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No. 14-15562

In the United States Court of Appeals
for the Ninth Circuit

AEROTEC INTERNATIONAL, INC.,

Plaintiff/Appellant,

v.

HONEYWELL INTERNATIONAL INC.,

Defendant/Appellee.

On Appeal from the United States District Court for the District of Arizona, Cause No. CV 2:10-cv-00433-JWS

DEFENDANT/APPELLEE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Honeywell International Inc. has no parent corporation. State Street Bank & Trust owns 10% or more of Honeywell International Inc.

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INTRODUCTION*

As in the Court below, Plaintiff/Appellant Aerotec International, Inc. ("Aerotec") strings together in its Opening Brief ("OB") a variety of so-called "burdensome" and "onerous" business dealings (OB12-13) between it and Defendant/Appellee Honeywell International Inc. ("Honeywell"). Then, in an effort to persuade this Court to reverse the summary judgment entered by the District Court, Aerotec proceeds to misapply several antitrust theories, relying on obviously inapplicable documents and characterizing other documents in a way that the documents themselves plainly do not support. But in doing so, Aerotec ignores the record on which the District Court granted summary judgment, ignores that the District Court fully analyzed the summary judgment record presented to it and found that there was no genuine dispute as to any material fact, and ignores the principle that mere arguments and mischaracterization of facts do not give rise to a genuine dispute as to a material fact so as to preclude summary judgment. Simply stated, Aerotec's antitrust claims (and related state law claims) are without merit based on the undisputed facts presented to the District Court, and the District Court

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* Cases and statutes cited in this brief include hyperlinks to Westlaw. Cites to the record are to Defendant/Appellee's Supplemental Excerpts of Record ("SER") (e.g., SER2/023 refers to page 23 of volume 2).

Citations to the Opening Brief are to the page printed on the bottom of the page, not the ECF header. Citations to Appellant's Excerpts of Record are to the ECF page, e.g., App. Doc. 12-3 at 28.

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correctly granted Honeywell's motion for summary judgment as to all of those claims.

JURISDICTION

Honeywell agrees with Appellant's jurisdictional statement.

ISSUES

1. Honeywell, like Aerotec and every other repair provider, offers its customers a single repair price that includes both parts and labor necessary to accomplish the repair (like an oil change on a car). Honeywell also sells a large volume of parts separately from repair services. Did the District Court correctly reject Aerotec's claim that Honeywell's single price for an APU repair constitutes an unlawful tying agreement under Section 1 of the Sherman Act?

2. Honeywell, like Aerotec and every other repair provider, responds to bid requests from airlines and other aircraft owners who seek a fixed, not-to-exceed price for APU repairs for a stated contract period. Honeywell has won contracts to repair at most 54% of Honeywell-branded APUs on both an exclusive and non-exclusive basis. Did the District Court correctly reject Aerotec's exclusive dealing claim because Aerotec could not show that Honeywell actually foreclosed the alleged market for repair of Honeywell APUs, among other reasons?

3. It is undisputed that Honeywell experienced a worldwide parts shortage from approximately 2007 to 2009 for certain APU parts and that this parts

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shortage impacted Honeywell's own APU manufacturing and repair businesses as well as the APU repair businesses of virtually all repair providers. Assuming that Honeywell gave priority to itself and to some customers over other customers for parts that were in short supply, does such a prioritization of scarce parts create an unlawful refusal to deal or an "essential facilities" claim under Section 2 of the Sherman Act?

4. Did the District Court correctly determine that Honeywell's unwillingness to deal with Aerotec on credit terms that Aerotec preferred created no viable refusal to deal claim under Section 2 of the Sherman Act?

5. Aerotec is one of at least 49 entities that offer APU repair services, and Aerotec at all relevant times had less than 1% of the "market" for repair of Honeywell-branded APUs. Can Aerotec prove an injury to competition by alleging that it has been harmed by the business practices it complains of and that its "market" share declined from 0.71% to 0.55%?

6. Has Aerotec (a) met Robinson-Patman Act requirements to show that the sales involving alleged discriminatory parts pricing occurred in the United States, (b) shown that it contemporaneously competed for the sales that involved the alleged discriminatorily priced products, (c) shown that discounts given to long-term contractual parts purchasers who assume certain obligations to Honeywell are not materially different from the purchase-order-by-purchase-order

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sale to Aerotec, and (d) shown that the Robinson-Patman Act entitles it to the same prices Honeywell offers airlines who perform their own APU repairs?

7. Aerotec stated to the District Court that its state antitrust and interference claims "live or die based on Aerotec's federal antitrust claims." Thus, if Aerotec has not established a triable claim as to any of its antitrust theories, did the District Court properly dismiss Aerotec's interference claims as well as its state antitrust claims?

8. Because Aerotec has not raised any issue on appeal regarding its state law injurious falsehood and consumer fraud claims, should this Court summarily affirm dismissal of those claims?

STATEMENT OF THE FACTS AND CASE

A. APU Industry Overview

Honeywell is a diversified manufacturer of aerospace and other consumer and industrial products.[1] Among other things, Honeywell designs, manufactures, sells and services approximately a dozen different models of auxiliary power units ("APUs") for commercial aircraft.[2] Almost all commercial aircraft, like Boeing and Airbus aircraft, need APUs to provide power to start the main engines, cool the cabin, and operate on-board electrical equipment.[3] The two major APU

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[1] SER1/051 ¶3.

[2] *Id.*

[3] *Id.* ¶4.

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manufacturers in the western world are Honeywell and Hamilton Sundstrand, a division of United Technologies.[4]

Like an aircraft's propulsion engines, an APU must be repaired/overhauled periodically.[5] These "maintenance, repair, and overhaul" ("MRO") services are provided by numerous MRO shops around the world (also known as "MROs").[6]

Aerotec is an APU service provider in Phoenix, Arizona.[7] Aerotec provides MRO services for several APU models, including both Honeywell and Hamilton Sundstrand APUs.[8] Throughout its existence, Aerotec has been plagued by financial difficulties, including two bankruptcy reorganizations, the most recent lasting from 2003 to late 2006.[9] Aerotec's share of the worldwide Honeywell APU repair business has always been less than 1%.[10]

Honeywell also sells Honeywell-branded APU replacement parts that it and its third-party licensees manufacture to Honeywell's proprietary specifications.[11] Honeywell sells the parts to MROs, airlines, parts brokers, distributors, and uses the

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[4] *Id.*

[5] *Id.* ¶6.

[6] *Id.*

[7] SER1/012.

[8] *Id.*

[9] SER3/147-51; SER1/072.

[10] SER1/052 ¶7; SER3/280 ¶138; SER1/012.

[11] SER1/060 ¶3; SER1/011.

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parts itself for new APUs and APU repairs.[12] Throughout the relevant period, Honeywell has sold substantial quantities of parts to Aerotec and to numerous other MROs.[13]

In addition, aftermarket substitutes exist for many Honeywell parts.[14] These aftermarket parts suppliers sell surplus Honeywell parts and also obtain regulatory approval for what are termed parts manufacturing authority ("PMA") parts.[15] Typically, more PMA parts become available as an APU model ages.[16]

Many MROs offer repair and refurbishment of APU parts.[17] Honeywell also offers these services and uses its proprietary, FAA-approved methods.[18] Others (including Aerotec) have developed substitutes for Honeywell methods and obtain approval to use those substitute methods from an FAA-designated engineering representative, or "DER."[19] The industry calls these repairs a "DER-approved repair" or simply "DER repair."[20]

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[12] *Id.*

[13] *Id.*; SER1/146-178; SER1/045 ¶99.

[14] SER1/012; SER1/061 ¶7; SER1/145 (touting Aerotec's "links to parts houses, brokers and airline surplus sales").

[15] SER1/061 ¶7.

[16] *Id.*

[17] *Id.* ¶8.

[18] *Id.*

[19] *Id.*

[20] *Id.*

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B. The Marketplace for APU Repairs

Aircraft owners/operators have at least five choices when an APU needs repair:

1. Complete their own repairs in-house;
2. Airlines that, in addition to their own repairs, do repairs for third-parties;
3. Independent MROs, such as Aerotec;
4. Independent MROs that have entered into an Authorized Service Center ("ASC") agreement with Honeywell; and
5. Honeywell.[21]

Although Honeywell is the largest repair provider for Honeywell APUs, at least 49 other MROs around the world compete with Honeywell and against each other for APU repair work.[22] Although Honeywell's share of the repair business for its own APUs fluctuates from time to time, Aerotec contends (and Honeywell need not dispute for summary judgment purposes) that Honeywell had between 45% and 54% of that repair business during the relevant time.[23]

When an airline or aircraft owner does not perform its own APU repairs, typically it will solicit bids from numerous repair providers for long-term contracts

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[21] SER1/010-11; SER1/068; SER1/074; SER1/098-104.

[22] *Id.*; SER1/060 ¶2; SER1/077, 079; SER1/022 n.45.

[23] SER1/040 ¶9; SER3/279 ¶30; SER1/027.

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(i.e., 3 to 7 years).[24] Competition for any given repair bid is often very robust, including head-to-head competition among Honeywell, ASCs and independent MROs.[25] To further complicate matters, because airlines usually operate more than one type of aircraft (and thus more than one type of APU), airlines often contract for APU repairs with different repair providers for different APU models.[26]

C. Honeywell's Agreements with Repair Customers.

Any APU repair invariably involves the purchase of replacement parts and related services to complete the repair — not unlike an automobile repair.[27] Honeywell's agreements with repair customers (like agreements of most other repair providers) thus have some kind of negotiated pricing that includes parts and labor, such as a Maintenance Service Agreement ("MSAs") (charging a flat rate based on hours of APU use) or a Not-To-Exceed agreement ("NTE") (charging for parts and labor but guaranteeing that the overall price is "not to exceed" a negotiated rate).[28] Some of Honeywell's customer agreements are exclusive and

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[24] SER1/041-42 ¶¶26, 29; SER1/047 ¶¶26, 29; SER1/052 ¶8; *e.g.*, SER2/168-96.

[25] SER1/041-42 ¶27; SER1/047 ¶27; SER1/089-90; SER2/166-67 (competitors include Honeywell, ASCs, Aerotec, and others).

[26] SER1/052-53 ¶10.

[27] SER1/052 ¶8.

[28] SER1/053-54 ¶¶11-13.

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some are not.[29] Like Honeywell, Aerotec offers MSA and NTE agreements, and some of its agreement are exclusive and some are not.[30]

D. Honeywell Ensures That Its Repair Contracts Are Always Above-Cost

Honeywell's prices for MRO work substantially exceed its total costs (i.e., not just marginal costs).[31] For any material agreement Honeywell is negotiating, Honeywell goes through what it calls an "Airline Sales Approval Process."[32] Through this process, Honeywell analyzes the proposed deal and determines bidding strategy, including calculating Honeywell's lowest possible price.[33] This process ensures that Honeywell does not set its bid too low — i.e., it ensures that Honeywell would only win the business if it may earn an acceptable margin above its costs.[34] In fact, Honeywell's bids produced revenue that far exceeded Honeywell's costs for each of the repair contracts about which Aerotec has raised specific issues.[35]

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[29] SER1/054 ¶13; SER1/022 n.43.

[30] *E.g.*, SER1/081-82.

[31] SER1/054-57 ¶¶16-23; *e.g.*, SER2/197-215 (standard NTE pricing analysis, showing predicted revenue above any measure of cost).

[32] SER1/055 ¶19; *e.g.*, SER3/009-15.

[33] SER1/055 ¶19.

[34] SER1/056 ¶21; *e.g.*, SER3/034.

[35] SER1/056-57 ¶23; SER3/035-38.

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For APU repair agreements in particular, Honeywell also undertakes a "Point of Indifference" analysis.[36] Under this analysis, Honeywell determines whether it would make a higher profit performing the repair work itself or foregoing the repair job and selling the winning bidder the needed replacement parts.[37]

E. The Worldwide Parts Shortages

Between approximately 2007 and 2009, Honeywell (and other aerospace companies) faced a worldwide shortage of certain parts.[38] During much of that time, Honeywell could not obtain from its parts suppliers sufficient quantities of certain bearings, turbine blades, turbine nozzles, and other parts to satisfy demand.[39] The shortages impacted a number of Honeywell APU models, including models that Aerotec worked on for much of that time, the 331-500 and 131-9 APUs.[40]

Honeywell went to great lengths to address the parts shortage: it sought alternate suppliers, presented financial incentives to suppliers in an effort to shorten cycle times, engaged suppliers at the CEO and Board of Directors levels, had daily

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[36] SER1/056 ¶20.

[37] *Id.*; *e.g.*, SER3/016-33.

[38] SER1/057 ¶25; SER1/092; SER1/096; SER3/253-55, 259-63.

[39] *E.g.*, SER3/042; SER3/053; SER3/057 (1,222 blades available; 1,744 demanded); SER3/066-68 (short between 800 and 1,100 turbine blades); SER3/071; SER3/117 ("Industry-wide Constraint Situation"); SER3/205 (331-500 bearing "most critical"). *See generally* SER1/043-44 ¶56 and SER3/039-123.

[40] SER3/259; SER3/106; SER3/129; SER1/057 ¶25.

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calls with suppliers, and even sought to repurchase parts from independent MROs and ASCs (including Aerotec).[41] Despite these efforts, the shortage caused damaging delays in Honeywell's delivery of new APUs to its principal customers, Boeing and Airbus.[42] Even Aerotec's own documents recognize that a "worldwide shortage[] of OEM parts" for APUs existed at that time.[43]

Regardless of how Honeywell allocated the scarce parts, many customers simply could not get the parts they ordered within the time frame they desired.[44] The parts shortage affected nearly all of Honeywell's customers: airlines large and small, MRO providers, parts dealers, and even Honeywell's own production lines and service centers.[45] Honeywell generally tried "to allocate parts to the most critical needs."[46] For example, Honeywell tried to give the highest priority to "aircraft on the ground," a situation in which the aircraft simply could not fly until a repair was completed.[47] Honeywell also took into account business factors, such as

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[41] SER3/119-27, 133-41.

[42] SER1/092; SER3/107; SER3/135-41 (missed deliveries to Airbus and Boeing).

[43] SER1/145; SER2/185.

[44] In addition to examples cited in notes 39, 40, and 42, *supra*, *see also* SER3/142 (stating "Lufthansa Technik, SRT, EPCOR (KLM/Air France), and Delta Tech Op's . . . have all expressed growing dissatisfaction regarding [Honeywell's] delivery performance").

[45] *See* notes 39-42, 44, *supra*.

[46] SER3/053; SER1/094; SER1/057 ¶26; SER3/209.

[47] SER1/095; SER3/146 (general allocation guideline).

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contractual obligations concerning delivery times, and Honeywell's own needs for parts to manufacture new APUs and to repair existing APUs for its customers.[48] Honeywell also considered the nature and length of Honeywell's relationship with each customer.[49]

Although some parts are still in limited supply from time to time, the deep and protracted shortage of parts tapered by the end of 2009.[50]

F. Honeywell's Dealings with Aerotec

Aerotec claims that Honeywell "refused to deal" with Aerotec by (1) delaying shipment of APU parts and creating "burdensome" procedures for ordering and delivery of parts, (2) providing "onerous" credit terms, and (3) denying access to certain proprietary technical information free of charge. (OB12-16.)

The ***undisputed*** facts show something much different: Aerotec took on rapid and substantial growth in business from a single customer, Saudi Arabian Airlines ("Saudia"), in 2007, right after Aerotec exited bankruptcy for the second time. Aerotec lacked sufficient working capital or an existing parts inventory to allow it

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[48] SER1/057 ¶26.

[49] For example, Honeywell had contractual obligations to EPCOR, a European ASC, regarding parts supply. SER1/097. EPCOR even threatened to sue Honeywell because of Honeywell's delays in supplying EPCOR with parts as obligated. SER3/145. And many other ASCs and airlines complained as well.

[50] SER1/057 ¶24; SER1/080; SER1/049 ¶71.

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to weather ordinary business exigencies, including difficulties in parts supply, delayed payment from Saudia, or other unforeseen business difficulties. Aerotec instead expected (and now contends that the Sherman Act compels) Honeywell to be Aerotec's financier and an on-demand parts supplier, even of parts that were in short supply and were on critical allocation worldwide.

For several years before 2006, Honeywell repaired Saudia's APUs.[51] Saudia, however, was frequently late with payment.[52] Eventually, in late 2005, Honeywell told Saudia that it would not perform any further work and would not ship any of Saudia's APUs currently in Honeywell's shops until Honeywell received overdue payment from Saudia.[53] Saudia thereafter sought a different repair provider.[54]

In mid-2006, Aerotec was approached to help provide repair services to Saudia.[55] Aerotec "openly discussed its financial limitations" with Saudia, which led Saudia to "suggest a 'fixed monthly payment' plan to be incorporated into the contract to ensure a steady cash flow, ***recognized as essential to Aerotec's performance***."[56]

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[51] SER1/069-70.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] SER3/153, 157.

[56] SER3/153 (emphasis added); *see also* SER3/204 (Aerotec sales director stating that carrying customer debt of $0.5M-$1.5M "would put us out of business").

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It is undisputed, however, that Aerotec did not receive timely payment from Saudia.[57] Saudia was often millions of dollars behind schedule for months at a time, leaving Aerotec to plead and beg for cash.[58] For example, Aerotec stated in September 2008 at the height of its dealings with Saudia:

> "As you are aware, Aerotec constantly feels the financial stress of [Saudia's] failure to make on-time payments. . . . Consequently, Aerotec is on a continuous financial roller-coaster."[59]

G. Aerotec's Lack of a Parts Inventory, Poor Credit, and Financial Exposure to Saudia Made Aerotec Especially Vulnerable to the Worldwide Parts Shortage.

As Aerotec had explained to Saudia, Aerotec had a very minimal parts inventory on hand.[60] Although Aerotec purchased many parts from other suppliers and PMA providers, Aerotec still had to buy a substantial number of replacement parts from Honeywell to complete Saudia's work.[61] Thus, it was inevitable that Aerotec would feel the consequences of the worldwide parts shortage. Some of Aerotec's deliveries were delayed, as were those of Honeywell's other customers,

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[57] SER3/154; SER1/083-84 (agreeing Saudia was "always late" and that "lack of payment by Saudi was exacerbating . . . problems not just with Saudi, but also with respect to [Aerotec's] other customers").

[58] *Id.*; SER3/158-203.

[59] SER3/178.

[60] SER3/153; *see also* SER1/087; SER3/165, 180, 190.

[61] SER1/146-78; SER1/045 ¶99.

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many of whom, like Aerotec, complained bitterly to Honeywell.[62] Honeywell sometimes had to quote its customers, including Aerotec, long delivery windows because of the shortages.[63] And in some instances, Honeywell could not provide definite delivery dates at all.

It is undisputed, however, ***that Honeywell never refused to provide parts to Aerotec***.[64] To the contrary, Honeywell went out of its way to accommodate Aerotec.[65] For example, and as discussed in more detail below, Honeywell extended large credit lines to Aerotec (for which Aerotec clearly did not qualify) to help facilitate Aerotec's ordering of parts.[66]

Aerotec also complains about cumbersome ordering processes at Honeywell. Some of these ordering difficulties were the result of Honeywell's change of computer systems during this time.[67] Others, such as unpredictable parts availability, were caused in part by the worldwide parts shortage.[68] But it is

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[62] *See* note 44, *supra*; *e.g.* SER3/104 (Piedmont, an ASC, complaining about parts delays).

[63] *Id*.

[64] SER1/075, 085.

[65] SER1/078 (Honeywell assigned employee dedicated to facilitating Aerotec's orders); *see e.g.*, SER3/213-14, 222 (allocation of extremely scarce blades to Aerotec and setting up extra deliveries to support Aerotec).

[66] SER3/238; SER1/088.

[67] SER1/057-58 ¶27; SER3/224-25.

[68] *See* note 44, *supra*.

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undisputed that Honeywell took extensive measures to address the parts shortage and to improve its handling of orders, not just for Aerotec, but for all of its customers, many of whom were experiencing the same ordering and parts shortage problems as Aerotec.[69]

Aerotec's ordering difficulties were compounded by Aerotec's lack of credit combined with its on-demand need for parts arising from its lack of a pre-existing inventory of parts.[70] Honeywell — the largest unsecured creditor in Aerotec's second bankruptcy — was initially reluctant to extend any credit to Aerotec.[71] As a result, Honeywell generally required Aerotec to "pay prior to shipment."[72] For parts that were not ready to ship (such as parts that had to be ordered at lead time or parts that were on allocation because of shortages), Aerotec (like other financially weak customers) had to pre-pay at the time of ordering before it could be put in the queue for the part.[73] Requiring payment at the time of an order is common in the aviation industry, including for parts that cannot be shipped immediately.[74]

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[69] SER1/057-58 ¶27; *see also* SER3/223 (Triumph, an ASC, complaining about ordering process).

[70] SER1/058 ¶28; SER3/232.

[71] SER3/232, 238-39; SER3/147-49.

[72] SER1/058 ¶28.

[73] *E.g.*, SER3/227-28.

[74] SER3/256-58, 264.

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Nevertheless, it is undisputed that Honeywell repeatedly extended credit to Aerotec, only to have Aerotec exceed the credit limits or otherwise default. For example, in September 2007, Honeywell extended a $100,000 credit line to Aerotec on “net 30” terms (i.e., payment due within 30 days).[75] Honeywell’s credit analyst approved the credit line to assist Aerotec even though her analysis showed that Aerotec had “operating losses, very high debt, very little equity and a negative cash flow.”[76] Honeywell twice increased that credit line, first in January 2009 to $300,000, and later in 2009 to $500,000.[77] However, Aerotec failed to keep current, leading Honeywell to revoke Aerotec’s credit in 2010.[78] After 2010, Aerotec made no effort to reestablish a credit line with Honeywell.[79]

H. Aerotec’s Claim That Honeywell Intentionally Tied Up Aerotec’s Working Capital Ignores Undisputed Facts

Aerotec contends that part of Honeywell’s effort to exclude Aerotec was to restrict Aerotec’s cash by forcing it to pre-pay for parts and then delayed delivery of the parts. For instance, Aerotec points to an e-mail allegedly indicating that Aerotec had pre-paid Honeywell more than $1 Million on open orders. (OB13.)

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[75] SER3/233-36.

[76] SER3/235.

[77] SER1/073.

[78] *Id.*

[79] *Id.*

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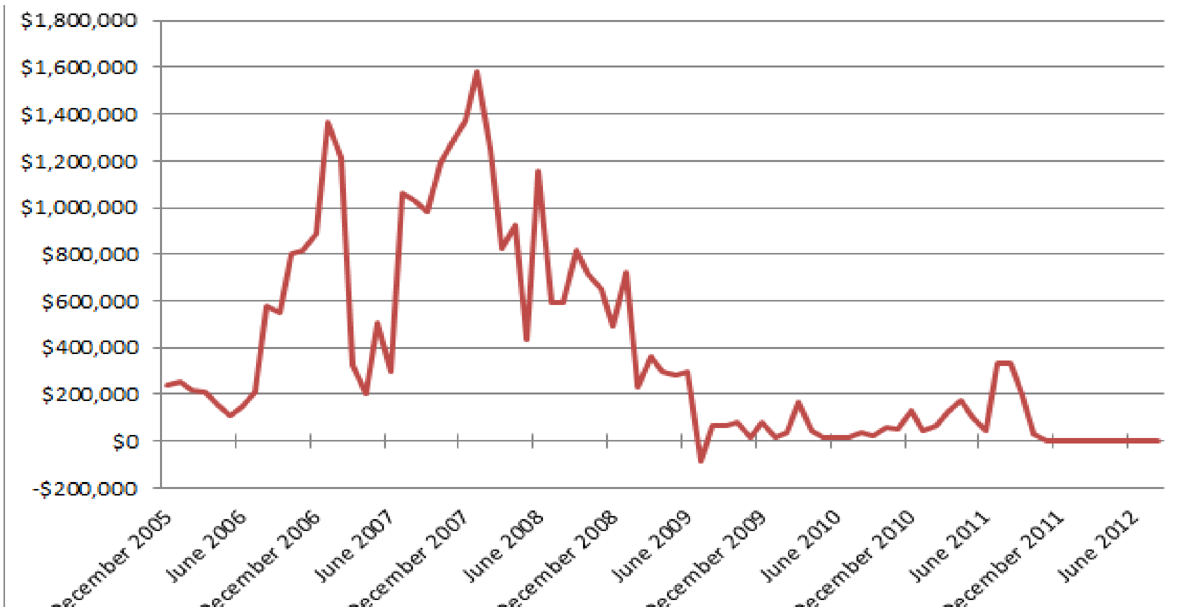
Aerotec's characterization aside, and far from showing a scheme, the undisputed facts show that Aerotec's cash-on-account with Honeywell fluctuated frequently, and tracked both the timing of the worldwide parts shortage and Aerotec's sudden need for huge quantities of parts due to the increased work from Saudia:[80]



Aerotec's Cash-on-account at Honeywell

As the graph shows, and Aerotec concedes, the amount of cash on hand at any given time tapered substantially as the parts shortages lessened beginning in mid-2009, and thereafter there were fewer and fewer instances of Aerotec having paid for parts that Honeywell could not immediately deliver.[81]

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[80] SER1/065 ¶¶5-6; SER3/241 (orders "not on hold due to credit. They are a PPS customer . . . [t]he issue is we do not have the inventory to ship").

[81] SER1/049 ¶71 (agreeing shortages and allocations tapered in 2009).

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I. Aerotec Complains That Honeywell Does Not Freely Give Its Intellectual Property to Aerotec

FAA regulations require aircraft owners and operators to have access to certain basic repair information, known as "Instructions for Continued Airworthiness." *See* FAA Order 8110.54A. *See also* FAA Technical Standard Order TSO-C77b § 5.b.(6)(b) & App'x 4 (regulations related to APUs). Honeywell publishes manuals and other technical publications that satisfy these regulations.[82]

In addition to this required information, Honeywell has invested in developing additional information concerning APU components, repairs, and tools used for APU repairs.[83] This additional information is Honeywell's proprietary intellectual property. Honeywell licenses some, but not all, of the information to others through licensing agreements, including to ASCs and other MROs (with sizeable royalty payments to Honeywell).[84]

In any event, Aerotec has admitted that there is not a single Honeywell repair manual that it needs but does not have.[85] In addition, Aerotec has developed its own proprietary DER substitutes for certain repair information.[86]

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[82] SER1/063 ¶12.

[83] *Id.*

[84] *Id.*

[85] SER3/246.

[86] *Id.*; SER1/084.

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J. Aerotec Complains That Honeywell Engages in Price Discrimination in the Sale of Parts

Starting in 2007, Honeywell implemented a tiered-pricing structure for sales of aerospace replacement parts, including APU parts. Under this system, airlines receive a 50% discount off of list price and MROs receive a 42.5% discount. Thus, MROs pay 15% more than airline customers.[87] Honeywell's tiered system ***does not differentiate*** between Honeywell ASCs and non-ASCs like Aerotec.[88] MROs, whether authorized or non-authorized, are charged 15% more than airlines customers.[89] Contrary to Aerotec's mischaracterization, the undisputed evidence is that Aerotec does not automatically pay a "15% premium" over what Honeywell's ASCs pay.

Because of long-term and sometimes complex agreements, however, some (but not all) ASCs pay lower list prices for ***specific*** parts relating to specific APU models and gain access to ***specific, limited*** portions of Honeywell's intellectual property as part of carefully negotiated agreements.[90] In exchange for these benefits, the ASCs and licensees pay Honeywell significant royalties and have substantial obligations to Honeywell that are not imposed on independent repair

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[87] SER1/062 ¶9.

[88] *Id.*

[89] *Id.*

[90] *Id.* ¶10.

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facilities such as Aerotec.[91] In addition, for the discounted parts covered by an ASC agreement, the MRO typically agrees to use only Honeywell parts and not to use aftermarket PMA parts manufactured by firms other than Honeywell.[92] Other obligations include demanding inventory and forecasting requirements, use of Honeywell-approved repair procedures instead of DER substitutes, periodic audits, training requirements, and the like.[93] The price discounts, licensing fees, and other terms vary from contract to contract and are the subject of extensive negotiation.[94]

Aerotec has no such contractual obligations to Honeywell, nor does it pay any royalties to Honeywell.[95] Instead, when Aerotec purchases parts from Honeywell, it does so solely on a purchase-order-to-purchase-order basis.[96] Aerotec pays the same prices for Honeywell replacement parts as do all other MROs (including ASCs) who purchase on a purchase-order-to-purchase-order basis.[97]

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[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id. See also* SER1/105-43, SER1/179-300, SER2/009-160 (ASC and related agreements with Standard Aero, EPCOR, Piedmont, and Chromalloy).

[95] SER1/062-63 ¶11.

[96] *Id.*

[97] *Id.*

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STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo in a light most favorable to the non-moving party. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). To survive summary judgment, the non-moving party must present evidence creating more than a "metaphysical doubt as to the material facts," but instead must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986).

SUMMARY OF ARGUMENT

The District Court correctly entered judgment in Honeywell's favor on all claims. As the District Court's decision reflects, Aerotec has ignored the most basic principle of antitrust law — i.e., that the Sherman Act protects "competition not competitors."[98] Regardless of Aerotec's outlandish factual allegations, Aerotec cannot survive summary judgment on its Sherman Act claims unless it can show that there was "***injury to competition***," not merely alleged injury to Aerotec. Aerotec has not and cannot meet that burden, and its antitrust claims (and related state claims) fail for that reason alone.

Apart from Aerotec's failure to prove injury to competition, the District Court correctly dismissed Aerotec's antitrust claims for other reasons. Aerotec's

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[98] SER1/024, 026-28.

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tying claim fails because Aerotec presented no evidence that Honeywell ever (through coercion or otherwise) conditioned the sale of parts on the purchase of repair services. Honeywell sells parts separately to anyone who wants them, including the thousands of parts sold to Aerotec.

Aerotec's exclusive dealing claim fails because Aerotec lacks evidence that Honeywell has market power in the relevant market or that its customer agreements (essentially the same as Aerotec's) have any anticompetitive effect, much less that such non-existent effects outweigh the many procompetitive reasons for the agreements.

Aerotec's Section 2 claims fare no better. Aerotec's refusal-to-deal theories — that Honeywell delays parts, restricts the distribution of its intellectual property, makes Aerotec pre-pay for parts, and charges Aerotec too much for parts — fall far short of the exceptionally rare refusal cases that succeed and reflect Aerotec's misguided position that the Sherman Act should shield Aerotec from the rigors of competition. Moreover, Aerotec's bundled pricing claim — that Honeywell charges too little for its repairs — lacks any evidence of predatory below-cost pricing and is thus nothing more than the kind of price-squeeze claim that the Supreme Court has held the Sherman Act does not recognize.

The District Court also correctly dismissed Aerotec's price-discrimination claim under the Robinson-Patman Act for multiple reasons, including that the Act

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does not require Honeywell to offer Aerotec the same prices that Honeywell charges airlines repairing their own APUs or ASCs who negotiate prices as part of individually negotiated complex agreements that are materially different from the spot sales to Aerotec.

Finally, Aerotec's state-law claims cannot survive because they either depend wholly on the federal claims (state antitrust and tortious interference) or have been abandoned on appeal (injurious falsehood and consumer fraud).

ARGUMENT

I. Tying and Exclusive Dealing

Aerotec's tying and exclusive dealing claims assume that anytime a customer opts to purchase parts and repair services from Honeywell, it could only have been the result of monopolistic coercion. Like in many other transactions, however, it is certainly true that some customers prefer to buy parts and services together and to negotiate an exclusive contract for the repair of a fleet of vehicles (or APUs). That preference results from market efficiency not market perversion. As a matter of law, the District Court properly rejected Aerotec's claims to the contrary.

A. Tying

"Tying" is a type of vertical restraint of trade "where a supplier agrees to sell a buyer a product (the tying product), but only on the condition that the buyer also

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purchases a different (or tied) product." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1199 (9th Cir. 2012) (internal quotation marks and citation omitted). Only a very narrow range of tying claims may constitute a *per se* violation of the Sherman Act. *Id*. at 1197 n.7. To prevail on a *per se* tying claim, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a "not insubstantial volume of commerce" in the tied product market. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003).

To survive summary judgment on its tying claim, Aerotec had to produce some evidence that there was actually a tie: an obligation to buy Honeywell's repair services to get access to parts. The District Court correctly concluded that Aerotec could not prove this basic element.[99] The District Court also correctly concluded that Aerotec failed to present evidence of economic coercion, meaning that even if there was any "tie," it would not be unlawful.[100]

[99] SER1/017-18.

[100] SER1/018-19.

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1. Aerotec's Tying Claim Fails Because It Has No Evidence That Honeywell Actually Ties APU Parts and Repair Services

As the District Court observed, it is undisputed that Honeywell sells parts to any number of customers, including other MRO providers, ASCs, distributors, and airlines, without requiring the purchase of repair services.[101] Aerotec itself purchased millions of dollars in parts every year without buying related repair services.[102] Moreover, Aerotec did not present evidence of ***any*** customer who was refused Honeywell parts because the customer wanted to have an independent party handle the repairs. That is, Aerotec has no evidence that Honeywell "condition[ed] the sale of" APU replacement parts "on the [APU owner's] purchase" of Honeywell repair services. *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 971 (9th Cir. 2008). Thus, "[t]here is no tie for any antitrust purpose" because Honeywell did not "require buyers to take the second product if they want the first one." 10 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1752b, at 286 (3d ed. 2011).

To bypass these undisputed facts, Aerotec asserts two flawed arguments. First, Aerotec contends that under the Supreme Court's *Kodak* case, its claim survives even though Honeywell sells parts separately from repairs. (OB22-23.)

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[101] SER1/018.

[102] SER1/146-78; SER1/045 ¶99.

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See Eastman Kodak v. Image Technical Servs., Inc., 504 U.S. 451, 461-62 (1992). There, Kodak sold replacement parts and performed repairs on Kodak photocopiers. 504 U.S. at 457. Kodak refused to sell parts to independent repair providers directly and would sell parts to owners of the machines "only if they agreed not to buy service from" independent repair providers. *Id*. at 458, 463. In other words, an owner could get parts from Kodak only if it agreed to self-repair or "buy service from Kodak." *Id*. at 463 n.8. The Court held that this provided "sufficient evidence of a tie between service and parts." *Id*. at 463.

The District Court correctly recognized that key facts from *Kodak* are missing here: Kodak refused to sell to independent repair providers and refused to sell to owners unless the owner agreed to hire Kodak or self-repair. As discussed above (and Aerotec's own purchasing history shows) the opposite is true here. Thus, *Kodak* has no application here.

Second, Aerotec contends that Honeywell's conduct creates a "de facto" or "implied" tie that causes APU owners to use Honeywell for repair services. (OB21, 24-25.) The support for Aerotec's "implied tie" theory is a rehashing of its refusal-to-deal claim that Honeywell delays delivery of parts to independent repair providers. (OB32-33.) As discussed in §II below, this theory is simply wrong. Aerotec's fact-starved story that Honeywell refuses parts to independent repair companies cannot displace the substantial undisputed evidence of separate parts

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sales to APU owners, Aerotec, and any other customers, all without regard to who is performing repairs.

Moreover, Aerotec's two examples (OB24-25) from Saudia and Air China are immaterial and misleading hearsay, not evidence. *See In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) (decision on summary judgment "may only be based on admissible evidence"). The Saudia quote is taken out of context from a Saudia employee's e-mail expressing frustration at Honeywell.[103] The e-mail's author has never been deposed, submitted a declaration, or otherwise done anything to make the e-mail anything other than inadmissible hearsay.

Aerotec's Air China quote is not only plainly inadmissible hearsay, it is incorrect and misleading. The quote does not come from Air China at all; it comes from Aerotec's own agent who helped Aerotec get business in China, and Aerotec's own written statement to Air China was that the APU in question was so badly damaged that it required replacement of parts that "are not replaced during a normal maintenance shop visit and are not readily available."[104] That these two quotes are Aerotec's best examples of an "implicit tie" only underscores that the District Court was correct when it found that Aerotec could not prove the existence of a tie, the most basic element of its tying claim.

[103] App. Doc. 12-3 at 273.

[104] App. Doc. 12-3 at 283; SER3/249.

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2. Aerotec Also Failed to Show Economic Coercion

The second "essential" element of a tying claim is "proof that the seller ***coerced*** a buyer to purchase the tied product." *Paladin Assocs.*, 328 F.3d at 1159 (emphasis added). The "coerced purchase of the tied product is the key aspect of an illegal tie." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2007). A tie is prohibited "where a seller 'exploits,' 'controls,' 'forces,' or 'coerces,' a buyer of a tying product into purchasing a tied product." *Rick-Mik Enters., Inc.*, 532 F.3d at 971 (collecting cases).

The District Court correctly concluded that Aerotec could not show coercion. Where a de facto tie is alleged, courts often look to the extent of separate sales as evidence of a coercive tie. *See* 10 Areeda & Hovenkamp ¶ 1758b at 363 (3d ed. 2011) ("separate sales below 10% presumptively indicate a de facto tie"). Here, even using Aerotec's most aggressive figures and assuming Aerotec's market definition, at least 46% of Honeywell APUs are repaired by some entity ***other than Honeywell***.[105] Because every repair of a Honeywell APU requires the purchase of at least some parts from Honeywell, this means that in almost half of all repairs of Honeywell-branded APUs, Honeywell sells parts separate from repairs.[106] This was such a "large percentage of customers not using Honeywell

[105] SER3/279 ¶30; SER1/027.

[106] SER1/052 ¶8, SER1/060 ¶3.

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for repair services" that the District Court correctly "presume[d] that Honeywell has not engaged in tying." (SER1/019 (citing 10 Areeda & Hovenkamp ¶ 1758 at 358 (indicating presumption of non-tying if a "sufficiently large number of customers are observed who purchase the secondary product from someone other than the defendant")).)

Aerotec argues (OB27-28) that the 46% figure is too large because it includes airlines that self-repair and that the "actual percentage of separate sales is 26%."[107] First, Aerotec does not explain why the Court should disregard separate sales to self-repairing airlines. That would make sense only if there was evidence that Honeywell conditioned the sale of parts on the promise to self-repair or use Honeywell; as the District Court observed, there is no such evidence. *See Kodak*, 504 U.S. at 463 (there was "sufficient evidence of a tie between service and parts" because "Kodak would sell parts to third parties ***only if they agreed not to buy service*** from" third parties (emphasis added)). Second, even the 26% of separate sales that Aerotec posits far exceeds the 14% that this Court held "may indicate some degree of coercion" in *Cascade Health* or the 10% that Areeda & Hovenkamp suggest "indicates a coercive tie." *See also Ways & Means, Inc. v. IVAC Corp.*, 506 F. Supp. 697, 702 (N.D. Cal. 1979) (granting summary judgment

[107] The evidence Aerotec cites is a plainly inadmissible draft report of an undisclosed expert. *See* App. Doc. 12-3 at 28-53. Although Honeywell does not concede Aerotec's market data is accurate or admissible, Aerotec's claims fail even using Aerotec's data.

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because, among other reasons, "approximately 25% of all purchases" were separate), *aff'd* 638 F.2d 143 (9th Cir. 1981).

Aerotec next asks the Court (OB25-26) to ignore the evidence of the absence of a coercive tie and to instead infer coercion from Honeywell's large share of the market for Honeywell-branded replacement parts. Aerotec argues that because it raises a *per se* tying claim, it "need not present evidence of actual coercion." (OB25.) Thus, says Aerotec, its mere allegation that Honeywell sells approximately 95% of Honeywell-branded replacement parts should be enough to go to trial.

Aerotec's argument fails. Honeywell's market share in Honeywell APU parts would be relevant only if there were a tie in the first place. In *Jefferson Parish*, the first "threshold matter" is whether there is actually a tying arrangement with a "substantial potential for impact on competition." *Jefferson Parish Hosp. Dist. No. 2. v. Hyde*, 466 U.S. 2, 15-16 (1984) *abrogated in part on other grounds by Ill. Tool Works v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). There, the defendant hospital required surgical patients to use a particular anesthesiologist. 466 U.S. at 5-6. Only once that "threshold matter" of an actual tie is cleared does the inquiry turn to whether the defendant/seller possesses "market power" to "force a purchaser" to buy the tied products. *Id*. at 13-14. Here, Aerotec has not cleared

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the first hurdle because the evidence unequivocally shows that although Honeywell ***offers*** parts and service together, it also sells parts separately.[108]

As the District Court found, the record unequivocally demonstrates that there simply is no tying arrangement, much less a coercive one.

Finally, Aerotec apparently has abandoned its argument below that "Honeywell's bundling of parts and repairs" was a "coercive tie" because of a discounted "package price."[109] But even if preserved, the argument is plainly wrong. *See* 3A Areeda & Hovenkamp ¶ 749d2 at 325 (3d ed. 2008) ("A variation of the requirement that prices be 'below cost' is essential for the plaintiff to establish . . . that the purchaser was actually 'coerced' . . . into taking the tied-up package."). In *Cascade Health*, this Court expressly identified but declined to decide whether "a plaintiff alleging that a bundled discount amounts to an illegal tie" must "prove below-cost prices." 515 F.3d at 916 n.27. In *linkLine*, the Supreme Court resolved this issue, holding that "the Sherman Act does not forbid — indeed it *encourages* — aggressive price competition at the retail level, as long as the prices being charged are not predatory." *Pac. Bell Tel. Co. v. linkLine Commc'ns*, 555 U.S. 438, 455 (2009). As explained above (pp. 18-19),

[108] In fact, Aerotec concedes that it is ***customers*** who request prices that include both parts and labor (e.g., NTE). (*See* SER1/047 ¶¶30-31.)

[109] ECF-107 at 21.

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Honeywell's repair contracts are priced above cost. Consequently, Aerotec cannot rely on Honeywell's pricing as evidence of a coercive tie.

B. Exclusive Dealing

Aerotec's exclusive dealing claim is, at bottom, a complaint that the law should protect Aerotec from Honeywell's ability to offer better terms to customers. In essence, Aerotec's claim is that Aerotec and all other MROs should be permitted to enter into customer-driven, multi-year APU repair contracts, but that Honeywell may not.

1. As the District Court Held, Aerotec Cannot Show That Honeywell's Agreements Actually Foreclose Competition

The District Court noted that exclusive agreements are typically procompetitive, "pose little threat to competition," and are therefore subject to the "rule of reason." (SER1/020 (quoting *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012).) *See Omega Envtl. Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) ("rule of reason" applies because of "well-recognized economic benefits to exclusive dealing arrangements").

The Ninth Circuit uses a burden-shifting approach under which "[t]he plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within the relevant product and geographic markets." *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996). Among other things, to meet its initial burden Aerotec "must prove that the exclusive

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dealing arrangement actually foreclosed competition." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 n.1 (9th Cir. 2010) (internal citations omitted). The exclusive dealing must "foreclose competition in a substantial share of the line of commerce affected." *Id*. at 996.

The District Court correctly applied this law and found that Aerotec's claim failed because, even assuming Aerotec's assumptions about Honeywell's market power, Aerotec had no evidence to "prove a reduction of competition in the market in general and not mere injury to [Aerotec's] own position []as [a] competitor[] in the market."[110] *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989).

Aerotec's primary evidence is harm to Aerotec. It contends that it lost some bids to Honeywell and that Aerotec's share of the Honeywell-branded APU repair market decreased from 0.71% to 0.55% between 2008 and 2012. (OB31.) But that only means that Honeywell won customers, not that Aerotec was precluded from competing. Moreover, harm to a single competitor can constitute injury to competition only when the "relevant market is both narrow and discrete and the market participants are few." *Les Shockley*, 884 F.2d at 508-09 (allegation that anticompetitive conduct caused removal of eight competitors from market held insufficient to show injury). The APU repair market, with its dozens of

[110] SER1/021-22.

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competitors worldwide (at least 49), plainly does not fit that description. Thus, even setting aside the lack of evidence that Aerotec's decline in market share has anything to do with anticompetitive conduct, the District Court correctly concluded that Aerotec could not show foreclosure of competition.

Aerotec nevertheless insists that the question of foreclosure should survive summary judgment because (a) Honeywell has a 50% share of the repair market with 47% of APUs "under contract" and (b) an internal Honeywell document showed a shift in repair business to Honeywell between 2008 and 2010. (OB30-32.)

The District Court was right to conclude that Aerotec did not meet its burden with this "evidence." Aerotec has no evidence showing what proportion of Honeywell's supposed 50% was locked into long-term exclusive agreements. Aerotec merely assumes that if a customer is "under contract," then it must be locked into a long-term exclusive agreement. That sort of speculation cannot survive summary judgment. *See Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) ("A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data."). Aerotec's assumption also happens to be wrong. As the District Court noted, Aerotec does not dispute that some Honeywell customer agreements are non-exclusive.[111]

[111] SER1/022; SER1/053-54 ¶13.

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Furthermore, the internal document indicating that Honeywell gained market share between 2008 and 2010 and that a handful of other competitors had some business slowdown does not "prove that" Honeywell's exclusive dealing "actually foreclosed competition." *Allied Orthopedic*, 592 F.3d at 996 n.1. Aerotec must do more than observe modest shifts in market share over time to prove its claim. Nothing in the document suggests that competition has been harmed, let alone that there is any causal link to any exclusionary conduct.

2. Honeywell Lacks Market Power Sufficient to Prove Actual Foreclosure

As part of its burden to prove that Honeywell's customer contracts actually foreclosure competition, Aerotec must also prove that Honeywell has market power in a properly defined relevant market. *See Hairston*, 101 F.3d at 1319. In granting Honeywell summary judgment, the District Court assumed without deciding that Aerotec's market definition — repair of Honeywell-branded APUs — was correct. Although Honeywell disagrees, even using Aerotec's narrow market definition, Aerotec still lacks sufficient evidence to show market power.

Aerotec relies principally on data indicating that Honeywell performed as much as 54% of the repairs on Honeywell APUs in 2010 and that Honeywell and so-called "Honeywell affiliates" (e.g., ASCs) together performed more than 60% in 2010, implying that the market shares should be aggregated. (OB20.)

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These inflated figures cannot establish market power. Without evidence of Honeywell's "actual ability to control prices or exclude competition," a market share much higher than 54% is required. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a prima facie case of market power.").

Moreover, Aerotec may not aggregate market shares of ASCs with Honeywell's. Honeywell and ASCs are plainly separate, independent entities who compete against each other for repair work.[112] Aggregation of market share could be possible only if "the rivals are alleged to have ***conspired*** to monopolize," something that Aerotec has not alleged, much less proven. *Rebel Oil Co. Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1437 (9th Cir. 1995) (emphasis added); *see also Am. Needle Inc. v. Nat'l Football League*, 560 U.S. 183, 196-97 (2010).

Thus, this Court should affirm for the separate reason that Aerotec has not carried its burden to prove that Honeywell has market power.

3. As a Matter of Law, Honeywell's Customer Agreements Are Procompetitive and Lawful

In the APU repair business, exclusive contracts like NTEs are not only common but also reasonable and procompetitive for several undisputed reasons.

[112] SER2/166-67 (Honeywell competing with ASCs); SER1/130 (Honeywell and ASC act as "independent contractors" without forming any joint or agency relationship).

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Aerotec concedes that "there is usually more than one repair provider submitting a competing bid for a repair contract," and that the competition among Honeywell, ASCs, and independents is often intense.[113] It is also undisputed that generally "the terms of a repair agreement are in a form requested by the customer," and the airlines "typically request bids for long-term agreements."[114] In other words, Honeywell's customer agreements respond to customer demands, reflect the desire in the industry for long-term cost control, and result from vigorous competition. *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 237-38 (1st Cir. 1983) (agreements are procompetitive because, among other things, terms were requested by customer); *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 986 (1st Cir. 1984) (customers "can, it would seem, legitimately seek to obtain a stable, favorable price").

Given the realities of the market — including the undisputed fact that Aerotec and all other MROs respond to customer demand by entering into essentially the same kinds of agreements — Aerotec's contention that Honeywell's customer contracts constitute unlawful exclusive dealing agreements is without merit.

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[113] SER1/047 ¶¶26-27.

[114] SER1/042 ¶29; SER1/047 ¶29.

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II. Refusal to Deal

Aerotec's refusal to deal claim seeks to build an antitrust case out of the commercial terms on which the parties do business. Aerotec complains about the delivery time for parts, the content of Honeywell's FAA-mandated repair manuals, the payment terms, and even the prices Honeywell charges. But the parties in this case continue to do business with each other and Aerotec no longer claims that Honeywell actually refused to do business.

The District Court identified two reasons for granting summary dismissal of Aerotec's refusal to deal claim. First, it held that even if Aerotec's allegations are true, the so-called "onerous" terms do not rise to the level of an antitrust claim. Second, it held that Aerotec failed to meet its burden to show that any "refusal" harmed competition.[115] Either rationale is sufficient for affirmance, and none of Aerotec's arguments to this Court has any merit.

A. The District Court Correctly Held That Aerotec's Claim of "Onerous" Business Terms Is Not an Illegal Refusal to Deal

As the District Court stated (SER1/025), "Generally speaking, the Sherman Act does not restrict a business's right to choose the parties with whom it will deal." The Supreme Court articulated that rule nearly a century ago, holding that 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

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[115] SER1/024-27.

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independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). That remains the law today. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004) (quoting *Colgate* and affirming principle).

The District Court also recognized that the "leading case for § 2 liability based on refusal to cooperate with a rival," *Aspen Skiing*, is a "limited exception" to that general proposition. *Trinko*, 540 U.S. at 408-09. Indeed, the Supreme Court has all but abandoned *Aspen Skiing*, noting that it "is at or near the outer boundary of § 2 liability." *Id.* at 409. The Court has "been very cautious in recognizing such exceptions." *Id.* at 408. To the extent the refusal-to-deal doctrine has any life left, at most it condemns an absolute, complete refusal to deal even on market terms, as was the case in *Aspen Skiing* but is certainly not the case here. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 593-94 (1985) (affirming § 2 liability when defendant in two-seller market totally ceased profitable dealing with smaller rival, even at full retail prices).

The District Court correctly stated the law: even accepting Aerotec's factual allegations as true, there was no outright refusal to deal and Aerotec's claims boiled down to complaints about business terms.[116] In this Court, Aerotec now concedes (as it must) that there was no actual refusal to deal by Honeywell, but

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[116] SER1/025-26.

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instead claims that Honeywell's business terms are so unfavorable or onerous that they amount to a refusal to deal. It identifies (OB32) the delivery times for parts, the payment terms, the technical data in Honeywell's repair manuals, and price increases. The District Court accepted these allegations but held, as a matter of law, that "this is not a situation where the unreasonable terms are so onerous that they act as an outright refusal."[117] Thus, the court did not weigh facts, but instead held that the business terms Aerotec identified — even if true — were not sufficient to meet Aerotec's burden to establish conduct tantamount to an outright refusal to deal. Rather than "weighing facts," the District Court properly analyzed whether the evidence Aerotec submitted was sufficient to defeat summary judgment and concluded correctly that it was not. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court acknowledged that even terms that "may have been frustrating, damaging, and even malicious," do not make an antitrust claim.[118]

Aerotec essentially asked the District Court to impose on Honeywell an obligation to give Aerotec more favorable terms, but the Supreme Court has rejected that position: "[A]lleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Trinko*, 540 U.S. at 410; *accord linkLine*, 555 U.S. at 457 (the

[117] SER1/026.

[118] *Id.*

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antitrust laws recognize "no duty to deal under the terms and conditions preferred by [a competitor's] rivals"); *see also* 3B Areeda & Hovenkamp ¶ 774e at 279 & n.55 (3d ed. 2008) (collecting cases) ("[C]ourts are loathe to interfere when the claim is that the defendant is actually dealing, but only on disadvantageous or onerous terms."). Thus, the District Court properly applied the law to the undisputed facts.

B. The District Court Correctly Held That Aerotec Cannot Meet Its Burden to Show Harm to Competition

In addition to holding that Aerotec's allegations did not rise to the level of an unlawful refusal to deal — itself sufficient to affirm the judgment — the District Court held that Aerotec failed to meet its burden to show harm to competition.[119] Aerotec fares no better on appeal.

Aerotec must show that Honeywell's anticompetitive conduct caused harm to competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). "[H]arm to one or more competitors will not suffice," particularly when the plaintiff has a negligible role in the market. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc, per curiam).

As discussed above (§I.B.1), Aerotec has no evidence to show that Honeywell's alleged conduct actually foreclosed competition. Other than the scant evidence discussed above in §I.B.1, Aerotec conjures a series of possible harms to

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[119] SER1/026.

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competition: that Honeywell "forc[ed] Saudia to lease APUs," thereby misallocating resources; that if Honeywell succeeds in "gobbl[ing]" up independent shops, the use of substitute PMA parts would decline; that without independents like Aerotec, small airlines would be driven to "long-term contracts with Honeywell" at higher prices. (OB42-43.) Missing is reference to anything in the record showing admissible evidence of harm to competition caused by Honeywell's anticompetitive conduct. To survive summary judgment, Aerotec must do much more than argue "that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 585.

Construed in Aerotec's favor, the undisputed facts are that there are no fewer than 49 other MRO service providers, and Honeywell has only about a 50% share of the Honeywell-branded APU repair business.[120] Aerotec concedes that competition has remained intense for airline bids, even as the parts shortages tapered in 2009.[121] Thus, Aerotec's claim that Honeywell's actions would harm ***competition*** — as opposed to just Aerotec itself — has no basis in the record.

C. Intent Alone Cannot Take the Place of Proof in a Refusal-To-Deal Claim

"The 'intent' to achieve or maintain a monopoly is no more unlawful than the possession of a monopoly. Indeed, the goal of any profit-maximizing firm *is* to

[120] SER1/098-104; SER1/022 n.45; SER3/279 ¶30.

[121] SER1/047 ¶¶26-27, SER1/049 ¶71.

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obtain a monopoly by capturing an ever increasing share of the market." *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1991); *Trinko*, 540 U.S. at 407 ("The opportunity to charge monopoly prices . . . is what attracts 'business acumen' in the first place; it induces risk taking that produces economic growth."). A refusal to deal claim, like all monopolization claims, looks to whether the defendant employed "*anticompetitive means*." *Burris*, 935 F.2d at 1481. Mere intent to win in the marketplace will not do.

The Tenth Circuit reached the same conclusion just last year, explaining, "Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring vigorous competition." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1078 (10th Cir. 2013) *cert. denied*, 134 S. Ct. 1947 (2014). "Most businessmen don't like their competitors and the antitrust laws aren't designed to be a guide to good manners." *Id.* (quotation marks and citation omitted). *Accord, In re Adderall XR Antitrust Litigation*, 754 F.3d 128, 135 (2d Cir. 2014) ("Nor do business disputes implicate the antitrust laws simply because they involve competitors.").

Aerotec has not and cannot identify a single case upholding a refusal claim based on intent alone. Indeed, although Aerotec cites (OB33) *Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004), that court ***rejected*** plaintiff's refusal-to-deal claim, explaining that a plaintiff must

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show that the defendant "intentionally engag[ed] in conduct that unnecessarily excludes competitors and impairs competition." That is, the *Morris* court correctly held that the law requires both anticompetitive conduct and injury to competition; alleged intent to defeat a competitor is not enough.

Even *Aspen Skiing*, on which Aerotec relies (OB33), acknowledges the limited role of evidence of intent: "evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" 472 U.S. at 602. *Kodak* has the same focus on exclusionary conduct, rather than intent. *See* 504 U.S. at 483. In sum, intent alone cannot establish a claim of refusal to deal.

The same is true as to Aerotec's attempted monopolization claim. Attempted monopolization requires "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Intent cannot take the place of either anticompetitive conduct or the probability of monopoly power, neither of which Aerotec can show.

Furthermore, even in attempted monopolization, the relevant "intent" is not intent to harm the plaintiff, but rather the "specific intent to monopolize." *Id.* A stated desire to "drive [a competitor] out of business," and "a manifestation of

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intent to triumph in the competitive market" is not enough. *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971). "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). Thus, Aerotec's purported evidence of a supposed intent to drive Aerotec out of the market — even if true — cannot support its claims.[122]

D. Honeywell Has Not Denied "Essential Facilities" to Aerotec

Aerotec's reliance on the "essential facilities" doctrine is equally flawed. In *Trinko,* the Supreme Court stated that it has "never recognized such a doctrine." 540 U.S. at 411. To the extent the doctrine remains viable at all, it has been interpreted very narrowly and cannot support Aerotec's claim that it has obtained access to the alleged "essential facilities," but not on the terms it would prefer. *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004) ("The

[122] Aerotec's marquee "evidence" of alleged anticompetitive intent is a 2010 document as to which Aerotec mischaracterizes the words "Close Aerotec, TAR & CAZ," arguing that those words reveal an intent to "close three independent shops, Aerotec, Triumph Air Repair (TAR), and Chromalloy Arizona (CAZ)." (OB8, 33.) Aerotec's interpretation makes no sense. During that time, Triumph and Chromalloy Arizona were what Aerotec calls "Honeywell Affiliates," not "independent shops" like Aerotec. (*See* SER1/100-01 (listing Chromalloy as a Storefront and Triumph as an ASC).) Read in context, the document is clear that the word "close" is being used to mean "close a transaction," just as the rest of the same sentence refers to Honeywell's desire to "finalize" and "complete" agreements with other entities. (SER3/267.) Like Aerotec, in 2012, Triumph and Chromalloy continued to compete. (SER1/098.)

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doctrine does not guarantee competitors access to the essential facility in the most profitable manner.").

Aerotec's allegations themselves condemn its claim. Aerotec claims (OB11) that it "was able to purchase surplus parts from other repair shops." It also admitted that Honeywell never refused to sell it a replacement part and that it was able to obtain all the technical manuals it needed to perform repairs.[123] Thus, Aerotec in fact had access to the alleged "essential facilities," to which it claimed it was denied. *See Trinko*, 540 U.S. at 411 ("[W]here access exists, the doctrine serves no purpose."); *MetroNet*, 383 F.3d at 1129 ("A facility is 'essential' only if it is '*otherwise unavailable*.'" (citation omitted)).

E. Aerotec's "Unreasonable-Terms" Theory Fails as a Matter of Law for Additional Reasons.

Aerotec's theory that Honeywell's alleged unreasonable business terms give rise to any kind of a monopolization claim is directly contrary to Supreme Court precedent. The District Court explained (SER1/026) that courts are "ill-suited" to "identify proper prices, quantities, allocations of APU parts, and determine what proprietary information Honeywell should turn over to Aerotec." In so stating, the District Court cited to *Trinko* where the Supreme Court, in rejecting a similar antitrust claim, stated: "Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a

[123] SER1/075, 085; SER3/246.

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role for which they are ill suited." 540 U.S. at 408. In short, the District Court properly rejected as a matter of law Aerotec's invitation to regulate the ongoing business relationship between the parties.

Aerotec's argument concerning Honeywell's proprietary technical information highlights this conflict. Aerotec claims (OB13-14) that Honeywell removed technical data from its repair manuals. The FAA has established detailed requirements for providing aircraft owners and operators access to certain required basic repair information. (*Supra*, p. 28). Aerotec invites the courts to demand more than the FAA. But the Supreme Court has squarely rejected this notion. The existence of the FAA's regulatory regime with its own enforcement process completely forecloses this aspect of Aerotec's refusal-to-deal claim. *See Trinko*, 540 U.S. at 414; *cf. linkLine*, 555 U.S. at 450 ("any such duty arises only from FCC regulations, not from the Sherman Act").[124]

III. Bundled Pricing

Aerotec invites this Court to forbid an ordinary and familiar business practice: providing repairs at a single price, including both parts and labor. Transactions as diverse as motor oil changes, house painting, and handyman services involve bundles of parts and service. Indeed, even Aerotec itself charges

[124] Aerotec's reliance on *Otter Tail* (OB37, 39) is sorely misplaced, but, in any event, *Otter Tail* predates *Trinko* and *linkLine* by decades and does not in any way overcome the holdings of those modern cases.

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customers this way. Despite this, Aerotec claims that Honeywell's practice violates the Sherman Act. This claim fails for the several reasons set forth below.

A. The District Court Properly Held That Aerotec's Bundled Pricing Claim Fails Because Aerotec Cannot Meet Its Burden to Show Below-Cost Pricing

So-called bundled pricing does not violate the antitrust laws unless the plaintiff can prove that the defendant charges prices below the defendant's cost. The District Court acknowledged (SER1/029 & n.69) that the parties agree on that point.[125] That prices must be below cost to have a claim is not merely academic; the Supreme Court has explained that the law favors low pricing if it is above-cost. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). Aerotec has the burden to prove below-cost pricing, *see Brooke Grp.*, 509 U.S. at 222, and the District Court correctly held that Aerotec failed to meet that burden.

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[125] Aerotec now asserts (OB46) that "Pricing need not be below cost to be exclusionary." That directly contradicts its position below (*see* SER3/282). It is also wrong. *See Cascade Health*, 515 F.3d at 903 ("[W]e hold that the exclusionary conduct element of a claim arising under § 2 of the Sherman Act cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs."); 3A Areeda & Hovenkamp ¶ 749d2 at 325 (3d ed. 2008) ("A variation of the requirement that prices be 'below cost' is essential . . . to establish . . . unlawful bundled discounting.").

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Indeed, Aerotec failed to introduce ***any*** direct evidence of below-cost pricing. Instead, it resorts to the "discount attribution test" from *Cascade Health*. That test applies the full amounts of a discount to a subset of bundled goods and then compares the resulting price to the defendant's incremental cost. *Cascade Health*, 515 F.3d at 906. The District Court properly rejected Aerotec's application of the test because Aerotec's only evidence regarding pricing improperly focuses on individual repair jobs that are performed pursuant to long-term contracts for repair services.[126]

The transactions Aerotec cites are part of NTE agreements, common in the industry, under which the repair provider caps each repair job at a certain amount. For the same reason that it is not predatory for a buffet restaurant to make an all-you-can-eat offer at a set price, it is not predatory if Honeywell performs twenty repairs for a particular customer under an NTE agreement and one or more of those repairs turns out to be under cost. If the restaurant makes a profit on the offer as a whole, it is of no moment that the restaurant may lose money on the occasional customer who eats a prodigious amount. Honeywell's agreements must be considered as a whole — the profits will fluctuate with each repair, but each agreement is profitable over its effective term, and Aerotec has no evidence to the contrary.

[126] SER1/031.

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The District Court recognized this point and properly held that "Aerotec has not provided any other evidence that Honeywell prices its MRO services below cost, and thus its bundled pricing claim against Honeywell fails."[127]

B. Aerotec's Bundled Pricing Claim Is an Invalid Price Squeeze Claim

Aerotec's theory is that, even if priced above cost, Honeywell prices its repair contracts so low that customers choose Honeywell, and at the same time the wholesale prices Honeywell charges for parts are too high to enable Aerotec to match Honeywell's prices on repair contracts.[128] The Supreme Court squarely foreclosed this sort of price-squeeze claim. *See linkLine*, 555 U.S. at 442 ("We hold that no such claim may be brought."). Although Aerotec resists labeling its claim a price squeeze, that is what it is. This Court has rejected attempts to disguise price squeeze claims as something else, explaining, "However labeled, [the defendant's] conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *linkLine*." *Doe v. Abbott Labs.*, 571 F.3d 930, 935 (9th Cir. 2009). As a result, Aerotec's bundled pricing claim should be rejected. *See id.* ("[I]n light of *linkLine*, [the plaintiffs] have not stated a § 2 claim.").

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[127] *Id.*

[128] *E.g.*, SER3/277 ¶47.

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C. The Bundled Pricing Claim Also Fails Because the Discount Attribution Test Does Not Apply

The discount attribution test should be applied only when the plaintiff does not offer the same bundle as the defendant. That the "rival does not sell as many products as the bundled discounter" is a necessary starting premise of *Cascade Health*. 515 F.3d at 909. Here, both parties offer an identical bundle: an APU repair consisting of both parts and service sold together at a single price. Aerotec claims (OB45) it "does not meaningfully provide parts." Of course it does. A garage provides oil as part of an oil change, even if Mobil, a competitor in the oil-change business, manufactures the oil. The discount attribution test makes sense only if one business can offer a bundle the competitor cannot match because the competitor does not offer that product at all. *See Cascade Health*, 515 F.3d at 909 ("[T]he primary anticompetitive danger posed by a multi-product bundled discount is that such a discount can exclude a rival . . . simply ***because the rival does not sell as many products as the bundled discounter***" (emphasis added).).

In addition, to the extent there is any doubt, the very transaction Aerotec identifies (OB45) illustrates the absurd results of applying the test in the manner Aerotec advocates. Honeywell charged Avianca $63,726 for a repair (list price of $239,434 less a $175,708 discount under the NTE agreement).[129] For the same

[129] App. Doc. 12-4 at 133-34.

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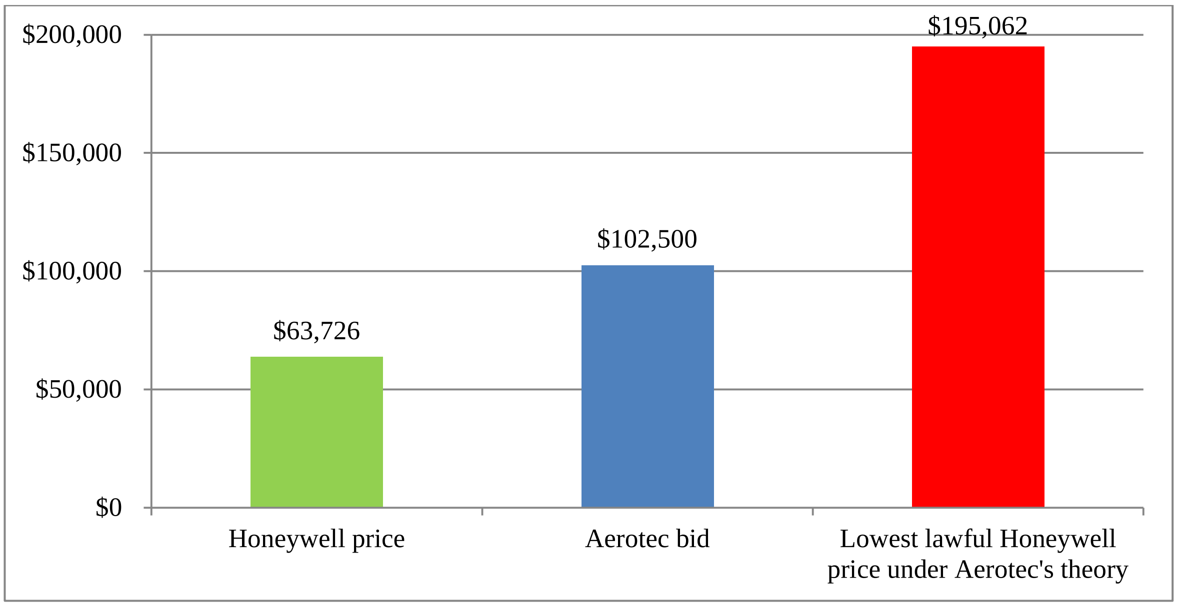
engine model, Aerotec's NTE bid was capped at $102,500.[130] After applying the attribution test, Aerotec claims (OB45), "So to compete with Honeywell, Aerotec would have to sell repairs for –$131,334.50, an impossibility." In other words, Aerotec wants to force Honeywell to add that discount back into its price, resulting in Honeywell charging $195,062, as shown in the chart below.



Aerotec concedes, as it must, that the discount attribution test "yield[s] absurd effective prices." (OB45.) But rather than abandon its "absurd" result, Aerotec instead invites this Court to force Honeywell to charge prices nearly double Aerotec's own "bundled" prices, all to the detriment of the airline customer.

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[130] SER3/266.

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D. Honeywell Did Not Set Prices Below Cost and Aerotec Cannot Show Any Possibility of Recoupment

The record is also clear that Honeywell did not engage in below-cost pricing. Honeywell introduced substantial, incontrovertible evidence proving that at every step of the repair sales process — from initial bid formulation through final contracting — Honeywell ensures that its prices are well above any relevant measure of cost.[131] Thus, Honeywell demonstrated that Aerotec cannot "make a showing sufficient to establish the existence of an element essential to [its] case, and on which [it] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The burden therefore shifted to Aerotec to "designate specific facts showing that there is a genuine issue for trial." *Id*. at 324 (quoting Fed. R. Civ. P. 56 (e)). The District Court correctly held that Aerotec did not do so.

Moreover, in addition to below-cost pricing, Aerotec must prove that Honeywell has "a dangerous probability[] of recouping its investment in below-cost prices." *Brooke Grp.*, 509 U.S. at 224; *see also Cascade Health*, 515 F.3d at 903 (applying *Brooke Group* principles to bundled discounting claims). Aerotec put forth zero evidence that Honeywell could recoup any such investment. Evidence of recoupment is an "essential component[] . . . that [is] not easy to establish." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) (internal quotation marks and citations omitted). For good reason: erroneous

[131] SER1/054-57 ¶¶16-23; SER2/197-215; SER3/009-15; SER3/035-38.

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condemnations of low prices "chill the very conduct the antitrust laws are designed to protect." *Id.* (citation omitted).

For these reasons, this Court should affirm summary judgment for Honeywell on Aerotec's bundled pricing claim.

IV. Price Discrimination

The District Court correctly concluded that the Robinson-Patman Act ("RPA") does not require Honeywell to offer Aerotec (a) the same prices for APU replacement parts Honeywell charges airline customers who repair their own APUs, and (b) the same prices Honeywell's ASCs individually negotiate with Honeywell as part of complex agreements that are materially different from Aerotec's purchase-order-to-purchase-order arrangement. And Aerotec's price discrimination claim fails for additional reasons as well.

The RPA does not "ban all price differences charged to different purchasers of commodities of like grade and quality." *Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006). Where, as here, the plaintiff complains that the alleged price discrimination inhibits its ability to compete with a favored purchaser (i.e., another MRO provider), Aerotec must prove that: (1) the relevant replacement part sales were made "in commerce"; (2) the parts were of "like grade and quality"; (3) Honeywell discriminated in price between Aerotec and another purchaser of Honeywell APU parts; and (4) the price discrimination would

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injure, destroy, or prevent competition to the advantage of a favored purchaser, i.e., one who received the benefit of such discrimination. *Id.* at 176-77. Each of these four elements, in turn, has a number of separate requirements.

A. The "In Commerce" Element

The RPA requires that the commodities involved in each of the compared sales be "sold for use, consumption, or resale within the United States." 15 U.S.C. § 13(a). Thus, the RPA does not reach sales to customers located outside of the United States at prices lower than to a plaintiff located within the United States. *E.g.*, *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 317 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986) (both sales must be within the United States); *Gen. Chems., Inc. v. Exxon Chem. Co.*, 625 F.2d 1231, 1234 (5th Cir. 1980) (same). As a result, Honeywell's sale of parts to airlines or service centers located outside of the United States cannot form the basis for a price discrimination claim. Aerotec's complaints, however, relate predominantly to Honeywell's sales of APU parts to ASCs located outside of the United States or to foreign airlines.[132]

B. The RPA Does Not Reach Transactions That Are Not Reasonably Comparable

As for the second and third elements, courts have repeatedly held that RPA is "confined to a comparison of two business transactions reasonably comparable." *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 807 (9th Cir. 1969).

[132] SER2/162-64.

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Thus, "a seller is not obligated to charge the same prices for a commodity if its sales contracts with different buyers contain materially different terms." *Coalition for a Level Playing Field, LLC v. Autozone, Inc.*, 813 F. Supp. 2d 557, 566 (S.D.N.Y. 2011). Among other things, RPA does not prohibit a seller from charging different prices for goods sold under long-term contracts as opposed to the same goods sold on the "spot market" or a purchase-order-to-purchase-order basis. *E.g., Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25, 27 (1st Cir. 1993); *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407 (7th Cir. 1989); *Texas Gulf Sulphur*, 418 F.2d at 805-07; *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1572-73 (N.D. Ga. 1992).

Coalition for a Level Playing Field is particularly relevant. There, a trade association of smaller automotive aftermarket parts retailers challenged the discounts provided by parts manufacturers to large, vertically integrated automotive parts chain store operations under complex, individually negotiated supply agreements. The amended complaint was dismissed with prejudice, because any price differentials were the result of the materially different contract terms in the agreements between the manufacturers and the chain retail stores. 813 F. Supp. 2d at 566-67. Simply put, the plaintiff improperly compared its purchase-order-to-purchase-order relationship with the long-term contracts containing materially different terms. *Id.*

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The same is true here, where each of the Honeywell ASCs whom Aerotec alleges received favored pricing is a party to agreements with Honeywell that differ materially from the purchase-order-to-purchase-order arrangement Aerotec has with Honeywell.[133] These agreements impose substantial obligations on the ASCs, obligations Aerotec does not incur.[134] These obligations include, among other things, royalty payments, exclusive use of Honeywell parts (i.e., no use of PMA parts), exacting inventory and forecasting requirements, use of Honeywell approved repair procedures instead of DER repairs, periodic audits, and training requirements.[135] Contrary to Aerotec's unsupported allegations, the prices vary from agreement to agreement (there is no across-the-board 15% discount for ASCs as Aerotec alleges) and are individually negotiated as well, as the District Court properly concluded from reviewing the ASC agreements themselves.[136]

In sum, Aerotec's purchase orders and Honeywell's ASC agreements are not reasonably comparable business transactions. As the District Court explained, it would distort both the RPA and the competitive process generally if Aerotec could use the RPA to obtain the benefits of Honeywell's agreements with its ASCs — i.e.,

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[133] SER1/062-63 ¶¶9-11.

[134] *Id.*

[135] *Id.*

[136] SER1/034; *see* SER1/105-43, 179-300, SER2/009-160.

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selected discounts on pricing of repair parts — without being subject to the obligations these agreements impose on the ASCs.[137]

Aerotec's attack on the District Court's reasoned decision is meritless. First, Aerotec cannot avoid summary judgment simply because the "reasonably comparable business transactions" element may in some cases pose an issue of fact. *Matsushita*, 475 U.S. at 585 ("metaphysical doubt" insufficient). Aerotec must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Aerotec made no showing that its purchase orders to Honeywell are "reasonably comparable" to Honeywell's ASC agreements. Even a cursory review of the ASC agreements shows that they are substantially different from a purchase-order-to-purchase-order relationship.

Similarly, Aerotec cannot defeat summary judgment merely by alleging, without any supporting admissible evidence, that Honeywell's ASCs automatically pay 15% less than what Aerotec pays for each and every part. The undisputed facts show the opposite, and Aerotec's reference (OB49) to a disembodied copy of a draft of Honeywell's standard Conditions of Sale (which refers to Honeywell's Catalog prices) cannot trump individually negotiated ASC agreements, particularly when, as the District Court noted, the Conditions of Sale specifically states that its

[137] SER1/034.

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provisions are superseded by any agreement between Honeywell and the purchaser that has different terms.[138] Indeed, Honeywell's ASC agreements submitted into evidence demonstrate on their face that any discounts are individually negotiated, differ from ASC agreement to ASC agreement, and are limited to specific parts or APU models that are the subject of the Agreement.[139]

Finally, Aerotec provides no relevant legal support for its argument that different pricing in non-comparable transactions constitutes illegal price discrimination unless the price differences equal the cost or value of the specific obligations imposed on the party receiving the discount. Neither *Coalition for a Level Playing Field* nor any other case made such an inquiry, let alone held that such an inquiry is required. If the transactions are not comparable, then the RPA claim fails as a matter of law. Aerotec, however, inaptly relies (OB50-51) upon functional discount cases where a seller charges different prices to distributors than to retailers because of the warehousing/distribution services the distributors perform that are not performed by the retailers. But Honeywell is not granting functional discounts to the ASCs. Any discounts provided to an ASC are not the result of the ASCs operating at a different level of the distribution chain (indeed, ASCs and

[138] *Id.*; SER3/273. Aerotec appears to contend that the alleged 15% discount purportedly enjoyed by ASCs is contained in Honeywell's catalog, but Aerotec never submitted the catalog as evidentiary support, presumably because the catalog contains no such provision with respect to ASCs as opposed to airlines.

[139] SER1/105-43, 179-300, SER2/009-160 (agreements).

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Aerotec operate at the same competitive level), but instead are part of the *quid pro quo* for the specific obligations imposed upon the ASCs in the agreements — obligations that are not borne by Aerotec and other service centers who have a purchase-order-to-purchase-order relationship with Honeywell. But even the functional discount cases Aerotec relies upon place the burden on the plaintiff "of showing either (1) that the discount is being given for services that are not being performed at all, or (2) that the amount of the discount greatly exceeds the value or cost of the service." 14 Areeda and Hovenkamp ¶ 2333 at 134 (3d ed. 2008). Aerotec did not even make this argument below, let alone submit sufficient evidence to meet its burden to avoid summary judgment.

C. Competitive Injury

The final element — competitive injury — requires Aerotec to do far more than simply allege that its business is harmed because it pays a higher price for replacement parts than do airlines or Honeywell's ASCs who have negotiated highly complex agreements for specific parts. Aerotec's arguments rely on a misreading of very old cases and have been rejected by *Volvo* and other modern cases. Instead, Aerotec must prove that it and the alleged favored airlines or ASCs ***were competing against each other for the same customers or set of customers***. *E.g.*, *Volvo*, 546 U.S. at 178-80; *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191, 194 (3d Cir. 2010) (no injury to competition because favored and disfavored

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purchasers did not compete with each other for the same set of customers); *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 693 (5th Cir. 2003) (no injury to competition because the favored and disfavored dealers operated in different geographic territories and therefore did not compete with each other).

Nor can Aerotec meet this element merely by demonstrating that ASCs and it generally compete with each other. Instead, Aerotec must prove that it and the alleged favored ASCs were ***contemporaneously competing*** with each other to win APU repair business from the ***same customers***. *See Volvo*, 546 U.S. at 178-80. In a market characterized by competitive bidding, this must be proven on a customer-by-customer basis. *Id*. (holding that evidence of differing prices for the same product was insufficient; plaintiff-dealer had to show that Volvo charged it and favored dealers different prices when plaintiff and the favored dealers were ***contemporaneously*** competing for the ***same retail customer***).

Aerotec has not and cannot meet this element as to Honeywell's airline customers. The RPA does not require Honeywell to charge the same prices to customers who do not compete with each other. *Feesers*, 591 F.3d at 194 (no competitive injury established where supplier charged higher prices to distributor of food supplies to institutional food service customers than to operators of institutional food services); *see Volvo*, 546 U.S. at 178-80. An airline purchasing repair parts from Honeywell to perform its own APU repairs in-house is not in

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competition with Aerotec to provide repair services to the same customer or set of customers.

Although Aerotec appears to concede that it does not compete with airlines who perform their own APU repairs (OB53), it now makes an argument it did not make before the District Court — that the subsidiaries of three airlines (Delta, Air France, and Lufthansa) offer APU repair services to third parties. The "evidence" that Aerotec claims it submitted below consists of two short sentences buried in a lengthy hearsay exhibit, "evidence" that Aerotec never relied upon in its effort to defeat summary judgment.[140] But even if this Court were to consider the merits of this argument rather than deem it waived,[141] there are at least three reasons why it fails:

(1) Air France and Lufthansa are foreign airlines and therefore do not satisfy the RPA's "in commerce" requirement.

(2) Air France's subsidiary (EPCOR) and Delta Tech Ops each have ASC or Storefront Agreements which provide individually negotiated discounts in return for obligations not borne by Aerotec.[142] Aerotec therefore cannot meet the "reasonably comparable transaction" element.

(3) The cited exhibit is silent as to what brands and models of APUs these airlines' subsidiaries repair, but evidence Honeywell

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[140] App. Doc. 12-4 at 223.

[141] *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (Papers opposing summary judgment must specifically refer to facts set forth in the record with adequate references so they can be conveniently found).

[142] SER1/098-100.

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> submitted demonstrates that Lufthansa's subsidiary (LHT) repairs only Hamilton Sundstrand APUs, not Honeywell APUs.[143] Moreover, Aerotec never alleged, let alone submitted admissible evidence, that it competed for and lost bids to Delta or LHT because of parts pricing,[144] and therefore cannot prove competitive injury under *Volvo*.

In sum, the District Court properly analyzed Aerotec's price discrimination claim, and Aerotec has presented no basis to reverse the District Court's grant of summary judgment on that claim.

V. Aerotec's State Law Claims

Although Aerotec concedes (OB54) that its state antitrust claims rise and fall with its federal antitrust claims, it now contends that the District Court erred when it dismissed Aerotec's tortious interference claims on those grounds. That is not, however, what Aerotec told the District Court. In response to Honeywell's motion for summary judgment, Aerotec stated that "Aerotec's tortious interference claims live or die based on Aerotec's federal antitrust claims."[145] Thus, if the District Court correctly dismissed Aerotec's antitrust claims, the District Court could not have erred by accepting Aerotec's concession that its tortious interference claims likewise must fail. *See McMillan v. United States*, 112 F.3d 1040, 1047 (9th Cir.

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[143] *Id.*

[144] SER2/162-64.

[145] SER3/283.

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1997) (party is precluded from taking a position on appeal different from that taken in the District Court).

Moreover, Aerotec's only statement to the District Court about its tortious interference claims — a total of two sentences — reinforced Aerotec's position below that the antitrust and tortious interference claims stood or fell together. Aerotec argued that the same alleged theories and facts that supported Aerotec's antitrust claims supposedly established the required "improper conduct" element of Aerotec's tortious interference claims.[146] Aerotec cannot now argue something different to this Court. Thus, if the Honeywell conduct relied upon by Aerotec does not give rise to a viable antitrust theory, Aerotec has conceded (as it must) that that same conduct cannot support the "improper conduct" element of a tortious interference claim. *See Marmis v. Solot Co.*, 573 P.2d 899, 902 (Ariz. Ct. App. 1977) ("Tortious interference does not occur through lawful competition"); *United Nat'l Maint., Inc. v. San Diego Convention Ctr., Inc.*, ___ F.3d ___, No. 12-56809, at 18-19, 2014 WL 3973414, at *7 (9th Cir. Aug. 15, 2014) (holding that failure of antitrust claims "dooms" claim of tortious interference when "assertion of independent wrongfulness [was] based on the antitrust claims").

Finally, Aerotec's remaining state law claims (injurious falsehood and consumer fraud) were fully briefed to the District Court, and the District Court

[146] SER3/283-84.

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found sufficient grounds to dismiss those claims as a matter of law. Aerotec does not make any argument on appeal for their reinstatement. The Court should therefore affirm their dismissal. *See Wilcox v. C.I.R.*, 848 F.2d 1007, 1008 n.2 (9th Cir. 1988) ("Arguments not addressed in a brief are deemed abandoned.").

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's order granting summary judgment.

SUBMITTED this 2nd day of October, 2014.

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STATEMENT OF RELATED CASES

Defendant/Appellee is not aware of any related case pending in this Court.

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Dated this 2nd day of October, 2014.

s/ William J. Maledon
Attorneys for Defendant-Appellee

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing and Defendant/Appellee's Supplemental Excerpts of Record (Volumes 1 through 3) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 2, 2014.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that there is no participant in the case who is not a registered CM/ECF user.

s/ William J. Maledon
Attorneys for Defendant-Appellee