UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 08-55818

STEPHEN STETSON, SHANE LAVIGNE, CHRISTINE LEIGH BROWN-ROBERTS, VALENTIN YURI KARPENKO, and JAKE JEREMIAH FATHY,

Plaintiffs-Appellants,

v.

WEST PUBLISHING CORPORATION, a Minnesota Corporation dba BAR/BRI, and KAPLAN, INC.,

Defendants-Respondents.

Appeal from the United States District Court
for the Central District of California

The Honorable Manuel L. Real
(Case No. CV 08-00810 R)

Reply Brief for Plaintiffs-Appellants Stephen Stetson, Shane Lavigne, Christine Leigh Brown-Roberts, Valentin Yuri Karpenko, and Jake Jeremiah Fathy

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Alan Harris
David Zelenski
HARRIS & RUBLE
5455 Wilshire Boulevard
Suite 1800
Telephone: (323) 931-3777

Joel R. Bennett
Perrin F. Disner
DISNER LAW CORPORATION
5455 Wilshire Boulevard
Suite 1806
Telephone: (323) 939-8900

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

On May 7, 2008, Plaintiffs-Appellants appealed from the District Court's Order dismissing their Complaint. (Excerpts of R. for Pls.-Appellants ("ER") Vol. III at 206.) The Complaint alleges that BAR/BRI, a division of Defendant-Appellee West Publishing Corporation ("West"), violated section 2 of the Sherman Act by monopolizing the bar-review-course market and violated section 1 of the Sherman Act by conspiring with Defendant-Appellee Kaplan, Inc. ("Kaplan") to restrain trade. (ER Vol. II at 14–67.) Appellees moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(b)(1), which was erroneously granted by the Court on April 10, 2008. (ER Vol. I. at 3–4.)

In dismissing the Complaint, the District Court relied on *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), stating that, "based on *Twombly* [], as a matter of law, [P]laintiff[s] ha[ve] not and cannot allege that [D]efendant West is the proximate cause of any injury that they might have sustained since they are not yet damaged by anything that is alleged." (ER Vol. I at 9.) A review of Appellees' Opposition Brief indicates that their primary argument is that the District Court properly applied *Twombly*. (*See* Br. for Defs.-Appellees ("Opp'n Br.") at 11 ("The District Court properly dismissed Appellants' complaint on the authority of *Twombly*."), 13–30.) According to Appellees, the conduct alleged in the Complaint is "consistent with robust, rational, and self-interested competition,"

which, Appellees contend, renders Appellants' anticompetitive allegations "factually insufficient." (Opp'n Br. at 12.) However, as explained in Appellants' Opening Brief (Opening Br. for Pls.-Appellants ("Opening Br.") at 13–18) and in more detail below, the facts alleged in the Complaint are not "neutral" ones that are "just as much in line with . . . rational and competitive business strategy" as they are with anticompetitive behavior. *Twombly*, 127 S. Ct. 1966. Instead, they make Appellants' Sherman Act claims "plausible" because they "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* Because Appellants have made "allegations plausibly suggesting ([and] not merely consistent with)" anticompetitive behavior, *id.*, any motion to dismiss on *Twombly* grounds cannot be granted, and the District Court's Order dismissing the Complaint therefore should be reversed.

In addition, there is no merit to Appellees' argument that the settlement reached in the related case of *Rodriguez v. West Publishing Corp.*, U.S. Dist. Court Case No. CV 05-3222 R, obviates a "'real and immediate' likelihood that BAR/BRI will engage in violations of the antitrust laws in the future." (Opp'n Br. at 30–31.) As explained below, whatever positive benefits might accrue from the injunctive relief promised in connection with the *Rodriguez* settlement necessarily only benefits those who take the course *after* the effective date of compliance with that settlement's terms. Because the *Rodriguez* settlement is still on appeal, that

day is not yet here. Moreover, insofar as Appellees argue that they immediately complied with the injunctive requirements of the settlement, that can only benefit those who took the course *after* the settlement was approved, not those who opted out of *Rodriguez* or who took a bar exam between July 2006 and September 2007, when the District Court approved the settlement. Furthermore, the extent of the continuing impact of the illegal conduct can only be measured after discovery has commenced. Although it may be proper to address that continuing impact in the context of a summary-judgment proceeding, it is *not* appropriate to address it in a motion to dismiss. Accordingly, the District Court's reasoning that "[Appellants'] allegations regarding the current state of the market and its effects on individual plaintiffs cannot be squared with the provisions of the *Rodriguez* settlement" (ER Vol. I at 8) is simply wrong, and its Order should be reversed.[1]

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[1] The District Court articulated one additional ground for dismissing Appellants' Complaint, namely, that "[Appellants] are stopped from making an end run around th[e District C]ourt's December 17, 2007, order [in *Schall v. West Publishing Corp.*, U.S. Dist. Court Case No. CV 07-5146 R,] which granted defendants' motion to dismiss without leave to amend." (ER Vo. I. at 8.) Appellants' Opening Brief lays out the error of the lower court's opinion as to the relationship between the present case and *Schall*. (Opening Br. at 3, 10–12 (explaining that *Schall* was not dismissed without leave to amend and that the present case eliminates the standing "issue" in *Schall*).) Appellees' Brief nowhere discusses *Schall*, and this Court should therefore reject the lower court's conclusion that Appellants are simply attempting to make an "end run" around *Schall*.

On that note, Appellants submit that Appellees are also incorrect when they claim, bizarrely, that Appellants have not challenged the dismissal of Appellants' conspiracy claims. (*See* Opp'n Br. at 4 (Appellants' complaint did include . . .

ARGUMENT

I. The District Court Misapplied *Twombly*.

A. The Pleading Standard Discussed in *Twombly*.

The District Court misapplied *Twombly*. In *Twombly*, plaintiffs had brought claims against telephone- and internet-service providers for claimed violations of section 1 of the Sherman Act. *Twombly*, 127 S. Ct. at 1962. The plaintiffs alleged that the service providers had restrained trade by "'engag[ing] in parallel conduct' in their respective service areas to inhibit the growth of upstart [competitors]."[2] *Id.* As alleged in the complaint, the "parallel conduct" consisted of "making unfair agreements with the [upstart competitors] for access to [existing] networks, providing inferior connections to the networks, overcharging, and billing in ways

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allegations purportedly supporting a claim against BAR/BRI and Kaplan under § 1 of the Sherman Act, but the dismissal of that claim is not seriously challenged in Appellants' opening brief in this Court."). Nothing could be further from the truth, as the Opening Brief *repeatedly* discusses the illegal market-division arrangement between BAR/BRI and Kaplan. (*See*, *e.g.*, Opening Br. at 13–18 (discussing *Twombly*).)

[2] As background, Appellants note that *Twombly* was decided in the wake of the Telecommunications Act of 1996. *Twombly*, 127 S. Ct. at 1961–62. The 1996 Act sought to "'fundamentally restructure[] local telephone markets' [by] "subject[ing] telephone companies to a host of duties intended to facilitate market entry." *Id.* at 1961 (quoting *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999)). Prior to the enactment of the 1996 Act, the telephone-service market consisted of a system of regional service monopolies, and the point of the 1996 Act was to obligate the companies in control of those monopolies "'to share [theretofore monopolized] network[s] with competitors'" by, *inter alia*, leasing and interconnecting elements of their networks to upstart competitors. *Twombly*, 127 S. Ct. at 1961 (quoting *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 402 (2004)).

designed to sabotage the [upstart competitors'] relations with their own customers." *Id.* The District Court originally dismissed the complaint, explaining that "allegations of parallel business conduct, taken alone, do not state a claim under § 1 [of the Sherman Act because] 'the behavior of each [defendant service provider] in resisting incursion of [upstart competitors] is fully explained by the [service provider's] own interests in defending its individual territory.'" *Id.* at 1963. The Second Circuit Court of Appeals reversed the District Court, but the U.S. Supreme Court reversed the Second Circuit. *Id.*

In reversing, the Supreme Court explained:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, *and a formulaic recitation of the elements of a cause of action will not do*.
>
> [With respect to a section 1 claim,] we hold that stating such a claim requires a complaint with enough factual matter (taken as true) *to suggest that an agreement was made*. . . . In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct [by itself] fails to bespeak unlawful agreement. *It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice*. . . . *Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action*.
>
> . . . . A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; *without that further circumstance pointing*

> *toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory*. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint . . . .
>
> . . . .
>
> We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the [service providers'] supposed agreement to disobey the 1996 Act and thwart the [upstart competitors'] attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, *unilateral* reaction of *each* [service provider] intent on keeping its regional dominance.

Id. at 1965–66, 71 (internal citations omitted) (emphasis supplied).

Read in this context, the U.S. Supreme Court has merely reiterated the established notion that a court must not "'conjure up unpleaded facts [in order to] turn a frivolous claim . . . into a substantial one.'" *Id.* at 1969 (quoting *O'Brien v. Di Grazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976)). *Twombly*'s "novelty," then, is in applying this established approach to a claim based on a Sherman Act "conspiracy" *when no facts have been pleaded as to whether an agreement was ever actually entered into in the first place*. In other words, conclusory allegations of a conspiracy, accomplished by an illegal agreement, will not suffice absent an allegation that at least "suggests" the *making* of such an agreement. *See Twombly*, 127 S. Ct. at 1974 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the

plaintiffs here have not nudged their claims across the line from *conceivable* to plausible, their complaint must be dismissed.") (emphasis supplied).

B. Appellants' Claims Meet the Pleading Standard Discussed in *Twombly*.

Although it is true that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions[] and [that] a formulaic recitation of the elements of a cause of action [therefore] will not do," *id.* at 1964–65 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)), Appellants' Complaint fully satisfies this obligation. If Appellants' had merely stated in their Complaint that West and Kaplan had engaged in parallel behavior that each would have engaged in independently, Appellees would have a point. *However, the Complaint actually alleges the existence of a written "co-marketing agreement" designed to establish an illegal market division*:

> 48. **Kaplan.** On or about July 31, 1997, Kaplan entered into a letter of intent with West [Bar Review] to purchase the assets of West Bar. However, within the next 10 days, executives of Kaplan and BAR/BRI secretly communicated. *As a result of these communications, Kaplan withdrew its bid for West Bar, instead entered into a so-called "co-marketing" agreement with BAR/BRI in which BAR/BRI secretly paid to Kaplan up to $750,000 per year, but on the condition that Kaplan secretly agree to stay out of the full-service bar review course market*. BAR/BRI and Kaplan also further agreed to "strategically" work together in the future to promote their complementary businesses.
>
> 49. Around the time that the Kaplan/West Bar acquisition fell through, West announced that it was closing West Bar,

> purportedly because it did not fit within its "long term strategic direction." As noted above, it then divested its operative bar review assets to BAR/BRI, including the commitments of more than 20,000 students to purchase and complete its bar review course. Also around that time, BAR/BRI quietly wound down, at least, its LSAT preparation course. (Part of its agreement with Kaplan was that BAR/BRI would not compete in the LSAT course market against Kaplan.) BAR/BRI's combination with Kaplan violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).
>
> 50. Prior to its 1997 Agreement with BAR/BRI, Kaplan sought to enter into the full service bar review business. To date, however, neither Kaplan nor PMBR has entered the market, nor has BAR/BRI resumed sale of a separate supplemental MBE course.

(ER Vol. II at 16 (emphasis supplied).) The pleaded agreement—an element that was missing from the complaint at issue in *Twombly*—is a smoking gun that forecloses any dismissal on *Twombly* grounds.[3] Appellants, in other words, have

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[3] Appellants submit that a jury might easily agree with this conclusion, particularly in light of the fact that Appellees paid $49,000,000 to settle *Rodriguez*. Appellants also submit that the "smoking gun" is what distinguishes *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), which case Appellees rely on in conjunction with *Twombly*. As stated in *Kendall*:

> "[T]erms like 'conspiracy,' or even 'agreement,' are borderline: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint." . . .
>
> . . . .
>
> Here, appellants pleaded only ultimate facts, such as conspiracy, and legal conclusions. They failed to plead the necessary evidentiary facts to support those conclusions.

done more than plead behavior that happens merely to be consistent with self-interested, robust competition; *they have pled the existence of an actual arrangement between Appellees whereby one would pay the other close to $1 million dollars per year in exchange for an agreement not to compete*. To use *Twombly*'s own words, then, the Complaint alleges a "meeting of the minds." *Twombly*, 127 S. Ct. at 1966. The District Court therefore should not have dismissed the Complaint. *See Am. Hardware Mfrs. v. Reed Elsevier, Inc.*, 2008 U.S. Dist. LEXIS 27836 at *8 n.1 (N.D. Ill. Apr. 3, 2008) ("[Two of the defendants] . . . argue[] that because [their] purpose for entering into the contract with [one of the other defendants] is just as consistent with innocent conduct as with guilt, [the plaintiff] has failed to state a claim for conspiracy under *Twombly*. We disagree. [The plaintiff] has made allegations as to [the defendants'] conduct and the motives behind it, and has also alleged the existence of an agreement—something missing in *Twombly*.").

As a matter of fact, in addition to pleading the existence of an actual agreement, Appellants have alleged a long list of anticompetitive misdeeds, the majority of which have not been pled on mere "information and belief." (*See* Opening Br. at 5 (summarizing the anticompetitive behavior alleged in the

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Kendall, 518 F.3d at 1047–48. Unlike in *Kendall*, Appellants *have* alleged an agreement: the written "co-marketing agreement." (*See* Opp'n Br. at 8 (conceding that a written co-marketing agreement exists).)

Complaint), 14–18 (reproducing verbatim thirteen paragraphs from Appellants' Complaint that detail Appellees' anticompetitive behavior).) The Complaint weaves a tapestry of Appellees' wrongdoing, and that tapestry—coupled with the above-described agreement, which, along with the Complaint's other allegations, must be accepted as true at this stage of the proceedings, *e.g.*, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination*, 507 U.S. 163, 164 (1993)—easily satisfies the notice-pleading requirements of Rule 8, whether under *Twombly* or otherwise. *See Cont'l Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699 (1962) ("'The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'") (quoting *Am. Tobacco Co. v. U.S.*, 147 F.2d 93, 106 (6th Cir. 1944)), *superseded on other grounds by statute as stated in In re Intel Corp. Microprocessor Antitrust Litig. v. Intel Corp.*, 452 F. Supp. 2d 555 (D.C. Del. 2006). The District Court, however, dismissed all claims in one fell swoop, throwing out the baby with the bathwater. This cannot possibly have been the intention of the *Twombly* Court, which merely upheld the dismissal of a section 1 complaint filed on the theory that seemingly parallel pricing was sufficient evidence, *in and of itself*, of conspiracy at the pleading stage.

In this regard, Appellants note that Appellees' Brief repeatedly mischaracterizes the Complaint's anticompetitive allegations as "sparse" (Opp'n

Br. at 4), "speculative" (Opp'n Br. at 6), and "conclusory" (Opp'n Br. at 9). However, as Appellees themselves point out, the same District Court that granted the Motion to Dismiss actually *denied* Kaplan's motion for summary judgment in a related case—*Rodriguez*—premised on "essentially the same set of allegations" that are at play here. (Opp'n Br. at 9–10.) The lower court in *Rodriguez* ruled that the contract between Kaplan and BAR/BRI raised a triable issue of fact as to the allegation of market-division conspiracy. Suffice it to say that Rule 12(b)(6) allows less judicial discretion and requires a far-higher standard of deferring to the allegations than Rule 56 does. Appellants' allegations, to the degree that they are the same as those made in *Rodriguez*, have already weathered the lower court's heightened scrutiny, and the intervention of *Twombly* alone cannot so dramatically render today's Rule 12(b)(6) dismissal easier than yesterday's Rule 56 summary judgment. Yet Appellees' classification of Appellants' allegations as "sparse" post-*Twombly*, and the lower court's acquiescence to that conclusion, depend precisely on that legal fiction. This Court should therefore reverse the District Court's Order granting Appellees' Motion.

II. The *Rodriguez* Settlement.

A. The Settlement Reached in *Rodriguez* Does Not Moot the Allegations Made in the Complaint.

The *Rodriguez* settlement benefits only a subclass of the entire group that has been injured by BAR/BRI's monopoly. The entire group, of course, consists of all law students who have been, or will be, channeled to BAR/BRI through its anticompetitive behavior. However, the *Rodriguez* settlement only covers students who took a bar-exam course during the period of time from 1997 *to July 2006*.[4] Of course, as the U.S. Supreme Court has noted—*in an antitrust case brought against BAR/BRI, no less*—the residual impact of a monopoly may continue for many years after the illegal conduct itself has been exposed. *See Palmer v. BRG of Ga.*, 498 U.S. 46, 50 n.7 (1990). This accounts, in part, for the present matter, wherein Appellants seek damages and injunctive relief on behalf those who have taken or will take a course *after* July 2006. (ER Vol. II at 39 ("Plaintiffs bring this action on their own behalf and as a Class Action . . . on behalf of all members of the following classes: **A**. All persons who have purchased a bar review course from Defendant BAR/BRI after July 1, 2006, including those who may purchase at least

[4] The *Rodriguez* settlement only covers activity through the date on which a class-certification motion was granted. This is in contrast to typical settlements, which cover a period of time at least through the preliminary-approval-of-settlement date. Accordingly, the *Rodriguez* settlement necessarily created a "sub class" of injured persons who are not covered by the initial settlement.

a second BAR/BRI bar review course in the future. **B**. All law students who intend to purchase a bar review course from Defendant BAR/BRI, but have not purchased such a course prior to the implementation of any injunctive relief ordered herein.").) At the very least, the lower court completely ignored the significant money damages alleged by Subclass A when it dismissed the prospective antitrust claims of Subclass B. Accordingly, the District Court's conclusion that "[Appellants'] allegations regarding the current state of the market and its effects on individual plaintiffs cannot be squared with the provisions of the *Rodriguez* settlement" (ER Vol. I at 8) is wrong, and its Order should be reversed.

Appellants submit that the Supreme Court's decision in *Palmer* is particularly germane to the matter presently before the Court. In *Palmer*, law-school graduates had brought suit against BAR/BRI and another bar-review provider ("BRG"), alleging that the two had entered into an agreement in violation of section 1 of the Sherman Act. *Palmer*, 498 U.S. at 46. Under the agreement, BRG was given an exclusive license to market BAR/BRI's material in Georgia and to use its trade name. *Id.* at 47. In exchange, BRG agreed that it would not compete with BAR/BRI outside of Georgia and that it would pay BAR/BRI $100 per student enrolled by BRG. *Id.* Immediately after entering into the agreement, the price of BRG's course rose from $150 to over $400. *Id.* Both the District Court and the Court of Appeals held that the agreement was lawful. *Id.* at 47–48.

The Supreme Court reversed, explaining that the agreement was *per se* illegal. *Id.* at 48–50.

In reaching its conclusion, the Supreme Court noted that, two years after the original agreement was entered, certain changes were made to the arrangement "in connection with the settlement of another lawsuit." *Id.* at 50 n.7. According to the Court:

> Because the District Court found that the [pre-settlement agreement] did not violate § 1 of the Sherman Act, it did not address whether the . . . modified agreement constituted a withdrawal from, or abandonment of, the conspiracy. In *United States v. Kissel*, 218 U.S. 601, 54 L. Ed. 1168, 31 S. Ct. 124 (1910), we held that antitrust conspiracies may continue in time beyond the original conspiratorial agreement until either the conspiracy's objectives are abandoned or succeed. *Id.* at 608–609. *Thus, it is an unsettled factual issue whether the conspiratorial objectives manifest in the [pre-settlement] agreement between [BAR/BRI] and BRG have continued in spite of the 1982 modifications*.

Palmer, 498 U.S. at 50 n.7 (emphasis supplied). As in *Palmer*, there is a factual issue in the present case as to whether the anticompetitive impact alleged in the Complaint continued after the consummation of the *Rodriguez* settlement. Accordingly, the fact that *Rodriguez* was settled does not mean that the impact of BAR/BRI's pre-settlement anticompetitive behavior simultaneously ceased. *Cf. U.S. v. Inryco, Inc.*, 624 F.2d 290, 293 n.6 (1981) ("'The defendants argue that a conspiracy is a completed crime as soon as formed . . . and that therefore . . . a plea is proper to show that the statute of limitations has run. . . . [¶] The argument . . .

does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. . . . Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success.'") (quoting *Kissel*, 218 U.S. at 607–08). This is particularly true in light of the facts alleged in the Complaint, including the allegation that the specific non-monetary relief settled upon in *Rodriguez* still fails to adequately improve the relevant market conditions created by BAR/BRI's long and storied campaign to neutralize and/or destroy all significant competition. (ER Vol. II at 37–39.) Under *Palmer*, Appellants submit that the insufficiency of the *Rodriguez* settlement—which settlement is now pending appeal—is a question that cannot be resolved by any party before this Court. Appellants here will not pass judgment on the merits of the *Rodriguez* appeal. However, they steadfastly aver that, contrary to the stated opinion of the lower court in dismissing the present case, the *Rodriguez* settlement did not definitively repair the numerous flaws in the bar-review-course market. Notwithstanding the lower court's faith in the remedial impact of *Rodriguez*,

Subclass A was, and Subclass B will be, overcharged in the exact same manner that the class members in *Rodriguez* had alleged. That there was limited equitable relief in the *Rodriguez* settlement cannot justify the dismissal of Appellants' request for injunctive relief on a motion to dismiss.

Appellees seem to hang their hat primarily on business changes they claim to have made in the wake of *Rodriguez*. As explained more fully below, whether or not Appellees' have, in fact, made these changes and, for that matter, whether such minor, disparate changes have, in fact, borne sufficiently pro-competitive fruit in the relevant market are questions of fact that are not appropriately considered at the pleading stage of litigation. (*See infra* Section II.B.) However, even if the Court were to consider such changes, they would not support the outright dismissal of this case. For example, Appellees claim that they have supposedly terminated their "co-marketing agreement" in which BAR/BRI agreed to stay out of the LSAT market and to pay Kaplan a yearly sum in exchange for Kaplan's staying out of the bar-exam market. (Opp'n Br. at 35.) Appellees contend that this totally ameliorates any anticompetitive effects, thus depriving Appellants of standing to sue for any antitrust violations. (Opp'n Br. at 35.) However, as explained above, section 1 of the Sherman Act provides that such a contract is *per se* illegal, and it does not permit an inference that the contracts' termination necessarily and instantly undoes the damage to the market brought on by the market division in the

first place. *See Palmer*, 498 U.S. at 50 n.7. Accordingly, even assuming *arguendo* that the market division is truly over and that Kaplan is poised to begin meaningful, widespread competition with BAR/BRI, that does not exculpate Appellees. Settling with what is essentially a subclass of all who have been injured is no rationale for dismissing a separate suit on behalf of others who also were injured but who were not covered by the settlement.

Appellees also tout Kaplan's purchase of PMBR as evidence of renewed competition insofar as PMBR has allegedly "launched what Appellants refer to as 'full-service' bar review courses in competition with BAR/BRI." (Opp'n Br. at 38.) As explained below, it is unlikely that the Court can even consider this "fact," which has been submitted via a request for judicial notice. Notwithstanding its inadmissibility, Appellant points out that PMBR currently teaches only the Multistate Bar Exam: the one-size-fits-all multiple-choice component common to every state's bar exam. Most attorney-hopefuls who take PMBR also take BAR/BRI, and that is not competition.

In sum, the Complaint alleges that Appellees have perpetrated a litany of anticompetitive and entry-barring acts. (ER Vol. II at 24–37.) However, the order in *Rodriguez*, if made final after the pending appeal, contains only the following provisions designed to promote competition:

> For purposes of settlement, BAR/BRI and Kaplan agreed to terminate the marketing agreement that Plaintiffs allege is unlawful

> and has allowed BAR/BRI to maintain a monopoly and Defendants divide the market. Further, for a period of five years following the Effective Date, BAR/BRI will include the following statement on the forms it uses to enroll law students into its review courses:
>
> > NOTE: By signing this Enrollment Form and making an initial payment to BAR/BRI, you are not committing yourself to taking the BAR/BRI Bar Review course or making full payment to BAR/BRI for such course.
>
> Finally, in the Settlement Agreement, BAR/BRI expressly states "that it is committed to accurate advertising as required by the Lanham Act, the Federal Trade Commission Act and similar laws, regulations and rules."

Rodriguez v. West Publ'g Corp., 2007 WL 2827379 at *5 (C.D. Cal. Sept. 10, 2007). The *Rodriguez* settlement, in other words, purports to curtail only *two* of the anticompetitive practices detailed in the Complaint (the dividing of the market and the illegal advertising). This is in marked contrast to the situation in *In re Nifedipine Antitrust Litigation*, 335 F. Supp. 2d 6 (D.D.C 2004), where the appellate court ruled that an FTC consent order from a prior case addressed *every* concern of the plaintiffs. *See In re Nifedipine Antitrust Litig.*, 335 F. Supp. 2d at 17 ("The plaintiffs insist that they meet this requirement because the relief they seek exceeds the scope of the FTC Consent Order. The only differences that the plaintiffs are able to point to, however, are that they seek a *permanent* injunction, whereas the Consent Order expires in ten years, ... The plaintiffs do not articulate any specific action that they seek to enjoin that is not already prohibited by the Order or identify any action taken by defendants in violation of the Order.")

(emphasis in original) (internal citations omitted). In the matter presently before the Court, there is still a cognizable threat of recurrent violations. In the very least, there are putative Class Members whose claims for damages cannot be addressed by *Rodriguez* (members of Subclass A).[5] Accordingly, Appellees' Motion should have been denied, and the District Court's Order must be reversed.

B. The Allegations Made in the Complaint Cannot Be Rejected at This Stage of the Litigation.

There can be no dispute at this stage of the litigation that BAR/BRI controls 95% of the relevant market (ER Vol. II at 22) and that it has either bought off, coerced, or colluded with virtually every actual and potential competitor in the full-service bar-review market (ER Vol. II at 24–37). Given these facts—again, facts that must be accepted as true when ruling on Appellees' Motion to Dismiss, *e.g.*, *Leatherman*, 507 U.S. at 164—it is entirely reasonable to conclude that the residual effects of any pre-settlement anticompetitive behavior are still being felt. *See*

[5] One final note with respect to the settlement in *Rodriguez*. In what seems to be an attempt at misdirection, Appellees argue that "[p]reclusion is particularly warranted [in this case] because Appellants' counsel in this action represented the plaintiffs in the *Rodriguez* action." (Opp'n Br. at 37 n.3.) For authority, Appellees rely on *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934 (8th Cir. 1995), as well as on several other cases that stand for the proposition that, when the interests of plaintiffs in a second class action are protected by the actions of plaintiffs in an earlier class action, the second class action should be precluded. (Opp'n Br. at 37 n.3.) However, as no members of Subclass A will receive *any* benefits from the settlement in *Rodriguez*, their claims cannot be precluded. That *one* of the attorneys for the class in *Rodriguez* at one point represented the putative Class in this case does not change that fact.

Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998) ("We limit our review to the allegations of material facts set forth in the complaint, which we read in the light most favorable to the [plaintiff] and which, *together with all reasonable inferences therefrom*, we take to be true.") (emphasis supplied). *See also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979) ("So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide."). Simply put, Appellees' insistence that they have terminated their anticompetitive agreement cannot be taken as true at this stage. Such reasoning, if it was behind the lower court's dismissal, is a mistake of law.

As explained above, Appellees attempt to downplay the Complaint's allegations by repeatedly mischaracterizing them as "sparse," "speculative," and "conclusory."[6] In addition, they attempt to undermine the allegations with an

[6] Appellees also contend that the facts in the Complaint are too old to support any claims for relief. (*See* Opp'n Br. at 38.) Appellees throw out a number of pejorative adjectives to describe the Complaint, but they do not go so far as to argue that *any* statute of limitations bars *any* of the claims made in the Complaint. Appellants submit that Appellees would not be able to do so. *See*, *e.g.*, *Berkey Photo, Inc*, 603 F.2d at 295 ("By statute, 15 U.S.C. § 15b, a four-year period of limitations applies in private antitrust suits. The plaintiff, therefore, clearly can recover only for overcharges suffered since the beginning of the limitations period. It remains to be decided, however, whether the conduct element of the offense may be satisfied by wrongful action occurring before the limitations period but that nevertheless made an enduring contribution to the monopolist's ability to charge an excessive price. [The district court], without articulating reasons, concluded that § 15b requires a negative answer. [¶] . . . . We believe that the purchaser's claim

inappropriate Request for Judicial Notice that seeks to supplement the appellate record with a "copy of a press release from [Kaplan's] website."[7] (Defs.-Appellees' Req. for Judicial Notice Pursuant to Fed. R. Evid. 201 ("Req. for Judicial Notice") at 5.) Appellees have offered the press release as evidence "that Kaplan has launched 'full-service' bar review courses in competition with BAR/BRI." (Opp'n Br. at 3–4.) A closer reading demonstrates that the release claims that Kaplan merely *plans* on offering courses in three states, not that Kaplan has as yet actually "launched" anything. (Req. for Judicial Notice Ex. 8.) More fundamentally, the Court should strike the release, as it is simply incapable of being judicially noticed. *See* Ninth Cir. R. 27-1(7) ("Requests for judicial notice and responses thereto filed during the pendency of [a] case are retained for review by the panel that will consider the merits of the case. The parties may refer to the

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cannot accrue until it actually pays the overcharge. Accordingly, [the district court's] ruling was erroneous. . . . [¶] So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide. Thus, in this setting, *as in 'the context of a continuing conspiracy to violate the antitrust laws*. . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act.'") (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)) (emphasis supplied). Appellees' Brief feverishly beats around the bush with respect to the timing of Appellants' claims, but it never straightforwardly proposes, nor cites any authority to the effect, that Appellants' section 2 claims are not timely. In short, despite Appellees' indignant derision of these facts as "old," they do not genuinely dispute that they are relevant to a section 2 claim.

[7] Appellants do not object to the other documents submitted with Appellees' Request for Judicial Notice.

material the request addresses with the understanding that the Court may strike such references and related arguments if it declines to grant the request.").

Appellees are correct when they state that "Federal Rule of Evidence 201 [allows] a court [to] take judicial notice of a fact 'not subject to reasonable dispute [if] it is either (1) generally known within the territorial jurisdiction of the . . . court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." (Req. for Judicial Notice at 2.) They are also correct when they state that "'[i]t is not uncommon for courts to take judicial notice of factual information found on the world wide web.'" (Req. for Judicial Notice at 3 (quoting *Paralyzed Veterans of Am. v. McPherson*, 2008 WL 4183981 at *5 (N.D. Cal. Sept. 9, 2008).) However, as explained in *McPherson*, judicial notice is most often taken of official government information and documents, not of self-serving, unverified press releases issued by one of the parties to a litigation. *See McPherson*, 2008 WL 4183981 at *5 ("[That information found online can be judicially noticeable] is particularly true of information on government agency websites . . . . *See*, *e.g.*, *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (taking judicial notice of approval by the National Mediation Board published on the agency's website); *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam) (taking judicial notice of Texas agency's website); *Denius v. Dunlap*, 330 F.3d 919, 926–27 (7th Cir.2003)

(taking judicial notice of information on official government website); *In re Wellbutrin SR/Zyban Antitrust Litig.*, 281 F.Supp.2d 751, 754 n.2 (E.D. Pa. 2003) (taking judicial notice of the Food and Drug Administration's list of new and approved drugs); *United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich.2003) (citation omitted) ("Public records and government documents are generally considered not to be subject to reasonable dispute. . . . This includes public records and government documents available from reliable sources on the Internet."); *Cali v. E. Coast Aviation Servs., Ltd.*, 178 F. Supp. 2d 276, 287 n.6 (E.D.N.Y. 2001) (taking judicial notice of documents from Pennsylvania state agencies and Federal Aviation Administration); *In re Agribiotech Sec. Litig.*, No. CV-S-990144 PMP (LRL), slip op., 2000 WL 35595963, *2 (D. Nev. Mar. 2, 2000) ("In this new technological age, official government or company documents may be judicially noticed insofar as they are available via the worldwide web."). Accordingly, the fact that the press release submitted by Appellees happens to be found online does not change its character into something generally known, let alone something that is not subject to reasonable dispute. None of the cases cited by Appellees goes so far as to hold that an appellate court can consider evidence that was not presented to the trial court and that consists of a party's unsworn testimony.

Indeed, the press release actually raises more questions than it answers. Again, as far as Appellants can tell, the release purports to announce that Kaplan is planning on offering bar-review courses in three states. (*See* Req. for Judicial Notice Ex. 8.) But Kaplan, as alleged in the Complaint, offers a myriad of test-preparation courses across the country. (ER Vol. II at 19, 24.) Why, then, is it ostensibly planning on offering bar-review courses in just three states? Furthermore, in those three states, how much is Kaplan investing: enough to succeed or just a token sum? Perhaps the release is merely an effort to make it appear as though its conspiracy with West is over. Likewise, perhaps Kaplan has calculated that it is cheaper to make a nominal investment in a fragment of the market instead paying a treble-damages judgment. Instead of proceeding through the unverifiable door opened by the press release, this Court should simply disregard it at this stage of the proceedings.

CONCLUSION

For the foregoing reasons, the District Court's dismissal of the Complaint should be reversed.

Dated: February 11, 2009

HARRIS & RUBLE

/s/

Alan Harris
David Zelenski
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,490 words, as counted by Microsoft Office Word 2007.

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

Dated: February 11, 2009

HARRIS & RUBLE

/s/

Alan Harris
David Zelenski
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I am an attorney for Appellants herein, over the age of eighteen years, and not a party to the within action. My business address is Harris & Ruble, 5455 Wilshire Boulevard, Suite 1800, Los Angeles, California 90036. On February 11, 2009, I served **Reply Brief for Plaintiffs-Appellants Stephen Stetson, Shane Lavigne, Christine Leigh Brown-Roberts, Valentin Yuri Karpenko, and Jake Jeremiah Fathy** on the following via the Court's CM/ECF System:

Edward A. Klein
eklein@linerlaw.com
hchoi@linerlaw.com

Heather H. Gilhooly
hgilhooly@linerlaw.com
ntorrecillas@linerlaw.com
aeichelberger@linerlaw.com

Bradley S. Phillips
brad.phillips@mto.com
norine.mar@mto.com

Stuart N. Senator
stuart.senator@mto.com
loren.rives@mto.com

Elizabeth J. Neubauer
Elisabeth.Neubauer@mto.com
Marsha.Oseas@mto.com

James P. Tallon
jtallon@shearman.com

Wayne D. Collins
wcollins@shearman.com
dale@wdcollins.com

I declare under penalty of perjury that the above is true and correct. Executed on February 11, 2009, at Los Angeles, California.

/s/
David Zelenski