Directors;

(b) Complete due diligence, including but not limited to, review of all Telco Carrier Agreements and determination of Telco Carrier approval or consent requirements, if any.

(c) Determination of necessary regulatory approvals, if any, by any Public Service Commissions for the Possible Acquisition.

(d) Review of the current California office space lease and determination of approval or consent requirements by lessor, if any.

(e) Buyer agrees to provide joint sales and marketing support, at terms to be agreed upon prior to Closing.

(f) Buyer (and all other investors in the Company) shall enter into an exclusive Services Agreement with Seller for SMS and MMS texting aggregation services for a period of at least two years from the date of Closing. Seller agrees to provide "best in category" pricing, e.g., that Buyer will be at a minimum in competitive parity with other resellers of SMS and MMS services at the level of volume when compared to similarly situated resellers.

(g) At or prior to Closing, Buyer (and all other investors in the Company) shall enter into an Agent Agreement with Seller, providing Seller with limited rights and access to resell the Company's services. The terms of the Agent Agreement shall include:

(1) Seller shall retain exclusive rights to sell StarStar services to WellsFargo, American Express, Fidelity National Information Services, Inc., The Weather Channel,

Kroger, Barnes and Noble, First Financial Bank, AllState Insurance, Facebook, Match.Com, Coupons.Com, GM Financial, Johnson and Johnson, MLB, Merck and Co., Bank of America, IJSAA, Capitol One, Regions Bank, Visa and Fifth Third Bank for a period of one year from the date of Closing.

(2) Seller shall be allowed to resell StarStar services in its target markets with "best in category pricing" as described in Section (f) above, for a period of no less than two years from the date of Closing.

(3) Neither the Buyer nor the Company shall provide StarStar services to direct "category competitors" in the messaging aggregation business, including Syniverse, OpenMarket, SAP/Sybase, mGage, Vibes, iConnective and CLX for a period of two years from the date of Closing.

(4) Neither the Buyer nor the Company shall compete, directly or indirectly, with Seller with respect to services offered by Seller as of Closing, including as of the date of this LOI: SMS and MMS aggregation services, HLR look up services, and 800 number texting services.

(5) Seller shall retain the SMS and MMS texting business (i.e., Qwasi, SITO Mobile and SUMOText); and

(6) Seller shall provide all commercially reasonable support to Buyer to close a

transaction with existing UK carrier relationships and a transaction with a potential financial investment or similar transaction with a new investor to be identified by Buyer.

II. Binding Terms

The following paragraphs of this Letter of Intent (the "Binding Provisions") are the legally binding and enforceable agreements of the Buyer and each Seller.

1. Access

During the period from the date this Letter of Intent is signed by on behalf of Seller (the "Signing Date") until the earlier of (a) the date on which either Party provides the other Party with written notice that negotiations toward a Definitive Agreement are terminated, (b) at such time as Buyer materially changes the terms of this Letter of Intent set forth in Section I during the course of negotiations, (c) ten (10) business days after the date hereof if Buyer has failed to verify funds sufficient to pay the purchase price in a manner reasonably satisfactory to Seller or (d) twenty days following the date hereof if Buyer has failed to deliver a draft of the definitive purchase agreement (the "Termination Date"), the Seller will afford the Buyer reasonable access to the Company and its properties, contracts, books and records, and all documents and data. Seller shall make Mr. Steve Love, Mr. Mike Caffey and Mr. Mark Kaufman and any other personnel as requested (with prior written consent from Seller) reasonably available to Buyer to respond to questions and inquiries.

2. Exclusive Dealing

Until the earlier of (i) forty-five (45) days after the Signing Date or (ii) the Termination Date, the Seller will not and will cause the Company not to, directly or indirectly, through any representative or otherwise, solicit or entertain offers from, negotiate with or in any manner encourage, discuss, accept, or consider any proposal of any other person relating to the acquisition of the Company or its capital stock, assets or business, in whole or in part, whether directly or indirectly, through purchase. merger, consolidation, or otherwise (other than sales of inventory in the ordinary course).

3. Conduct of Business

During the period from the Signing Date until the Termination Date, the Seller shall cause the Company to operate its business in the ordinary course and will communicate with the Buyer on activities in the business necessary to plan for transition.

4. Disclosure

Except as and to the extent required by law, without the prior written consent of the other Party, neither the Buyer nor the Seller will, and each will direct its representatives not to make, directly or indirectly, any public comment, statement, or communication with respect to, or otherwise to disclose or to permit the disclosure of the existence of discussions regarding, a possible transaction between the Parties or any of the terms, conditions, or other aspects of the transaction proposed in this Letter of Intent. If a Party is required by law to make any such disclosure, it must first provide to the other Party the content of the proposed disclosure, the reasons that such disclosure is required by law, and the time and place that the disclosure will be made.

5. Costs

The Buyer and the Seller will be responsible for and bear all of its own costs and expenses (including any broker's or finder's fees and the expenses of its representatives) incurred at any time in connection with pursuing or consummating the Possible Acquisition.

6. Entire Agreement

The Binding Provisions constitute the entire agreement between the Parties, and supersede all prior oral or written agreements, understandings, representations and warranties, and courses of conduct and dealing between the Parties on the subject matter hereof. Except as otherwise provided herein, the Binding Provisions may be amended or modified only by a writing executed by all of the parties.

7. <u>Governing Law</u>

The Binding Provisions will be governed by and construed under the laws of the State of Delaware without regard to conflicts of laws principles.

8. <u>Jurisdiction: Service of Process</u>

Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Letter of intent may be brought against any of the parties in the courts of the State of FLORIDA, County of BROWARD, or, if it has or can acquire jurisdiction, in the United States District Court for the Southern District of Florida, and each of the parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein. Process in any action or proceeding referred to in the preceding sentence may be served on any party anywhere in the world.

9. <u>Termination</u>

The Binding Provisions will automatically terminate on NOVEMBER 30, 2015 and may be terminated earlier upon written notice by either party to the other party unilaterally, with or without cause, at any time; provided, however, that the termination of the Binding Provisions will not affect the liability of a party for breach of any of the Binding Provisions prior to the termination. Upon termination of the Binding Provisions, the parties will have no further obligations hereunder, except as stated in Paragraphs 2 through 11 of this Part 11, which will survive any such termination.

10. <u>Counterparts</u>

This Letter of Intent may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Letter of Intent and all of which. when taken together, will be deemed to constitute one and the same agreement.

11. <u>No Liability</u>

The paragraphs and provisions of Part I of this Letter of Intent do not constitute and will not give rise to any legally binding obligation on the part of any of the Parties. Moreover, except as expressly provided in the Binding Provisions (or as expressly provided in any binding written agreement that the Parties may enter into in the future). no past or future action, course of conduct, or failure to act relating to the Possible Acquisition, or relating to the negotiation of the terms of the Possible Acquisition or any Definitive Agreement, will give rise to or serve as a basis for any obligation or other liability on the part of the Parties.

If you are in agreement with the foregoing, please sign and return one copy of this Letter of Intent, which thereupon will constitute our agreement with respect to its subject matter.

Very truly yours,

BUYER:

By: /s/ Steve Doumar
Name: Steve Doumar
Title: CEO

Duly executed and agreed as of this 4 day of September, 2015. [(ORIGINAL LOI) (AS AMENDED OCT 9, 2015)]

SELLER:

By: /s/ Steve Love
Name: Steve Love
Title: CFO

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*** Attorneys' Eyes Only ***

From: Ron Levitt [r.levittstarstarmobile.com]
Sent: Sunday, January 10, 2016 7:10 PM
To: Antony North; Brian Jamieson; McAndrew Ian; Derek MacDonald; Jonathan Berman
CC: Steve Doumar
Subject: StarSteve, LLC – Update
Attachments: Logo Main Orange.png; Logo Main Orange.png; StarStar VHT Slides DRAFT 0921.ppbc; StarStar VHT Slides DRAFT 0921.pptx; StarStar & VHT Joint Venture (10-11-2015).pptx; StarStar & VHT Joint Venture (10-11-2015).pptx; VHT.Star.EC100915.pdf; VHT.Star.EC100915.pdf

Gentleman,

Steve asked me to provide you a quick update on our progress and share a few of our recent PowerPoint presentations and the Letter of Intent with VHT, for you to review.

Our Joint Venture partner completed the Acquisition of Zoove, Inc. and we now control the Short Code (**Number) Registry and have direct contact with companies such as Rite Aid, the Atlanta Hawks (NBA), American Airlines, XM Sirius Radio and others. We have developed business models, which include promotional videos staring Kevin Frasier and Christina & David Arquette for **MOVE, **FLOWERS, **HANDY, and **TAXI just to name a few of our vertical brands.

We are completing the Joint Venture combination and closing the required $2.0M dollar funding this week. We are reaching out to our first round investors to see if they have any interest in increasing their position based on our exciting update.

Steve will be calling you on Monday to discuss our progress and to see if you are interested in increasing your position in StarSteve at your current valuation.

Thank you,

Ron Levitt
954.260.2803

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StarSteve, LLC
Summary of Events
(Updated Oct. 10, 2015)

- **May 29th 2015** - StarSteve entered into a exclusive Customer Acquisition Agreement with MBlox, Inc. the parent company of Zoove, Inc.. Zoove, Inc. owns and operates the Carrier Agreements (with the 4 major Wireless providers) and Short Code Registry.

- **June 1, 2015** - StarSteve initiates a Debt/Equity raise of $1.0M. To-date the Company has raised $340,000.00.

- **August 31, 2015** - StarSteve completes a Spokesperson Agreement with Christina and David Arquette. Promotional videos are in production for **Taxi, **DOC & **Cash.

- **September 4, 2015** - StarSteve signs a Letter of Intent to Acquire Zoove, Inc. This acquisition will give StarSteve complete control of the Carrier Agreements, and Short Code Registry thereby minimizing competition in the Short Code industry.

- **September 20, 2015** - StarSteve negotiates a Partnership/Joint Venture with Virtual Hold Technology (VHT). VHT will not only provide the Operating Backbone Support for StarSteve using their patented Callback Solution "Navigator", but will introduce the Short Code calling feature to their Fortune 100 and 500 Clients. StarSteve will concentrate on marketing short code numbers that will be used by millions of people everyday such as **Taxi (the anti-Uber application), **DOC and **Cash. While providing revenue opportunities by themselves, these Short Codes will be the foundation to the StarMe consumer database.

- **September 20, 2015** - StarSteve secures a Financing Commitment to complete the acquisition of Zoove at a combined company valuation of between $16.0M – $20.M, pending Due Diligence.

- **October 3, 2015** – Received LOI to form a Joint Venture with Virtual Hold Technology, LLC. As part of the transaction, VHT will contribute $8.0M to the Joint Venture. StarSteve will contribute $2.0M & Zoove, LLC. Enterprise Valuation equal to $16.0M.

- **October 15, 2015** – Closeout the $1.0M Debt/Equity Raise under the OLD valuation (prior to Closing of Zoove Acquisition). Goal is to raise $250,000. Use of Proceeds to complete Due Diligence, Marketing Expenses, and Operational Expenses. Offering is $250,000 for 2.5% membership interest in StarSteve, LLC

- **November 15, 2015** – Complete $2.0M Capital Raise. Enterprise Valuation of $16.0 (See October 3, 2015). Offering 12.5% membership interest in StarSteve, LLC. StarSteve owns 50% of NewCo. A provision in the LOI with VHT provides that StarSteve can increase Membership Interest to 65.0% based on Company Valuation at the end of 2017.

- **November 20, 2015** - Closing of the Zoove Acquisition & VHT Partnership.

- **December 31, 2017** – Valuation of NewCo for "ClawBack" Computation. StarSteve expects membership interest to increase to 60%-65% (from original 50%)

Zoove Launches National Mobile Dial Code Registry; Sees the Future of Branded Mobile Phone Numbers and Their Ability to Strengthen Customer Relationships

SOURCE: Zoove
[LOVO]
Simply Dial

June 28, 2010 09:00 ET

Early Adopters Already Registered to Secure Branded Mobile Dial Codes

PALO ALTO, CA – (Marketwire - June 28, 2010) - Zoove, the pioneer in cross-carrier mobile dial codes and direct response marketing, today announced the launch of the National Mobile Dial Code Registry and the general availability of StarStar Codes for brands and trademark holders. Zoove's National Mobile Dial Code Registry is the single authority for the leasing of cross-carrier Mobile Dial Codes and has been adding early adopters to the list of brands looking to secure their codes through www.zoove.com.

By dialing an intuitive, branded mobile phone number, like **BRAND, consumers have instant access to the company from wherever they may be. Marketers can then interact with the consumer via content delivered to their phone such as a coupon, web page, picture or video, text message or application. Callers can also be connected directly with a call center or IVR system, and many of these responses can be delivered in combination. For example, callers can be greeted with a custom voice message and then sent to a web page on their phone to view product information, contact sales or request more information.

"As people are increasingly using mobile phones to find out about upcoming arts events, music shows or even to decide where to go next during a night out, being able to connect with consumers using a mobile phone is an increasingly important capability," said Marci Weisler, Digital Business Director of Time Out North America. "Through our unique StarStar Code, **TONY, Zoove gives our users a really simple way to access and download our mobile application without searching and seeking, in a streamlined way. Quick access is important if the user needs information immediately to decide where to go. While other technologies have attempted to close this loop, Zoove's StarStar Dialing is the first that allows us to secure easy to remember, branded Mobile Dial Codes."

The National Mobile Dial Code Registry is the only way for brands to lease their StarStar Code. Dedicated to ensuring brands secure the two- to twelve-digit number combination that best represents their brand, the codes are assigned via the National Mobile Dial Code Registry based on a first-come, first-serve basis.

"Officially launching the National Mobile Dial Code Registry marks the introduction of our full range of services to brands and marketers," said Tim Jemison, CEO of Zoove. "The value of a ubiquitous marketing platform that not only solicits a direct response from a consumer, but is also easy to remember and branded, is unlimited. We've had a great response from our preliminary testers and are excited to take these capabilities to the larger marketing community to fulfill the need for a branded direct response mobile marketing solution for their integrated campaigns."

Later this week, Zoove will be in New York City as Diamond Sponsors of the DMA's Mobile Marketing and Media 2010.

To find out more, and to register and lease a StarStar Mobile Dial Code today, visit http://www.zoove.com.

About Zoove:

Founded in 2004 with the mission to make Mobile Dial Codes a ubiquitous direct response mechanism for advertisers, Zoove is the only provider of nationwide Mobile Dial Code services. StarStar Mobile Dial Codes are intelligent, branded phone numbers that can be dialed by any mobile phone in the United States, and deliver more than simply text messages, allowing direct dialing and multi-media campaigns, such as Web pages, pictures, sound files and video files. In the summer of 2010, Zoove launched the US Mobile Dial Code registry, making StarStar Codes accessible to the subscribers of the major mobile carriers and the majority of US mobile users. Powered by the Zoove Services Platform, Zoove enables consumers to easily interact with advertisers, brands and media companies from any phone.

For more information, please visit www.zoove.com, and follow us on Twitter at www.twitter.com/zoove.

About Zoove StarStar Mobile Dial Codes:

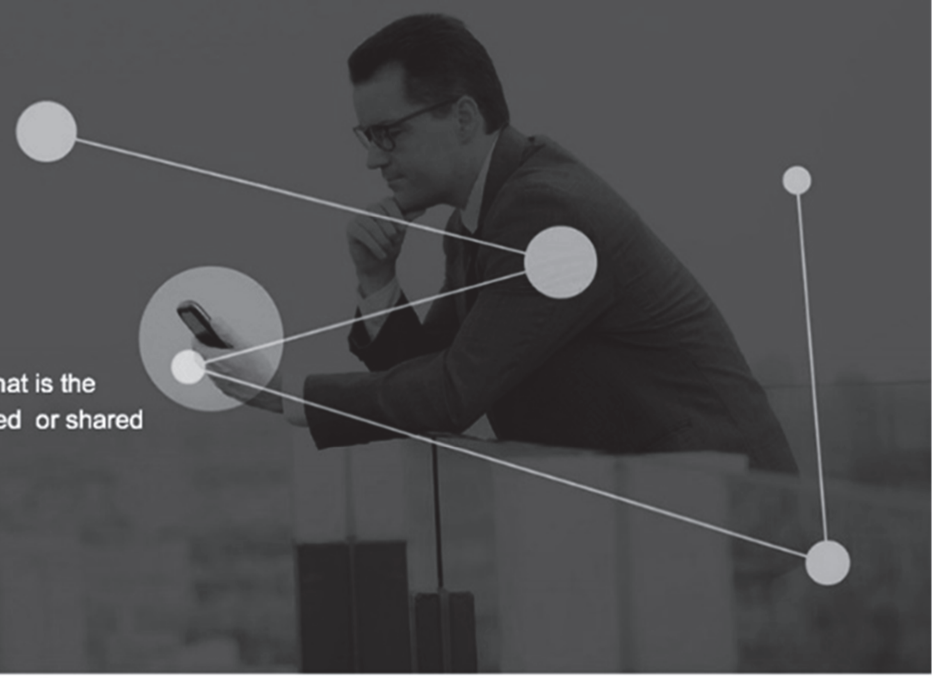
StarStar Mobile Dial Codes are intelligent brandable phone numbers that anyone with a mobile phone can dial to interact with a brand. The two to twelve character mobile dial codes uniquely combine the familiarity of an 800 number, the power of a Web address (URL), and mobile access of an SMS/text short code all into one easy to use number.

mblox

StarStar® Introduction

October 6, 2015

CONFIDENTIALITY
This document contains proprietary and confidential information that is the property of Mblox, Inc. The information should not be disseminated or shared without prior written consent from Mblox, Inc.



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Introducing StarStar Calling

What are StarStar Numbers?

- Easy to remember phone numbers that begin with **
- Reflect the identity of a brand, product, or service
- Callable on most mobile phones in the US
- Programmable based on a variety of factors
- Used to connect with customers on their mobile devices

** NFL
** SONIC
** HAWKS
** MTV
** LAW
** WIN
** MOVE
** CASH

Benefits of StarStar Numbers

- Frictionless connection with users on their mobile phone
- No app is required
- No need to enter a URL
- No need to text to a short code
- Combination of voice and data services
- Works on the major US wireless carriers

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StarStar® Customer Experience

Step 1: Customer sees or hears an ad and calls a ** number – just like a regular phone call

Step 2: Customer receives a customized audio experience:

A. Can be connected directly to an office or call center

— OR —

B. Can hear a branded audio announcement:

*"Thanks for calling **BRAND. We've just sent a text message to your phone with a link to exclusive offers..."*

— OR —

C. Can be connected to a full IVR:

*"Thanks for calling **BRAND.*
Press 1 to receive weekly updates...
Press 2 to download our mobile app...
Press 3 to reach a representative..."

Step 3 (optional): Customer receives a message on their phone:

A. Can be a plain text message:

*"**BRAND: Reply Y to receive weekly deals..."*

— OR —

B. Can be a text message with a link:

*"**BRAND: Keep up with all the latest using our mobile app. Tap this link to download our the app for your device http://starstar.to/brand"*

The platform can track clicks on the link in order to measure conversion rates. Can also target links based on the users device

— OR —

C. Can be a picture message containing an image, coupon...

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Common Use Cases

Drive App Downloads

- Callers hear a branded audio message, gets a link to download
- Targeted based on users device:
  - Android users go to Google Play
  - IOS users go to Apple app store

**NFL **MTV **CMT **DD **HOPPER

Call Center Routing

- Callers are directly connected to a company's call center
- Caller may also receive a text message
- Often geo-targeted based on the caller's location

**ADT **CASH **LAW **MOVE **PAGEPLUS

Opt-in for Recurring Messages

- Callers hear a branded audio message
- May opt-in several ways:
  - Pressing a DTMF digit
  - Replying to a text message
  - Clicking a web link
- TCPA-compliant

**SONIC **SEARS

Drive Mobile Web Traffic

- Callers hear a branded audio experience, receives a text with a mobile web link
- Upon click, the caller's phone number and device **model** is passed to the mobile site

**ATTBB **HAWKS **GGB

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History

Fall 2005: Zoove founded (Investors: Worldview Partners and Highland Capital)

2009: Carrier agreement signed with AT&T

2010: Carrier agreement signed with Verizon & T-Mobile

2011: Carrier agreement signed with Sprint

June 2011: Initial enterprise service launch

Oct 2012: StarStar Me service launch

June 2014: Acquired by Mblox

Jan 2015: ASP reseller service launched (StarStar Toolkit)

Total of **$71.3M** in venture investment

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Carrier Contracts

Carrier contracts

- Exclusive right to offer ** and ## service on Verizon, AT&T, Sprint and T-Mobile
- Exclusive right to offer * and # service on AT&T, Sprint & T-Mobile
- MetroPCS subscribers are also now enabled through T-Mobile
- Revenue share model /w minimum revenue guarantees to Verizon

Direct aggregator connections with each carrier for SMS & MMS traffic

- Pool of 500 carrier-private short codes (no CTIA fees)
- Approval authority delegated to Zoove for campaigns on these short codes
- Connections can also be used for Common Short Codes

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Powerful Re-Seller Model

- Have successfully executed on a new Go-to-Market approach
  - Moved to primarily indirect sales model
  - List of Retail and Wholesale prices
  - Growing API to enable integration with ASP platforms
  - StarStar Select and StarStar Toolkit now driving almost all sales

- Multiple companies investing/launching based on new offers
  - New players include both entrepreneurial and existing ASPs
  - First "competition" for prime StarStar Codes has started
  - Results in much broader addressable market

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From: Mike Caffey <mcaffey@starstarmobile.coM>

Sent: Wednesday, February 24, 2016 2:35 PM

To: Tim Keyes <tkeyes@starstarmobile.com>

Subject: Re: Audience D – Strategy to Take Back Numbers – Invitation to edit

---

Here are my comments.

1. I would not say that "we have been working with the carriers" in this letter. That invites them to call the carriers and complain. Some may complain to the carriers anyway, but we shouldn't represent this as something we've done in coordination with the carriers. They could literally get ahold of someone at one of the carriers and ask questions about the pricing that would put the carriers in a tough spot.

2. I would say that let's deal with CADCs (#-codes) separately. We may do something very similar, but we should talk through all of that before we notify those customers. I note that SITO Mobile is not listed on your list for #-codes. We would need to notify them when we do the #-code price change.

3. It's not really good business to tell customers that we are terminating your agreement and you'll have new pricing April 1st but we won't tell you what the new pricing is till the end of March. That's just bad. So I'd say we should commit to having new pricing available March 1. That gives therm all one month to digest

the new model and decide if they want to continue to do business with them or not.

4. The way things are worded, they may assume that they'll still have access to the Toolkit API in April but just with different pricing. I'm not sure we're planning to do that. The registry isn't the issue it's the API and the portal that you use to setup service. I believe we are not going to let them access these going forward - correct? They are going to only be able to resell our packaged navigator-based services - correct? If so, we should probably also be ready to explain these changes effective March 1 - OR - we could simply state in the letter that there will no longer be Toolkit access after April 1st and that we will provide more details on the nature of the new services later. This also gets messy because we are cancelling the number leases but not necessarily the Toolkit agreements because they had an initial term of 12 moths I believe. So. . . . we need to think through all this a bit.

On a related note, SITO Mobile has enquired about the availability of another #-code. Should I reply and indicate to them that there are some changes coming in the pricing model and introduce them to you? I don't think it's useful to have me in the middle of these issues.

Thanks,

–
Mike Caffey
Sent with Airmail

On February 24, 2016 at 2:59:38 PM, Tim Keyes (via Google Docs) (drive-shares-noreblyeaoode.com) wrote:

> Tim Keyes has invited you to **edit** the following document:
>
> [Attachment Omitted]
>
> Audience D - Strategy to Take Back Numbers

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SUMOTEXT CORP.,	Case No. 16-cv-01370-BLF
Plaintiff,	**JURY INSTRUCTIONS**
v.	(Filed Mar. 4, 2020)
ZOOVE, INC., et al.,	
Defendants.	

IT IS SO ORDERED.

Dated: March 4, 2020

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

* * *

Jury Instruction 35 re Sumotext's Claim 2: Sherman Act Section 2 – Conspiracy to Monopolize: First Element: Relevant Market – General

Sumotext must prove by a preponderance of the evidence that a defendant had monopoly power in a relevant market. Defining the relevant market is essential because you are required to make a judgment about whether the defendants had market power in the defined relevant market. To make this judgment, you must be able to determine what, if any, economic forces restrained the defendant's freedom to set prices for or restrict the output in the defined relevant market.

The most likely and most important restraining force will be actual and potential competition from other firms and their products. This includes all firms and products that act or likely could act as restraints on the defendant's power to set prices as it pleases because customers could switch to them if defendant sets its own prices too high. All the firms and products that exert such restraining force are within what is called the relevant market.

The basic idea of a relevant market is that the products or services within it are reasonable substitutes for each other from the buyer's point of view; that is, the products or services compete with each other. In other words, the relevant market includes the products or services that consumers believe are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products or services need not be identical or precisely interchangeable as long as they are reasonable substitutes. Thus, for example, if consumers seeking to cover leftover food for storage considered certain types of flexible wrapping material – such as aluminum foil, cellophane, or even plastic containers – to be reasonable alternatives, then all those products would be in the same relevant market. The same applies for services.

To determine whether products or services are reasonably interchangeable substitutes for each other, you may consider whether a small but significant permanent increase in the price of one product would result in enough customers switching from that product to another product such that the price increase would not be profitable. In other words, will customers accept the price increase or will so many switch to alternative products that the price increase will be withdrawn? Generally speaking, a small but significant and non-transitory increase in price is approximately a 5 percent increase in price not due to cost factors. If you find that customers would switch and that the price increase would not be profitable, then you may conclude that the products are in the product market. If, on the other hand, you find that customers would not switch, then you may conclude that the products or services are not in the market.

In evaluating whether various products or services are reasonably interchangeable or reasonable substitutes for each other under the price increase test I have just given you, you may also consider:

- consumers' views on whether the products or services are interchangeable;
- the relationship between the price of one product or service and sales of another;
- the presence or absence of specialized vendors;
- the perceptions of either the industry or the public as to whether the products or services are in separate markets;
- the views of Sumotext and Defendants regarding who their respective competitors are; and

- the existence or absence of different customer groups or distribution channels.

In this case, Sumotext contends that there are two relevant markets: the market for *leasing* StarStar numbers and the market for *servicing* StarStar numbers. By contrast, Defendants contend that there are not distinct markets for leasing StarStar numbers and servicing StarStar numbers. Rather, Defendants contend that StarStar numbers and services pertaining to StarStar numbers compete with a wide variety of other goods and services by which potential customers can connect with businesses by way of mobile devices. If you find that Sumotext has proven a relevant market, then you should continue to evaluate the remainder of Sumotext's claim. However, if you find that Sumotext has failed to prove such a relevant market, then you must find in Defendants' favor on this claim.

* * *

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SUMOTEXT CORP., a Nevada corporation, Sumotext, vs. ZOOVE, INC., et al., Defendants.	Case No.: 16-CV-01370-BLF **VERDICT FORM** (Filed Mar. 6, 2020) *Hon. Beth Labson Freeman*

We, the Jury, unanimously find as follows:

I. QUESTIONS APPLICABLE TO LEASING MARKET CLAIMS

A. MARKET DEFINITION

1. Did Sumotext prove by a preponderance of the evidence a relevant market for *leasing* ** numbers in the United States?

Yes ___ ("Yes" is a finding for Sumotext)

No _X_ ("No" is a finding for Defendants)

If you answered "Yes" to Question 1, proceed to Question 2.

If you answered "No" to Question 1, you have found no liability for Sumotext's Leasing claims. Do not answer any other questions in Section I. Please proceed to Section II (Question 8).

B. CLAIM 1: Sherman Act § 1: Agreement to Restrain Trade in the Leasing Market – Against VHT and StarSteve

2. Did Sumotext prove by a preponderance of the evidence that VHT and StarSteve, as separate corporate entities, entered into an agreement to unreasonably restrain trade in the relevant market for *leasing* ** numbers?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for VHT and StarSteve)

If you answered "Yes" to Question 2, then answer Question 3.

If you answered "No" to Question 2, you should skip to Question 5.

3. Did Sumotext prove by a preponderance of the evidence that the agreement between VHT and StarSteve resulted in a substantial adverse effect on competition that outweighed any procompetitive benefits in the relevant market for *leasing* ** numbers?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for VHT and StarSteve)

If you answered "Yes" to Question 3, then answer Question 4.

If you answered "No" to Question 3, you should skip to Question 5.

4. Did Sumotext prove by a preponderance of the evidence that the unreasonable restraint on trade caused injury to Sumotext's business and property that is the type of injury that the antitrust laws were intended to prevent?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for Defendants VHT and StarSteve)

Proceed to the Question 5.

C. CLAIM 2: Sherman Act § 2: Conspiracy to Monopolize in the Leasing Market – Against VHT, StarSteve, VHT StarStar, and Zoove

5. Did Sumotext prove by a preponderance of the evidence that two or more Defendants knowingly entered into an agreement specifically intended to obtain or maintain monopoly power in the relevant market for *leasing* ** numbers?

Yes ___ ("Yes" is a finding for Sumotext)

If you answered "Yes" to Question 5, please check which two or more Defendants you found entered into such an agreement:

☐ VHT

☐ StarSteve

☐ VHT StarStar

☐ Zoove

No ___ ("No" is a finding for VHT, StarSteve, VHT StarStar, and Zoove)

If you answered "Yes" to Question 5, then answer Question 6.

If you answered "No" to Question 5, proceed to Section II (Question 8).

6. As to those Defendants you found in Question 5 that entered into an agreement, did Sumotext prove by a preponderance of the evidence that any Defendant committed an overt act in furtherance of the agreement?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for VHT, StarSteve, VHT StarStar, and Zoove)

If you answered "Yes" to Question 6, then answer Question 7.

If you answered "No" to Question 6, proceed to Section II (Question 8).

7. Did Sumotext prove by a preponderance of the evidence that the conspiracy to monopolize caused injury to Sumotext's business or property that is the type of injury that the antitrust laws were intended to prevent?

Yes ___ ("Yes" is a finding for Sumotext)
No ___ ("No" is a finding for VHT, StarSteve, VHT StarStar, and Zoove)

Proceed to Question 8 (next page)

II. QUESTIONS APPLICABLE TO SERVICING MARKET CLAIMS

A. MARKET DEFINITION

8. Did Sumotext prove by a preponderance of the evidence a relevant market for *servicing* ** numbers in the United States?

Yes ___ ("Yes" is a finding for Sumotext)

No _X_ ("No" is a finding for Defendants)

If you answered "Yes" to Question 8, proceed to Question 9.

If you answered "No" to Questions 8, you have found no liability on Sumotext's Servicing Market claims. Do not answer any further questions in Section II. Please proceed to Section III (page 9).

B. CLAIM 1: Sherman Act § 1: Agreement to Restrain Trade in the Service Market – Against VHT and StarSteve

9. Did Sumotext prove by a preponderance of the evidence that VHT and StarSteve, as separate corporate entities, entered into an agreement to unreasonably restrain trade in the relevant market for *servicing* ** numbers?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for VHT and StarSteve)

If you answered "Yes" to Question 9, then answer Question 10.

If you answered "No" to Question 9, you should skip to Question 12.

10. Did Sumotext prove by a preponderance of the evidence that the agreement between VHT and StarSteve resulted in a substantial adverse effect on competition that outweighed any procompetitive benefits in the relevant market for *servicing* ** numbers?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for VHT and StarSteve)

If you answered "Yes" to Question 10, then answer Question 11.

If you answered "No" to Question 10, you should skip to Question 12.

11. Did Sumotext prove by a preponderance of the evidence that the unreasonable restraint on trade caused injury to Sumotext's business and property that is the type of injury that the antitrust laws were intended to prevent?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for VHT and StarSteve)

Proceed to Question 12 (Next Page)

C. CLAIM 2: Sherman Act § 2: Conspiracy to Monopolize in the Service Market – Against VHT, StarSteve, VHT StarStar, and Zoove

12. Did Sumotext prove by a preponderance of the evidence that two or more Defendants knowingly entered into an agreement specifically intended to obtain or maintain monopoly power in the relevant market for *servicing* ** numbers?

Yes ___ ("Yes" is a finding for Sumotext)

If you answered "Yes" to Question 12, please check which two or more Defendants you found entered into such an agreement:

☐ VHT

☐ StarSteve

☐ VHT StarStar

☐ Zoove

No ___ ("No" is a finding for VHT, StarSteve, VHT StarStar, and Zoove)

If you answered "Yes" to Question 12, then answer Question 13.

If you answered "No" to Question 12, you should proceed to Section III (page 9).

13. As to those Defendants you found in Question 12 that entered into an agreement, did Sumotext prove by a preponderance of the evidence that any Defendant committed an overt act in furtherance of the agreement?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for VHT, StarSteve, VHT StarStar, and Zoove)

If you answered "Yes" to Question 13, then answer Question 14.

If you answered "No" to Question 13, you should proceed to Section III (page 9).

14. Did Sumotext prove by a preponderance of the evidence that the conspiracy to monopolize caused injury to Sumotext's business or property that is the type of injury that the antitrust laws were intended to prevent?

Yes ___ ("Yes" is a finding for Sumotext)

No ___ ("No" is a finding for VHT, StarSteve, VHT StarStar, and Zoove)

Proceed to Section III below.

III. DAMAGES

<u>If you answered "Yes" to any of Questions 4, 7, 11, or 14, answer Question 15 below.</u>

15. What is the total amount of damages that you find Sumotext is entitled to?

$____________________.

[Proceed to Next Page]

IV. MITIGATION TO DAMAGES – APPLICABLE TO CLAIM 1 AND CLAIM 2 (6 old depending on evidence at trial)

If you answered Question 15, answer Question 16 below.

16. Did Defendants prove by a preponderance of evidence that Sumotext acted unreasonably in failing to take specific steps to minimize or limit its losses?

Yes ___ ("Yes" is a finding for Defendants)

No ___ ("No" is a finding for Sumotext)

If you answered "Yes" to Question 16, then answer Question 17.

If you answered "No" to Question 16, skip Question 17.

17. What is the amount by which Sumotext's loss should be reduced if Sumotext had taken those steps?

$____________________.

Please have the presiding juror sign, date, and return this form.

Signed: /s/ [Illegible]   Date: 6 Mar 2020

Presiding Juror