UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: KEURIG GREEN MOUNTAIN SINGLE-SERVE COFFEE ANTITRUST LITIGATION	:	14-MD-2542 (VSB)
This Document Relates to All Actions	:	**OPINION & ORDER**

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TABLE OF CONTENTS

I. Factual Background 1

A. Roaster Agreements 3

B. Supplier Agreements 6

C. Distributor Agreements 9

D. Retail Agreements 10

E. The 2.0 Brewer 12

F. Litigation Activities and Patent Enforcement 14

G. Advertising 15

H. Acquisitions of Roasters 19

II. Procedural History 20

III. Legal Standard 23

IV. Discussion 25

A. Antitrust Injury 25

1. Harm to Competition 27

2. Injury Flowing From Anticompetitive Conduct 36

B. Monopoly Power 40

1. Keurig Compatible Cup Market 40

2. Brewer Market 44

C. Section 1 Claims 47

1. Roaster Agreements 48

2. Tying 59

D. Section 2 Claims 69

1. Exclusive Dealing Claims 69

2. The 2.0 Brewer 81

3. False Advertising 87

4. Infringement Litigation 92

5. Patent Misuse 96

6. Acquisitions of Roasters 97

E. Damages 100

1. JBR's Damages 100

2. TreeHouse's Damages 101

3. DPP's Damages 105

4. McLane's Damages 107

F. Lanham Act Allegations 108

1. False, Misleading, or Puffery 109

2. Literally False Statements 113

3. Materially Misleading Statements 116

G. State Law Claims 118

1. Treehouse's Tortious Interference Claims 118

2. JBR's Tortious Interference Claims 121

3. State Law Antitrust and False Advertising Claims 124

4. Unjust Enrichment Claims 125

H. McLane's Claims 126

I. Unclean Hands and In Pari Delicto 128

J. Non-Party Declarations 130

K. Declaratory and Injunctive Relief 132

V. Conclusion 133

VERNON S. BRODERICK, United States District Judge:

Before me are cross-motions for summary judgment by Defendant Keurig, (Doc. 1493), and Plaintiffs TreeHouse Foods, Inc., Bay Valley Foods, LLC, and Sturm Foods, Inc. (collectively "TreeHouse"), JBR Inc. d/b/a Rogers Family Company ("JBR" or "Rogers"), McLane Company, Inc. ("McLane") and the Direct Purchaser Plaintiffs ("DPPs") (collectively "Plaintiffs"), (Doc. 1489). Keurig seeks summary judgment on all claims. Plaintiffs move for summary judgment on claims relating to agreements with coffee roasters and other beverage companies, ("Roaster Agreements"); agreements with the suppliers of materials for Keurig's products, ("Supplier Agreements"); agreements with certain distributors of Keurig single-serve brewers, ("Distributor Agreements"); the introduction of the 2.0 Brewer; Keurig's allegedly false advertising; and to strike two affirmative defenses. This Opinion & Order addresses Plaintiffs' allegations on a claim-by-claim basis and in that context addresses the cross-motions.

For the reasons that follow, Keurig's motion is GRANTED IN PART and DENIED IN PART. Plaintiffs' motion for summary judgment is DENIED, with the exception of Plaintiffs' motion for summary judgment on the affirmative defense of *in pari delicto*, which is GRANTED.

I. Factual Background[1]

Keurig is a manufacturer of single-serve brewers and distributer of compatible single use coffee cups ("K-cups"). (Doc. 1496 ("DSUMF") ¶¶ 1–6.)[2] Keurig launched and began selling

[1] The following factual summary is drawn from the parties' Rule 56.1 submissions, declarations, depositions, and exhibits. The facts in this section are substantively undisputed unless otherwise noted, either explicitly or by attributing the fact to one party. I recount here only the information necessary for my decision on the pending motions.

[2] The market for compatible single use coffee cups will hereinafter be referred to as the "Compatible Cup Market."

its first brewer in 1998. (*Id.* ¶ 1.) Keurig has sold brewers to both offices and for at-home use since at least 2003. (*Id.* ¶¶ 2–3.)[3] A short-filter K-cup holds up to [redacted] of coffee. (*Id.* ¶ 7.) Keurig's patent on its short-filter K-cup expired in 2012. (*Id.*) In 2012, when Keurig's patent expired, "TreeHouse, Rogers, and other competitors entered the Compatible Cup market with filtered product." (Doc. 1568 ("PCSUMF") ¶ 8.) Around this time, Keurig made a series of business decisions, including entering into various contracts, that Plaintiffs allege are anticompetitive. (*See* Doc. 1495 ("Plaintiffs' Memorandum" or "Pls' Mem.") at xxiv (alleging relevant time period of 2009 to the present, hereinafter "Relevant Time Period").)

As early as 2009, a presentation relating to Keurig's "strategic framework for the future" was prepared for the company's board of directors. (Doc. 2817-83 at 1.) That presentation[4] posited a "Roaster Decision," i.e., how to avoid price and margin erosion from both licensed roasters and unlicensed roasters as the market for portion packs grew and Keurig's patent expired. (*Id.* at 4–8.) The presentation noted that "[i]f no action is taken on our part and unlicensed competition enters," then "the average wholesale price could drop $0.04 to $0.31." (*Id.* at 8.) However, if the company took steps to bring roasters into the Keurig system then it could keep wholesale prices higher, at $0.34 rather than $0.31. (*Id.*) As the presentation explains, a penny "in price/cost" could be worth "over $100 million in operating profit." (*Id.* at 6–7 ("1 penny in price/cost is worth: over $100 million dollars in operating profit!!").) Therefore, Keurig's "[o]ptimal strategy is to have new roasters join the system," "[w]ithin

[3] The market for brewers of compatible single use coffee cups will hereinafter be referred to as the "Single-Serve Brewer Market."

[4] Keurig disputes whether the version of the presentation relied upon by Plaintiffs is the final version of the presentation that was shown to the board of directors. (Doc. 1569 ("DCSUMF") ¶ 65.)

defined distribution channels," and "with limited rights." (*Id.* at 9.) "If new roasters do not join [] there is greater potential for price erosion." (*Id.*)

Over the next several years, Keurig made their "Roaster Decision," opting to sign contracts with their competitors, (*see* Doc. 1491 ("PSUMF") ¶¶ 21–26), to allow them into the "Keurig system," rather than competing with them on the merits. Keurig also took a number of other steps as its patents expired, including entering into a variety of other contracts and agreements with entities involved in supply and distribution, initiating litigation against competitors, advertising and promotional efforts, and the launch of a new brewer, the Keurig 2.0. I discuss each in turn below.

A. *Roaster Agreements*

Since at least 2011, coffee roasters and other beverage companies have entered into contracts with Keurig to sell compatible K-cups, ("Roaster Agreements"). (PSUMF ¶¶ 11, 37.) Folgers, Maxwell House, Starbucks Corporation, ("Starbucks"), Dunkin' Donuts LLC, ("Dunkin'"), and Peet's have all entered into licensing partnership agreements with Keurig.[5] (*Id.* ¶ 102.) On February 21, 2011, Keurig and Dunkin signed such a licensing partnership contract. (*Id.* ¶¶ 37–38.) On May 6, 2013, Keurig and Starbucks signed such a contract, (*id.* ¶ 47–48), and Keurig and Starbucks signed further agreements on March 5, 2014, (*id.* ¶¶ 34–36), and March 18, 2016, (*id.* ¶¶ 45–46, 49). On March 5, 2014, Keurig and Peet's entered into such an agreement. (PCSUMF ¶¶ 1356–57.) On August 21, 2024, Keurig and Kraft Food Groups Inc. ("Kraft") signed a licensing partnership agreement. (*Id.* ¶ 57.)[6] On June 15, 2016, Keurig and

[5] The parties in their summary judgment papers refer to these types of agreements as either partnerships or licensing agreements interchangeably; I will refer to them in this section as "licensing partnership contracts" or "licensing partnership agreements," and subsequently as the "Roaster Agreements."

[6] Kraft owns Maxwell House, a coffee roaster. (PCSUMF ¶ 1250.)

Joffrey's Coffee and Tea Co. ("Joffrey's") signed such a contract. (*Id.* ¶¶ 41–42.) On September 1, 2017, Keurig and Smucker Sales and Distribution Company ("Smucker") signed such a contract. (*Id.* ¶¶ 51–52.)[7] Keurig also signed similar contracts with Caribou Coffee Company, Inc. ("Caribou") on December 20, 2011, (*id.* ¶¶ 43–44), and with International Coffee & Tea, LLC d/b/a The Coffee Bean & Tea Leaf ("Coffee Bean"), on May 13, 2013, (*id.* ¶ 40).

Keurig's contracts with Starbucks and Smucker contained a non-competition clause limiting the ability of Starbucks and Smucker to install or manufacture any single-serve or portion pack cartridges other than those subject to the agreement with Keurig. (*Id.* ¶¶ 48, 49, 52.) Keurig's contract with Starbucks also contained an exclusivity provision providing that Starbucks would not "sell coffee, [t]ea or any other beverage precursor product to any third party for the specific intended use of producing Keurig Packs or any other product specifically intended for use in the Keurig Brewing System." (*Id.* ¶ 35.) Furthermore, "Starbucks shall not license or permit to be licensed to any third party any Starbucks Marks or any other brand name, trade name or trademarks owned by Starbucks for use in connection with coffee, [t]ea or any other beverage precursor product, other than Starbucks Keurig Packs and GMCR Starbucks Keurig Packs." (*Id.*)

Keurig's contracts with Starbucks, Dunkin', Coffee Bean, Joffrey's, and Caribou all also included clauses providing a maximum number of varieties of K-Cups that the partner could sell through the Keurig system. (*Id.* ¶¶ 36, 38, 40, 42, 44.) On December 5, 2011, Mark Wood, Keurig's Chief Business Development and Partners Officer, told other Keurig employees that with these exclusivity agreements, Keurig "ha[d] fairly narrowly defined the field of exclusivity to the type of systems which we feel are most directly competitive." (*Id.* ¶ 60.) On August 24,

[7] Smucker owns the Folgers brand and licenses the Dunkin' brand. (DCSUMF ¶ 25.)

2015, Brian Kelley, Keurig's former CEO, wrote to members of the Keurig board of directors that "the reason we've enjoyed the lion[']s share of shelf space is that we were able to control the number of [stock keeping units ("SKUs")] [] Starbucks, Folgers and Dunkin were allowed to have in our system." (*Id.* ¶ 62.) In 2013, Keurig and Starbucks employees exchanged emails sharing ways to "drive sales and block non licensed brands," and how to "elevate Starbucks . . . vs. being treated as equal among all brands." (Doc. 2187-79 at 1.)

A Starbucks corporate representative testified that "the original contract [with Keurig] was pretty constraining" and that Starbucks "wanted to have additional product innovation in a way that the original contract didn't allow." (Doc. 2187-96 at 129:23-130:8.) A Starbucks employee, Bruce Katsman, testified that Starbucks wanted more SKUs "for more latitude or flexibility." (PSUMF ¶ 94.)[8] An internal research presentation prepared by Peet's Coffee and Tea in October 2013 indicated that "[v]ariety is very important to single-serve owners- many keep 6 varieties on hand at any given time." (Doc. 2187-97 at 8.)

Several of the entities with whom Keurig signed Roaster Agreements were its competitors. For example, Keurig's 10-K filing in 2021 indicated that two of its five major competitors were Kraft and Smucker, which "offer[ed] competing brands in categories" that Keurig "participate[s] in," but "are also our partners and customers." (PSUMF ¶ 20.) Kelley testified that Dunkin, Smucker, and Starbucks were competitors of Keurig's. (*Id.* ¶ 21.) Joel White, Keurig's former director of product marketing, testified that Kraft and Peet's were competitors of Keurig's. (*Id.* ¶ 22.) White also testified that Starbucks and Folgers were described by Keurig employees as "frenemies." (*Id.* ¶ 17.) A Starbucks corporate representative

[8] The quoted exhibit submitted by Plaintiffs in connection with their summary judgment motion does not contain the cited testimony, but Keurig does not dispute the accuracy of the quotation. (*But see* Doc. 2187-11.)

testified that the company competes with Keurig, Dunkin', Peet's, and Kraft. (*Id.* ¶ 23.) A Smucker corporate representative testified that the company competes with Keurig, and Starbucks, among other coffee roasters. (*Id.* ¶ 25.) Dunkin's former vice president testified that Dunkin' competed with Keurig and other coffee roasters. (*Id.* ¶ 26.) Kraft documents indicated that it competes with Starbucks, Keurig, Dunkin' and Peets. (*Id.* ¶ 24.)

B. *Supplier Agreements*

During the Relevant Time Period, Keurig also entered into agreements with its suppliers, ("Supplier Agreements"). (Pls' Mem. 23–34; Doc. 1494 ("Defendant's Memorandum" or "Def's Mem.") 52–54.) In order to make single-serve coffee cups, firms require various inputs, including cups and lids. (PSUMF ¶ 107.)[9] Keurig entered into contracts with R.A. Jones & Co ("R.A. Jones"), Optima Filling and Packaging Machinery ("Optima"), and Opem S.p.A ("Opem"), to source packaging and filling machinery. (*Id.* ¶ 108.) Keurig signed a series of agreements with R.A. Jones between December 2009 and May 13, 2013 that included a twenty-year non-compete clause. (*Id.* ¶¶ 112–19.) The clause prohibited R.A. Jones from designing, developing, or manufacturing Keurig compatible single-serve coffee cups or machinery for any such cups for Keurig's competitors. (*Id.*) On July 26, 2013, Keurig and R.A. Jones amended their contract and the non-compete clause to provide for a ten-year exclusivity period instead of twenty years. (*Id.* ¶¶ 120–27.)

Between March 14, 2006 and July 1, 2011, Keurig signed a series of contracts with Opem that included or incorporated a twenty-year non-compete clause. (*Id.* ¶¶ 128–39.) The clause prohibited Opem from designing, developing, or manufacturing Keurig compatible single-serve

[9] Keurig notes in its counter statement that "not all Keurig-compatible portion packs require the same inputs. JBR for example, used a mesh cup rather than an airtight cup, and did not use filter paper even though its coffee is filtered." (DCSUMF ¶ 107.)

coffee cups or machinery for any such cups for Keurig's competitors. (*Id.*) On May 21, 2010, Keurig and Optima agreed to a contract that included a three-year non-compete clause, (*id.* ¶¶ 140–42), but also provided if that "Keurig or one of its licensed roaster partners orders from Optima one or more systems capable of producing cups or vessels usable in the production of portion packs that are usable in one or more models of 'Keurig Brewer' the duration of the Non-Compete Term shall be automatically extended, in each instance for ten years following." (*Id.* ¶ 141 (cleaned up).) The non-compete clause also provided that the parties could agree in any amendment to extend the term of the non-compete. (*Id.*) Subsequently, Keurig and Optima signed two amendments to that agreement on May 21, 2015 and October 16, 2017 that revised the non-compete term to ten years and seven years, respectively. (*Id.* ¶¶ 143–47.) The clause prohibited Optima from designing, developing, or manufacturing Keurig-compatible single-serve coffee cups or machinery for any such cups for Keurig's competitors. (*Id.* ¶¶ 141–47.)

Keurig also entered into contracts to source its cups with Phoenix Packaging LLC, ("Phoenix"), Winpak Portion Packaging, Inc., ("Winpak"), and Curwood, Inc., ("Curwood"). (*Id.* ¶ 151.) The contract signed between Keurig and Phoenix on October 1, 2009 required that "during the Term of this Agreement and for a period of twenty (20) years following the termination or expiration of this Agreement" Phoenix could not "design, develop or manufacture for any third party," unauthorized by Keurig, "a cup, lid or other portion pack component for use by such third party or any direct or indirect customer of such third party to produce one or more portion packs that are usable in brewing equipment designed, developed and marketed by or for Keurig" or its licensees, or engage in a contract with a third party for such a purpose. (*Id.* ¶ 154 (cleaned up).) Phoenix's 30(b)(6) witness stated that it was able to renegotiate this term to ten years when Phoenix signed its next contract with Keurig. (Doc. 2286-13 at 257:23-258:7.)

However, the next iteration of Phoenix's contract with Keurig cited by the parties in connection with the motions for summary judgment is an agreement dated January 18, 2018, indicating that Keurig and Phoenix agreed to reduce the period of the non-compete to five years. (*Id.* ¶ 157.)

On August 1, 2011, Curwood and Keurig agreed to a supplier contract that included an exclusivity provision, requiring that Curwood "during the Term of this Agreement and for a period of ten years following the termination or expiration of this Agreement" not "design, develop or manufacture for any third party," unauthorized by Keurig "a cup, lid or other portion pack component for use by such third party or any direct or indirect customer of such third party to produce one or more portion packs that are usable in brewing equipment designed, developed and marketed by or for Keurig" or its licensees, or engage in a contract with another third party for such a purpose. (*Id.* ¶ 160 (cleaned up).)

On August 19, 2011, Winpak and Keurig agreed to a supplier contract that included an exclusivity provision, requiring that Winpak "during the Term of this Agreement and for a period of ten years following the termination or expiration of this Agreement" not "design, develop, manufacture for or sell to any third party," unauthorized by Keurig, "a cup or other portion pack component intended to be used by such third party or any direct or indirect customer of such third party to produce one or more portion packs usable in brewing equipment designed, developed and marketed by or for Keurig" or its licensees, or engage in a contract with another third party for such a purpose. (*Id.* ¶ 164 (cleaned up).) On July 9, 2017, Winpak and Keurig amended the term of the non-compete agreement to five years for portion pack cups. (*Id.* ¶ 167.)

C. *Distributor Agreements*

Keurig also entered into agreements during the Relevant Time Period with Keurig Authorized Redistributors ("KARDs") to sell brewers and K-Cups, who then resold product to Keurig Authorized Distributors ("KADs"), ("Distributor Agreements"). (PSUMF ¶¶ 296–97.) Keurig sells its brewers and K-Cups separately. (*Id.* ¶ 310.) However, it sells both brewers and K-Cups to distributors. (*Id.* ¶ 316–18.) Keurig entered into hundreds, if not more than a thousand, agreements with KARDs throughout the Relevant Time Period. (*Id.* ¶¶ 400, 328–29.) For example, on October 1, 2010 and October 7, 2014, Keurig entered into distributorship agreements with Compass Group USA, Inc. ("Compass") to distribute Keurig product. (*Id.* ¶¶ 330–31.)[10] On October 1, 2010 and April 2, 2014, Keurig entered into re-distribution agreements with Performance Food Group, Inc. d/b/a Vistar ("Vistar"), a KARD. (*Id.* ¶¶ 332–33.) On June 27, 2018, Keurig entered into a distributorship agreement with McLiff Partners Ltd., ("McLiff"). (*Id.* ¶ 336.)

Many of Keurig's agreements with its redistributors authorize KARDs and KADs to "promot[e] and direct sale, lease, rent or loan" of Keurig's brewers to away-from-home businesses like offices or food service locations. (*Id.* ¶ 337.)[11] Agreements also contained language requiring that the distributor not "promote, market, sell or otherwise make available (a) any beverage base or portion pack product, other than K-Cups, for use in Keurig Brewer," that the "[d]istributor shall order and purchase K-Cups directly from and only from Keurig, Licensed Roasters or KARDs," and that the "[d]istributor shall purchase at least six (6) . . . Keurig

[10] On August 26, 2010 a draft contract between Keurig and Compass, was emailed between Keurig employees, prior to the signing of final agreements on October 1, 2010 and October 7, 2014. (PSUMF ¶ 334.)

[11] Keurig argues that "[t]he language does not appear in agreements where a redistributor is not also appointed as a distributor." (DCSUMF ¶ 337.)

Brewers in each six month period following the date of this Agreement," (collectively "Loyalty Provisions"). (*Id.* ¶¶ 338–39.) All of Keurig's agreements with KADs and KARDs contained Loyalty Provisions in one shape or form. (*Id.* ¶¶ 354–55; *see also* Doc. 2305-57 at 60:2-6 (Keurig Vice President of Away From Home Sales testifying that "[e]very KAD agreement had the loyalty provision in it."); Doc. 2188-37 at 36:18-25 ("Q. And all of those agreements had what you've referred to as the loyalty provision? A. Correct Q. And the loyalty provision prevented these KARDs from selling to any entity unlicensed K-Cup-compatible products; correct? A. The loyalty provision stated that these KARDs would only sell or market Keurig packs.").) Additional firms that signed agreements with Keurig that contained Loyalty Provisions included Master Wholesale, Vend Catering, BC Coffee, B.K. Miller Company, Sarnow Food Group Company, United Stationers, SP Richards, Accent Vending, Albert Wrigley, and hundreds of independent office coffee services distributors. (*Id.* ¶¶ 390–98, 420–22.)

D. *Retail Agreements*

Keurig also signed private label retail agreements with various big box distributors, ("Retail Agreements"). Almost all of Keurig's retail contracts were for two years or less. (DSUMF ¶ 59.) "Private label brands are retailer-owned brands" that are manufactured by Keurig, like Costco's "Kirkland Signature" brand. (*Id.* ¶ 21.) "Retailers purchase Keurig-compatible portion packs through individual purchase orders." (PCSUMF ¶ 181.) Of Keurig's private label partners, only Staples signed a contract that contained a specific exclusive term within the agreement explicitly requiring that the partner not "sell coffee or any other beverage

precursor product to any third party for the specific intended use of producing K-Cup Pods or any other product intended for use in the Keurig Brewing System." (Doc. 2283-37 § 12.1.)[12]

Keurig signed a private label contract with Giant Eagle dated October 23, 2014 providing for a term of two years. (Doc. 2280-28 § 16.1 ("This Agreement shall have a term of two (2) years from the Effective Date").) Keurig agreed to a private label contract with Meijer dated September 23, 2014 that provided for a term of two years. (Doc. 2280-29 § 4 ("Unless terminated sooner as provided in Section 18, the term of this Addendum will expire two years from the Effective Date.").) Keurig's private label contract with Supervalu, dated July 3, 2014, provided for an expiration date two years from its effective date. (Doc. 2280-31 § 2 ("The term of this Agreement shall be through May 31, 2016.").) Keurig signed a private label contract with Costco on August 27, 2012 that provided for a term of two years. (Doc. 2282-29 Annex A ("Term and Costco Wholesale Commitment for this Product (in months or years): Two (2) years from the date of first deliver.").) Keurig's private label contract with Demoulas Market Basket, dated November 6, 2012, provided for a term of three years from the "effective date" of the agreement. (Doc. 2206-3 § 14.1 ("This Agreement shall have a term of three (3) years from the Effective Date.").) Keurig's private label contract with Target provided for a term of two years from the "initial launch" of the private label brand. (Doc. 2206-4 § 10.1 ("This Agreement shall have a term of two (2) years from the Initial Launch.").) Keurig's private label contracts "were terminable without penalty." (DSUMF ¶ 60; *see also* PCSUMF ¶ 60 ("The evidence merely shows that some retailers could terminate the agreement without cause upon ninety (90) days written notice").)

[12] Plaintiffs cite "exclusivity provisions" in retail agreements that prevent retailers from independently engaging in the "design, develop[ment], or manufacture," of single serve portion packs, (*see* PCSUMF ¶¶ 1008–15). These provisions do not prohibit the retailers in question from stocking or distributing competitor coffee products, such as JBR or Treehouse single serve coffee cups.

Walmart's corporate representative did not indicate that a written exclusive agreement between Walmart and Keurig existed that required Walmart to purchase from Keurig exclusively. (DSUMF ¶¶ 55, 182; Doc. 2279-6 at 170:25-171:5 ("Q. Do you recall Walmart entering into an exclusive agreement with Keurig related to private-label portion packs? [objection] A. Not to my memory.").) Plaintiffs assert that Walmart "verbally committed" to purchase from Keurig, although there is no indication in the record of an exclusive written contract between Walmart and Keurig to not purchase from competitors. (PCSUMF ¶¶ 55, 182.)

E. *The 2.0 Brewer*

Keurig also attempted to use new technology to "provide barriers to entry," and "discourage competition." (Doc. 2197-5, at 3, 8, 13, 16–18.) One technology considered was Radio Frequency Identification ("RFID") technology for some Keurig brewers. (PSUMF ¶ 509.) According to a deponent from Microtrace, another technology under consideration was the "security inks" produced by Microtrace. (*Id.* ¶¶ 511–13.) A "lock-and-key" technology produced by Sagentia to prevent competitors from operating in Keurig's brewers was also part of a "brainstorming session," conducted by Keurig. (*Id.* ¶¶ 514–16; *see also* DCSUMF ¶ 519) On July 23, 2012, Sagentia Senior Vice President Dan Edwards wrote an email to Robert Beale, another Sagentia employee, saying "[redacted] That's why they've [Keurig] invited their lawyer to meet – to give 'privileged' status to the meeting. Our comms after (emails[)] won't be subject to the same protection. Delete this email please." (PSUMF ¶¶ 517–19.) In September 2012, Keurig launched "Project Squid," which was

designed to further explore the use of ink in the next generation of Keurig brewers. (*Id.* ¶ 524.)[13]

The next generation of Keurig brewer, (the "2.0 Brewer"), contained so-called consumer benefit technology ("CBT") which reflected "technology" that "has a reader system that read ink signatures that were on the lids of licensed portions packs." (PSUMF ¶ 527.) This technology included an optical reader, taggant ink on Keurig manufactured portion packs, and a software in the 2.0 Brewer based on the specific portion pack used. (DCSUMF ¶ 527.) Keurig also included a reed switch, at the time of launch, "which informed 2.0 Brewers whether a K-Cup size cup or Vue Cup size cup was inserted." (PSUMF ¶ 529; DCSUMF ¶ 529.)[14] The reed switch was present in all commercialized 2.0 Brewers. (PSUMF ¶ 530.) The parties dispute whether cup size detection was primarily conducted using the reed switch or taggant ink. (PSUMF ¶¶ 528–33; DCSUMF ¶¶ 528–33.) In 2017, Keurig stopped manufacturing 2.0 Brewers that incorporated an optical reader for ink-based portion pack identification. (PSUMF ¶ 534; DCSUMF ¶ 534.)[15] The 2.0 Brewers without a CBT optical reader for ink-based portion pack identification used the reed switch to distinguish between different kinds of cups. (PSUMF ¶¶ 541–46; DCSUMF ¶¶ 541–46.) 2.0 Brewers without a CBT optical reader for ink-based portion pack identification still had the "key features of the 2.0 Brewer," such as "the piston pump engine," "the carafe option" and "the brew settings customized for particular beverages."

[13] Keurig argues in response that "Project Squid was Keurig's early exploration concerning the use of ink on portion packs." (DCSUMF ¶ 524.)

[14] Vue cups were single serve portion packs designed by Keurig to be compatible with the "Vue" brewer, which was released in 2013 with a slightly different style of cup with a different method to inject water through the pack. *See* Frank O'Connell, *Inside the Keurig Vue V700, a Single-Serve Coffee Maker*, N.Y. TIMES, Aug. 14, 2013.

[15] The Keurig 2.0 Brewers were discontinued in 2018. (Doc. 2289-4 ("[W]e are approved to tell customers that the 2.0 Plus series brewers will be discontinued in July 2018."); *see also* Def's Opp'n 58 ("Production of the 2.0 Brewer ended in 2018." (citing DCSUMF ¶ 544)).)

(PSUMF ¶ 549; DCSUMF ¶ 549; *see also* Doc. 2200-9 ("Hearing Tr.") at 31:4-11 ("Now that machine, that 2017 version that the competitor plaintiffs are raising, still had the key features of the 2.0 brewer. It still had the piston pump engine, it still had the carafe option, and it still had the brew settings customized for particular beverages.").) From a consumer's perspective, there was no difference in functionality between 2.0 Brewers with a CBT optical reader for ink-based portion pack identification and those without this technology. (PSUMF ¶ 557; DCSUMF ¶ 557.) The ink-based technology had been used to detect ink signatures from K-Cups or Vue Cups, both manufactured by Keurig. (PSUMF ¶ 566; DCSUMF ¶ 566.) If the ink was not on the lid, the 2.0 Brewer was designed so it would not brew the portion pack. (PSUMF ¶ 567; DCSUMF ¶ 567.) This means that the 2.0 Brewer was designed to be a closed system compatible only with Keurig-produced products. (PSUMF ¶ 568; DCSUMF ¶ 568.)

F. *Litigation Activities and Patent Enforcement*

Keurig also engaged in various litigation and patent enforcement activities that Plaintiffs claim were anticompetitive. (Def's Mem. 66–77.) On October 1, 2010, Keurig sued Sturm, a subsidiary of TreeHouse, for patent infringement. (PSUMF ¶ 887.) On September 13, 2012, the District Court for the District of Delaware granted summary judgment for Sturm on its patent claims but denied summary judgment on the other non-patent claims alleged in the suit. (*Id.*; *see also Keurig, Inc. v. Sturm Foods, Inc.*, No. CV-10-841, 2012 WL 4049799, at *12 (D. Del. Sept. 13, 2012), *judgment entered*, No. CV-10-841, 2012 WL 12896333 (D. Del. Nov. 2, 2012), *and aff'd*, 732 F.3d 1370 (Fed. Cir. 2013).)

On February 19, 2013, Keurig and Sturm settled the non-patent claims, with the terms of the settlement dictating that Sturm was to pay Keurig [redacted] and stipulating to dismissal. (DSUMF ¶ 387; Doc. 2282-41.) The Federal Circuit affirmed the District Court's summary

judgment decision on October 17, 2013. (DSUMF ¶ 387; *see also Keurig, Inc. v. Sturm Foods, Inc.*, 732 F.3d 1370, 1375 (Fed. Cir. 2013).)

On November 2, 2011, Keurig brought patent infringement claims against JBR in the District of Massachusetts. (DSUMF ¶ 394.) The District Court granted summary judgment for JBR. (*Id.* ¶¶ 397–98; *see also Keurig, Inc. v. JBR, Inc.*, No. CV-11-11941, 2013 WL 2304171, at *16 (D. Mass. May 24, 2013), *aff'd*, 558 F. App'x 1009 (Fed. Cir. 2014).) Keurig appealed the District Court's decision, in part, prior to the issuance of the Federal Circuit's *Sturm* decision. (DSUMF ¶ 399–400.) The Federal Circuit affirmed the district court's summary judgment ruling in a short unreasoned order on March 12, 2014. (*Id.* ¶ 402; *see also Keurig, Inc. v. JBR, Inc.*, 558 F. App'x 1009, 1010 (Fed. Cir. 2014).) The procedural history of these litigations is recounted in further detail *infra* § IV.D.4.

G. *Advertising*

Plaintiffs also allege that advertisements promulgated by Keurig constituted unfair competition under the Lanham Act and that they separately violated the antitrust laws. (Def's Mem. 79–84.)

First, Keurig made statements that using non-Keurig cups would affect the Keurig warranty. These statements include: "For best performance and warranty protection, we suggest using Keurig Brewed products in your brewer," ("Statement 1" or "S1"), (No. 14-CV-4242, Doc. 83 ("JBR AC") ¶ 240); "Any damage to or malfunction of your Brewer resulting from the use of non-Keurig Brewed K-Cup brand packs and accessories may not be covered by this warranty or may result in a service fee if the damage or malfunction is determined to be caused by such use . . . . Nor does this warranty cover damages caused by use of non-Keurig Brewed K-Cup brand packs or accessories," ("Statement 2" or S2"), (No. 14-CV-905, Doc. 86 ("TH AC") ¶ 495

(emphasis omitted)); that the company did "not endorse using any product in or with our brewers other than those that carry the Keurig or Keurig Brewed logos. . . . We also want to note that using unapproved portion packs may decrease your brewer's performance, overall life and may affect its warranty," ("Statement 3" or "S3"), (TH AC ¶ 496; *see also* Doc. 237 ("DPP AC") ¶¶ 199, 202 ("Throughout the Class Period, Keurig has misrepresented to current and prospective purchasers of Competitor Cups that the quality of Competitor Cups is inferior to Keurig's K-Cups."); No. 19-cv-0325, Doc. 47 ("McLane AC") ¶ 234 ("Throughout the Damages Period, Keurig has misrepresented to current and prospective purchasers of Competitor Cups that the quality of Competitor Cups is inferior to Keurig's K-Cups.")); that Grove Square is "not approved by Keurig" and could "void the warranty" and OneCups do not have Keurig's "seal of approval" and could damage brewers and "void warranty," ("Statement 4" or "S4"), (TH AC ¶¶ 497–98 (emphasis omitted); DPP AC ¶¶ 203–07 ("Purchasers of Competitor Cups have reported Keurig's Misrepresentations and Disparagements to competitor customer support lines"); McLane AC ¶¶ 239–41 ("[C]omplaints from Rogers' customers demonstrate the Misrepresentations and Disparagements made by Keurig.")).

Second, Keurig made comments about the compatibility of non-licensed cups with the 2.0 Brewer, even after Keurig became aware that competitors had reverse engineered the 2.0 Brewer to ensure compatibility of competitive cups. (*Compare* Pls' Mem. 81 ("In May 2014, Keurig received a video of employees of Bed Bath & Beyond successfully brewing a Competitive Cup in a K2.0 prototype." (alterations adopted and internal quotation marks omitted)), *with* DCSUMF ¶ 990 (acknowledging that compatibility statements continued to have been made through at least 2015).) These statements include: "We remain confident that only Keurig designed and produced and/or licensed beverage-optimized packs with the Keurig

Brewed seal will allow the Keurig 2.0 [B]rewer to perform consistently at its optimum level," ("Statement 5" or "S5"), (TH AC ¶ 490); "The Keurig 2.0 [B]rewer will only function with Keurig brand pods. That means the Keurig 2.0 [B]rewer will brew both K-cup and Vue pods and the new K-Carafe pods. Keurig brand pods have been specially designed to work with the Keurig 2.0 Brewing Technology in the Keurig 2.0 system, which guarantees a perfect brew every time. Look for the Keurig Brewed seal on your favorite K-Cup pod and KCarafe pod varieties to ensure a delicious cup every time. Keurig cannot guarantee that pods without the Keurig Brewed logo will work in the Keurig 2.0 [B]rewer," ("Statement 6" or "S6"), (Doc. 2248-1 ("Butler Cup Rep.") ¶ 45); that the 2.0 Brewer "[w]orks only with Keurig Brand Packs," ("Statement 7" or "S7"), (*id.*); the "2.0 [B]rewer will not work with packs that don't have the Keurig logo," ("Statement 8" or "S8"), (TH AC ¶¶ 471, 487); that an unlicensed pack "wasn't designed for" the 2.0 Brewer, ("Statement 9" or "S9"), (TH AC ¶ 472; JBR AC ¶¶ 250–51); that "Unlicensed products will not work in all Keurig 2.0 K-Cup [B]rewers," ("Statement 10" or "S10"), (TH AC ¶ 513 (alterations adopted)); "[o]nly packs with the Keurig logo work with 2.0," ("Statement 11" or "S11"), (TH AC ¶¶ 506–07; 540); "[e]ven if unlicensed packs could develop workarounds to the 2.0 K-Cup Brewer's lock-out technology, those Competitive Cups would not be compatible with future iterations of the K-Cup Brewer," ("Statement 12" or "S12"), (TH AC ¶ 518); and that "[p]ortion packs must have [the] interactive technology to brew," ("Statement 13" or "S13"), (JBR AC ¶ 208).

The Plaintiffs also allege that certain statements extolling the benefits of the 2.0 Brewer and regarding the rollout of the product were misleading. These statements include that "2.0 K-Cup lids contained proprietary ink and make use of proprietary and exclusive interactive technology," and "currency anti-counterfeiting technology," ("Statement 14" or "S14"), (TH AC

¶ 513 (internal quotation marks omitted)); that the ink "informs the 2.0 K-Cup Brewer of the beverages contained in those packs and further instructs the 2.0 how to brew those specific beverages," ("Statement 15" or "S15"), (TH AC ¶ 491); that the ink reader could "read recipes," and that this would "provide consumers with the perfect brew settings for each beverage by recognizing the recipes of licensed portion packs," ("Statement 16" or "S16"), (TH AC ¶¶ 16, 405, 539); that "simplicity" informs the 2.0 Brewer, ("Statement 17" or "S17"), (JBR AC ¶ 259); that the "2.0 has game-changing performance," ("Statement 18" or "S18"), (TH AC ¶¶ 405, 409); that "[t]he 2.0 K-Cup Brewer reads the lids of 2.0-compatible K-Cups" in order "to provide the perfect beverage setting," "to deliver on the promise of excellent quality beverages," and to "provide the perfect brew settings," ("Statement 19" or "S19"), (TH AC ¶¶ 405, 487–88, 492); that the company planned to "replace its current lineup of both K-Cup and Vue brewers" with 2.0 K-Cup Brewers and would "be transitioning its lineup of Keurig brewers over fiscal 2014 and early 2015," ("Statement 20" or "S20"), (TH AC ¶ 527 (alterations adopted)); that "1.0 K-Cup Brewer models would be discontinued by Spring 2015," ("Statement 21" or S21"), (TH AC ¶ 525); and that the 2.0 Brewer had "250+ varieties and 40+ brands," ("Statement 22" or "S22"), (JBR AC ¶ 246 (internal quotation marks omitted)).

Keurig also made various representations about whether it had tested unlicensed portion packs and about the quality of these packs. These statements include: "If it doesn't have the Keurig logo, it's not Keurig quality," and that the Keurig logo is "the only mark of Keurig quality," ("Statement 23" or "S23"), (TH AC ¶ 521); that Keurig could not "ensure the quality, consistency, and safety" of unlicensed packs, ("Statement 24" or "S24"), (JBR AC ¶ 93); and that Keurig "does not make or test other brands," ("Statement 25" or "S25"), (TH AC ¶ 483; JBR AC ¶ 243; *see also* Butler Cup Rpt. ¶ 45).

Finally, Plaintiffs allege that certain statements that unlicensed packs might or would damage the 2.0 Brewer were false or misleading. These statements include that "it's critical for performance and safety reasons that our new system" included CBT. ("Statement 26" or "S26") (JBR AC ¶ 221 (alterations adopted); TH AC ¶¶ 490, 492); that the CBT technology was "needed to deliver the consumer benefit in a safe way," ("Statement 27" or "S27"), (TH AC ¶ 490); that "[o]nly products with the Keurig brewed seal meet Keurig standards for taste, quality, and safety. Using products without the seal may damage your Keurig brewing system," ("Statement 28" or "S28"), (Butler Cup Rpt. ¶ 45); that "it's critical for performance and safety reasons that the 2.0 system only brews Keurig brand license packs," ("Statement 29" or "S29"), (TH AC ¶ 489 (alterations adopted)); that "Sturm pods do not work safely or effectively," ("Statement 30" or "S30"), (Butler Cup Rpt. ¶ 45 (internal quotation marks omitted)); that "Rogers' OneCup will gum up the machine, and cause it to stop functioning," ("Statement 31" or "S31"), (JBR ¶ 238; *see also* DPP AC ¶¶ 200, 204; McLane AC ¶ 235); and finally, that "Rogers' Portion Packs contained stale coffee and were exposed to excessive amounts of oxygen," ("Statement 32" or "S32"), (JBR AC ¶ 236).

H. *Acquisitions of Roasters*

Plaintiffs also claim that a series of acquisitions made by Keurig in the late 2000s and early 2010s constituted anticompetitive conduct under the Sherman Act. (Def's Mem. 74–77.) Keurig acquired Tully's in March of 2009 and Timothy's in November 2009. (DSUMF ¶ 36.) It then merged with Diedrich in December 2009, (PCSUMF ¶ 1072), and acquired Van Houtte in December 2010, (*id.* ¶ 1050). "Between 2011 and 2019, the Tully's, Timothy's, Diedrich, and Van Houtte brands combined constituted 3% of all Keurig-compatible portion packs sold." (DSUMF ¶ 37.) [redacted]

[redacted], but there is no evidence in the record that the Government took any further action [redacted] or took steps to investigate the merger. (*Id.* ¶¶ 1066–71.) There is also no evidence in the record that any of the acquisitions involving Tully's, Timothy's, or Van Houtte raised any antitrust concerns with the FTC that required follow-up from the agency or that any other industry participants objected to any of these acquisitions at the time they were consummated. (*But see id.*)

II. Procedural History

On February 11, 2014, TreeHouse filed a complaint in the Southern District of New York against Keurig alleging federal and state antitrust claims, among other claims. (No. 14-CV-905, Doc. 2.) On March 13, 2014, Rogers filed its complaint, containing similar allegations, in the Eastern District of California. (No. 14-CV-4242, Doc. 1.) The Rogers and TreeHouse lawsuits were two of many actions filed in early 2014 in federal district courts around the country alleging that Keurig engaged in unlawful anticompetitive conduct, including class action lawsuits by direct purchasers plaintiffs, ("DPPs"), and indirect purchaser plaintiffs ("IPPs"). On March 20, 2014, the named plaintiff in one of the class action lawsuits moved the Judicial Panel on Multidistrict Litigation ("JPML") to consolidate all of these cases into a single multidistrict litigation ("MDL") in this District. (*See* Doc. 1.) On June 3, 2014, the JPML transferred these related actions to this District and assigned the action to me for consolidated pretrial proceedings as part of the MDL. (*Id.* at 3.) On May 28, 2014, I had appointed interim co-lead counsel for the Named Plaintiffs and proposed direct purchaser plaintiff class in the DPPs' action. (No. 14-CV-1609, Doc. 19.) On June 26, 2014, I appointed interim co-lead counsel for the Named Plaintiffs and a proposed IPP class. (Doc. 36.) On July 24, 2014, the DPPs filed a Consolidated Class

Action Complaint, (Doc. 65), and the IPPs filed a Consolidated Amended Indirect Purchaser Class Action Complaint, (Doc. 61).

On August 11, 2014, Rogers filed a motion for a preliminary injunction. (Doc. 84.) I denied JBR's motion on September 19, 2014, finding that Rogers had not made a sufficient showing of irreparable harm in the absence of the requested injunction. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. 14-MC-2542, 2014 WL 12778832, at *1 (S.D.N.Y. Sept. 19, 2014) ("*TRO Op.*") ("The possibility that JBR will suffer such severe consequences . . . as a result of actions by Keurig during the pendency of this litigation is speculative and remote. In addition, any injury JBR has shown it is likely to suffer would be compensable with money damages."), *aff'd sub nom. JBR, Inc. v. Keurig Green Mountain, Inc.*, 618 F. App'x 31 (2d Cir. 2015) (summary order).

Rogers filed its Amended Complaint on December 8, 2014, (JBR AC), TreeHouse filed its Amended Complaint on December 2, 2014, (TH AC), the DPPs served their Amended Complaint on November 25, 2014, (DPP AC), and the IPPs served their Second Amended Complaint on the same date, (Doc. 206). On February 2, 2015, Keurig filed its motions to dismiss. (Docs. 223–32.) On January 11, 2019, McLane Company, Inc., ("McLane") filed an antitrust complaint against Keurig. (No. 19-CV-325, Doc. 1.) On April 3, 2019, I issued an Opinion & Order granting in part and denying in part Keurig's motions to dismiss. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 216 (S.D.N.Y. 2019) ("*MTD Op.*"). On June 7, 2021, I approved the IPPs' motion for a settlement, (Doc. 1394), and for attorneys' fees, (Doc. 1395). On December 17, 2019, McLane filed an amended complaint. (McLane AC.)

On August 25, 2021, Plaintiffs filed a motion for summary judgment, (Doc. 1489), along with a Rule 56.1 statement, (PSUMF), a memorandum of law in support, (Pls' Mem.), and a declaration of Aldo A. Baldini, which attached 441 exhibits, (Doc. 1497). On the same day, Keurig filed its motion for summary judgment, (Doc. 1493), along with a memorandum of law in support, (Def's Mem.), a Rule 56.1 statement, (DSUMF), and seven declarations from Lisa M. Danzig that attached 350 exhibits, (Docs. 2277–83). On October 27, 2021, Plaintiffs filed their memorandum of law in opposition to Keurig's motion for summary judgment, (Doc. 1563 ("Plaintiffs' Opposition" or "Pls' Opp'n")), along with a declaration of Aldo A. Baldini, which attached 814 exhibits, (Doc. 1565), and their counterstatement to Defendant's Rule 56.1 Statement, (PCSUMF). On the same day, Keurig filed its memorandum of law in opposition to Plaintiffs' motion for summary judgment, (Doc. 1567 ("Defendant's Opposition" or "Def's Opp'n")), along with a counterstatement to Plaintiffs' Rule 56.1 Statement, (DCSUMF), and five declarations from Alan B. Freedman that attached 264 exhibits, (Docs. 2286–90). On December 15, 2021, Keurig filed its reply memorandum in support of summary judgment, (Doc. 1659 ("Defendant's Reply" or "Def's Reply")), along with a response to Plaintiffs' counterstatement under Rule 56.1, (DRISOSUMF), and a declaration from Lisa Danzig that attached fifty-five exhibits, (Doc. 2293). On the same day, Plaintiffs filed a reply memorandum in support of summary judgment, (Doc. 1653 ("Plaintiffs' Reply" or "Pl's Reply")), along with a response to Keurig's counterstatement under Rule 56.1, (Doc. 1655 ("PRISOSUMF")), and a declaration of Aldo A. Baldini, which attached forty-two exhibits in support, (Doc. 1656).

On January 3, 2025, I issued an omnibus Opinion & Order on the parties' *Daubert* motions addressing eighteen experts.[16] (Doc. 2366; *see In re Keurig Green Mountain Single-*

[16] After granting Keurig's motion to exclude the damages testimony of Dr. Gareth Mccartney, *see Daubert Op.*, 2025 WL 354671, at *10–16, JBR moved for reconsideration and leave to file an amended report, (Doc. 2368), with

Serve Coffee Antitrust Litig., No. 14-MD-2542, 2025 WL 354671 (S.D.N.Y. Jan. 30, 2025) ("*Daubert Op.*").) On October 27, 2025, I issued an Opinion & Order denying the DPPs' Motion for Class Certification. (Doc. 2412.) On May 19, 2026, I issued an Opinion & Order on Plaintiff Winn-Dixie's motion for reconsideration, and various outstanding sealing requests. (Doc. 2469.) On June 8, 2026, I issued an Opinion & Order granting in part and denying in part Keurig's motion to exclude the amended expert report and related testimony of Dr. Gareth Macartney. (Doc. 2474.)[17]

III. Legal Standard

Summary judgment is appropriate when "the parties' submissions show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Fay v. Oxford Health Plan*, 287 F.3d 96, 103 (2d Cir. 2002); *see also* Fed. R. Civ. P. 56(a). "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law," and "[f]actual disputes that are irrelevant or unnecessary will not be

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their motion supported by a memorandum of law, (Doc. 2369). Keurig filed an opposition, (Doc. 2371), and JBR filed a reply, (Doc. 2377). On June 30, 2025, I issued an Opinion & Order denying JBR's motion for reconsideration but granting leave to file an amended report. (Doc. 2389.) On March 20, 2026, Keurig filed a renewed motion to exclude the amended expert report of Dr. Maccartney, (Doc. 2449), accompanied by a memorandum of law, (Doc. 2450), and a declaration from Alan B. Freedman, (Doc. 2451). JBR filed a response in opposition to this motion, (Doc. 2458), and Keurig filed a reply, (Doc. 2465). On June 8, 2026, I filed an Opinion & Order under seal granting in part and denying in part Keurig's motion. (Doc. 2474.) That Opinion & Order was unsealed on July 10, 2026. *Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. 14-MC-2542, 2026 WL 2015552, at *1 (S.D.N.Y. July 10, 2026) ("*Amended Macartney Op.*").

[17] On May 15, 2026, DK-Butterfly-1, formerly known as Bed, Bath & Beyond, filed an antitrust complaint against Keurig. (No. 26-cv-4074.) On May 18, 2026, HBP 1, LCC filed an antitrust complaint against Keurig. (No. 26-cv-6088.) On the same date, Taurus Acquisition Group filed an antitrust complaint against Keurig. (No. 26-cv-6087.) On May 22, 2026, Target Corporation filed an antitrust complaint against Keurig. (No. 26-cv-6089.) On July 1, 2026, Performance Food Group Inc., Core-Mark International, LLC, Core-Mark US, LLC, Reinhart Foodservice, LLC, and Cheney Brothers, Inc. filed an antitrust complaint against Keurig. (No. 26-cv-6344.) On August 10, 2026, The Golub Corporation, Fareway Stores, Inc., Alex Lee, Inc., Marc Glassman, Inc., and Brookshire Grocery Company filed an antitrust complaint against Keurig. (No. 26-cv-7971.) These actions have all been conditionally transferred by the JPML into the MDL before me and are not substantively addressed in this Opinion & Order.

counted." *Id.* On a motion for summary judgment, the moving party bears the initial burden of establishing that no genuine factual dispute exists, and, if satisfied, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial," *id.* at 256, and to present such evidence that would allow a jury to find in his favor, *see Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000).

To defeat a summary judgment motion, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). In the event that "a party fails . . . to properly address another party's assertion of fact as required by Rule 56(c), the court may," among other things, "consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(2)–(3).

In considering a summary judgment motion, the Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995) (internal citation and quotation marks omitted). "[I]f there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party," summary judgment must be denied. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002).

"Where, as here, there are cross-motions for summary judgment, each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Lumbermens Mut. Cas. Co. v. RGIS Inventory Specialists, LLC*, 628 F.3d 46, 51 (2d Cir. 2010) (internal quotation marks omitted). "In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited; the non-moving party must set forth facts that tend to preclude an inference of permissible conduct." *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993). Nonetheless, "broader inferences are permitted, and the tends to [pre]clude standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (internal quotation marks omitted).

IV. Discussion

A. *Antitrust Injury*

Keurig first seeks summary judgment on all of Plaintiffs' claims, arguing that each necessarily fails because Plaintiffs cannot establish antitrust injury. (Def's Mem. 14–23.) Antitrust injury is an essential element of any monopolization claim, and Plaintiffs "must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In *Brunswick Corporation*, the Court found that plaintiffs could not show antitrust injury when a large bowling chain bought a handful of failing bowling centers that would have gone bankrupt but for the acquisition because by "acquiring the

failing centers petitioner preserved competition" and so awarding treble damages under the Sherman Act would be "inimical" to the purposes of the law, which was designed to protect competition, not prevent it. *Id.* at 488. Interpreting this principle, the Second Circuit has held that "[t]he antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006) (emphasis in original) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990)).

The Second Circuit uses a three-step process for determining whether a party has made a sufficient showing of antitrust injury:

> First, the party asserting that it has been injured by an illegal anticompetitive practice must identify the practice complained of and the reasons such a practice is or might be anticompetitive. Next, we identify the actual injury the plaintiff alleges. This requires us to look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct. Finally, we compare the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges. . . . in order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes or might make defendants' acts unlawful.

Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 76 (2d Cir. 2013) (internal quotation marks omitted and alterations adopted). My seriatim rulings on each purportedly anticompetitive course of conduct dispose of the first *Gatt* factor, which is not specifically disputed by Keurig, as I find that Plaintiffs make an adequate showing as to the "reasons" some "practice[s] . . . might be anticompetitive," *see id.*, but not as to other alleged exclusionary acts, *see infra generally*. I address the second and third factors below.

1. Harm to Competition

Keurig paints a rosy picture of the single-serve portion cup coffee market. Keurig describes the market as healthy, competitive, and expanding, with decreased prices, increased output, and no barriers to entry throughout the period after the expiration of its short-filter patent. (*See* Def's Mem. 14–23.) In particular, Keurig asserts that because the price in the single-serve compatible cup market decreased between 2012 and 2019 and output rose in that time period, that, ipso facto, there was no harm to competition from the conduct alleged by Plaintiffs. (Def's Mem. 15–18.) Keurig's overly simplistic argument fails for at least three reasons: (1) Keurig's arguments about price and output are predicated on a misleading framework that ignores that it had a patent that distorted competitive market conditions prior to 2012; (2) Plaintiffs raise a genuine dispute of material fact as to whether prices decreased and output increased; and (3) Keurig mistakenly limits the focus of the inquiry with regard to antitrust injury to just price and output—however, Plaintiffs can and do argue injury to competition through reduction in consumer quality and reduction in innovation and support their argument through competent evidence in the record, (*see* Pls' Opp'n 33–35).

In the first instance, Keurig's arguments elide the fact that it had a patent on its short-filter coffee cup technology until 2012 and the resulting impact of such a patent on the economics of the market. (DSUMF ¶ 7.) In other words, as a purely economic matter, Keurig had a government-sanctioned monopoly on the market that expired in 2012. *See* Ramon A. Klitzke, *Patents and Monopolization: The Role of Patents Under Section Two of the Sherman Act*, 68 MARQ. L. REV. 557, 596 n.18 (1985) ("The United States Supreme Court has long recognized the patent grant as a 'legal monopoly.'" (citing *E. Bement & Sons v. Nat'l Harrow Co.*, 186 U.S. 70, 91 (1902) ("The very object of [the patent] laws is monopoly"), and *Sears,*

Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964) ("The grant of a patent is the grant of a statutory monopoly"), and collecting cases)); *see also Broadcast Music, Inc. v. Columbia Broadcasting,* 441 U.S. 1, 28 (1979) (Stevens, J., dissenting) ("A patent is a statutory grant of monopoly privileges.").

Patents are designed to encourage and reward productivity amongst firms, even though markets operating in conditions subject to a patent indisputably are subject to reduced output and increased prices as compared to fully competitive conditions. *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945) (patent "is an exception to the general rule against monopolies and to the right to access to a free and open market."). Therefore, after a patent expires and once a market can return to fully competitive conditions, economic theory anticipates significantly reduced prices and increased output. *See United States v. Studiengesellschaft Kohle, m.b.H.*, 670 F.2d 1122, 1128 (D.C. Cir. 1981) ("[A]n exclusion of competitors and charging of supracompetitive prices are at the core of the patentee's rights, and are legitimate rewards of the patent monopoly.").

This kind of market dynamic occurs frequently in the pharmaceutical context. In such cases, the firm with a patent often tries to delay or preclude generic entry, which can give rise to an antitrust violation. *See New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 654 (2d Cir. 2015) (Defendant's coercive conduct "prior to generic entry" designed to "impede generic competition" was anticompetitive); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514, 522 (E.D.N.Y. 2005) ("[I]nternal analyses prepared at the time the Agreements were entered into confirm that both [Defendant and Plaintiff] expected [Defendant] to lose significant sales once generic competition" was direct evidence of anticompetitive effects), *aff'd in part*, 544 F.3d 1323 (Fed. Cir. 2008), and *aff'd in part sub nom. Arkansas Carpenters Health*

& Welfare Fund v. Bayer AG, 604 F.3d 98 (2d Cir. 2010), *as corrected* (June 17, 2010); *In re Glumetza Antitrust Litig.*, No. 19-05822, 2021 WL 1817092, at *12 (N.D. Cal. May 6, 2021) ("'Generic drugs crash brand monopolies, entering the market at significant discounts. . . . And, this generic market penetration increases over time.' Delayed generic entry delays the resultant price cuts." (citation omitted and quoting *In re Glumetza Antitrust Litig.*, 336 F.R.D. 468, 476 (N.D. Cal. 2020)).

The Second Circuit addressed this kind of competitive landscape and concomitant anticompetitive behavior in *Actavis*, 787 F.3d 638. There, the antitrust defendants introduced a new version of an Alzheimer's drug near to the expiration date of the patent of an older version. *Id.* at 642–43. They then "withdr[e]w virtually all" of the older drug "from the market in order to force Alzheimer's patients who depend[ed]" on it to switch to the newer drug before generic products became available. *Id*. This practice is "commonly known as product hopping." *Id.* at 643. Although the conduct in question here differs in some respects,[18] the theory of harm to competition is much the same: A monopolist's attempt to continue to reap the benefits of its patent even after its initial expiration "crosse[d] the line from persuasion to coercion and is anticompetitive." *Id.* at 654. Because the Second Circuit in *Actavis* affirmed a preliminary injunction, the standard of proof there was even higher than it is before me in considering the summary judgment motion. *See Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) ("requirement for substantial proof" for the party seeking injunctive relief "is much higher" than it is for "a defendant's motion for summary judgment."). Nonetheless, the Second Circuit found that "forcing patients to switch to the new version and impeding generic competition, without a legitimate business justification" constituted anticompetitive conduct, even if Defendant's sales

[18] However, some of the conduct is analogous. *See supra* § IV.D.2.

were reduced. *Actavis*, 787 F.3d at 659. That means that although the conduct may not have resulted in an immediate windfall to the Defendant in *Actavis* or instantaneous price hikes for consumers in the market, "eliminating generic competition" sufficed to demonstrate anticompetitive harm, in part because the underlying conduct "ma[d]e[] sense only because it eliminate[d] competition." *Id.* (citing *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 133 (2d Cir. 2014), *as corrected* (June 19, 2014)); *see also In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 63 ("[B]roader inferences are permitted, and the tends to exclude standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive." (internal quotation marks omitted)).

As another court in the District has recently held, "no part of this analysis requires the plaintiff to show *actual* changed prices, output, or quality." *United States v. Live Nation Ent., Inc.*, No. 24-CV-3973, 2026 WL 456804, at *28 (S.D.N.Y. Feb. 18, 2026) (internal quotation marks omitted and emphasis in original), *reconsideration denied*, 2026 WL 563024 (S.D.N.Y. Feb. 27, 2026). Instead, antitrust plaintiffs only must show "harm to the competitive process," which is "harm to consumers." *Id.* Therefore, Keurig is wrong to limit the analysis to a showing of "price increases" or "reduced output," as compared to the time before its short-filter patent expired. (Def's Reply 3–4.) Rather, the exclusion of competitors through anticompetitive means and an adequate showing of more competitive conditions in the but-for world, which Plaintiffs make here, (Doc. 2187-6 ("Sibley Rep.") ¶¶156–75 ("The fact that Keurig has increased prices of Compatible Cups by more than a SSNIP is clear from the evidence. Keurig has admitted that it frequently raised prices, and that these price increases did not cause Keurig to lose a significant amount of customers."), ¶¶ 492–93 ("Following a review of Keurig's agreements with roasters,

and as noted above, I understand that the agreements allocate markets, limit output and protect Keurig and the roasters against price erosion as a result of the roasters' agreement not to do business with unlicensed competitors like TreeHouse."), ¶¶ 570–99 ("Record evidence further supports the conclusion that Keurig used its distributor Loyalty Clauses to insulate itself from competition with Competitive Cup manufacturers and the resulting price erosion, rather than to increase competition in any way."); Doc. 2189-52 ("Sibley Reply Rep.") ¶ 224 ("The restrictive brand and distributor agreements, for example, are key to the Keurig 'recapture' strategy. Its anticompetitive conduct in the private label channel has enhanced the recapture strategy, too. The total effect has been to cause prices in all channels and segments to be higher than they would be absent the conduct."); PSUMF ¶¶ 430 ("Keurig's 15% price increase was a substantial increase, which Keurig unilaterally imposed without any negotiation, and which Atlantic was forced to pass on to its customers").), suffices to defeat summary judgment on antitrust injury. *Live Nation*, 2026 WL 456804, at *32 ("[A]rgument that to make out a Section 2 claim, a plaintiff is required to show changed prices, reduced output, or inferior quality [is] wrong.").

When viewed in this light, the competitive façade that Keurig constructs is nothing more than a proverbial Potemkin village. Defendant faults Plaintiffs for arguing that they "could have sold *even more* than the billions of Keurig-compatible packs they actually sold," and argues that modelling such a but-for world "*would not establish harm to competition*." (Def's Mem. 17 (emphasis in original).) This is wrong as a matter of law and economics. For example, in the *Ciprofloxacin Hydrochloride Antitrust Litigation*, the price that a distributor paid for a drug produced by Bayer dropped 95 percent after generic entry. 363 F. Supp. 2d at 523 ("[A] 100–pill bottle of oral, 500–mg ciprofloxacin that cost Barr $321.96 before the beginning of open generic competition would cost only $14.30 after the expiration of Bayer's pediatric exclusivity.") Such

price drops are typical in the pharmaceutical industry after the expiration of a patent. *See, e.g.*, C. Scott Hemphill & Mark A. Lemley, *Earning Exclusivity: Generic Drug Incentives and the Hatch-Waxman Act*, 77 ANTITRUST L.J. 947, 953 (2011) ("Once multiple generic firms enter the market, prices fall, often dramatically. Consider the case of simvastatin, a blockbuster treatment for high cholesterol sold under the brand name Zocor." Within a year of generic entry "a month's worth of generic simvastatin sold for as little as $7, compared to more than $150 for Zocor."); *The Patent Cliff and Beyond: A Definitive Guide to Generic and Biosimilar Market Entry*, DrugPatentWatch (Jan. 22, 2026), *available at* https://www.drugpatentwatch.com/blog/generic-drug-entry-timeline-predicting-market-dynamics-after-patent-loss/ ("For small-molecule drugs, this transition—colloquially termed the 'patent cliff'—typically precipitates a revenue collapse of 90% or more within months of multi-source generic entry.").

Where a dominant firm signs "[a] set of strategically planned exclusive dealing contracts [to] slow the rival's expansion. . . . Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) (internal quotation marks omitted)). So, if a patent holder engages in anticompetitive conduct that causes prices to only drop by forty or fifty percent rather than the ninety some-odd percent that economic models would predict as a result of generic entry, then this harms consumers, who pay higher prices than they would have had the anticompetitive conduct not occurred. Plaintiffs allege such exclusionary acts here and support their claims with competent evidence in the record. (*See* PSUMF ¶¶ 64–65, 67 ("if no action is taken on our part and unlicensed competition enters," "then the average wholesale price could drop $0.04 to $0.31," but "if Keurig expands the number of roasters in the system," the "estimate average

wholesale price may drop $0.01 to $0.34." (alterations adopted) (quoting Doc. 2187-83)); *see also* Doc. 2817-83 at 6–7 ("1 penny in price/cost is worth: over $100 million dollars in operating profit!!"), 9 (explaining that Keurig's "[o]ptimal strategy is to have new roasters join the system," "[w]ithin defined distribution channels," and "with limited rights," and that "[i]f new roasters do not join [] there is greater potential for price erosion.").) Therefore, summary judgment cannot be appropriate on the question of antitrust injury.

Secondly, Plaintiffs do argue Keurig's prices were supracompetitive, harming competition as a whole, not just individual competitors. (*See* Pls' Opp'n 31 ("The evidence shows that Keurig *raised* prices without losing sales, kept AFH and AH prices elevated, increased its margins overall, and that customers would have purchased lower-priced cups had they been available" (emphasis in original)).) Keurig's anticompetitive conduct decreased output from a but-for world with more competition, they assert, supporting their claims with deposition testimony from competitors and their experts on injury and damages. (Pls' Opp'n 32–33 ("Keurig reduced output of Compatible Cups and SSBs compared to the but-for world. Even Keurig executives admitted that brewer output would have been higher without Keurig's restraints.").) Although Plaintiffs have not presented indisputable proof of antitrust injury as a result of Keurig's scheme,[19] they have raised, with the support of competent material evidence in the record, a genuine dispute as to whether they suffered injury as a result of Keurig's Roaster Agreements, *see infra* § IV.C.1., among other allegedly anticompetitive conduct, *see infra* § IV.C.2–D.1. Put differently, Plaintiffs have proffered sufficient evidence to tend to suggest that

[19] Plaintiffs are not entitled to summary judgment on their own claims, as I explain in more detail below, because none of the anticompetitive conduct that they allege Keurig to have engaged in is *per se* illegal, and so Keurig must have an opportunity to present its case before the finder of fact that the procompetitive benefits of said restraints outweighed their anticompetitive impact. *See N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018) (if Plaintiff shows anticompetitive effects "the burden shifts to the defendant, who must demonstrate the procompetitive effects of the challenged restraint").

Keurig's behavior reduced output and raised prices in the market, meaning that they have raised a triable issue regarding whether the cognizable exclusionary conduct caused them antitrust injury by way of reducing output and increasing prices. *See Int'l Television Prods. Ltd. v. Twentieth Century-Fox Television Div. of Twentieth Century-Fox Film Corp.*, 622 F. Supp. 1532, 1538 (S.D.N.Y. 1985) ("[A]n injury suffered by one competitor by virtue of a conspiracy engaged in by another competitor is, if not prototypical, certainly the kind of injury about which the antitrust laws are concerned"); *Disenos Artisticos E Industriales, S.A. v. Work*, 676 F. Supp. 1254, 1278 (E.D.N.Y. 1987) (similar).

Plaintiffs further argue that Keurig's anticompetitive conduct reduced quality and consumer choice in the market, including by limiting the varieties of brands that could be used in the Keurig infrastructure, and "suppress[ing] the availability of lower-priced Competitive cups, including at times when Keurig did not provide the same product." (Pls' Mem. 34–35 ("Keurig also prevented brands, distributors, and retailers from creating new products of their own with Competitive Cup manufacturers, including lower-priced private label cups.").) In recent years, courts have become increasingly receptive to quality-based harms to competition and commentators have questioned the unceasing reliance on price as the most important barometer of anticompetitive harm. *See United States v. AT&T, Inc.*, 916 F.3d 1029, 1045 (D.C. Cir. 2019) ("Vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation."); *Fed. Trade Comm'n v. Sanford Health*, No. 17-CV-0133, 2017 WL 10810016, at *7 (D.N.D. Dec. 15, 2017) ("[S]econd-stage competition generally focuses on non-monetary factors which include, e.g., clinic hours, convenience of location, available services, technology, and quality."), *aff'd sub nom.*, 926 F.3d 959 (8th Cir. 2019); *see also* Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95

B.U.L. REV. 35, 73 (2015) ("Anticompetitive harms include increases in price (adjusting for quality changes) or reductions in quality, variety, or innovation, while procompetitive benefits include lower prices or increases in quality, variety, or innovation."); Nikolas Guggenberger, *Moderating Monopolies*, 38 BERKELEY TECH. L.J. 119, 135 (2023) ("As the network-effect-induced value gap between the incumbent [firm] and its rivals becomes an insurmountable market entry barrier, the quality of the service and innovation lose import: the advantages of size trump other features.").

Plaintiffs have also raised genuine questions of material fact concerning whether Keurig's conduct in the face of the pending expiration of its patent dampened further innovation in the market. (PSUMF ¶ 91 (limiting SKUs impacted Starbucks's "ability to innovate and participate in club and e-commerce"), ¶ 93 ("additional product innovation" constrained by Keurig); PCSUMF ¶ 1966 (internal Keurig powerpoint indicating competitors were "innovative with eco-friendly K-Cups"), ¶ 1973 (Keurig internal email stating that "competitive suppliers . . . are innovating exclusively for PL customers and offering max flexibility in terms of pricing, innovation, volume and number of skus.").) As Areeda and Hovenkamp explain in their treatise, "a dominant firm's restraints on the innovations of others go to the heart of antitrust law." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 704d (2026 Cumulative Supplement 2018–2023) (hereinafter Areeda & Hovenkamp); Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1938 (2015) ("An increase in market power from a merger can . . . reduce the merged firm's incentive to create new products and services. Alternatively, the merger can combine two firms, each of which would have taken significant sales from the other if they had been successful innovators."). Indeed, the court in the

seminal *Microsoft* antitrust case noted that "there is no consensus among commentators on the question of whether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects." *See United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001) ("*Microsoft II*"); *see also* Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft,* 7 GEO. MASON L. REV. 617, 623 (1999) ("Innovation is an important dimension of competition in these markets. By controlling compatibility and interoperability of rivals' programs, and by implementing exclusive relationships that deny rivals' access to certain technologies, it is more difficult for competitors to offer new and superior programs and technologies."); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in Welfare Economics and Inventive Activity*, RAND CORP., 609, 619 (1962) ("[A] monopoly is understood here to mean barriers to entry . . . the incentive to invent is less under monopolistic than under competitive conditions but even in the latter case it will be less than is socially desirable."). There is at least a genuine dispute of material fact concerning whether Keurig's conduct reduced quality and limited consumer choice or reduced innovation in the single-serve coffee cup market, either of which could separately cause antitrust injury.

2. Injury Flowing From Anticompetitive Conduct

Keurig also argues that the injuries to TreeHouse and JBR do not flow from the anticompetitive conduct in question and so they fail to make out the third prong of the *Gatt* inquiry. (Def's Mem. 18–23.) With regard to TreeHouse, Keurig essentially argues that the company's lost sales consist of merely harm to a competitor, not harm to competition. (*Id.* at 19-21.) It claims that because TreeHouse's injury and damages model are predicated on lost "private label sales," (*id.* at 19), and prices for "private label sales" were competitive and lower

than they would have been but for Keurig's conduct in the market, that TreeHouse necessarily cannot demonstrate antitrust standing, (*id.* at 19–21). Keurig argues that, even if it were acting anticompetitively and prices were supracompetitive in the branded cup segment, it won its business over TreeHouse in the private label market on the merits through competitive pricing. (*Id.*; *see also* Doc. 2206-20 ("Stiroh Reply Rep.") ¶ 16 ("In stark contrast to the pricing pattern observed in private label products, when focusing on branded products, which make up 87 percent of Keurig's sales and from which TreeHouse was almost entirely foreclosed, Keurig's prices were substantially higher than TreeHouse's prices").) Therefore, according to Keurig, TreeHouse's injury and damages model is not "fairly traceable" to the conduct in question. *See DirecTV, LLC v. Nexstar Media Grp., Inc.*, 162 F.4th 295, 308 (2d Cir. 2025) (antitrust plaintiff must "plausibly allege[] that its past economic harm was fairly traceable to the defendant['s] conduct.").

However, TreeHouse claims that Keurig's anticompetitive conduct affected the market as a whole, not just one individual segment. *See Daubert Op.*, 2025 WL 354671, at *40 (Treehouse's damages expert "has adequately explained her model and accounted for the factors courts traditionally require to meet the necessary standard of reliability" to estimate lost customers vis a vis a but-for world with more competition). This is evidenced by testimony from TreeHouse's expert David Sibley that "the gap between Keurig's branded prices and Keurig's private label prices increased over time and Keurig's sales of private label grew, and with it, Keurig's private label share," providing proof of what he calls "the recapture theory," which means that Keurig gained market share in the private label segment specifically to avoid price erosion in the branded product market enabling Keurig to continue to overcharge consumers as a result of its conduct. (Sibley Reply Rep. ¶¶ 226–27 ("As demonstrated in the figure, the gap

between Keurig's branded prices and Keurig's private label prices increased over time and Keurig's sales of private label grew, and with it, Keurig's private label share. This result confirms the recapture theory, thus demonstrating the effectiveness of Keurig's anticompetitive conduct.").) According to Plaintiffs' expert Lauren Stiroh, this scheme has permitted Keurig to "maintain[] a substantial price premium relative to its competitors' products" and "foreclosed TreeHouse from competing for customers, even though TreeHouse offered better pricing than Keurig." (Stiroh Reply Rep ¶ 13; *see also* Doc. 2189-53 ("Stiroh Rep.") ¶ 224 ("The restrictive brand and distributor agreements, for example, are key to the Keurig 'recapture' strategy. Its anticompetitive conduct in the private label channel has enhanced the recapture strategy, too. The total effect has been to cause prices in all channels and segments to be higher than they would be absent the conduct.").) In this way, the antitrust injury alleged by TreeHouse "reflect[s] the anticompetitive effect . . . of anticompetitive acts made possible by the violation," and TreeHouse meets the third element of the *Gatt* test. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016) (quoting *Brunswick Corp.*, 429 U.S. at 489).

Keurig also argues that JBR's claims fail as a matter of law because JBR was successful and could have been even more so but for its own business decisions. (Def's Mem. 21–23.) However, there is also at least a genuine dispute of material fact with regard to whether JBR's alleged injury flows from harm to competition. The only binding precedent that Keurig cites in support of its argument that an antitrust plaintiff must positively rule out alternative explanations, such as competition on the merits, for its antitrust injury at the summary judgment phase is *U.S. Football League v. National Football League*, 842 F.2d 1335, 1377 (2d Cir. 1988). As an initial matter, that case was before the Second Circuit on an appeal of a jury verdict, so the evidentiary burdens were different than they are here. *Id.* Second, the *U.S. Football League* decision related

to a jury instruction on damages, not on antitrust injury—the Second Circuit held that "once proof of injury causation has been established, courts have allowed antitrust plaintiffs considerable latitude in proving the amount of damages," but also that "[a] plaintiff's proof of amount of damages thus must provide the jury with a reasonable basis upon which to estimate the amount of its losses caused by other factors, such as management problems, a general recession or lawful factors." *Id.* at 1378–79.

Therefore, it is undoubtedly true that, at trial, the jury instructions issued will need to provide the finder of fact with a methodology that enables it to parse JBR's injury in this way, and that JBR's proof will need to be tailored finely enough to enable such an inquiry. However, I cannot find the fact that some of JBR's lost sales may be attributable to failed competition on the merits rather than anticompetitive conduct warrants summary judgment in favor of Keurig. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565 (1981) (explaining that there is a "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury."); *see also Gelboim*, 823 F.3d at 773 (even if "[c]ompetition was not eliminated from the markets," but rather merely "curtailed," there is sufficient proof of antitrust injury (citing *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 220 (1940))). This is particularly the case because "[a] competitor's exclusion from a market is a conventional form of antitrust injury" and is "exactly the type of injury that antitrust laws were designed to prevent and flows from the competition-reducing aspect of defendant's conduct." *Valassis Commc'ns, Inc. v. News Corp.*, No. 17-CV-7378, 2019 WL 802093, at *11 (S.D.N.Y. Feb. 21, 2019) (internal quotation marks omitted and alterations adopted) (collecting cases). Therefore, Keurig's assertion that any diminution in JBR's performance is a result of competition on the merits is the sort of argument that it may make on cross-examination and during argument at trial

before the finder of fact, but does not warrant a grant of summary judgment on antitrust injury grounds.

B. *Monopoly Power*

1. Keurig Compatible Cup Market

Keurig also claims that the suit must be dismissed for failure to raise a genuine dispute of material fact as to monopoly power. (Def's Mem. 23–34.) This argument is largely predicated on the legally dubious and factually contested claim that the fact of entry means that Plaintiffs have failed to show "significant barriers to entry" and so monopoly power cannot be demonstrated. (*Id*.) Not only does this overly simplistic assertion start from a flawed factual premise, but it also does not hold true as a matter of law.

Keurig argues that because "*[m]ore than a dozen competitors* entered the purported single-serve brewer market, and *more than a dozen competitors* entered the purported Keurig-compatible pack market . . . no reasonable jury could find [] significant barriers to entry." (Def's Mem. 23–24 (emphasis in original).) The presence of entry alone, Defendant argues, commands the result of summary judgment being entered in favor of an antitrust defendant on monopoly power. In support of this proposition, it cites *Tops Markets*, *Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 99 (2d Cir. 1998). In that case, the Second Circuit affirmed the dismissal of Sherman Act claims brought by a supermarket chain against one of its competitors when the defendant had over seventy percent of the market share for the area surrounding a small town in Western New York. *Id.* at 98–99 ("Tops presented evidence that Quality's share of the total sales of food items and general household merchandise by Jamestown area supermarkets always exceeded 72 percent"). However, in *Tops*, "the record suggest[ed] that undeveloped land on which to locate a supermarket ha[d] been available at all relevant times throughout the market area." *Id*. at 99.

Further, the evidence in that case reflected the successful entry of another competitor that was a major national chain, Wegmans, which "quickly gained a respectable share of the market," after opening a nearby store. *Id.* Therefore, the Second Circuit noted that, although market share "is highly relevant to the determination of monopoly power," and that "[a] court may infer monopoly power from a high market share," *id.* at 98, if "other relevant market characteristics" suggest that the Defendant cannot "control prices or exclude competition," then this inference may be rebutted, *id.* at 99.

In another recent case entailing similar issues, Judge James Boasberg in the District of Columbia denied summary judgment to an antitrust defendant even though its "chief rival" was growing at a rapid clip and the evidence showed that "companies outside of the [relevant] market c[ould] pivot to compete with" the alleged monopolist. *Fed. Trade Comm'n v. Meta Platforms, Inc.*, 775 F. Supp. 3d 16, 52 (D.D.C. 2024) ("*Meta I*"). Although Judge Boasberg later entered judgment in favor of the defendant after a bench trial, the evidence that the Government put in at trial tipped the scale in the defendant's favor—specifically, the evidence at trial showed that TikTok, Meta's fiercest competitor, "ha[d] been overrunning the market ever since" its entry into the market seven years ago, and that Meta's market share had eroded from 58 percent to 54 percent. *Fed. Trade Comm'n v. Meta Platforms, Inc.*, 811 F. Supp. 3d 67, 122–23 (D.D.C. 2025) ("*Meta II*").

Here, Keurig has not demonstrated that there is no genuine dispute of material fact concerning whether the entry in the market acted as a competitive check on Keurig causing, for example, Keurig's market share to "erod[e]" over time. *See id.* at 122. Rather, Keurig's market share has remained remarkably durable over the course of 2010s after the expiration of its patent, maintaining market shares upwards of seventy-five percent throughout the past decade.

(PCSUMF ¶ 917 (Keurig's share of "portion pack market was 84.3 percent" in approximately February 2015), ¶ 918 ("KGM producing >85% of all K-Cups" in November 2015), ¶ 920 ("Keurig System Brewed Eq servings of portion packs was 84.3%" in February 2015).)

As multiple circuit courts have held, "[i]n evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 188–89 (3d Cir. 2005) (emphasis in original) (quoting *United States v. Syufy Enters.*, 903 F.2d 659, 665–66 (9th Cir. 1990)). Said differently, "market power matters only if it is 'durable.'" *Meta I*, 775 F. Supp. 3d at 50 (citing *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1124 (10th Cir. 2014)). This does not mean that courts, in this Circuit or elsewhere, reflexively insist on putting plaintiffs to task in demonstrating that there has been no entry into a market at the summary judgment phase of litigation, provided that an antitrust plaintiff has put forward a sufficient measure of competent proof to demonstrate durable monopoly power. In other words, the fact that competitors entered the market after the expiration of Keurig's patent does not demonstrate that there were no barriers to entry in the market. Nor could it. Were such a principle the law, it would effectively preclude all monopoly suits relating to anticompetitive conduct after the expiration of a patent because, as I have previously explained, the patent effectively concedes to the holder the ability to constrain output and increase prices. *See supra* § IV.A. After the expiration of a patent, almost all markets see increased output, decreased prices, and the entry of generic competitors. *See* Richard E. Caves, Michael D. Whinston & Mark A. Hurwitz, *Patent Expiration, Entry, and Competition in the U.S. Pharmaceutical Industry*, 1991 Brookings Papers on Econ. Activity 1, 42 (1991) (explaining that the "quantity of the branded drug" typically goes into steep decline until generic entry occurs to increase output); *see also How to Stop a 90% Revenue Crash: Mapping Patent Thickets to*

Survive the New Exclusivity Slope, DrugPatentWatch (Mar. 8, 2026), *available at* https://www.drugpatentwatch.com/blog/how-to-stop-a-90-revenue-crash-mapping-patent-thickets-to-survive-the-new-exclusivity-slope/. ("In highly competitive generic markets . . . generic penetration can reach 80–90% of prescription volume within six to twelve months of launch."). Thus, the fact of entry alone cannot defeat an antitrust suit as a matter of law.

That a market sees some output growth or price decrease in the wake of the expiration of such an intellectual property right does not, alone, refute evidence of durable monopoly power. Keurig argues that TreeHouse's "retail sales volume grew by [redacted]," that "unlicensed manufacturers" sold "around 2.5 billion packs in 2019," and that "*more than a dozen competitors*" entered the Keurig-compatible pack market. (Def's Mem. 23–34 (emphasis in original).) However, the framework put forward by Keurig to evaluate entry and growth is dubious. *See supra* § IV.A. Keurig's durable market power and ability to control prices and output in the market, even prior to the Relevant Time Period for this suit, because of its patent, is what has necessitated the retention of over a dozen experts in this case to model a but-for world in which more competitive conditions prevail.[20]

Plaintiffs are able to and do, raise a genuine dispute of material fact concerning whether there were barriers to entry in the single-serve coffee cup market. (PSUMF ¶ 200 (Keurig's CEO stating in 2010 that "the cost of K-Cup packaging machinery [is] a significant barrier"), ¶

[20] Therefore, Keurig is wrong to fault Plaintiffs for modelling a world with more perfect anticompetitive conditions, given, even aside from Keurig's anticompetitive conduct, the ubiquity of externalities that cause real world market conditions to deviate away from ideal competitive conditions. *See* Bruce C. Greenwald & Joseph E. Stiglitz, *Externalities in Economies with Imperfect Information and Incomplete Markets*, 101 Q.J. ECON. 229 (1986) (discussing how ubiquitous information asymmetries impede the efficiency of markets and cause them to diverge from optimal competitive conditions); *see also* JOSEPH E. STIGLITZ, ECONOMICS AND THE GOOD SOCIETY 46–51 ("Externalities are pervasive in our economy and society . . . While [some] externalities are obvious and have spectacular consequences, there are also more chronic, more pervasive, but somewhat less obvious externalities."). In any event, and more importantly, Keurig's framing of the market during the period after the short-filter patent expired is inaccurate. *See supra* § IV.A.

1032 (Keurig stated in 2012 that it would be considering "an offensive strategy to secure distributor relationships and create a barrier to entry"), ¶ 1033 (memorandum dated May 17, 2011 stating that "the real barrier to market entry is the brewer, because the Keurig brewers are still well protected by patents and launching a brewer is a major commercial undertaking."), ¶ 1137 (presentation prepared for Keurig stating that "Signing partner contracts/agreements with as many roasters as possible . . . acts as a defensive move to prevent or delay the entry of competitive, disruptive systems.").) That there was some entry in the market after Keurig's patent expired merely tracks quotidian economic theory and in no way forecloses the possibility that there would have been even more entry and more competitive conditions in the market had Keurig not erected barriers to entry.

Keurig's motion for summary judgment on monopoly power in the Keurig compatible cup market is therefore DENIED.

2. Brewer Market

Plaintiffs have also raised a genuine dispute of material fact concerning whether Keurig had monopoly power in the brewer market, although Keurig's arguments present me with a somewhat closer call than with regard to the Keurig Compatible Cup Market. It is equally the case in the brewer market that entry alone does not absolve Keurig of having durable monopoly power. *See supra* § IV.B.1. However, Defendant lacked a patent that constrained competitive conditions prior to the Relevant Time Period. Furthermore, Plaintiffs' market definition is somewhat nebulous and predicated on the idea of distinct "channels" of distribution rather than the traditional touchstone of reasonable interchangeability. Nonetheless, I find that Plaintiffs have done enough at this stage of the litigation to meet their burden of defining a market and demonstrating monopoly power.

Monopoly power is "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (internal quotation marks omitted). "The existence of [monopoly] power ordinarily may be inferred from the predominant share of the market," *id.*, and "the higher a market share, the stronger is the inference of monopoly power," *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc.*, 651 F.2d 122, 129 (2d Cir. 1981). However, "[a] court will draw an inference of monopoly power only after full consideration of the relationship between market share and other relevant market characteristics." *Tops*, 142 F.3d at 98. This means that the persistent market share of more than 85 percent for Keurig that Plaintiffs allege and provide competent support for during the Relevant Time Period weighs heavily in favor of Keurig having monopoly power in the brewer market, but that I must still consider the relevant market characteristics as a whole before finding monopoly power. (PSUMF ¶¶ 473–79 ("Several Keurig business records show Keurig's Single-Serve Brewer market share was above 85%.").)

In *Tops,* the court was persuaded to grant summary judgment because of the ease with which a national competitor, Wegmans, grew during the relevant time period, holding that, "[h]ad Wegmans not gained such a high market share within such a short period, we might recognize at least a *genuine* issue of material fact as to monopoly power, in light of Quality's over-70 percent market share. Wegmans' successful entry, however, itself refutes any inference of the existence of monopoly power that might be drawn from Quality's market share." *Tops*, 142 F.3d at 99 (emphasis in original). Within one year of opening, Wegmans had captured twenty-six percent of the relevant market. *Id.* at 97. Although Keurig points to entry generally, it cannot demonstrate that a large competitor grew to prominence during the period of the purported monopoly that could compete with the dominant player and ensure that economic

conditions remained competitive in the same way that Wegmans did in *Tops*. These are the kinds of considerations that courts must and do take into account when determining whether or not a firm has obtained and/or maintained monopoly power. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964) ("The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."); *see also Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" (quoting *United States v. E.I. du Pont De Nemours & Co.*, 366 U.S. 316, 326 (1961))). In other words, barriers to entry are not only about the fact of entry itself, but also the ability of potential entrants and nascent competitors to actually compete with the dominant firm and keep competitive conditions in check.

Keurig fails to demonstrate that there is no genuine dispute of material fact as to whether competitors were able to enter the market and prevent Keurig from exerting monopoly power in the markets in which the firm operated, given Keurig's consistently high market share. (*See* PSUMF ¶ 911 ("Keurig is still the clear leader of the category with 86% share" of brewer market), ¶ 919 ("Keurig Brand Brewers have a 98% market share of the Total US single-serve brewer market."); DRISOSUMF ¶ 916 (acknowledging Keurig "had an 85 percent share in single-serve"); Doc. 2189-19 at 6 (December 2013 document stating that "Keurig Brand Brewers have a 98% market share of the Total US single-serve brewer market."); Doc. 2200-6 at 11 (indicating 81 to 85 percent of "single-serve category" captured by Keurig).) There is no evidence that the market conditions in this case, like those in *Tops*, tended to facilitate a large and well-resourced firm going toe to toe with the Defendant and competing with it in a way that

prevented Keurig from maintaining control over output and prices. Again, Keurig is wrong to equate the fact of some entry, alone, with the absence of "barriers to entry," as a legal matter, and to presume that the fact of growth alone results in the necessary conclusion that Keurig lacks monopoly power. Considering the market as a whole, there are no circumstances that would tend to rebut the inference of monopoly power that I must draw from Keurig's consistently high market share. Thus, summary judgment on the issue of monopoly power is inappropriate.

Keurig's motion for summary judgment on monopoly power in the brewer market is therefore DENIED.[21]

C. *Section 1 Claims*

Plaintiffs allege that some of the agreements that Keurig entered into during the Relevant Time Period constitute "restraint[s] of trade or commerce among the several States," in violation of the Sherman Act. 15 U.S.C. § 1. "To establish a § 1 violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between at

[21] Because I find that Keurig is not entitled to summary judgment on Plaintiffs' claims on monopoly power grounds, I necessarily find that it is not entitled to summary judgment on Plaintiffs' attempted monopolization and monopoly leveraging claims. Attempted monopolization and monopolization "claims are substantially identical, with the exception that attempted monopolization requires a showing of specific intent to monopolize." *New York v. Actavis, PLC*, No. 14-CV-7473, 2014 WL 7015198, at *35 (S.D.N.Y. Dec. 11, 2014), *aff'd sub nom. New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015). Keurig does not challenge the intent prong of the attempt test. Rather, it only claims, (*see* Def's Mem. 34–36), that the presence of entry, alone, precludes Plaintiffs not only from raising a genuine dispute of material fact as to monopoly power, but also as to a "dangerous probability" of achieving monopoly power, the relevant standard for attempted monopolization and monopoly leveraging. *See Int'l Distrib. Ctrs. Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 790 (2d Cir. 1987) (Plaintiff must show "(1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a 'dangerous probability' that the attempt will succeed," to make out claim of attempted monopolization); *New York Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559, 572 (S.D.N.Y. 2004) (to maintain monopoly leveraging claim, plaintiff must show that defendant "(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; [](3) caused injury by such anticompetitive conduct," and (4) "that there be a 'dangerous probability of success' in monopolizing a second market." (quoting *Virgin Atl. Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir.2001), and *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004))). Because "a lesser degree of market power may establish an attempted monopolization claim than that necessary to establish a completed monopolization claim," *Tops*, 142 F.3d at 100, and I found that Plaintiffs raised a triable issue as to the greater measure of market power necessary for a monopolization claim, Keurig's motion for summary judgment on attempted monopolization and monopoly leveraging claims is DENIED.

least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either *per se* or under the rule of reason." *Tops*, 142 F.3d at 95–96. "[C]ertain restrictive practices among competitors, such as price fixing, are illegal [p]er se." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979).

1. Roaster Agreements

In their brief, Plaintiffs argue that the Roaster Agreements were per se illegal horizontal group boycotts. (Pls. Mem. 11 ("Keurig's Brand Competitor Agreements check all the boxes for per se treatment.").) Therefore, as a threshold gating exercise, I must analyze whether the Roaster Agreements are subject to per se analysis or the rule of reason.

a. Per Se Versus Rule of Reason

"Most cases fall outside the[] narrow, carefully demarcated categories held to be illegal *per se.* In the general run of cases a plaintiff must prove an antitrust injury under the rule of reason." *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993). However, "collusion" is "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Therefore, a horizontal agreement amongst competitors to fix prices is per se illegal—no further analysis is required in order to find such an arrangement unlawful under the Sherman Act. *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 348 (1982) ("Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices."). Similarly, the Supreme Court "has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985).

On the other hand, vertical price fixing arrangements are subject to the rule of reason. *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) ("[V]ertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason."). In that vein, the Second Circuit has held that what is known as a "dual distribution arrangement" is not subject to per se unlawfulness. *See Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997) ("[E]ven if the distributor and manufacturer also compete at the distribution level, where, as here, the manufacturer distributes its products through a distributor and independently (so-called 'dual distribution' arrangements)," agreements between manufacturers and distributors are subject to the rule of reason). However, as I found in ruling on Keurig's motion to dismiss, *see MTD Op.*, 383 F. Supp. 3d at 243, this case is distinguishable—in *Toshiba*, the plaintiff and defendant had entered into an agreement for plaintiff to distribute defendant's products, which defendant abruptly terminated on the basis of an anticompetitive agreement. 129 F.3d at 241–42. The market in *Toshiba* was clearly split into a distribution level and a supplier level, so the Second Circuit had little trouble concluding that the suit was "essentially a dispute about the way one product is distributed, a question of intrabrand competition." *Id.* at 244. That is not the case here. To the extent that Dunkin', Starbucks, and the other roasters operated at "different levels of distribution" from Keurig, Plaintiffs argue, and marshal material evidence in support of their arguments, that this is only so because the Roaster Agreements made it the case.

Plaintiffs assert that the Roaster Agreements are no mere vertical agreement because companies like Starbucks, Dunkin', Joffrey's, and Smucker were not just suppliers of input coffee into Keurig's cups, but rather that they were potential entrants into the market for single-serve coffee cups. (PSUMF ¶ 69 (Peet's CEO expressed that Keurig "paid [Peet's] in order not

to compete with them.").) Plaintiffs support these allegations with evidence gleaned through discovery. (*See id.* ¶ 79 (Keurig's Chief Business Development Officer testified that roasters expressed "concern" that "they might wind up in conflict" with Keurig).) Prior to these contracts, Starbucks and Dunkin' were nascent competitors that sought to enter the market on their own. (*See id.* ¶ 75 (internal document from Keurig stating that it was able to "convince many of the previously unlicensed brands to join the Keurig system. Brands such as Maxwell House, Peets, McCafe, Gevalia, Community Coffee, New England Coffee and many private label retail brands joined the system. These brands would now be manufactured by KGM once the logistics could be worked out between the two parties."), ¶ 82 (Dunkin' acceded to "not commercialize another . . . hard capsuled single cup coffee, tea or hot cocoa product," as part of dealings with Keurig), ¶¶ 91–93 (Starbucks found contract with Keurig "pretty constraining" and lacked "SKU count flexibility" (alterations adopted)).) Therefore, the Roaster Agreements themselves were designed to ensure that potential competitors in the single-serve coffee cup market like Dunkin' and Starbucks remained nascent and cooperated with Keurig rather than designing their own products. (*See* Doc. 2187-90 at 171:11-18 (Starbucks deponent testifying that "Our Stream 2 channels are, I believe, limited to office superstore, possibly department specialty, like Bed, Bath & Beyond, and Keurig.com. It's a very small percentage of the overall Starbucks brand K-Cup pod business.").) An antitrust defendant cannot merely bootstrap its per se illegal behavior into rule of reason analysis by ferreting out all potential competitors at other levels of the market and picking them off one by one—thus ensuring that restraints remain vertical rather than horizontal.[22] *See Microsoft II*, 253 F.3d at 79 ("[I]t would be inimical to the

[22] Indeed, *Toshiba* cautioned that "[m]ere labels do not alter the essential nature of the economic relationship." 129 F.3d at 244 n.1. In that case, the plaintiffs attempted to use the "competitor" label for an economic relationship that was, at bottom, one between a supplier and manufacturer, to try to misrepresent a dual distribution arrangement as a

purpose of the Sherman Act to allow [] free reign to squash nascent, albeit unproven, competitors at will."); *see also Int'l Constr. Prods., LLC v. Caterpillar Inc.*, No. CV-15-108, 2024 WL 1619836, at *14 (D. Del. Apr. 15, 2024) (similar).

As the Second Circuit has acknowledged, "determining the orientation of an agreement can be difficult as a matter of fact and turns on more than simply identifying whether the participants are at the same level of the market structure." *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015). "[T]he Sherman Act outlaws *agreements* that unreasonably restrain trade and therefore requires evaluating the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the *per se* rule is properly invoked." *Id.* at 297 (emphasis in original). "If an arrangement might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,' more than a quick look is required." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 318 (2d Cir. 2008) (internal quotation marks omitted).

As the Second Circuit in *Apple* explained, the rule of reason and per se rule are ultimately both rules of thumb designed to determine "whether the *restraint imposed* is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 791 F.3d at 322 (emphasis in original) (quoting *Bd. of Trade of City of Chicago v. U.S.*, 246 U.S. 231, 238 (1918)). On the one hand, there are more benign agreements between manufacturers and distributors to "limit the price at which the distributors sell the manufacturer's goods or the locations at which they sell them," and, on the other hand, there are horizontal price fixing arrangements, which are at the heartland of what the antitrust laws seek to prohibit. *Id.* at 323. Here, the Roaster Agreements fall somewhere between these

horizontal conspiracy. *Id.* at 244–45. Here, Keurig attempts to use the "supplier" label to try to shoehorn this arrangement into the caselaw on dual distribution.

two polarities. There is undoubtedly an element of the Roaster Agreements that is horizontal—as I have indicated above, many of the roasters would have entered the market as competitors but for the agreements, (*see* PSUMF ¶¶ 69, 82, 91–93), meaning that Keurig's conduct stymied competition in the market for single-serve coffee cups by excluding nascent competitors. However, as a result of the arrangement, Keurig did, as a matter of fact, distribute single-serve coffee cups for Dunkin' and Starbucks.

Ultimately, although this gating exercise is a close call, I am cognizant of the fact that courts in this District to have considered this issue have held that, even when the counterparties to a contract "can also be fairly be viewed as potential competitors," indicating "a horizontal aspect to these agreements," that the agreements remain subject to the rule of reason. *See, e.g.*, *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 205–06 (S.D.N.Y. 2014) ("[T]he presence of even this significant horizontal dimension, alongside a vertical one, does not trigger *per se* review. This factor is instead relevant to the application of the rule of reason."); *Flash Elecs., Inc. v. Universal Music & Video Distribution Corp.*, 312 F. Supp. 2d 379, 387 (E.D.N.Y. 2004) ("[O]nly when there is evidence that an agreement is attributable solely to horizontal competitors, having been conceived without the input of a party higher up in the distribution chain, will the *per se* rule apply.") (internal quotation marks omitted)); *PepsiCo, Inc. v. Coca–Cola Co*., 114 F. Supp. 2d 243, 259 (S.D.N.Y.2000) (same), *aff'd*, 315 F.3d 101 (2d Cir. 2002). These cases support the conclusion that per se treatment is not appropriate here.

This finding is buttressed by the trend in courts moving away from reflexive application of the per se rule to group boycotts, in particular. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) ("[P]recedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors."); *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d

Cir. 1999) (rejecting per se rule where conduct in question "does not fit the classic model of a group boycott—that is, a 'concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level.'" (quoting *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978)). Ultimately, I am persuaded that there is enough dissimilarity from the paradigmatic case of an anticompetitive group boycott to militate against application of the per se rule to the Roaster Agreements. As in *SESAC*, "[t]his holding does not diminish the force of [Plaintiffs'] claim that [Keurig's Roaster Agreements] are in fact highly anti-competitive, in that they squelch an obvious form of competition." 1 F. Supp. 3d at 206. Therefore, I will consider the closeness of this call as I conduct the rule of reason analysis concerning the Roaster Agreements.

b. Existence of a Hub and Spoke Conspiracy

Another way in which a per se illegal conspiracy can be found under governing law is through proof of a hub and spoke conspiracy. "These arrangements consist of *both* vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the hub's terms, often because the spokes would not have gone along with the vertical agreements except on the understanding that the other spokes were agreeing to the same thing." *Apple, Inc.*, 791 F.3d at 314 (emphasis in original) (internal quotation marks omitted). At the motion to dismiss stage of this litigation, I found that Plaintiffs had "sufficiently alleged 'facts supporting the inference that a [hub-and-spoke] conspiracy existed.'" *MTD Op,*, 383 F. Supp. 3d at 245 (emphasis in original) (quoting *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013)). However, more is needed to support such a claim at the summary judgment phase of the litigation. Here, Plaintiffs have not adduced sufficient evidence relating to alleged horizontal agreements between roasters like Dunkin', Starbucks, and Smucker

to exclude Plaintiffs from the market for single-serve coffee cups. *See In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 n.33 (9th Cir. 2015) ("[A] rimless hub-and-spoke conspiracy is not a hub-and-spoke conspiracy at all (for what is a wheel without a rim?); it is a collection of purely vertical agreements."). Therefore, this is a case quite unlike *Apple*, where the allegedly anticompetitive conduct was orchestrated by a series of publishers serving as the spokes of the hub and spoke conspiracy, in conjunction with Apple. *See Apple*, 791 F.3d 290, 300 (2d Cir. 2015) ("The executives of the [spokes of the conspiracy] also recognized that their problem was a collective one.").

Here, in contrast, there is scant evidence of collective action between the roasters designed to neutralize TreeHouse and the other plaintiffs. Keurig, in its statement of material facts, claims that it is undisputed that "Keurig's roaster brand partners did not coordinate as a group regarding whether to use Keurig for co-packing K-Cups." (DSUMF ¶ 333.) Plaintiffs dispute this, but only in a conclusory and speculative way. After years of discovery, Plaintiffs can point to little more than parallelism in the agreements between Keurig and its roaster partners and awareness of that parallelism. (*See* PCSUMF ¶ 333.) Plaintiffs also cite one document from a meeting of Keurig's "Roaster Advisory Council" with language stating that Keurig "d[id] not want to be in competition with our roaster partners or circumvent[] roaster's sales strategies in the Away From Home market." (Doc. 2187-88.) Importantly, though, this document only shows what Keurig intended and what terms it offered its partners. Plaintiffs fail to identify where, in the reams of documents that they have received in discovery from the roasters, there exists any evidence of horizontal collusion to exclude Plaintiffs from the market. Further, the very evidence that supports Plaintiffs' bid to deny summary judgment under the rule of reason, namely that there is at least a genuine dispute of material fact as to whether Keurig's

agreements with the roasters had anticompetitive effects and were "pretty constraining" on the roasters, (*see* PSUMF ¶ 92), cuts against the conclusion that the roasters coordinated with each other as part of a hub and spoke conspiracy. Therefore, Keurig's motion for summary judgment is GRANTED as to a hub-and-spoke theory.

c. Standing

I also address briefly Keurig's argument that Plaintiffs lack standing to pursue their conspiracy claims. (Def's Mem. 60.) Although it is undoubtedly true that competitors who "stand to gain from any conspiracy to raise retail prices through vertical resale price maintenance," lack standing to bring suit regarding such a conspiracy, likewise, it is clearly established that competitors that suffer harm from an "alleged boycott or concerted refusal to deal," which, as "part of an overall scheme to maintain prices," may be injured. *Disenos*, 676 F. Supp. at 1276–77. This is precisely the sort of scheme that Plaintiffs claim exists here, and their claims cannot be dismissed for lack of standing.

d. Rule of Reason Analysis

I next analyze Plaintiffs' Section 1 claims regarding the Roaster Agreements under the rule of reason standard that I found governs these allegations. Under the rule of reason "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (internal quotation marks omitted). "In order to plead an antitrust violation under the rule of reason, a plaintiff must allege a relevant market, including both a product market and a geographic market." *Integrated Sys. & Power, Inc. v. Honeywell Intl., Inc.*, 713 F. Supp. 2d 286, 298 (S.D.N.Y. 2010). "The plaintiff bears the burden of demonstrating that the challenged behavior 'had an actual adverse effect on

competition as a whole in the relevant market.'" *Major League Baseball Props., Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212, 219 (S.D.N.Y. 2005) (quoting *Cap. Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)), *aff'd*, 542 F.3d 290 (2d Cir. 2008). "If the plaintiff meets its burden, the burden shifts to the defendant to offer evidence of the pro-competitive effects of its agreement. The burden then shifts back to the plaintiff to prove that any legitimate competitive benefits offered by the defendant could have been achieved through less restrictive means." *Id.* (citation omitted).

"[A]n injury suffered by one competitor by virtue of a conspiracy engaged in by another competitor is, if not prototypical, certainly the kind of injury about which the antitrust laws are concerned." *Int'l Television Prods. Ltd.*, 622 F. Supp. at 1538. As previously explained, Plaintiffs raise a genuine dispute of material fact concerning whether Keurig's conduct was anticompetitive and caused them antitrust injury. *See supra* § IV.A.1. I keep in mind that "[c]onduct that intentionally, significantly, and without business justification excludes a potential competitor from outlets (even though not in the relevant market), where access to those outlets is a necessary though not sufficient condition to waging a challenge to a monopolist and fear of the challenge prompts the conduct, is 'anticompetitive.'" *LePage's Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (en banc) (quoting Eleanor Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 390 (2002)). For the reason that the Roaster Agreements excluded nascent competitors, (*see* PSUMF ¶¶ 69, 82, 91–93), namely the roasters themselves, from competing with Keurig through the development of their standalone single-serve coffee cups, they had a latent anticompetitive effect on competition.

Keurig defends the Roaster Agreements by arguing that they constituted a "dual distribution" arrangement that led to lower prices and increased competition. (Def's Opp'n 6

("Courts have recognized the benefits of dual distribution agreements for decades," and "partner brands and Keurig testified that they compete aggressively against one another and other competitors." (internal quotation marks omitted)).) It further argues that any reduction in variety is not cognizable under the antitrust laws and furthermore is justified by procompetitive business reasons, such as a desire to reduce the number of SKUs in circulation. (*Id.* at 11 ("Defining the number of SKUs in advance allows the parties to negotiate a lower price based on a common understanding of expected cost.").) Additionally, it avers that, because its name-brand Green Mountain coffee cups continue to be distributed across channels, they remain competitive with roaster cups. (*Id.* at 14 ("Keurig sells its brands of K-Cups (e.g., Green Mountain) in *every* channel. Keurig also manufactures K-Cups for partners who sell those K-Cups in competition with Keurig's brands in most channels.").) Finally, it claims that its Roaster Agreements "increase interbrand competition by increasing the value of the Keurig system vis-à-vis other systems," which "gives brands an incentive to invest in the promotion and expansion of the Keurig system." (Def's Opp'n 19–20.)

These kinds of arguments may suffice to defeat Plaintiffs' motion for summary judgment on these restrictions, provided that the appropriate framework of analysis is the rule of reason rather than per se illegality. *See Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.,* 386 F.3d 485, 510 (2d Cir. 2004) (reversing grant of summary judgment on rule of reason analysis when district court resolved "assessment of long-term effects" on the papers, an inquiry which "depends greatly on credibility of the evidence [and] is the task of the jury"). However, they are not enough to demonstrate that Keurig is itself entitled to summary judgment. Plaintiffs have created at least a genuine issue of material fact concerning whether the agreements with roasters harmed competition by preventing nascent competitors like Starbucks and Dunkin' from

competing with Keurig. (*See* PSUMF ¶¶ 69, 82, 91–93.) Plaintiffs put forward facts that the purpose of the contracts with roasters was "to not commercialize . . . competition," (PCSUMF ¶¶ 82, 1827), and were designed to boycott competition, (PCSUMF ¶¶ 1390–1410). Other provisions of the agreements prevented firms like Starbucks "from competing directly in brewed coffee" and had the purpose and effect of "moot[ing] [Starbucks'] interest in developing their own single cup system," (PCSUMF ¶¶ 1151, 1189), or were otherwise intended to allocate markets between competitors or restrict quality by way of limiting variety or SKUs, (Pls' Reply 9–10 ("Keurig's agreements cap the number of product varieties that Keurig would make for its Brand Competitors and prohibit the Brand Competitors from working with Competitive Cup manufacturers on additional varieties or quantities that Keurig refused to produce.")). Plaintiffs have done enough to raise at least a cognizable, genuine, dispute of material fact concerning whether Keurig's Roster Agreements were anticompetitive as a matter of law and whether they restricted the entry of additional competitors after the expiration of Keurig's short-filter patent.

On this point I find *SESAC* to be instructive. 1 F. Supp. 3d 180. There, as here, a form of restraint was technically not entirely vertical in nature, but nonetheless, "squelch[ed] an obvious form of competition." *Id.* at 206. The defendant in that case "respond[ed] by articulating various pro-competitive benefits of its" contractual scheme that locked in other firms in the market. *Id.* at 221. So too here, where Keurig alleges that its Roaster Agreements had beneficial effects on the market, improving competition, quality, and integration, enabling it to provide the best product to consumers. (Def's Opp'n 6–25.) As in *SESAC*, Keurig "will be at liberty to defend its [] practices as more pro-competitive than anti-competitive" at trial. 1 F. Supp. 3d at 221. However, these arguments do not suffice to meet Keurig's burden as to the second prong of

the rule of reason analysis and rebut Plaintiffs' showing of anticompetitive effects resulting from the Roaster Agreements.

Therefore, both parties' motions for summary judgment on the Section 1 claims related to the Roaster Agreements are DENIED. Plaintiffs may proceed to trial on this theory, although the Roaster Agreements should be analyzed under the rule of reason rather than as per se restraints.

2. Tying [23]

Plaintiffs also allege that Keurig's Distributor Agreements are subject to per se illegality. (*See* Pls' Opp'n 72 ("These agreements violate Section 3 of the Clayton Act and Section 1 of the Sherman Act.").) As outlined above, *see supra* § I.C, Keurig entered into a series of agreements with authorized distributors and redistributors to sell K-Cups in connection with its single-serve brewers. A tying arrangement comes into being when the seller of multiple products compels a buyer to purchase something, (the tied product, here K-Cups), through exploitation of market power over a complimentary good, (the tying product, here the single-serve brewer). For example, in *Jefferson Parish Hospital District No. 2 v. Hyde*, a firm of anesthesiologists sued a hospital that predicated access to its operating rooms on the use of a different anesthesiology firm of its choosing, 466 U.S. 2, 6 (1984), *abrogated by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). In *Eastman Kodak Co.*, the Second Circuit warned that "[s]o long as

[23] Plaintiffs' complaints technically allege tying violations under the auspices of both Sections 1 & 2 as well as Section 3 of the Clayton Act. *See* TH AC ¶¶ 611–18; JBR AC ¶¶ 338–53. However, in their opposition to Keurig's motion for summary judgment, Plaintiffs appear to have abandoned any separate argument that the tying claims are subject to Section 2. (*See* Pls' Opp'n 72 ("These agreements violate Section 3 of the Clayton Act and Section 1 of the Sherman Act.").) In any event, the five-part test from the Second Circuit applies, *see Kaufman v. Time Warner*, 836 F.3d 137, 141 (2d Cir. 2016), and tying appears to more regularly be analyzed under Section 1 than Section 2. *See, e.g.*, *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2d Cir. 1980) (analyzing tying claims under Section 1); *Reisner v. Gen. Motors Corp.*, 511 F. Supp. 1167, 1176 (S.D.N.Y. 1981) (same), *aff'd*, 671 F.2d 91 (2d Cir. 1982); *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, No. 97-CV-5499, 2004 WL 691680, at *4 (S.D.N.Y. Mar. 31, 2004) (same), *aff'd sub nom.*, 124 F. App'x 73 (2d Cir. 2005) (summary order).

we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power." 603 F.2d 263, 276 (2d Cir. 1979). Nonetheless, a monopolist in one market may not use its market power in one industry as a lever to distort competition in another, even if "competition in the leveraged market may not be destroyed but merely distorted." *Id.* Tying arrangements are thus subject to a sui generis analysis that does not directly reflect either the per se rule that applies to, say, horizontal price-fixing, or the rule of reason analysis implemented with respect to the Roaster Agreements. *See supra* § IV.C.1.

Under governing Second Circuit law, a plaintiff must make showings as to five elements to support a tying claim:

> (i) the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product); (ii) the seller uses actual coercion to force buyers to purchase the tied product; (iii) the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product; (iv) the tie-in has anticompetitive effects in the tied market; and (v) a not insubstantial amount of interstate commerce is involved in the tied market.

Kaufman, 836 F.3d at 141. "These elements are common to claims asserted under either the Sherman or Clayton Acts." *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996). Here, Keurig does not dispute that its brewer and single-serve portion cups are two separate products. (*See* Pls' Opp'n 72–73; Def's Reply 29–31.) Nor does it dispute that a not insubstantial amount of interstate commerce is involved in the tied market. (*See* Def's Mem. 63; Pls' Opp'n 72–73.) Therefore, the disagreement between the parties centers around: (1) whether Keurig has market power in the single-serve brewer market; (2) whether the alleged tie coerced KADs and KARDs into buying single-serve coffee cups from Keurig as opposed to other

competitors; and (3) whether the alleged tie had anticompetitive effects in the single-serve coffee packet market.

a. Market Power

Plaintiffs must show that Keurig has "appreciable economic power in the tying market." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992) ("Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'" (citing *Jefferson Par.*, 466 U.S. at 14.)). "[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works*, 547 U.S. at 46. However, the Second Circuit has held that "to condemn a tie, the market for the tied product need not be monopolized. It suffices that a 'substantial' amount of competition is foreclosed." *Eastman Kodak Co.*, 603 F.2d at 276 (internal quotation marks omitted). Courts in this circuit have found that the amount of market share necessary to show "appreciable economic power," *Eastman Kodak Co.*, 504 U.S. at 464, for a tying claim is even less than for a traditional monopolization claim, *see Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 473 (S.D.N.Y. 1996) ("[A] market share above 30 percent is necessary to establish the requisite [market] power"); *In re Visa Check/Mastermoney Antitrust Litig*, No. 96-CV-5238, 2003 WL 1712568, at *4 (E.D.N.Y. Apr. 1, 2003) (market share of "nearly 60 percent" "easily qualifies as 'appreciable economic power' for purposes of the [tying] rule" (quoting *Eastman Kodak Co.*, 504 U.S. at 464)). Therefore, since I concluded that Plaintiffs raised a genuine dispute of material fact as to whether Keurig had monopoly power in the single-serve brewer market, *see supra* § IV.B.2, I have little trouble concluding that Plaintiffs raise a triable issue as to whether it possesses the lesser quantum of "appreciable economic power" in

this tying market for the purposes of a tying claim. Thus, Plaintiffs meet this prong of the test for tying.

b. Anticompetitive Effect in the Tied Market

Plaintiffs appear to argue that they need not show anticompetitive effects when bringing a tying claim under Section 3 of the Clayton Act. (Pls' Mem. 44–46.) However, their argument is misguided and relies on caselaw that is more than sixty-five years old. (*See id.*) As the Supreme Court explained in *Illinois Tool Works*, its "strong disapproval of tying arrangements has substantially diminished." 547 U.S. at 35. Indeed, "the *per se* rule" previously applied to tying arrangements is no more, and tying arrangements are "evaluated under" the multi-part factor-based inquiry initially put forward in *Jefferson Parish* and other contemporaneous cases. *Id.* at 42–43. *Illinois Tool Works* and *Jefferson Parish* provide the framework through which courts now analyze tying allegations, whether brought under Section 3 of the Clayton Act or Section 1 of the Sherman Act. *See Kaufman,* 836 F.3d at 141; *De Jesus*, 87 F.3d at 70.

Although it is true that the Supreme Court has not had cause to revisit its holdings that the Section 3 of the Clayton Act and the Sherman Act present different standards because it "has not faced a claim under section 3 of the Clayton Act since [*Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953)]," *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 496 n.42 (3d Cir. 1992), courts that have surveyed the caselaw have almost uniformly agreed that the "standards for illegality of tying arrangement under the Sherman and Clayton Acts have coalesced," *id.*; *see also Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1214 (9th Cir. 1977) ("The practical difference between the two standards has eroded steadily since Justice Clark's attempt to draw a fine line of distinction in *Times-Picayune*."); Areeda & Hovenkamp, ¶ 1719b (collecting cases and noting arguments for differing standards based on

precedent, legislative history, and general principles of statutory interpretation, but rejecting each). Even if there were some daylight between the two standards, it certainly would not stretch so far as to permit Plaintiffs to proceed with a tying claim absent any showing of anticompetitive effects due to the alleged tie.

As to the amount of anticompetitive effect that must be shown, Keurig argues that I should follow *Freeland v. AT & T Corp.*, which rejected a tying claim when plaintiff could not show any antitrust injury resulting from the tie in claim—i.e., it could not show increased prices as a result of the tie. 238 F.R.D. 130, 150 (S.D.N.Y. 2006). As I explain *infra* § IV.D.1.a, the obstacle to Keurig's assertion is the Supreme Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corporation*, where the Court made clear that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." 370 U.S. 690, 699 (1962); *see also Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 355 (4th Cir. 2024) ("[A]ggregation is appropriate" when individual acts are all "part of the same scheme to perpetuate dominance or drive the plaintiff from the market."); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 453 (7th Cir. 2020) ("The fact that [two exclusionary acts] are conceptually related and may overlap should not cause confusion if we stay focused on the underlying inquiry: the conduct 'must harm the competitive process and thereby harm consumers'" (emphasis in original) (quoting *Microsoft II*, 253 F.3d at 58)).

Therefore, Keurig's arguments are misplaced. The question for the purposes of this prong is not whether the Distributor Agreements in and of themselves had a sufficient anticompetitive effect, but rather whether "[t]he constituent elements . . . are enough to give to the scheme a body and, for all that we can say, to accomplish it," and whether "they are alleged

sufficiently as elements of the scheme." *Duke Energy Carolinas, LLC*, 111 F.4th at 355 (quoting *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905) (Holmes, J.)). Here, the Distribution Agreements at issue should be aggregated with regard to their anticompetitive impact with the Roaster Agreements and the Supplier Agreements.[24] Indeed, the law is clear that courts can and do aggregate the impact of such Agreements when alleged in the exclusive dealing context, *see infra* § IV.D.1.b. Keurig cites no caselaw, and indeed I am not aware of any, that would support cordoning off the Distributor Agreements from being aggregated with the Roaster Agreements and the Supplier Agreements merely because they are alleged to be anticompetitive in two ways: as ties and as exclusive contracts. Therefore, Keurig's arguments relating to the anticompetitive effect element fail to support granting summary judgment on this conduct.

c. Actual Coercion

With regard to the coercion element, Keurig argues that because purchasers have the choice not to participate in the Keurig system and instead are technically capable of buying cups and brewers separately, that Plaintiffs' tying claim fails. Plaintiffs do not dispute that since 2012, purchasers have been able to purchase single-serve brewers independently of the KAD and KARD agreements with distributors. (*See* Def's Reply 29.)

One initial impediment to Plaintiffs' tying claim is that the purported tie is being imposed on redistributors or dealers rather than end consumers. Keurig argues it is entitled to summary judgment for this reason, relying on out of circuit precedent that "[t]ies that constrain only dealers . . . create relatively little danger to competition, provided consumers may purchase the two goods separately." *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1383 (5th

[24] Because I find that the Retail Agreements are not exclusive and are not cognizable as a matter of law, independent of their impact on competition, *see infra* § IV.D.1.a, aggregation would not be appropriate with respect to this course of conduct.

Cir. 1994); *see also S. Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 875 (11th Cir. 1998) ("a foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal per se" (quoting *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1297 (10th Cir. 1989))). Certainly, courts are generally permissive toward what are known as "full line forces," actions that consist of manufacturers requesting that dealers include additional elements of their product lines in the dealers' offerings to consumers without specifically requiring that the dealers do so. *See Unijax, Inc. v. Champion Int'l, Inc.*, 683 F.2d 678, 685 (2d Cir. 1982) (affirming grant of judgment for defendant on tying claim because plaintiff could not show actual coercion, as distinguished from "strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce (its) retailer to buy its full line of products" (quoting *Bob Maxfield, Inc. v. Am. Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir. 1981))).

However, this permissiveness is a result of a fact that Keurig acknowledges in its summary judgment motion, which is that "end customers [will] have other ways to purchase the allegedly tied product," under these economic conditions. (Def's Mem. 64.) Professors Areeda and Hovenkamp suggest that what distinguishes the "full-line force," in which a firm encourages a dealer to stock a product line more completely, from the unlawful tying arrangement is that: (1) the "customer must be a reseller who is contractually free and practically able to resell at least some other brand," and (2) there must be "aggressive[]" competition in the tied product market such that it can discipline the tying market. Areeda & Hovenkamp, ¶ 1725. This is in line with the Second Circuit's holding in *Unijax*, which rejected a tying claim with respect to distributors because actual coercion could not be shown. 683 F.2d at 685–86 (explaining that conduct in that case did not "amount to actual coercion")

On the question of whether Plaintiffs are "practically able," to sell other brands, although it is an exceedingly close call, Plaintiffs do just enough to establish that there is a material factual issue ripe for resolution at trial, although they fall short of marshalling enough evidence to support summary judgment in their favor. "There need not be an explicit condition that the buyer of the tying product buy the tied product. 'Separate availability will not preclude antitrust liability where defendant has established its pricing policy in such a way that the only viable economic option is to purchase the tying and tied products in a single package.'" *Nobel Sci. Indus., Inc. v. Beckman Instruments, Inc.*, 670 F. Supp. 1313, 1324 (D. Md. 1986) (quoting *Ways and Means, Inc. v. IVAC Corp.*, 506 F. Supp. 697, 701 (N.D.Cal.1979), *aff'd* 638 F.2d 143 (9th Cir. 1981)), *aff'd*, 831 F.2d 537 (4th Cir. 1987). Whether buying the tying product separately from the tied product is "viable" is not just a question of whether buying the products separately is "possible," but rather whether "it is practical or feasible in the market as it exists and functions." *Dentsply*, 399 F.3d at 193 (defining "viable" as "possible" was counter to the facts and clearly erroneous). "The proper inquiry is not whether direct sales enable a competitor to 'survive' but rather whether direct selling 'poses a real threat' to defendant's monopoly." *Id.* (quoting *Microsoft II*, 253 F.3d at 71).

Plaintiffs have put forward material evidence that the KAD and KARD agreements were the only viable options for distributors and redistributors seeking to reach end consumers. (*See e.g.*, Doc. 2188-44 at 50:4-51:7 (Canteen corporate representative testified that distribution through a KAD or KARD was "most efficient" channel of distribution), *id.* at 212:10-213:6 (testimony that there were no "other viable alternative brewers that were compatible with K-Cups."); Doc. 2188-37 at 151:23-152:12 (testimony from Keurig corporate representative that "the loyalty clause did say that . . . Keurig authorized distributors could only sell and market

Keurig-manufactured pods.").) Although a jury could credit Keurig's account that it was economically viable for the single-serve brewer and K-cups to be sold separately, thus circumventing the exclusivity clause undisputedly present in the KAD and KARD agreements, there is also material factual support for Plaintiffs' argument that "distributors could not buy elsewhere," and "had no choice but to agree in order to obtain access to [] brewers." (Pls' Opp'n 73–74 (cleaned up).)

The second part of Areeda and Hovenkamp's formulation asks whether there is "aggressive[]" interbrand competition in the tied market or whether consumers who purchase the tying product are locked in to using the complementary tied product produced by the dominant firm. Areeda & Hovenkamp, ¶ 1725. Here, Plaintiffs raise a genuine dispute of material fact as to whether competitive conditions prevail in either the single-serve brewer or the compatible cup market. *See supra* § IV.B. Thus, purchasers are not necessarily free to purchase outside of the closed Keurig system in order to circumvent the alleged tie. "The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another." *Eastman Kodak Co.*, 504 U.S. 451, 469 (1992). Here, it cannot be fairly said that competition in the compatible cup market can necessarily discipline the sales of single-serve brewers, because Keurig has purportedly maintained a monopoly in that market as well and competitive conditions allegedly do not prevail there. *See supra* § IV.C.1; *infra* § IV.D.1.

In sum, although it is a close call, Plaintiffs have done enough to show that the only viable option for purchasers is to purchase the tying and tied products together in a single package. The imposition of "conditions that explicitly or practically require buyers to take the second product if they want the first one" demonstrates a tie. *United States v. Google LLC,* 778

F. Supp. 3d 797, 861 (E.D.V.A. 2025) ("*Google I*") (emphasis in original). In *Google I*, which I find instructive in conducting this analysis, the defendant threatened advertisers with being "shut out" of a core tying product in which it had market power, namely its advertising exchange. *Id.* It effectively foisted its publisher ad server on advertisers using its ad exchange, conditioning the use of the latter on purchase of the former and abusing its "coercive power" to force users of that exchange, which undergirded the entire online advertising industry, to funnel publishers through its ad server. *Id.* The practical effect was that "[o]pen-web publishers were therefore stuck using [the tied product], even if they would have preferred to use a different publisher ad server." *Id.* at 862. Although technically, open web publishers "were free to use a publisher ad server other than" the tied product, the monopolist "communicated to [them] that if they used a rival publisher ad server, they would be shut out of [the tying product's] core functionality." *Id.* at 861–62. The court in *Google I* held that a seller's "threat [] to stop selling needed products to its customers if they bought from a new market entrant offering a superior product for less money" was coercive. *Id.* at 861 (quoting *Chase Mfg., Inc. v. Johns Manville Corp.*, 84 F.4th 1157, 1162 (10th Cir. 2023)) (collecting cases). So too here, where Plaintiffs have at least raised a genuine dispute of material fact about whether or not it is economically feasible to purchase single-serve coffee pods and brewers separately. (*See, e.g.*, Doc. 2189-13 (email circulated amongst Keurig executives stating that "Like all KADs and KARDs, our agreement with Vistar prevents them from selling/marketing any unlicensed products intended for use in Keurig brewers. Vistar believes this is penalizing in nature and particularly for someone in the re-distributor role."); Doc. 2189-23 (email circulated amongst Peet's executives stating that Peet's was "completely shut out of the distribution channel" that related to food services and office coffee services).)

Therefore, both parties' motions for summary judgment are DENIED as to Plaintiffs' tying claims.[25]

D. *Section 2 Claims*

1. Exclusive Dealing Claims[26]

Plaintiffs bring several different exclusive dealing claims. In addition to alleging that the Roaster Agreements were anticompetitive exclusive contracts in violation of Section 2, they also argue that various contracts entered into by Keurig during the Relevant Time Period were anticompetitive, including agreements with suppliers, distributors, and retail firms.

Exclusive dealing or "requirements" contracts are "agreement[s] in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012). Although such contracts often "pose no competitive threat at all," *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) (internal quotation marks omitted), when entered into by a monopolist, they may "have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods." *Jefferson Par.*, 466 U.S. at 45 (O'Connor, J., concurring). In order for an exclusive dealing contract to be anticompetitive it must be "probable that performance of the contract will foreclose competition

[25] I agree with Keurig, and Plaintiffs do not appear to dispute, that McLane did not plead tying claims, (Def's Opp'n 37–38), and so McLane may not proceed with tying claims at trial. *See Brandon v. City of New York*, 705 F. Supp. 2d 261, 278 (S.D.N.Y. 2010) ("It is black letter law that a party may not raise new claims for the first time" in opposition to summary judgment.).

[26] Plaintiffs' complaints technically allege exclusive dealing violations under the auspices of both Sections 1 & 2. *See* TH AC ¶¶ 577–84, JBR AC ¶¶ 304–11; McLane AC ¶¶ 291–98. However, "the Supreme Court has long held that such agreements, whether challenged under Section 1 or Section 2," are subject to the same standard of review. *In re Mylan N.V. Sec. Litig.*, 666 F. Supp. 3d 266, 291 (S.D.N.Y. 2023) (analyzing exclusive dealing claims under Section 2 and citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)), *aff'd sub nom. Menorah Mivtachim Ins. Ltd. v. Sheehan*, 2024 WL 1613907 (2d Cir. Apr. 15, 2024) (summary order).

in a substantial share of the line of commerce affected." *Tampa Elec. Co.*, 365 U.S. at 327 (1961). When a "substantial percentage of the available opportunities" to distribute or supply product are foreclosed through exclusive contracts or when "nascent threats" are excluded, courts will find substantial foreclosure. *Microsoft II*, 253 F.3d at 70, 79; *see also ZF Meritor, LLC*, 696 F.3d at 283–84 (finding substantial foreclosure when "[t]here are only four direct purchasers of HD transmissions in North America, and Eaton, long the dominant supplier in the industry, entered into long-term agreements with each of them."). As a percentage of the market, this number is typically around forty percent of the market, although in some circumstances, a lesser amount is required, *see Microsoft II*, 253 F.3d at 70 ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation" (citing Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L.J. 659 (2001))). Although the *Microsoft II* court failed to explicitly elucidate precisely what preconditions would support accepting less than the traditional forty to fifty percent number for substantial foreclosure, other courts have interpreted the *Microsoft II* holding to mean that, where a monopolist "lock[s] up" "one of the two primary distribution channels," that substantial foreclosure can be found. *LePage's*, 324 F.3d at 159 (discussing *Microsoft II*, 253 F.3d at 69–71); *see also Fed. Trade Comm'n v. Qualcomm Inc.,* No. 17-CV-00220, 2017 WL 2774406, at *24 (N.D. Cal. June 26, 2017) (where Plaintiff alleged that exclusive dealing contracts "significantly limited" 'the opportunities for other [competitors] to enter into or remain in [the] market,'" substantial foreclosure was properly pled (quoting *Microsoft II*, 253 F.3d at 69)).

In addition to substantial foreclosure, the contracts in question must actually be "exclusive" such that competition for the contracts does not mute any purportedly anticompetitive effects from the agreements in question. *See ZF Meritor*, 696 F.3d at 270 ("[A] prerequisite to any exclusive dealing claim is an agreement to deal exclusively." (citing *Tampa Elec.*, 365 U.S. at 327–29)). "[A]rrangements which, albeit not expressly exclusive, effectively foreclose[] the business of competitors," may still be exclusive. *LePage's Inc.*, 324 F.3d at 157.

I consider each of the agreements at issue below.

a. Retail Agreements

Keurig is entitled to summary judgment on whether its private label contracts with retailers like Costco, Staples, OfficeMax, and Meijer were exclusive agreements cognizable under the antitrust laws. As an initial matter, these contracts generally lasted less than two years and were terminable by both parties at will. (Def's Mem. 48.) It is axiomatic that "[c]ontracts, *simpliciter*, are not illegal under the Sherman Act." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1181 (9th Cir. 2016); *see also Spinelli v. Nat'l Football League*, 96 F. Supp. 3d 81, 117 (S.D.N.Y. 2015) (where "the challenged agreements are not exclusive," they are not prohibited by the Sherman Act (internal quotation marks omitted)). Plaintiffs argue in response that the contracts, although terminable by either side, were effectively exclusive because they were so difficult to bid for. (Pls' Opp'n 52.) However, exclusion "connotes taking some *direct* action that pushes the rival out of the market, i.e., that bars the rival; to exclude a rival does not usually mean taking some action that merely leads *someone else*—here, a retailer—to make a free economic choice not to purchase the rival." *Fedway Assocs., Inc. v. U.S. Treasury, Bureau of Alcohol, Tobacco & Firearms*, 976 F.2d 1416, 1420 (D.C. Cir. 1992) (emphasis in original) (R.B. Ginsburg, J.). Just because the contracts had the practical effect of

causing TreeHouse and JBR to lose sales does not mean that the contracts in question were "exclusive" within the meaning of the term in the antitrust context.

Furthermore, JBR and TreeHouse had the opportunity to bid for these short-duration contracts but failed to do so, and the Retail Agreements typically did not prohibit retailers from stocking unlicensed brands. Indeed, in some instances, JBR declined to bid for certain business (PCSUMF ¶ 152 ("Undisputed that in certain instances, JBR has declined to bid for portion pack business in instances where the primary concern of the customer was to obtain the lowest price product"), ¶ 153 (acknowledging that JBR "was reluctant to bid for Walmart business" prior to 2016), ¶ 154 ("in certain instances in 2012 and 2013 and 2015, JBR refused to pay slotting fees" to retailers), ¶ 159 ("in certain instances, JBR declined to bid for private label business"); DSUMF ¶ 355 (JBR's co-president stating that JBR did not choose to compete in private label because "private label wasn't good business. It's a price, price, price business, and we are not a price, price, price guy.").) It is black letter law that when there is sufficient competition on the merits for contracts of a short duration, that such agreements are not cognizable under the antitrust laws. *See Spinelli*, 96 F. Supp. 3d at 117 ("It [] is well established that exclusive agreements do not harm competition when there is competition to obtain the exclusive contract."); *Digene Corp. v. Third Wave Techs., Inc.*, 323 F. App'x 902, 911 (Fed. Cir. 2009) ("The existence of competition for the contract [] demonstrates a lack of anticompetitive effect."). In *Spinelli*, the court concluded that contracts "for a term of three years" that were not facially exclusive were not anticompetitive. 96 F. Supp. 3d at 117. In another case from the Central District of California, *Ticketmaster Corporation v. Tickets.Com, Inc.*, the court granted summary judgment for the defendants when plaintiffs "had opportunity to bid for the contracts" and "did so" even though the contracts were on "average six years." No. CV-99-7654, 2003 WL

21397701, at *2 (C.D. Cal. Mar. 7, 2003), *aff'd*, 127 F. App'x 346 (9th Cir. 2005) (summary order). Here, the same principle, that there was significant competition for the retail contracts, precludes liability for Plaintiffs. In fact, the contracts in question here are of even shorter duration than those in *Ticketmaster*, which renders their purported anticompetitive effect even more attenuated. *See id.*

In response to Keurig's motion, Plaintiffs point to one or two contracts that were longer than two years and state the banal principle of law that contracts need not be facially "exclusive," in order be cognizable under the antitrust laws. (Pls' Opp'n 53–54.) Although this is true as a legal matter, *see supra* § IV.D.1, I do not find that the retail agreements that Keurig signed with its distributors were de facto exclusive dealing arrangements. This is because the contracts in question did not differ materially from those utilized as a general matter by other competitors in the industry and did not preclude partners from stocking unlicensed competitors. (*See* DSUMF ¶¶ 203–04 (Trilliant and Westrock manufactured private label packs for Walmart), ¶¶ 216–22 (Costco and other retailers continued to carry unlicensed packs even while carrying private label K-Cups).) That this kind of contract was "a common and generally accepted practice" supports the conclusion that these kinds of private label deals were not exclusive as a matter of law. *See Race Tires Am., Inc.*, 614 F.3d at 79; *see also NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 453 (6th Cir. 2007) ("A would-be supplier does not violate the antitrust laws by *offering* a multi-year agreement in a market in which the retailers already *require* one-year 'de facto' agreements. If the buyers in a market demand one thing, the antitrust laws do not prohibit an entrant from offering that same thing on slightly different terms." (emphasis in original) (internal citations omitted)). That these contracts were common practice is compounded by the fact that they were

almost universally of short duration, terminable at will, and did not typically prohibit retailers from stocking unlicensed brands.

These facts demonstrate that there was adequate competition for the private retail sales such that the contracts alone are not cognizable as exclusive dealing or requirements contracts under the more stringent standards of this strand of antitrust law.[27] *See United States v. Google LLC*, 687 F. Supp. 3d 48, 71 (D.D.C. 2023) ("*Google II*") ("Exclusive dealing contracts are not disfavored by the antitrust laws." (quoting *E. Food Servs., Inc. v. Pontifical Cath. Univ. Servs. Ass'n,* 357 F.3d 1, 8 (1st Cir. 2004))); *Am. Express Travel Related Servs. Co. v. Visa U.S.A.,* No. 04-CV-8967, 2005 WL 1515399, at *2 (S.D.N.Y. June 23, 2005) (similar). Put differently, because the retail agreements are "'easily terminable on short notice,' they tend not to foreclose competition," in addition to the fact that the contracts in question did not preclude retailers from carrying unlicensed packs like those sold by Plaintiffs. *Mazda v. Carfax, Inc.*, No. 13-CV-2680, 2016 WL 7231941, at *7 (S.D.N.Y. Dec. 9, 2016) (quoting *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 81 (2d Cir. 1999)), *aff'd sub nom.*, 726 F. App'x 66 (2d Cir. 2018) (summary order).[28]

[27] Because these agreements are not cognizable as exclusive dealing arrangements under the antitrust laws, I need not broach the separate issue of whether they substantially foreclosed competition and thus whether their "anticompetitive impact" could consequently be aggregated with the other conduct at issue in this suit. *But see infra* §§ IV.D.1.b-d

[28] In their opposition to Keurig's motion for summary judgment on the Retail Agreements, Plaintiffs rely on the novel argument that "every portion pack that Keurig or its co-packing partners sell to a retailer is 'foreclosed' even if there [wa]s no contract with the retailer." (Def's Reply 19.) Because I find that the short-term private label contracts were not actually "exclusive," I need not address the issue of whether the contracts substantially foreclosed competition, taken in combination with the other contracts that are alleged to be exclusive by Plaintiffs. However, I note that an attempt to use the number relating to all of Keurig's sales as the numerator in the substantial foreclosure fraction is obviously incorrect as a matter of economics and law. Such an approach could permit suit based on an exclusive contract for one widget in a market of a hundred widgets just because the seller had significant market share, in general. *See Maxon Hyundai Mazda v. Carfax, Inc.*, No. 13-CV-2680, 2014 WL 4988268, at *14 (S.D.N.Y. Sept. 29, 2014) (explaining that market share figures and foreclosure calculations need not be correlated and are not connected). Such a counterintuitive and economically unsound rule can clearly not be the law. When it comes to substantial foreclosure, Plaintiffs may only include ill-gotten gains, not all product sales.

Keurig's summary judgment motion with regard to the Retail Agreements is thus GRANTED.

b. Supplier Agreements

Plaintiffs concede that Keurig's contracts with its suppliers of materials are subject to the rule of reason, but they contend that they are still entitled to summary judgment on these claims. (Pls' Mem. 34–42.) The Supplier Agreements are not exactly the same kind of conduct as the exclusive dealing contracts alleged to be anticompetitive elsewhere by Plaintiffs: Rather than being akin to requirements contracts, placing obligations on buyers with regard to the sellers, they place obligations on the sellers, i.e., the suppliers, with regard to the buyer, here Keurig. Nonetheless, output contracts are "tested under the same principles generally applied to exclusive dealing." Areeda & Hovenkamp ¶ 1803 (citing *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993) (analyzing a supply contract under the exclusive dealing framework)).

First, the Supplier Agreements were exclusive. The contracts typically ranged for ten to twenty years. *See supra* § I.B. This is more than enough to demonstrate that competition on the merits for these contracts was not sufficient for normal economic conditions to prevail in the market. *See ZF Meritor*, 696 F.3d at 277 ("de facto purchase requirements of roughly 90% for at least five years" considered exclusive); *Duke Energy Carolinas, LLC*, 111 F.4th at 345 (contracts "which spanned 20 years and required several years' notice of termination" were exclusive).

Second, there is at least a genuine dispute of material fact concerning whether the Supplier Agreements foreclosed competition. Here, I acknowledge that when evaluating antitrust claims predicated on multiple categories of anticompetitive conduct, it is essential that plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the

various factual components and wiping the slate clean after scrutiny of each." *Cont'l Ore Co*, 370 U.S. at 699. To be sure, "[s]ubstantial foreclosure is a prerequisite for every exclusive-dealing Section 2 claim." *Reiss v. Audible, Inc.*, No. 24-CV-05923, 2025 WL 1654643, at *9 (S.D.N.Y. June 11, 2025) (quoting *BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.*, 49 F.4th 520, 530 (5th Cir. 2022)). However, when determining substantial market foreclosure "[a]ggregating the harms resulting from each of [Defendant's] categories of exclusionary conduct" is the appropriate way to perform such an analysis. *Id.* at *10; *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1303 (9th Cir. 1982) (explaining that "it was proper for the district court to have aggregated [Defendant's] contracts in the relevant market in order to assess the Sherman Act violations resulting from these contracts."); *Google I*, 778 F. Supp. 3d at 857 ("A holistic assessment of whether a monopolist's conduct harm[ed] the competitive *process* and thereby harm[ed] consumers is thus the touchstone for determining whether a monopolist alleged to have engaged in an exclusionary campaign violated Section 2 of the Sherman Act" (emphasis in original) (internal quotation marks omitted)); Areeda & Hovenkamp, ¶ 310c7 ("In a monopolization case conduct must always be analyzed as a whole. A monopolist bent on preserving its dominant position is likely to engage in repeated and varied exclusionary practices. Each one viewed in isolation might be viewed as de minimis or an error in judgment, but the pattern gives increased plausibility to the claim." (internal quotation marks omitted)).

This is the approach that the D.C. Circuit adopted in *Microsoft II*, concluding that Microsoft's exclusive contracts with Independent Software Vendors ("ISV") "had a substantial effect in further foreclosing rival browsers from the market," even though "the ISVs are a relatively small channel for browser distribution." 253 F.3d at 72. The Ninth Circuit has held

likewise: "[W]e think the district court correctly assessed [Defendant's] aggregate pattern of conduct in the relevant market." *Twin City Sportservice*, 676 F.2d at 1302–03 ("We therefore hold that it was proper for the district court to have aggregated [Defendant's] contracts in the relevant market in order to assess the Sherman Act violations resulting from these contracts.").

The fact that some of Plaintiffs' surviving claims are styled as not only exclusive contracts cognizable under Section 2, but also as tying and conspiracy claims, is not a barrier to aggregating them when it comes to anticompetitive effect. Of course, it is undeniable that "a series of unilateral acts that do not violate the antitrust laws may be aggregated into an unlawful 'course of conduct.'" *Eatoni Ergonomics, Inc. v. Rsch. In Motion Corp.*, 826 F. Supp. 2d 705, 710 (S.D.N.Y. 2011), *aff'd*, 486 F. App'x 186 (2d Cir. 2012) (summary order). However, as discussed previously, *see supra* § IV.C.2.b, all three of the Supplier Agreements, the Distributor Agreements, and the Roaster Agreements are alleged to be anticompetitive exclusive contracts, for which the caselaw supports aggregation. *See Reiss*, 2025 WL 1654643, at *9; *Twin City Sportservice*, 676 F.2d at 1303; *Google I*, 778 F. Supp. 3d at 857. Keurig demonstrates no legal support for the proposition that, because the Roaster Agreements and Distributor Agreements are separately alleged to be an anticompetitive conspiracy and tying arrangement, respectively, this would render them ineligible for aggregation under *Continental Ore*. Therefore, I do not find that this presents an obstacle to the viability of these claims such that it would support granting Keurig summary judgment on substantial foreclosure.

Next, Keurig defends its Supplier Agreements on the basis that they have procompetitive benefits—arguing that they reflect significant investment in exclusive partnerships and that other competitors seeking to use the same resources would be free riding off of their investments. (Def's Opp'n 30-33.) "Free-riding is the diversion of value from a business rival's efforts

without payment." *Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) (Easterbrook, J.). Counteracting free-riding and maintenance of the competitive advantage of a closed system are often provided as economic justifications for exclusive dealing contracts of this nature. *See Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 (3d Cir. 1975) (franchise system justified exclusive dealing contracts). *But see United States v. Microsoft Corp.*, No. CV-98-1232, 1998 WL 614485, at *21 (D.D.C. Sept. 14, 1998) ("*Microsoft III*") (preventing free-riding did not justify exclusive dealing contracts).

Keurig has created a question of material fact regarding whether its Supplier Agreements have a legitimate economic justification, especially considering its claim that such contracts are commonplace in the industry. (Def's Opp'n 33–34.) However, Keurig falls short of carrying its burden to warrant summary judgment on this issue. I am mindful that "[w]hen payment is possible, free-riding is not a problem because the 'ride' is not free." *Chicago Pro. Sports Ltd. P'ship*, 961 F.2d at 675. The finder of fact, when analyzing the anticompetitive harms and procompetitive benefits of the supplier agreements, will be free to parse through the evidence presented at trial and to consider less restrictive alternatives to the arrangements that Keurig made with its suppliers, including, but not limited to, ways in which Keurig could have recouped their investments in research and development without signing lengthy exclusive agreements with suppliers that foreclosed significant sources of inputs for competitive cups.

Therefore, both parties' motions for summary judgment are DENIED as to the Supplier Agreements.

c. Distributor Agreements

Plaintiffs allege that Keurig's contracts with KADs and KARDs could either be characterized as ties or as exclusive contracts. (*See* Pls' Mem. 42–61; Pls' Opp'n 56–58.) Keurig takes umbrage with "Plaintiffs restyl[ing] [these] claims as unlawful tying," (Def's Mem. 61), but appears to acknowledge that the Distributor Agreements can be conceptualized this way, going on to argue that summary judgment is warranted on any tying claims based on the Distributor Agreements because the legal test for tying is not met, (*id.* at 63–66). *See* Areeda & Hovenkamp, ¶ 1800b2 ("[A]n automaker might require that a dealer stock and sell both its cars and its pickup trucks exclusively. For the dealer, this is both tying as to the car/truck requirement and exclusive dealing as to the sole branding requirement."). I found above that Plaintiffs' tying claims predicated on the KAD and KARD agreements survive summary judgment. *See supra* § IV.C.2. However, in order to show that the KAD and KARD agreements are cognizable as exclusionary contracts as well as ties, Plaintiffs must also show substantial foreclosure. *See supra* § IV.D.1.

In their opposition to Keurig's motion for summary judgment, Plaintiffs argue, based on their expert David Sibley's testimony, that they have properly defined separate markets styled as the "Input Product Markets" and "Relevant Product Markets by Distribution Channel." (Pls' Opp'n 48 (quoting Sibley Rep. §§ III.B, V.B(ii)(b)).) I disagree. I cannot permit Plaintiffs to engage in this kind of market partitioning solely for the purposes of establishing substantial foreclosure, and these attempted markets fail as a matter of law. Allowing Plaintiffs to continue to divide and subdivide their market in order to show what they call "substantial foreclosure" would defeat the purpose of the substantial foreclosure test and render it nugatory. *See Live Nation Ent., Inc.*, 2026 WL 456804, at *29 (holding that "plaintiff's gambit to narrow the market

further than the relevant antitrust market," is improper, and concluding that "the right denominator for the foreclosure calculation is 'the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for.'" (quoting *Omega Env't, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997))). Therefore, I do not accept Plaintiffs' argument that they may demonstrate substantial foreclosure through use of such an artificial and strained division of the markets at issue. Plaintiffs fail to "draw the market's boundaries to 'encompass the product at issue as well as all economic substitutes for the product.'" *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th 948, 956 (9th Cir. 2023) (rejecting similarly "scattergun" approach to defining a market) (quoting *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018)). Therefore, Plaintiffs' argument that foreclosure of these improperly manipulated "markets" alone suffices to demonstrate substantial foreclosure fails.

Nonetheless, as detailed above, *supra* § IV.D.1.b, that failure does not necessarily prevent Plaintiffs from bringing claims based on the Distributor Agreements when, as Keurig acknowledges, these sales account for "around 8%" of sales in the compatible cup market, (Def's Mem. 50). This is because, as I have explained above, that eight percent may be aggregated with the measure of foreclosure from the Supplier and Roaster Agreements in order to arrive at an amount that meets the threshold inquiry under governing law. *See supra* §§ IV.C.2, b, IV.D.1.b. Plaintiffs raise at least a genuine dispute of material fact as to whether the allegedly anticompetitive contracts signed by Keurig as between the Roaster, Supplier, and Distribution Agreements, in aggregate, resulted in substantial foreclosure.

Keurig's motion for summary judgment on the Distributor Agreements as exclusive contracts is therefore DENIED.

d. Roaster Agreements

Plaintiffs' claims predicated on the Roaster Agreements survive summary judgment for same reasons outlined above. *See supra* § IV.C.1. As I explained, *supra* § IV.D.1.b-c, any foreclosure from the Roaster Agreements may be aggregated with foreclosure from the Supplier and Distributor Agreements, pursuant to the Supreme Court's ruling in *Continental Ore*, 370 U.S. at 699. Keurig's motion for summary judgment on the Roaster Agreements as exclusive contracts is therefore DENIED.

2. The 2.0 Brewer

Plaintiffs assert Section 2 claims based on the design of the Keurig 2.0 Brewer, which was released in 2014. (Pls' Mem. 61–63.) They allege that Keurig implemented its "CBT" technology in an unduly restrictive manner, and the company's claims that it was using this technology to read recipes and distinguish different kinds of cups from one another were merely pretextual, when, in reality, CBT technology was being used to lock out competitors. (*Id.*) However, Plaintiffs' motion for summary judgment lacks legal support, despite the fact that discovery unearthed internal communications containing inflammatory language regarding the benefits (or lack thereof) to consumers of the "CBT" technology. (*See* Pls' Opp'n 44 ("[T]he new Keurig 2.0 [B]rewer with its lock-out technology was developed solely for the purpose of locking out competition" and 2.0 taggant ink technology "WILL DO NOTHING TO BENEFIT THE CONSUMER." (emphasis in original) (quoting PSUMF ¶¶ 562, 1025)).) The only case Plaintiffs cite to provide a legal framework for how to analyze these claims around the introduction of the 2.0 Brewer is *Impax Labs., Inc. v. Fed. Trade Comm'n*, 994 F.3d 484 (5th Cir. 2021). In this non-binding case, the court analyzed whether the settlement of a patent litigation was exclusionary conduct and analyzed that agreement under the rule of reason. *Id.* at

493 ("[R]everse payment settlements may restrict competition even more than typical market allocation agreements because delaying entry of the first generic does not just eliminate one competitor—it prolongs the 'bottleneck' that delays entry of other generic competitors." (quoting *In re Nexium (Esomeprazole) Antitrust Lit.*, 842 F.3d 34, 41 (1st Cir. 2016))). These allegations cannot be analogized to the facts here and, indeed, are completely different in kind from those relating to the implementation of the CBT technology in the 2.0 Brewer.

Ultimately, the antitrust laws do not permit firms to dictate how other firms design their products, even monopolists. They certainly do not mandate that dominant firms design their products in the "least restrictive" manner with regard to interoperability. This is because, in part, if a monopolist introduces a new product that is inferior to a previous product offered by the monopolist, consumers will not be compelled to purchase the new good, absent a showing of coercion. *See Berkey Photo, Inc.*, 603 F.2d at 287 ("Even a monopolist, however, must generally be responsive to the demands of customers, for if it persistently markets unappealing goods it will invite a loss of sales and an increase of competition." (internal quotation marks omitted)); *In re Google Digital Advert. Antitrust Litig.*, 627 F. Supp. 3d 346, 395 (S.D.N.Y. 2022) (*"Google III"*) (same). Therefore, Keurig is correct to explain that antitrust claims premised on product design require a showing of coercion. *Actavis*, 787 F.3d at 652 ("Well-established case law makes clear that product redesign is anticompetitive when it coerces consumers and impedes competition.").

Courts often deal with similar economic conditions in the pharmaceutical and technology industries. For example, in *Mylan Pharmaceuticals Inc. v. Warner Chilcott Public Ltd.*, the Third Circuit affirmed a District Court's finding that a pharmaceutical's product design after the expiration of the manufacturing defendant company's patent was not anticompetitive, concluding

that "courts should also be wary both of second-guessing Congress's legislative judgment and of turning courts into tribunals over innovation sufficiency." 838 F.3d 421, 440 (3d Cir. 2016). However, the court also did not "rule out the possibility that certain insignificant design or formula changes, combined with other coercive conduct, could present a closer call with respect to establishing liability in future cases," particularly "where there is evidence of extreme coercion." *Id.*

Here, I find that there was no coercion from the implementation of the 2.0 Brewer. This is in accord with my ruling at the preliminary injunction stage of this litigation, in which I denied JBR's request to enjoin the promotion, marketing, and sale of the 2.0 Brewer, noting that "some market analysts have anticipated that consumer response to the 2.0 will be unenthusiastic." *TRO Op.*, 2014 WL 12778832, at *6.

Indeed, the response to the 2.0 Brewer was "unenthusiastic." Although Plaintiffs did enough at the motion to dismiss stage to justify maintaining these claims through discovery, cognizably alleging Keurig's exclusionary intent, *MTD Op.*, 383 F. Supp. 3d at 230–31, and other exclusionary conduct, *id.* at 229–30, discovery has revealed that consumers were not, in fact, coerced into buying the 2.0 Brewer at the expense of the 1.0 Brewer. Ultimately, the 2.0 Brewer did not replace the 1.0 Brewer, and, indeed, 1.0 Brewers continued to constitute approximately fifty percent of all brewer sales through the end of discovery in 2019. (DSUMF ¶¶ 10, 11, 286–90; Sibley Rep. ¶ 1196 ("Keurig never stopped producing 1.0 Brewers, and there is testimony that it was never Keurig's intention to do so").) Rather than embarking on a planned obsolescence scheme that could theoretically be cognizable as anticompetitive because of the presence of coercion, *Actavis*, 787 F.3d. at 654 (explaining that "persuad[ing] patients and their doctors to switch from [an old product] to [a new product] while both were on the market"

is not anticompetitive, but that a "hard switch," i.e., removing the old product from circulation, "crosses the line from persuasion to coercion and is anticompetitive"), here the 1.0 Brewers, packs, and sales were not discontinued. This fact alone is fatal to Plaintiffs' claims based on product redesign.

For example, in *Actavis*, the Second Circuit upheld a claim based on product redesign around the expiration of a patent, finding that although "neither product withdrawal nor product improvement alone is anticompetitive," that, when aggregated with other allegedly anticompetitive conduct perpetrated by the monopolist under *Continental Ore*, the conduct "forced" consumers to "switch" to the new product. 787 F.3d at 653–54 (internal quotation marks omitted). However, the court in *Actavis* explicitly stated that "[h]ad Defendants allowed [the old product] to remain available until generic entry, [consumers] could have decided whether the benefits of switching to [the new product] would outweigh the benefits of [the old product]." *Id.* at 655. In the context of pharmaceuticals being redesigned around the expiration of a patent, this is known as the difference between a "hard switch" and a "soft switch." *Id.* While a "hard switch," the combination of introducing a new product and withdrawing the old product, "crosses the line from persuasion to coercion and is anticompetitive," *id.* at 654, "soft switches do not have the same anticompetitive result because the market can determine whether one product is superior to another . . . 'so long as the free choice of consumers is preserved.'" *In re Asacol Antitrust Litig.*, 233 F. Supp. 3d 247, 269 (D. Mass. 2017) (quoting *Actavis*, 787 F.3d at 654–55). Here, at best and reading Plaintiffs' claims in their strongest possible light, Keurig effectuated (either intentionally or not) a "soft switch," which does not run afoul of the antitrust laws.[29] Absent the withdrawal of the old product, there

[29] To the extent Keurig intended the introduction of the 2.0 Brewer to be a "soft switch," it was not a particularly successful one. The CBT technology did not achieve the objective of establishing a closed ecosystem. (*See* Doc.

is no coercion, no distortion of competitive conditions, and no antitrust violation. *See* Areeda & Hovenkamp ¶ 776 (explaining that "product improvement without more is protected and beyond antitrust challenge" and only creates competitive concerns where "the defendant's position in the dominant product is so substantial that the market for the older technology is eliminated not by consumer choice but by the defendant's withdrawal").

Nor can Plaintiffs avoid this conclusion by claiming that the 2.0 Brewer constituted a "technological tie." Without a doubt, courts like that in *Microsoft II* have held that "technological bundling" of two distinct products can result in an unlawful tying arrangement, albeit one analyzed under the rule of reason rather than per se illegality. 253 F.3d at 84 ("The District Court concluded that Microsoft's contractual and technological bundling . . . resulted in a tying arrangement that was per se unlawful. We hold that the rule of reason, rather than per se analysis, should govern the legality of tying arrangements involving platform software products. (internal citations omitted)). However, like all antitrust tying claims, a technological tying claim requires proof of actual coercion, *Teradata Corp. v. SAP SE*, 124 F.4th 555, 574 (9th Cir. 2024) (analyzing whether Defendant "had enough market power in the core ERP market to coerce large enterprises into purchasing" the tied product under either a technological tying or traditional tying theory), and indeed such claims are held to a more exacting standard than typical tying arrangements, *see also id.* at 573 ("per se approach is inappropriate when (1) a tie 'involv[es]

2283-21 at 3 (JBR co-president stating that: "It's kind of funny that the new (Keurig) machine was hacked within hours of its release. There were YouTube videos up just hours after it landed on store shelves"); Doc. 2279-43 at 16 (admitting that "TreeHouse had developed a Portion Pack that functioned in the Keurig 2.0 Brewer by August 2014"); Doc. 2279-44 (admitting that "in or about November 2014 JBR introduced its Freedom Clip solution for the 2.0 Brewer")). Within months, competitors like TreeHouse, JBR, and others were able to produce and manufacture single-serve portion packs that were compatible with the 2.0 Brewer, rendering moot any attempts by Keurig to create a closed loop system through the introduction of the brewer with only approved portion packs. (Def's Mem. 40–42.) That the market was able to respond to Keurig's conduct relating to the 2.0 Brewer reinforces the conclusion that the introduction of a new product like the 2.0 Brewer, without coercion to buy the new product over and above an old product that remains on the shelves, is not of concern to the antitrust laws.

software that serves as a platform for third-party applications,' (2) the tied good is 'technologically integrated with the tying good,' and (3) the tie presents 'purported procompetitive benefits that could not be achieved by adopting quality standards for third-party suppliers of the tied good.'" (quoting *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 995 (9th Cir. 2023))); *Microsoft II*, 253 F.3d at 84 ("simplistic application of per se tying rules" to technological tying of two products "carries a serious risk of harm"). Here, Plaintiffs provide no such evidence of coercion and cannot rebut the undisputed and material evidence that consumers remained free to and did purchase 1.0 Brewers with which competitive portion packs were compatible and, in any event, competitors went on to "hack" the 2.0 Brewer resulting in interoperability in spite of the CBT technology. (DSUMF ¶¶ 291, 314, 331.) Therefore, Plaintiffs claims also necessarily fail, even if they are relabeled as "technological tying" claims.

Plaintiffs also identify evidence of Keurig's intent in introducing the 2.0 Brewer. However, intent alone, without more, cannot demonstrate an antitrust violation. *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1005 (N.D. Cal. 1979), *aff'd sub nom.*, 698 F.2d 1377 (9th Cir. 1983) (design whose "effect on competition was negligible" was not anticompetitive, and a finding adverse to the defendant "would amount to a punishment for intent alone" which is not cognizable under the antitrust laws). Therefore, evidence of Keurig's intent in introducing the 2.0 Brewer and the salacious language contained in a handful of emails gleaned through discovery cannot save Plaintiffs' claims premised on product design.

The problem with Plaintiffs' argument, based on *Actavis*, that "Keurig has combined the implementation of its Lock-Out Technology with some other conduct," (*see* Pls' Opp'n 42 n.179 (internal quotation marks omitted)), is that *Actavis* actually held that "when a monopolist *combines* product withdrawal with some other conduct," the dominant firm's conduct may be

anticompetitive, *see* 787 F.3d at 653–54 (emphasis in original), and, here, there was no "product withdrawal." It is not that "new product[s] are exempt from "the antitrust laws," as Plaintiffs style Keurig's argument, (Pls' Opp'n at 44), it is that while product redesign may be anticompetitive, a showing of coercion is necessary to make it so, *Actavis*, 787 F.3d at 653–54. Here no such showing is made, and the facts revealed during discovery indicate that consumers were not coerced into buying the 2.0 Brewer. (*See* DSUMF ¶¶ 10, 11, 286–90.) The best that Plaintiffs can do is point to allegedly deceptive advertisements that they claim harmed the competitive process. However, as I explain *infra* § IV.D.3, advertising and marketing is typically not of concern to the antitrust laws either, and the general rule is that the remedy for advertising is "not antitrust litigation but more speech—the marketplace of ideas," *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (Easterbrook, J.).

Plaintiffs' claims based on the introduction of the 2.0 Brewer consequently fail. Keurig's motion for summary judgment on these claims is GRANTED.

3. False Advertising

Keurig is entitled to summary judgment on Plaintiffs' Sherman Act advertising claims since Plaintiffs have failed to rebut the de minimis presumption that accompanies antitrust claims based on allegedly deceptive or misleading advertising and marketing. Antitrust claims premised on false or misleading advertising are rare and infrequently succeed. *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., Div. of/and Am. Home Prods. Corp.*, 850 F.2d 904, 916 (2d Cir. 1988) ("Because the likelihood of a significant impact upon the opportunities of rivals is so small in most observed instances—and because the prevalence of arguably improper utterance is so great—the courts would be wise to regard misrepresentations as presumptively de minimis for § 2 purposes."). In order to successfully make out a Sherman Act claim premised on deception,

a plaintiff must overcome what is known as the "de minimis" presumption that speech is unlikely to impact competition "by cumulative proof that the representations were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals." *Id.* "The presumption is based on the perception that, while there is no redeeming virtue in deception, there is a social cost in litigation over it." *Id.* (internal quotation marks omitted). This means that, as noted, "[i]f [] statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas." *Schachar*, 870 F.2d at 400.

I find a recent decision from the District of Kansas to be directly on point and persuasive to my ruling here. In *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, an antitrust suit regarding allegedly deceptive statements about manufacturers of products competing with Mylan's EpiPen, and the court granted summary judgment on the deception-as-anticompetitive-conduct claims even though it had previously denied a motion to dismiss regarding the same allegations. 507 F. Supp. 3d 1289, 1361 (D. Kan. 2020), *aff'd sub nom. In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. and Antitrust Litig.*, 44 F.4th 959 (10th Cir. 2022). As in *EpiPen*, at the motion to dismiss stage of this litigation, I held that "an allegation that the representation was false and misleading in certain respects was sufficient to go forward with the discovery process to substantiate its claim that the representation was clearly false, clearly material, and clearly likely to induce reasonable reliance." *Compare MTD Op.*, 383 F. Supp. 3d at 240 (internal quotation marks omitted), *with In re EpiPen*, 336 F. Supp. 3d at 1309 ("[T]he court applies *Ayerst's* rationale and concludes that the class plaintiffs should be allowed to go forward with the discovery process to substantiate

[their] claim" that Mylan's allegedly deceptive speech violated the antitrust laws. (internal quotation marks omitted)).

However, at the summary judgment phase, more is needed. In *EpiPen*, the court concluded that plaintiffs had failed to come forward with sufficient evidence that the "allegedly deceptive statements" "continued for prolonged periods," where the plaintiffs had "teams of sales representatives," who "engaged in various marketing efforts," that could combat the alleged deception. *Id.* at 1361. Here, the facts revealed by discovery here are much the same. (*See, e.g.*, Doc. 2283-21 at 3 (JBR's "response" to allegedly false advertising "was that we created a little clip with the colored spot of ink that it's looking for. So you can brew any coffee the consumer wants, not just ours," which enabled it to "hack" the 2.0 Brewer.); Doc. 2278-24 at 32:17-33:22 (Pete Rogers testifying that the Freedom Clip was "successful in generating positive publicity for JBR" and "driving sales growth for JBR"); Doc. 2277-44 at 264:22-265:5 (Jim Schuett from JBR testifying that the company's website crashed "due to interest in the Freedom Clip"); Doc. 2278-36 at 295:4-8 (TreeHouse representative testifying that TreeHouse "shipped a pallet of the new cups, our revised cups, to a customer the week before the machines were introduced"); Doc. 2277-4 at 151:1-12 ("There was a video that showed the use of I believe it was a Sharpie yellow fluorescent marker to defeat the system. There were a lot of videos and a lot of discussion on some of the chat boards about how to hack the K 2.0 to brew any pod.").)

Therefore, Plaintiffs fail to overcome the de minimis presumption, as they cannot demonstrate that specific consumers relied on the statements in question or considered them in making purchasing decisions that would impact competitive conditions in the market. Nor can they show that companies like TreeHouse, JBR, or the other Plaintiffs could not rebut the misleading impressions allegedly fomented by Keurig's advertisements with advertisements of

their own that could disaffirm any such misrepresentations. *See Genus Lifesciences Inc. v. Lannett Co., Inc.*, 378 F. Supp. 3d 823, 842 (N.D. Cal. 2019) (deception style claims failed when "allegations do not show why other efforts [by Plaintiff] to promote its product," would not be able to combat the allegedly misleading statements). Courts have noted that the de minimis "presumption rest[s] partially on the rationale that buyers generally do not trust comments made by competitors." *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 821, 837 (C.D. Cal. 2010).

To be sure, unlike in the Ninth Circuit, the Second Circuit has permitted the use of cumulative proof with regard to the six factors and has not required Plaintiffs to demonstrate a triable factual issue with regard to all six independently in order to rebut the de minimis presumption. *See id.* at 838 ("[U]nlike the Ninth Circuit, which requires a plaintiff to satisfy all of the six *Harcourt Brace* elements, the Second Circuit apparently does not find each element mandatory"); *Emulex Corp. v. Broadcom Corp.*, No. CV-09-01310, 2010 WL 11595718, at *3 n.4 (C.D. Cal. June 7, 2010) ("Some circuits do not require plaintiffs to satisfy every element," including the Second Circuit). Nonetheless, courts in the Second Circuit have continued to conclude that where consumers "conducted their own analyses when deciding which service to purchase," and "the relevant buying public is likely to be [] able to competently evaluate the veracity of the challenged statements," then these statements are unlikely to rebut the de minimis presumption. *Reed Const. Data Inc. v. McGraw-Hill Companies, Inc.*, 49 F. Supp. 3d 385, 422 (S.D.N.Y. 2014), *aff'd*, 638 F. App'x 43 (2d Cir. 2016) (summary order).

Here, unlike in cases involving large and complex purchasing decisions for complicated and esoteric machinery, Keurig correctly points out that "[t]his case is about coffee." (Def's Mem. 81.) The record shows that TreeHouse and JBR could combat Keurig's advertising

campaign with their own efforts and that the advertising in question was not necessarily relied upon by distributors in making purchasing decisions. (Def's Mem. 82–83; *see also* Doc. 2279-10 at 194:9-20 (Aramark corporate deponent testifying that it did its own evaluation of products and did not rely on "perfect cup" advertising); Doc. 2279-20 at 258:16-260:3 (Costco deponent testifying that "a manufacturer saying that something is a perfect cup of coffee" does not cause Costco to make a purchase); Doc. 2279-40 at 227:20-229:13 (Target corporate representative testifying that Target did not take advertisements at face value and Keurig's statements did not impact purchasing decisions).) If a purchaser in the market found K-Cups not to his or her liking, or some of the messaging regarding the cups misleading, they were free to switch to a different producer. (*See* DSUMF ¶ 312–13 (citing Doc. 2277-21 at 29:23-30:11 (Plaintiffs' expert testifying that "retailers all do their own quality assurance using Q graders")).)

Unlike in other cases where there are significant information asymmetries or lock-in costs relating to the allegedly misleading statements, the proper terrain for this dispute about advertising is on the field of competition, not in the courtroom. *Compare Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1116, 1127 (10th Cir. 2014) (statements not capable of neutralization when related to "bone mills that have been recalled" because "[o]nce the bone mill appeared on the FDA's recall list, it became too risky because of the threat of malpractice liability"), *with Chase Mfg., Inc. v. Johns Manville Corp.*, No. 19-CV-00872, 2019 WL 2866700, at *11 (D. Colo. July 3, 2019) ("comments could have been easily neutralized" when plaintiff was capable of empirically proving them incorrect and marketing empirical tests showing the falsity of the comments), *POURfect Prods. v. KitchenAid*, No. CV-09-2660, 2010 WL 1769413, at *5 (D. Ariz. May 3, 2010) (when plaintiff failed to explain why it could not counter allegedly misleading advertising by "communicat[ing] statements about its product

quality" directly to the public through advertising of its own, antitrust claims predicated on false advertising were dismissed), and *Kinderstart.com LLC v. Google, Inc.*, No. 06-2057, 2007 WL 831806, at *8 (N.D. Cal. Mar. 16, 2007) (similar).

Plaintiffs' citation to *Continental Ore* is unavailing, because the de minimis exception is distinct from the inquiry concerning whether there exists a triable issue regarding antitrust injury, which the *Continental Ore* court determined could be aggregated across categories of anticompetitive conduct. 370 U.S. at 697–701. Plaintiffs cite no cases, and I am not aware of any, in which injury caused by other anticompetitive acts unrelated to speech or advertising could be used to rebut the de minimis presumption from *Ayerst* and its progeny. Plaintiffs' *Ayerst* claims, consequently, fail. Keurig's motion is GRANTED as to these allegations.

4. Infringement Litigation

Keurig also moves for summary judgment on Plaintiffs' sham litigation claims, (Def's Mem. 66–73), and Plaintiffs' patent misuse claims, (*id.* at 73–74). In particular, Keurig brought lawsuits against Plaintiffs Sturm and Rogers in 2010 and 2011, respectively. (DSUMF ¶¶ 380–421.) Typically, litigation activities are protected from antitrust scrutiny by *Noerr-Pennington* immunity, which is derived from the First Amendment right to petition the government and two Supreme Court cases that established the exemption—*United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), and *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The doctrine manifests the "principle that the antitrust laws regulate business, not politics," and it is designed to protect fundamental First Amendment freedoms. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 383 (1991). "Litigation, including good faith litigation to protect a valid [intellectual property right], therefore falls within the protection of the *Noerr–Pennington* doctrine." *Primetime 24 Joint Venture v. Nat'l Broad., Co.*,

219 F.3d 92, 100 (2d Cir. 2000). However, the so-called "sham" exception provides that when petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . the application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144.

To make out the "sham" exception to *Noerr-Pennington*, a plaintiff must show that the underlying litigation is "objectively baseless," and "an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon." *Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). The relevant inquiry is not "'retrospective' but 'prospective': 'Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?'" *Primetime 24 Joint Venture*, 219 F.3d at 101 (quoting *USS–POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL–CIO*, 31 F.3d 800, 811 (9th Cir. 1994)). Although "[d]eterminations of whether a party's conduct is a genuine attempt to avail itself of the judicial process or is merely a sham is a question of fact that is inappropriate for a motion to dismiss," *Truck-Lite Co. v. Grote Indus., Inc.*, No. 18-CV-599, 2021 WL 8322467, at *12 (W.D.N.Y. Sept. 17, 2021), the "sham exception should be construed narrowly" and must be proven by the party seeking to invoke the exception, *In re Elysium Health-Chromadex Litig.*, 354 F. Supp. 3d 330, 336 (S.D.N.Y. 2019), *as amended* (Feb. 7, 2019).

Here, Plaintiffs fail to meet their burden of showing that the *Sturm* and *JBR* litigations were mere shams designed to frustrate the competitive process. The litigations in question raised

unsettled issues relating to patent exhaustion, (Def's Mem. 69–70), numerous amici were submitted in favor of Keurig before the Federal Circuit, (*id.* at 70–71), and the parties dealt in their briefing with new precedent from the Federal Circuit, (*id.* at 71–72). Plaintiffs can point to no analogous cases in which a litigation brought under comparable circumstances and that resulted in a similar disposition has been found to meet the "exacting standard" of being "objectively baseless." *But see Blue Cross & Blue Shield of Vermont v. Teva Pharm. Indus., Ltd.*, 712 F. Supp. 3d 499, 525 (D. Vt. 2024).

Plaintiffs argue that because Sturm's cups were not yet publicly available, Keurig had no factual or legal basis to bring its non-patent claims. (Pls' Opp'n 78.) They also aver that because any testing that Keurig did of Sturm's cups was done on its "mini-brewer," which posed its own safety risks, that their claims regarding Sturm's cup's quality and safety were a fraud or sham. (*Id.* at 80.) These arguments would have been appropriately made before a jury or finder of fact in the *Sturm* litigation, with the judge in that case having denied summary judgment on these issues, had the case not settled prior to trial. *Keurig, Inc. v. Sturm Foods, Inc.*, No. CV-10-841, 2012 WL 4049799, at *12 (D. Del. Sept. 13, 2012), *judgment entered*, 2012 WL 12896333 (D. Del. Nov. 2, 2012), *and aff'd*, 732 F.3d 1370 (Fed. Cir. 2013). However, they do not demonstrate that Keurig's conduct fits into the narrow sham litigation exception warranting summary judgment for Plaintiffs.

Although I concur that the parties' agreement to settle the non-patent claims, (*see* Pls' Mem. 81), does not obviate the possibility that the claims, when brought, were objectively baseless, Plaintiffs put forward no evidence, after years of discovery, that these lawsuits were brought for frivolous or anticompetitive reasons. Not even one internal email or communication

suggests that Keurig, at the time that it filed these lawsuits or the subsequent appeals, intended to use these claims to vex, harass, or delay.

Further, the language in the Federal Circuit's opinion affirming the district court in the *Sturm* litigation that Plaintiffs highlight, namely that the Supreme Court has "admonished" "claiming methods as well as the apparatus that practices them and attempting to shield the patented apparatus from exhaustion by holding downstream purchasers of its device liable for infringement of its method claims," *Keurig, Inc. v. Sturm Foods, Inc.*, 732 F.3d 1370, 1374 (Fed. Cir. 2013) (citing *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 630 (2008)), does not mean what Plaintiffs say it does, (*but see* Pls' Opp'n 83). Rather than finding that the Supreme Court has admonished Keurig's "tactic" of bringing a lawsuit like this in the first instance, the Federal Circuit held that granting the requested relief would permit an "end-run around exhaustion" principles, which is a practice that the Supreme Court has admonished. *Id.* Nowhere in the opinions do the Circuit or the District Courts fault Keurig for bringing these suits in the first place, the defendants never sought sanctions, and no court imposed sanctions sua sponte. Indeed, all claims in these suits survived motions to dismiss and some survived summary judgment, suggesting that they were not "objectively baseless." *Krasnyi Oktyabr, Inc. v. Trilini Imports*, 578 F. Supp. 2d 455, 475 (E.D.N.Y. 2008) (litigation was not objectively baseless, "although plaintiff's suit . . . prove[d] unsuccessful[,] [in part because] plaintiff's claims had enough merit to survive defendants' motion to dismiss"); *see also Syngenta Crop Prot., LLC v. Atticus, LLC*, No. 19-CV-509, 2022 WL 842938, at *4 (E.D.N.C. Mar. 21, 2022) (similar); *Arnett Physician Group, P.C. v. Greater LaFayatte Health Servs., Inc.*, 382 F. Supp. 2d 1092, 1097 (N.D. Ind. 2005) (similar).

Magistrate Judge Sarah Cave expressed similar sentiments in her order on Plaintiffs' motion concerning the crime-fraud exception during the course of discovery: "[I]t must be noted that Keurig's lawsuit against TreeHouse (which was premised on the same theory as the lawsuit against JBR) survived a motion to dismiss, involved cross-motions for summary judgment, and an appeal to the Federal Circuit that resulted in a signed opinion by the panel (as opposed to a summary order or per curiam opinion)." (Doc. 1166 at 6–7.) I agree with Judge Cave that Keurig's suit "did not rise to the level of a fraud on the courts," and that, likewise, it cannot fit in to the "sham litigation" exception to the Noerr-Pennington doctrine, (*id.* at 7). Indeed, I have previously affirmed Judge Cave's ruling over Plaintiffs' objections. *See In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. 14-MD-2542, 2021 WL 621222, at *5 (S.D.N.Y. Feb. 16, 2021) ("I cannot find that there is sufficient probable cause to determine that the [Sturm and JBR] litigation[s] had no legal basis or w[ere] put forth substantially to further a crime or fraud.").

This procedural reality, in combination with the lack of even a scintilla of evidence produced by Keurig during discovery that the lawsuits were objectively baseless or designed to harass JBR and Sturm, dooms Plaintiffs' claims regarding Keurig's patent litigation being a "sham." Keurig's motion for summary judgment on these claims is GRANTED.

5. Patent Misuse

Plaintiffs' patent misuse claims essentially repackage their deficient sham litigation claims under a different name. The relevant statute reads that "[n]o patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . sought to enforce his patent rights against infringement or contributory infringement." 35 U.S.C.

§ 271(d)(3). Nonetheless, a patent holder "may not, by virtue of his patent, control the use or disposition of the product after ownership passes to the purchaser. The sale terminates all patent rights to that item." *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 370 (2017) (internal quotations omitted). Patent misuse depends on whether the holder has "impermissibly broadened the 'physical or temporal scope' of the patent grant with anticompetitive effect." *B. Braun Med. v. Abbott Labs.*, 124 F.3d 1419, 1426 (Fed. Cir. 1997) (quoting *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001–02 (Fed. Cir. 1986)). "The bringing of a lawsuit to enforce legal rights does not of itself constitute . . . patent misuse; there must be bad faith and improper purpose in bringing the suit, in implementation of an illegal restraint of trade." *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply, Inc.*, 45 F.3d 1550, 1558 (Fed. Cir. 1995). For the same reasons outlined above, *supra* § IV.D.4, there is no evidence in the record of bad faith and improper purpose in Keurig bringing its patent infringement lawsuits. Therefore, Plaintiffs' patent misuse claims necessarily fail. Keurig's motion for summary judgment is GRANTED as to the patent misuse claims.

6. Acquisitions of Roasters

Plaintiffs also bring allegations relating to three acquisitions made by Keurig between 2008 and 2010. However, Plaintiffs cannot show that any of these acquisitions, made well before much of the other conduct at issue in this suit, (*compare* DSUMF ¶ 36 (acquisitions of Tully's and Timothy's took place in 2009), PCSUMF ¶ 1072 (merger with Diedrich occurred in December 2009), and ¶ 1050 (Keurig acquired Van Houtte in December 2010), *with* PCSUMF ¶ 8 (short-filter patent expired in "late 2012")), actually impacted or reduced competition. Indeed, Plaintiffs acknowledge in their brief that "the vast majority of [the alleged anticompetitive acts] occurred in 2010 and later." (Pls' Opp'n 86.) With the exception of some Supplier Agreements,

the acquisitions appear to be the only alleged conduct out of the many categories at issue in this suit that took place prior to the end of 2010. *See, e.g.*, *supra* § 1.E (introduction of 2.0 Brewer took place in 2014).[30]

"[T]he elimination of rivalry by the joinder of rivals into a larger economic unit is not, per se, an unlawful restraint of trade." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 223 (D.C. Cir. 1986) (citing *United States v. Joint Traffic Association*, 171 U.S. 505 (1898)). Nonetheless, the acquisition of potential rivals may constitute anticompetitive conduct under the Sherman Act if a monopolist acquires companies and "(1) as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether [acquired companies] reasonably constituted nascent threats at the time [acquiring company] engaged in the anticompetitive conduct at issue." *Microsoft II*, 253 F.3d at 79. In order to make out a *prima facie* case of monopolization, Plaintiffs must show not that the acquired company "'would actually have developed into a viable platform substitute,'" but rather raise a genuine dispute of material fact as to "whether [it] has 'showed potential' to do so." *United States v. Google LLC*, 747 F. Supp. 3d 1, 169–70 (D.D.C. 2024) ("*Google IV*") (quoting *Microsoft II*, 253 F.3d at 79) (alterations adopted).

Here, there is sparse evidence in the record that the four roasters in question—Tully's, Timothy's, Diedrich, and Van Houtte, commanded a substantial market share or were likely potential entrants into the market. Indeed, these four commanded only "around 3% of Keurig-compatible pack sales during the relevant period." (Def's Mem. 76.) Indeed, this does not

[30] In contrast to the Supplier Agreements, which, like the other agreements, continued to be signed throughout the time period when Keurig's patent expired, Keurig's acquisition strategy appears to have concluded by the end of 2010.

appear to be a case like that before the courts in *Microsoft II* or in *Meta I*, where a monopolist was accused of acquiring competitors that showed potential as threats. Unlike in *Meta I*, discovery has not produced "objective evidence of the acquired firm's capability or willingness to develop into such a threat" or that these were "fearful acquisition[s] of [] nascent competitor[s]." 775 F. Supp. at 59. All Plaintiffs can muster are conclusory statements that the acquisitions were "strategic" and designed to "control the go-to-market strategy and the manufacturing." (Pls' Opp'n 87.) Although Plaintiffs allege that the four acquired companies represented major market players in 2007, (*see* PCSUMF ¶ 1988), there are no internal documents presented after years of discovery that suggest that Keurig's acquisition strategy in the late 2000s was tied to Defendant's later allegedly anticompetitive conduct or that the strategy constituted a continuous course of conduct designed to monopolize either the compatible cup market or the single-serve brewer market. Furthermore, although Plaintiffs point to a [redacted] relating to Keurig's acquisition of Diedrich, (*see id.* ¶¶ 1066–72), there is no indication that the FTC took any follow-up enforcement actions [redacted] such as a second request under the Hart-Scott Rondino Act, *see* 15 U.S.C. § 18a(d)(1) (FTC may request "such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws"), or that the agency made any attempt to block the merger. This is a far cry from the evidence in *Meta I*, in which top executives worried that the acquired company was "really scary" and that the acquisition was necessary "from a defense perspective." 775 F. Supp. at 61 ("[T]he case for acquiring Instagram focused heavily on neutralizing a competitive threat."). Likewise, in *Microsoft II*, discovery revealed ample "internal documents and

deposition testimony confirm[ing] both the anticompetitive effect and intent of its actions." 253 F.3d at 77. Here, the record evidence that the early acquisitions lessened competition or prevented entry is simply too meager to survive summary judgment.

Summary judgment is thus warranted as to Plaintiffs' claims premised on these acquisitions. Therefore, Keurig's motion is GRANTED.

E. *Damages*

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 689 (2d Cir. 2009) (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946)). Nonetheless, Plaintiffs need to put forward a damages model that would "'support a just and reasonable estimate' of damages" without being "highly speculative." *Gelboim*, 823 F.3d at 779–80 (2d Cir. 2016) (quoting *U.S. Football League,* 842 F.2d at 1378.

1. JBR's Damages

I addressed Keurig's arguments regarding JBR's damages model in my separate opinion granting in part and denying in part Keurig's motion to exclude the amended report of JBR's damages expert, Gareth Macartney. *Amended Macartney Op.*, 2026 WL 2015552. JBR may proceed with its "Amazon approach" to calculate damages on that basis at trial, but not with its "full market benchmark" or its "lost customer approach" predicated on the growth rate based on a composite benchmark that consists primarily of sales from the alleged monopolist, Keurig. *Id.* at *10 ("The pervasive problem with Dr. Macartney's initial report was that he chose a particularly flawed benchmark, in Keurig, because it reflexively conveyed to JBR . . . the

excessive sales that Keurig was alleged to have obtained through that very same conduct. The Amazon benchmark . . . does, in fact, solve this problem" (internal quotation marks omitted)).

2. TreeHouse's Damages

Keurig argues that Dr. Stiroh's damages model assumes that TreeHouse will gain sales as Keurig lowers its prices without lowering its own prices, and so is premised on fundamental misconceptions about the way the market would behave in a but-for more competitive world. (Def's Mem. 95–96.) This mirrors an argument Keurig made in its motion to exclude Dr. Stiroh's expert testimony: "Dr. Stiroh says the market will grow because of Keurig's lower prices, TreeHouse will not lower prices, and TreeHouse will make more sales at higher relative prices." (Doc. 1462 at 12–13.) As I explained in the Daubert Opinion, Keurig's concerns with Dr. Stiroh's damages opinion are fodder for cross-examination at trial, but do not constitute fundamental deficiencies with her damages opinion as a matter of law. *Daubert Op.*, 2025 WL 354671 at *40 (Dr. Stiroh's "methodology is admissible and in line with economic theory and practices. Therefore, I find Keurig's arguments unpersuasive, and go to weight rather than admissibility.") As I stated, "once a reasonable effort has been made to construct th[e but-for] world, there is a limit to how much one is required to credit complaints that an economist's imaginary world is too imaginary. Dr. Stiroh has adequately explained her model and accounted for the factors courts traditionally require to meet the necessary standard of reliability." *Id.*

Keurig argues, as it did in its motion to exclude, that TreeHouse's lost customers damages model fails to account for important factors in TreeHouses's failure to win customers over Keurig. (*Compare* Def's Mem. 98 ("For TreeHouse's 'lost customers' the record shows they were lost based on multiple factors including price, quality, and service—that is competition"), *with* Doc. 1462 at 15 ("Dr. Stiroh's model does not account for [] increased

competition,").) This kind of reflexive reference to competition on the merits and blustering account of how a monopolist's competitors are merely inferior is commonly tendered as a rationalization for purported antitrust violations by defendants and commonly rejected by courts in such cases. *See e.g.*, *Google IV*, 747 F. Supp. 3d at 143–46 (that Google "has long been the best search engine" is "not inconsistent with possessing and exercising monopoly power," and does not "tell the full story"); *Viamedia*, 951 F.3d at 478–79 (when defendant's "source of competitive advantage was produced by the kind of mergers that the agency Merger Guidelines describe as anticompetitive," they are not "in and of themselves evidence of superior skills, services, or accident.").

Although it is undoubtedly true that "an antitrust plaintiff must prove that its injury was, in fact, caused by the defendant's violation of the antitrust laws" and "not shown to be attributable to other causes," *U.S. Football League*, 842 F.2d at 1377–78, "damages issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 123 (1969). Therefore, the law "expressly refuses to impose extraordinary burdens on a plaintiff to construct [a damages model]. Where [damages are] uncertain, 'the plaintiff's burden of proving damages is, to an extent, lightened.'" *In re Elec. Books Antitrust Litig.*, No. 11-MD-2293, 2014 WL 1282293, at *16 (S.D.N.Y. Mar. 28, 2014) (citing *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1077 (2d Cir. 1988)). Keurig's assertion that it is entitled to summary judgment on this ground is supported by little more than "speculatively raising potential offsets," which does not support a grant of summary judgment for "an antitrust defendant" on a damages model that is otherwise sufficiently concrete to survive summary judgment. *See id.* at *17.

Keurig claims that it beat TreeHouse on the merits for Walmart's contract, (Defs. Mem. 98–100), Community Coffee's business, (*id.* at 100–01), and Kroeger's business, (*id.* at 101), arguing that "Walmart secured a significantly lower wholesale price" by moving to Keurig, and that Community Coffee "would not be continuing long term with [TreeHouse] even if 2.0 had not come into play," (*id.* at 99–100.) However, just because a monopolist offers a lower price than a competitor does not mean that its conduct does not merit antitrust scrutiny, *see William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1032 (9th Cir. 1981) ("pricing below marginal cost should be conclusively presumed illegal" in the predatory pricing context), and Plaintiffs allege cognizable anticompetitive conduct attributable to Keurig separate and apart from the launch of the 2.0 Brewer, *see supra* §§ IV.C–D.1. Furthermore, Plaintiffs raise disputed fact issues concerning whether their lost sales are attributable, at least in part, to Defendant's allegedly exclusionary conduct. (*See, e.g.*, PSUMF ¶¶ 1526–28, 30 (Topco told TreeHouse it would not be moving forward because of Keurig's behavior), ¶ 1538 (Office Depot told TreeHouse it was "very interested in how Green Mountain will react" in determining whether it would work with TreeHouse), ¶ 1543 (Target "recommend[ing] NOT [to] pursue Sturm pods in view of the relatively high patent infringement risk" relating to Keurig (emphasis in original)).)

Courts in this Circuit routinely find that "[a]n antitrust plaintiff need 'not necessarily prove that the defendant's misconduct was the sole cause' of the plaintiff's alleged injury, and 'a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury,'" in order to defeat summary judgment and raise a triable issue about whether damages are a result of competition on the merits or anticompetitive behavior. *AngioDynamics, Inc. v. C.R. Bard, Inc.*, 537 F. Supp. 3d 273, 322 (N.D.N.Y. 2021) (quoting *In*

re Actos End-Payor Antitrust Litig., 848 F.3d 89, 97–98 (2d Cir. 2017)); *see also In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 66 (2d Cir. 2012) (similar). Plaintiffs cite deposition testimony from Walmart showing that Walmart chose Keurig for reasons related to the alleged anticompetitive scheme, (Pls' Opp'n 106), internal documents tying Keurig's conduct to lost sales to Community Coffee, (*id.* at 106–07), and other evidence showing that Keurig's anticompetitive behavior factored into Kroger's decision to make the switch, (*id.* at 107). Weighing this competing evidence is a classic question for the jury to decide at trial, not one for me to parse on the summary judgment papers. *See Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 62 (2d Cir. 2020) (summary order) (even when "model fails to consider some arguably significant variables," damages model not "so incomplete as to be inadmissible as irrelevant" (internal quotation marks omitted)); *In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, 201 (S.D.N.Y. 2018) ("It is up to the jury to weigh the evidence" as to whether injury was caused by allegedly anticompetitive conduct or some other factor.).

Furthermore, this contested evidence only relates to three of the twenty-seven alleged customers purportedly lost as a result of Keurig's conduct, and Keurig does not explain why I should extrapolate the conclusion it draws from this proof to the remaining twenty-four beyond proffering a cursory argument that "TreeHouse has failed to produce evidence excluding the reality that lawful factors, including Keurig's quality and pricing, contributed to all of TreeHouse's lost customers," not explicitly analyzed by Keurig in its motion. (*See* Def's Mem. 98 n.129.) However, in order to defeat summary judgment, it is not Plaintiffs' burden to affirmatively rule out the possibility that TreeHouse might have lost customers to competition on the merits, but rather merely to "set forth facts that tend to preclude an inference of permissible conduct." *Cap. Imaging Assocs.*, 996 F.2d at 542. In other words, Plaintiffs must only raise a

genuine dispute of material fact as to whether it might have lost customers due to Keurig's anticompetitive conduct, rather than competition on the merits. *See Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 38 (S.D.N.Y. 2016) ("[C]alculating damages in antitrust cases is not an exact science" and "'[a]n antitrust plaintiff must thus provide only sufficient evidence to support a 'just and reasonable estimate' of damages.'" (quoting *Bigelow*, 327 U.S. 251, 264 (1946))).

Plaintiffs have met this burden, proffering material evidence that other customers were lost as a result of Keurig's conduct. (*See* PSUMF ¶¶ 1526–54, 1557–62.) That TreeHouse lost customers to a competitor as a result of anticompetitive conduct that harmed competition, if credited by the finder of fact, is "'exactly the type of injury that antitrust laws were designed to prevent and flows from the competition-reducing aspect of defendant's conduct.'" *AngioDynamics, Inc.*, 537 F. Supp. 3d at 329 (alterations adopted) (quoting *Valassis Commc'ns, Inc. v. News Corp.*, No. 17-CV-7378, 2019 WL 802093, at *11 (S.D.N.Y. Feb. 21, 2019) (collecting cases)).

Therefore, Keurig's motion for summary judgment on the issue of TreeHouse's damages is DENIED.

3. DPP's Damages

Keurig also claims that the DPPs "put forward no estimate at all of damages to members of the purported class." (Def's Mem. 96–97.) In my Opinion & Order published on November 25, 2025, I found that class certification was not appropriate and that the DPPs' suit did not warrant class treatment. *See In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. 14-MC-2542, 2025 WL 3240044, at *10, 13 (S.D.N.Y. Nov. 20, 2025) ("The prevalence of individual negotiations renders Dr. French's model, which relies on averages, insufficient to

demonstrate class-wide antitrust injury," and "the issues identified in the context of antitrust impact apply to damages as well.").

Absent the class-wide damages model, the DPPs have no basis for demonstrating individual antitrust injury or damages. The DPPs' own expert acknowledged that his opinion "was not designed to estimate anything for an individual customer." (Doc. 2325-1 at 137:15-138:19.) Since I have denied class certification, nothing remains for the DPP Plaintiffs but individual customers. Therefore, these Plaintiffs, at this time, have no means of demonstrating antitrust injury or calculating damages, as their expert testimony designed to prove up these claims was solely designed to make these showings on a class-wide basis. Absent such expert testimony, there is not currently enough lay evidence in the record to survive summary judgment. *See, e.g., Intimate Bookshop v. Barnes & Noble, Inc.*, No. 98-CV- 5564, 2003 WL 22251312, at *4 (S.D.N.Y. Sept. 30, 2003) ("Only expert testimony can demonstrate that any injury to plaintiffs was caused by defendants' unlawful conduct, and not because of lawful competition or other factors."); *Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1042 (N.D. Cal. 2001) (similar); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988) (summary judgment appropriate when plaintiff had "no expert witnesses or designated documents providing competent evidence from which a jury could fairly estimate damages").

However, I am mindful of the pending motion to "amend the current Scheduling Order to allow DPPs to file a revised motion for class certification," (Doc. 2456), and Keurig's opposition, (Doc. 2460). Therefore, I will hold any ruling in abeyance on this issue pending a decision on the motion to amend and permit supplemental briefing on the status of the DPPs' claims following a ruling on that motion to amend, particularly provided that individual purchasers have filed lawsuits that have been consolidated into this litigation over the past

several months, which are pending, *see supra* at 23 n.17. The parties should submit a briefing schedule within two weeks of the issuance of a decision on the motion for leave to amend.

4. McLane's Damages

McLane's damages are the subject of some dispute between the parties. Plaintiffs effectively attempt to get out in front of Defendant's claim that McLane's damages fail as a matter of law in their summary judgment motion, arguing that I should grant summary judgment on the issue of standing in McLane's case to pursue the damages it seeks as a direct purchaser. (Pls' Mem. 104–15.) Keurig argues that McLane's damages theory fails as a matter of law because McLane reflexively applies a market-wide industry average overcharge to the individual market circumstances governing McLane and Walmart's relationship with Keurig. (Def's Mem. 77–79.) Thus, it also argues that McLane cannot accurately calculate its damages through its expert, Dr. Phillip Johnson. (Def's Opp'n 87–90.) Keurig's argument fails for the reasons I outlined in the portion of the Daubert Opinion denying Keurig's motion to exclude Dr. Johnson's testimony. *Daubert Op.*, 2025 WL 354671, at *31–38. The Second Circuit has held that "the person who has purchased directly from those who have fixed prices at an artificially high level in violation of the antitrust laws . . . may recover the entire amount of the illegal overcharge even if some or all of the overcharge may have been passed on to others." *Hendrickson Bros.*, 840 F.2d at 1079 (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 491–94 (1968)); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734–35 (1977)). "Accordingly, the full overcharge amounts paid by McClane are properly included as damages." *Daubert Op.*, 2025 WL 354671, at *37.

Keurig's continuing insistence that McLane reduce the amount of its damages calculations based on "unduly speculative" argument about the purported benefits Keurig's

arrangement with McLane fares no better at the summary judgment stage of the litigation than it did previously: "McClane might have sold fewer K-Cups but for this conduct, but McClane might also have sold more competitor cups in place of those extra cups . . . There is simply too much speculation and conjecture inherent in the development of any such but-for world to require that it be included as an offset in Dr. Johnson's model." *Id.* at *38. Keurig's motion is DENIED as to summary judgment on McLane's damages theory.

At the same time, "[t]he evaluation of the injury suffered by a plaintiff, unless damages have been liquidated or otherwise stipulated, is normally a question of fact to be decided by the factfinder after trial, not a matter for summary judgment." *Patterson v. Coughlin*, 905 F.2d 564, 570 (2d Cir. 1990). Therefore, the exact quantum of damages that McLane can recover at trial is an issue for trial, not for summary judgment. To the extent that Plaintiffs seek summary judgment on McLane's damages, (*see* Pls' Mem. 104–15), their motion is DENIED.

F. *Lanham Act Allegations*

Both parties seek summary judgment on the Lanham Act false advertising claims alleged by Plaintiffs. (Pls' Mem. 80–98; Def's Mem 83–85.) I find that Plaintiffs have raised a jury question as to some, but not all, of the statements they allege to have been false advertising. Therefore, Plaintiffs' motion is DENIED and Defendant's motion is GRANTED IN PART and DENIED IN PART.

The Lanham Act provides that it is a violation of that statute if "in connection with any goods or services . . . [Defendant] uses in commerce any . . . false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15

U.S.C. § 1125(a)(1)(B). "To prevail on a Lanham Act false advertising claim, a plaintiff must establish that the challenged message is (1) either literally or impliedly false, (2) material, (3) placed in interstate commerce, and (4) the cause of actual or likely injury to the plaintiff." *Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GmBH*, 843 F.3d 48, 65 (2d Cir. 2016).

1. False, Misleading, or Puffery

I must analyze these statements in light of the fact that "liability for false advertising extends only to false misrepresentations or statements of fact, and 'statements of opinion are generally not the basis for Lanham Act liability.'" *Chanel, Inc. v. RealReal, Inc.*, 449 F. Supp. 3d 422, 443 (S.D.N.Y. 2020) (quoting *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995)). In this vein, "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion," cannot be the basis of a Lanham Act claim. *Time Warner Cable, Inc. v. DIRECTV, Inc*., 497 F.3d 144, 160 (2d Cir. 2007). Many of the statements at issue here are statements of opinion or banal puffery. *See Int'l Code Council, Inc. v. UpCodes Inc*., 43 F.4th 46, 63 (2d Cir. 2022) ("[A] statement is nonactionable puffery if it makes '[s]ubjective claims about products, which cannot be proven either true or false.'" (quoting *Time Warner Cable*, 497 F.3d at 159)).

For example, statements like "[i]f it doesn't have the Keurig logo, it's not Keurig quality" and that "simplicity" informs the 2.0 Brewer, (*see* S17, S23) are obviously nonactionable statements of opinion. Similarly, the statement that Keurig's products were "game-changing," (*see* S18), is permissible under the Lanham Act. When it comes to such subjective matters of taste and opinion, there can be no Lanham Act liability as a matter of law. *See Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 644 (S.D.N.Y. 2011) (puffery encompasses "generalized or

exaggerated statements which a reasonable consumer would not interpret as a factual claim upon which he could rely."); *Mogull v. Pete & Gerry's Organics, LLC*, No. 21-CV-3521, 588 F. Supp. 3d 448, 453–54 (S.D.N.Y. Feb. 28. 2022) ("A subjective claim about a product that cannot be proven either true or false," is puffery. (alterations adopted and internal citations and quotation marks omitted)). Applying this standard, Keurig is entitled to summary judgment on Statements 5, 9, 14–19, 22–24, and 28 for this reason.

Returning to the two-prong test, a plaintiff may proceed under the theory that a misleading representation is "literally false, i.e., false on its face" or that "while not literally false, is nevertheless likely to mislead or confuse customers." *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 (2d Cir. 2010). "To be literally false, the message must be unambiguous; if the representation 'is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false,' and the advertisement is actionable only upon a showing of actual consumer confusion." *JC Hosp. v. Hochberg*, No. 23-CV-2051, 2025 WL 3124313, at *15 (S.D.N.Y. Nov. 7, 2025) (quoting *DIRECTV*, 497 F.3d at 158). "When a plaintiff demonstrates the literal falsity of an advertisement, consumer deception is presumed," but otherwise it must be demonstrated separately. *C=Holdings B.V. v. Asiarim Corp.*, 992 F. Supp. 2d 223, 242 (S.D.N.Y. 2013).

Therefore, I must evaluate whether any of the remaining challenged statements were "literally false" as a matter of law. Plaintiffs claim that "Keurig's statements regarding the compatibility of Competitive Cups in the 2.0 Brewer; the testing, safety, and effectiveness of Competitive Cups; and the effect of Competitive Cups on the Keurig Brewers all meet the standard for literal falsity." (Pls' Mem. 88.) The statements alleged to have been literally false include that the 2.0 Brewer "works only with Keurig brand packs" (*id.* at 80 [S7]), that it did not

"make or test other brands" even though it tested competitive cups since 2010, (*id.* at 82 [S25]), that using "unapproved portion packs" could "damage your Keurig brewing system" and "decrease the brewer's performance and overall life," (*id.* at 83–84 [S26, S28, S29, S31]), and that competitor cups "do not work safely or effectively," (*id.* at 85 [S27, S30]).

Keurig argues in response that none of these categories of statements are literally false. (Def's Opp'n 63–82.) With regard to the compatibility statements, it argues that these statements were largely made during the run-up to the launch of the 2.0 Brewer, which was, in fact, designed to be incompatible with non-Keurig cups. (*Id.* at 64.) However, the evidence in the record makes clear that, for more than a year after Treehouse sent the Defendant a video of its cups working in a 2.0 Brewer, Keurig continued to disseminate at least some statements about the lack of compatibility. (*Compare* Pls' Mem. 81 ("In May 2014, Keurig received a video of employees of Bed Bath & Beyond successfully brewing a Competitive Cup in a K2.0 prototype." (alterations adopted and internal quotation marks omitted)), *with* DCSUMF ¶ 990 (acknowledging that compatibility statements continued to have been made through at least 2015).) Therefore, Plaintiffs are correct that they may maintain Lanham Act claims based on literally false statements about lack of compatibility that were disseminated after August of 2014. Thus, Statements 6–8 and 10–13 were literally false if made after Keurig had actual knowledge of the compatibility between unlicensed packs and the 2.0 Brewer.

Keurig claims that the testing statements are taken out of context. This point is well taken. I keep in mind that "if the language or graphic is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false." *Pamlab, L.L.C. v. Macoven Pharms.*, L.L.C., 881 F. Supp. 2d 470, 476 (S.D.N.Y. 2012). Here, the statements regarding testing of unlicensed packs could reasonably be interpreted to mean that Keurig does not test to see if the

unlicensed competitors meet Keurig's standards for quality and taste that it applies to its own products. That Keurig tested competitor coffee cups for the purposes of competitive analysis and determining interoperability does not render these statements "literally false." In the face of "indirect and controverted nature of the evidence regarding the intent behind" these advertisements, I cannot extend the presumption of consumer confusion to these statements. *Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 299 (2d Cir. 1992). Therefore, Statement 25 is not literally false, given the context surrounding the statement.

The safety and performance statements, which claimed that non-compatible cups decreased the performance of the 2.0 Brewer and posed threats to user safety, despite not relying on any evidence for either of these propositions, are, in general, literally false, although some are the kind of non-actionable puffing that cannot be the basis of a successful Lanham Act claim. I find that Statements 26–27 and 29–32 are literally false.

Plaintiffs do not appear to argue in their motion for summary judgment that Statements 1–4, regarding Keurig's warranty, and Statements 20–21, regarding Keurig's business plans for phasing out the 1.0 brewer, were literally false when made, but instead only argue that they are materially misleading. (*But see* Pls' Mem. 79–87.)[31]

In sum, Keurig is entitled to summary judgment on Statements 5, 9, 14–19, 22–24, and 28, which are non-actionable puffery. Statements 1–4, 20–21 and 25 are not literally false, and,

[31] To the extent that Plaintiffs allege that the warranty statements at issue were literally false in their opposition to Keurig's motion for summary judgment, (*see* Opp'n 92 ("Not only did Keurig *never deny* warranty service based on use of Competitive Cups, it *never had any capability* to determine if Competitive Cups were a basis for denying service." (emphasis in original))), these allegations fail to raise a genuine dispute of material fact as to whether these statements were literally false as opposed to materially misleading. Plaintiffs do not put forward any evidence that the use of competitive Keurig-compatible single-serve coffee cups did not, in fact, violate Keurig's warranty, only that there were no specific instances of the warranty being enforced against the use of competitive cups. (*But see* PCSUMF ¶¶ 1682–83 (only alleging that there were no specific instances of warranty denial or ability to detect use of competitive cups, not that use of competitive cups did not violate Keurig's warranty).)

therefore, are not entitled to the presumption of consumer confusion, but are theoretically still actionable with a supplemental showing of deception because they could be construed as materially misleading. Finally, Statements 26–27 and 29–32 are literally false and Statements 6–8 and 10–13 are literally false if made after Keurig had actual knowledge of the compatibility between unlicensed packs and the 2.0 Brewer.

2. Literally False Statements

Plaintiffs claim they are entitled to summary judgment on Keurig's literally false advertisements. As I have explained, I agree that Statements 26–27 and 29–32 are literally false and Statements 6–8 and 10–13 were literally false to the extent made after Keurig had actual knowledge of the compatibility between unlicensed packs and the 2.0 Brewer. Nonetheless, "[f]alsity alone does not make a false advertising claim viable . . . 'the plaintiff must also demonstrate that the false or misleading representation involved an inherent or material quality of the product.'" *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 63 (2d Cir. 2016) (quoting *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001)). Further, Plaintiffs must show "that the defendant placed the false or misleading statement in interstate commerce, and that the plaintiff has been injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products." *Int'l Code Council*, 43 F.4th at 56 (quoting *Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247, 255 (2d Cir. 2014)). The injury and materiality requirements are separate from the presumption of consumer deception which adheres to literally false statements. *See Apotex,* 823 F.3d at 67–68 (such an "argument conflates falsity with materiality. Once literal falsity is proved, there is no requirement of extrinsic evidence showing consumer deception. But [defendant] is not thereby relieved of the burden of showing materiality.").

Here, Keurig has raised at least a genuine dispute of fact concerning whether the statements regarding safety and performance were material to purchasing decisions of ordinary consumers. Certainly, Plaintiffs have put forward competent evidence through the surveys of Sarah Butler and Hal Poret that these statements were material to consumers' purchasing decisions, which the finder of fact is at liberty to credit. (Doc. 2198-50 ("Rao Rep.") ¶ 91 ("According to the results of Mr. Poret's survey, in 2014, 26 percent of 2.0 [B]rewer owners did not purchase Competitive Cups at least in part due to a concern that they would not work, or would not brew well or safely" and "63 percent . . . would have considered purchasing Competitive Cups had they known that they would work well and safely"); Doc. 2248-5 ("Butler Survey Rep.") ¶¶ 60–70 (using a questionnaire to determine how statements issued by Keurig impacted consumers).) In addition, Dr. Rao's testimony supports injury and damages in connection with this survey evidence. (Rao Rep. ¶ 109 ("I applied findings from Mr. Poret's survey to assess what portion of these 4,400,163,130 Portion Packs were purchased as a result of Keurig's alleged false statements regarding the compatibility of Competitive Cups."), ¶ 110 ("According to the findings of Mr. Poret's survey, 63 percent of confused customers indicated that they would have considered purchasing non-licensed pods if they had known that they work well and safely in the Keurig 2.0." (internal quotation marks omitted)).)

However, Plaintiffs fail to support their claim for summary judgment with caselaw in which competent expert testimony actually entitled plaintiffs to summary judgment on Lanham Act claims, as opposed to serving to defeat a defendant's motion for summary judgment or warranting judgment for a plaintiff after a bench trial. *But see Ritani, LLC v. Aghjayan*, 880 F. Supp. 2d 425, 456 (S.D.N.Y. 2012) (granting in part and denying in part a motion to dismiss); *Merck Eprova AG v. Gnosis S.p.A.*, 901 F. Supp. 2d 436, 463 (S.D.N.Y. 2012), *aff'd*, 760 F.3d

247 (2d Cir. 2014) (judgment for plaintiff after a bench trial); *C=Holdings B.V.*, 992 F. Supp. 2d at 248 (same).

The law is clear that I "may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." *Allen*, 64 F.3d at 79. Although deception may be presumed, Plaintiffs are incorrect to argue that just because advertising is literally false means that courts can presume injury and causation. *See Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 697 (2d Cir. 1994) (discussing the "general rule in our Circuit against making presumptions of injury and causation favorable to the plaintiff" in the Lanham Act context). Here, I find that a reasonable jury could either conclude that consumers decided to purchase Keurig cups because of these statements or that these statements did not influence those decisions. Further, Keurig is free to argue that these statements were non-actionable puffery or otherwise directed at the wrong audience for a Lanham Act claim, such as in the form of a 10-K statement to investors, not consumers. *See Int'l Code Council*, 43 F.4th at 59 ("determining whether" statements are "puffery requires a factual inquiry into how users interpreted" the statements); *Genus*, 378 F. Supp. 3d at 835 ("[D]efendant's statements to potential investors via email were not actionable under the Lanham Act because they were not made for the purpose of influencing consumers to buy its goods or services").

Proof that these statements were literally false does not absolve plaintiffs of their burden on these points. Plaintiffs' motion for summary judgment on their Lanham Act claims is hereby DENIED.

3. Materially Misleading Statements

I have concluded that Statements 1–4, 20, 21, and 25 are not literally false, but that they could be construed as materially misleading. Therefore, Plaintiffs must "demonstrate that a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement." *Johnson & Johnson*, 960 F.2d at 298. For these statements "consumer survey evidence is required." *S.C. Johnson & Son, Inc. v. Clorox Co.*, 930 F. Supp. 753, 779 (E.D.N.Y. 1996). Plaintiffs' experts tested several categories of statements through expert survey evidence, which they argue demonstrates that the statements were likely to influence purchasing decisions. (*See, e.g.*, Rao Rep. ¶ 91; Butler Survey Rep. ¶¶ 60–70.) Here, Plaintiffs have tendered competent survey evidence regarding the warranty-related statements that permits these claims to survive summary judgment, but the same is not true with regard to other statements in this bucket.

Plaintiffs' expert Sarah Butler used competent survey evidence to test whether Keurig's statements regarding its warranty could deceive consumers. (Butler Survey Rep. ¶¶ 60–70.) "[C]ourts have long held that consumer surveys are the most persuasive evidence of secondary meaning," *Daubert Op.*, 2025 WL 354671, at *21 (quoting *Capri Sun GmbH v. Am. Beverage Corp.*, 595 F. Supp. 3d 83, 123 (S.D.N.Y. 2022)), and "any survey is of necessity an imperfect mirror of actual customer behavior under real life conditions," *id.* (quoting *Gucci Am., Inc. v. Guess?, Inc.*, 831 F. Supp 2d 723, 738 (S.D.N.Y. 2011)). Keurig's claims that it is entitled to summary judgment on the materially misleading statements relating to its warranties largely regurgitate its arguments that failed to warrant the exclusion of the Butler Survey under Rule 702. The Butler Survey is not inadmissible, and constitutes competent evidence of consumer deception that may be placed before the jury as admissible probative evidence that the statements

in question were sufficiently materially misleading to deceive a consumer, even if the exact language tested is not identical to the statements alleged to have been materially misleading. "Survey results are useful and have 'evidentiary value' if the surveys are properly designed and objectively and fairly conducted." *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 345 (S.D.N.Y. 2008). Therefore, Keurig is not entitled to summary judgment on the "warranty" statements, i.e., Statements 1–4.

However, none of the statements tested by Poret and Butler or discussed by Rao relate to Keurig's phasing out of the Keurig 1.0 brewer, or the testing of competitor cups, which are the issues covered by the other statements I have concluded are materially misleading. (*But see* Rao Rep.; Butler Survey Rep; Doc. 2198-51 (Rao Reply Rep.); Doc. 2248-21 (Poret Rep.); Doc. 2248-23 ("Supp. Poret Rep.").) Of those topics regarding which Plaintiffs allege Keurig made actionable statements, Poret only tested whether compatibility, safety, quality, and taste concerns predominated for the purchasers of single-serve compatible cups. (Poret Rep. 14.) Indeed, Dr. Rao, in paraphrasing Poret's survey, notes that Poret considered whether purchasers would have bought competitor cups had they "known that they work well and safely" in Keurig brewers, (Rao Rep. ¶ 110), not had they known whether the 1.0 Brewer would be phased out by Keurig, (*see* S20–21), or whether Keurig tested other compatible cups, (*see* S25). Butler's Report, similarly, deals predominantly with questions of safety, quality, damage and warranty, (Butler Survey Rep. Ex. C 15–17), not whether consumers were confused and/or would have behaved differently had they had different information about testing or product line obsolescence. This means that Plaintiffs fail to put forth the necessary survey evidence to raise a genuine dispute of material fact about consumer confusion with regard to Statements 20, 21, or 25 and summary judgment is warranted for Keurig on these statements.

Keurig's motion for summary judgment on Statements 20, 21, and 25 is GRANTED. With regard to Statements 1–4, Plaintiffs have tested the impact of such kinds of representations on consumers using competent survey evidence; therefore, Keurig's motion for summary judgment is DENIED as to these statements.

G. *State Law Claims*

Finally, Plaintiffs allege a variety of state law claims, including tortious interference with contract and prospective business relations vis a vis Treehouse and JBR, (Def's Mem. 85–90), state law antitrust and false advertising claims predicated on the same conduct as Plaintiffs' federal Sherman Act claims, (*id.* at 90–92), and unjust enrichment claims brought by the DPPs and McLane, (*id.* at 92–93). I address these claims in turn below.

1. Treehouse's Tortious Interference Claims

Keurig argues it is entitled to summary judgment on TreeHouse's claims of tortious interference with its contract with Unilever and prospective business relations, which are brought under New York Law, Illinois Law, and Wisconsin Law. (Def's Mem. 85–87.)

"'Under New York law, the elements of tortious interference with contract are (1) 'the existence of a valid contract between the plaintiff and a third party'; (2) the 'defendant's knowledge of the contract'; (3) the 'defendant's intentional procurement of the third-party's breach of the contract without justification'; (4) 'actual breach of the contract'; and (5) 'damages resulting therefrom.'" *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401–02 (2d Cir. 2006) (quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996)). "Tortious interference with contract under Illinois and Wisconsin law require similar showings." *MTD Op.*, 383 F. Supp. 3d at 252–53.

Keurig argues that it is entitled to summary judgment on TreeHouse's tortious interference with contract claim because there was no "actual breach" of Unilever's contract with TreeHouse. (Def's Mem. 85–86.) Rather than breaching its contract with TreeHouse, Unilever paid TreeHouse $1.25 million to terminate the contract. (*Id.*) TreeHouse merely argues that "[t]here is a material dispute of fact that Keurig induced Unilever's breach of its contract with TreeHouse," but does not explain how Unilever's conduct constituted a breach. (Pls' Opp'n 95.) TreeHouse can point to no provision of the contract with TreeHouse that Unilever actually breached by allegedly "secretly negotiating an exclusive agreement" with Keurig. (*Id.*) Instead, TreeHouse claims in a footnote that Unilever's conduct violated the duty of good faith and fair dealing. (*Id.* at 96 n. 360.)

However, the law is clear that "[t]he covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Xerox Corp.*, 2807 N.Y.S.2d 344, 344 (N.Y. App. Div. 1st Dept 2006). Here, TreeHouse's claims effectively read in an exclusivity requirement to its contract with Unilever when none is apparent from the face of the agreement. TreeHouse places emphasis on whether its voluntary decision to terminate the agreement in exchange for consideration from Unilever can excuse a nonparty like Keurig from liability. (Pls' Opp'n 96.) However, the relevant legal question is not whether the voluntary termination excuses Keurig from liability writ large, but rather whether the voluntary termination renders nugatory any purported breach by Unilever. Without evidence of a breach, there can be no maintaining a tortious interference claim at this stage of the litigation. *See Wellington Shields & Co. LLC v. Breakwater Inv. Mgmt. LLC*, No. 14-CV-7529, 2016 WL 5414979, at *6 (S.D.N.Y. Mar. 18, 2016) (granting summary judgment where "the evidence in

the record does not show that [counter-party] breached th[e] contract, as required by the fourth element of a tortious interference with contract claim").

In any event, there is no dispute that TreeHouse agreed to terminate the contract with Unilever in exchange for $1.25 million. This resolution was specifically contemplated by the agreement itself, which provided for liquidated damages of "$1.25 million in the event that Unilever orders for timely delivery in the first Contract Year less than 35 million cups of the product," (Doc. 2281-10 § 3), and where Unilever had initially agreed to order 50 million cups of product in the contract, (*id.* § 1.b). Thus, to the extent that there was any sort of breach, (and I do not find that there was any), TreeHouse received precisely the remedy that they bargained for —$1.25 million from Unilever. *See Del. Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 650 (Del. 2006) ("Contract law allows parties to establish [] a good faith estimation of actual damages sustained as a result of a contract's termination."); *see also S.H. Deliveries, Inc. TriState Courier & Carriage, Inc.*, No. 96C-02-086, 1997 WL 817883, at *2 (Del. Super. Ct. May 21, 1997) (liquidated damages clauses should be enforced so long as they are "a reasonable estimate of the damages which would be caused").[32] TreeHouse may not now have it both ways by bringing suit for the cancellation of a contract to which it voluntarily consented and that it was already compensated for in the precise manner contemplated by the contract. Keurig's motion for summary judgment on TreeHouse's tortious interference with contract claim is therefore GRANTED.

I next address Keurig's argument that it is entitled to summary judgment on TreeHouse's tortious interference with business relations claims. Under New York law, the elements of tortious interference with business relations are that a plaintiff "[1] had a business relationship

[32] The contract between Unilever and TreeHouse was governed by Delaware Law. (Doc. 2281-10 § 15.a.)

with a third party; [2] the defendant knew of that relationship and intentionally interfered with it; [3] the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and [4] the defendant's interference caused injury to the relationship." *Plaintiff Funding Holding, LLC v. Blue Ocean Partners LLC*, No. 22-CV-4094, 2024 WL 3524497, at *7 (S.D.N.Y. July 24, 2024) (quoting *Kirch*, 449 F.3d at 400). Keurig only argues that it is entitled to summary judgment on TreeHouse's claims for interference with prospective business relations because the claims are "undefined, speculative, and based on competition." (*Id.* at 86–87.) These kind of conclusory references to competition on the merits cannot warrant summary judgment given the evidence put forward by TreeHouse that Keurig's exclusionary conduct interfered with TreeHouse's future business prospects. *See Viamedia*, 951 F.3d at 478–79 (when defendant's "source of competitive advantage" is allegedly anticompetitive conduct, it is not "evidence of superior skills, services, or accident."). Therefore, Keurig's motion for summary judgment on TreeHouse's tortious interference with prospective business relations claims is DENIED.

2. JBR's Tortious Interference Claims

Keurig also argues it is entitled to summary judgment on JBR's tortious interference with contract and prospective economic advantage claims brought under California law. (Def's Mem. 88–90.) Unlike TreeHouse, JBR identifies no specific arrangements or contracts whose breach was caused by Keurig's conduct. It is clear that, under governing California law, "as a threshold issue, a cause of action for intentional interference with contract requires an underlying enforceable contract." *Song v. Telesair, Inc.*, No. 8:25-CV-00370, 2025 WL 3139029, at *5 (C.D. Cal. Oct. 3, 2025) (quoting *PMC, Inc. v. Saban Ent., Inc.*, 45 Cal. App. 4th 579, 601 (Cal. Ct. App. 1996)). JBR's claims for tortious interference with contract fail for this reason alone. In addition, under California law, "a cause of action for tortious interference with a contract has

the following elements: defendant's knowledge of this contract; defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; actual breach or disruption; and resulting damage." *Id.* (citing *Nat'l Specialty Pharmacy, LLC v. Padhye*, 734 F. Supp. 3d 922, 928 (N.D. Cal. 2024)).

JBR's offhanded references to two agreements with prospective business partners may have sufficed at the motion to dismiss stage, but, after years of discovery, they are plainly not enough to survive summary judgment. (*See* Pls' Opp'n 97 n. 367 ("Keurig also incorrectly argues that JBR has no contracts. Because JBR's OneCup sales relationships with Essendant and Staples required JBR to enter a vendor agreement and use those customers' vendor management systems, it also establishes tortious interference with contract").) As Keurig explains in its reply, "[n]either is an enforceable contract for the sale of portion packs." (Def's Reply 38–39.) JBR's vendor agreement with Staples contains no binding purchase requirements like TreeHouse's agreement with Unilever, *see supra* § IV.G.1, that would have mandated that Staples purchase from JBR a specific quantity of product. (*But see* Doc. 2219-45.) Rather, JBR's vendor agreement with Staples governed the terms of future purchase orders. (*Id.* § 2(a) ("Product sold to Staples by [JBR] under this Vendor Agreement may include Stocked Product and Drop-ship Product, as agreed to by the parties from time to time m accordance with the relevant purchase order.").) Plaintiffs cannot illuminate how Staples breached that agreement, much less how Keurig's conduct caused any such breach. The same is true for Essendant. (*But see* PCSUMF ¶¶ 1752–55 (claiming that Essendant cancelled a vendor agreement without alleging that the agreement was finalized, much less any breach of same contract by Essendant caused by Keurig's conduct).)

Put differently, JBR has not "alleged any facts identifying the particular contracts, the actual disruption of these contracts, or any actual damage," much less knowledge of these specific contracts and an intent to disrupt them, which is fatal to its tortious interference with contractual relations claim. *See Image Online Design, Inc. v. Internet Corp. for Assigned Names & Numbers*, No. CV 12-08968, 2013 WL 489899, at *9 (C.D. Cal. Feb. 7, 2013); *see also Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1134 (9th Cir. 2015) (affirming dismissal of tortious interference with contract claim under California law when plaintiff "d[id] not allege any specific resultant disruption to contractual or economic relationships"). Therefore, Keurig's summary judgment motion related to JBR's tortious interference with contract is GRANTED.

In order to make out a claim for tortious interference with prospective business relations, however, a plaintiff need only "prove a business relationship with a specific third party containing 'the probability of future economic benefit to the plaintiff.'" *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 980 (N.D. Cal. 2013) (quoting *Youst v. Longo,* 43 Cal. 3d 64, 71 (Cal. 1987)). JBR has done enough to raise a disputed fact issue concerning whether Keurig's purportedly anticompetitive conduct caused it to lose business relationships with partners and caused it injury as a result of that tort. Therefore, Keurig's motion for summary judgment is DENIED as to JBR's tortious interference with business relations claim.

3. State Law Antitrust and False Advertising Claims

The state law claims brought by TreeHouse and JBR rise and fall on the same standards as the federal antitrust claims. *See MTD Op.*, 383 F. Supp. 3d at 251 (explaining the parallel between Illinois, Wisconsin and New York antitrust and false advertising laws and Sherman Act claims); *id.* at 249–50 (explaining the parallel between California Cartwright Act and unfair competition law claims with Lanham Act and Sherman Act claims). Therefore, the state law antitrust and false advertising claims may proceed to trial to the same extent that Plaintiffs' Sherman Act and Lanham Act claims may continue.

Keurig's summary judgment motion is GRANTED as to all Illinois, New York, California, and Wisconsin unfair competition claims and antitrust claims predicated on the Retail Agreements, introduction of the 2.0 Brewer, false advertising as an antitrust violation, infringement litigation, patent misuse, and acquisitions of roasters.

Keurig's summary judgment motion is DENIED as to all Illinois, New York, Wisconsin, and California antitrust and unfair competition claims predicated on the Supplier Agreements, Roaster Agreements, and Distributor Agreements.

Keurig's summary judgment motion is also GRANTED as to any Illinois, New York, Wisconsin, and California false advertising claims based on Statements 5, 9, 14–25, and 28, but DENIED as to Statements 1–4, 6–8, 10–13,[33] 26–27, and 29–32.

[33] Statements 6–8 and 10–13 are only actionable to the extent made after Keurig had actual knowledge of the compatibility between unlicensed packs and the 2.0 Brewer.

4. Unjust Enrichment Claims

Keurig also argues that McLane's unjust enrichment claims fail for the separate reason that unjust enrichment claims are not cognizable under Texas law, (Def's Mem. 92), and all unjust enrichment claims fail because they are "parasitic" of other claims, (*id.* at 92–93). Plaintiffs argue in opposition that the unjust enrichment laws should be adjudicated based on New York, Massachusetts, and Vermont law. (Pls' Opp'n 98–99.) "New York's most significant relationship, or center of gravity test, governs the choice-of-law analysis for breach of the implied covenant and unjust enrichment claims." *Seibel v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 655 F. Supp. 3d 212, 217 (S.D.N.Y. 2023) (internal quotation marks omitted); *see also In re Hydrogen, L.L.C.*, 431 B.R. 337, 359 (Bankr. S.D.N.Y. 2010) ("New York choice-of-law principles dictate that an interest analysis be applied to a claim sounding in equity, such as a claim for unjust enrichment.").

Under the center of gravity test I am "required to apply the law of the state with the 'most significant relationship to the transaction and the parties.'" *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 822 N.Y.S.2d 30, 33 (N.Y. App. Div. 1st Dept. 2006) (quoting *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.,* 84 N.Y.2d 309, 317 (N.Y. 1994)), *aff'd*, 876 N.E.2d 500 (N.Y. 2007). Here, the harm suffered by McLane took place in Texas, which militates in favor of the application of Texas law. Additionally, even accepting Plaintiffs' argument that I should "apply the law of the state where the tort occurred" because the conduct in question here relates to a "conduct-regulating standard," courts in this district have found that conduct relating to the sale and purchase of goods "occurs" for choice of law purposes where the good is "purchased" not where it is "sold." *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 149 (S.D.N.Y. 2008) ("[T]hough portions of the defendants' allegedly

deceptive marketing may have been conceived at the defendants' principal places of business in New York, the actual deception occurred at the time that each plaintiff purchased [the product]."); *see also Goshen v. Mut. Life. Ins. Co.*, 98 N.Y.2d 314, 325–26 (N.Y.2002) (deception took place in state where plaintiffs purchased insurance policies, not where alleged fraudulent scheme was designed). Therefore, McLane's claims are governed by Texas law.

Because Texas does not recognize unjust enrichment as an independent cause of action, McLane's unjust enrichment claims cannot proceed. *See Yowell v. Granite Operating Co.*, 630 S.W.3d 566, 578 (Tex. App. 2021) ("Unjust enrichment is not an independent cause of action"); *see also V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010) (I am "bound to apply the law as interpreted by a state's intermediate appellate courts unless there is persuasive evidence that the state's highest court would reach a different conclusion."). Keurig's motion to dismiss McLane's unjust enrichment claims is GRANTED.

As stated previously, *see supra* § IV.E.4, the DPPs lack a nonspeculative damages model. Therefore, the DPPs are not capable of raising unjust enrichment claims at this time. However, I will hold any ruling on their claims in abeyance pending further briefing on the state of these claims following a ruling on the parties' motion for leave to amend.

H. *McLane's Claims*

Keurig also seeks to dismiss McLane's claims in their entirety, categorizing McLane's allegations as mere "business grievances" and not antitrust claims. (Def's Mem. 77–79.) In effect, Keurig argues that McLane suffered no antitrust injury because it was merely cut out of its role as distributor or middleman in the transaction between K-Cup producers and Walmart. (*Id.*) Keurig is free to make this argument before the jury, but these kinds of disputes go to weight, not whether McLane has a claim as a matter of law.

McLane was undisputedly a direct purchaser of K-Cups, (*see* Reply 45 ("Keurig admits McLane has standing as a direct purchaser")), and brings antitrust claims based on overcharges resulting from Keurig's allegedly anticompetitive conduct as well as reduced output in unlicensed single-serve compatible cups resulting from Keurig's purportedly exclusionary behavior. (Pls' Opp'n 87–89.) Not only are overcharge damages by a direct purchaser at the very heartland of antitrust injury, *see Apple Inc. v. Pepper*, 587 U.S. 273, 277 (2019) ("A claim that a monopolistic retailer [] has used its monopoly to overcharge consumers is a classic antitrust claim"), but the Second Circuit recently affirmed that "[l]ost profits resulting from a reduction in output represent a cognizable antitrust injury," *Nexstar Media Grp., Inc.*, 162 F.4th at 302. These kinds of lost profits are exactly what McLane alleges that it suffered in its complaint. (*See* Doc. 47, McLane AC ¶ 21 ("As a direct and proximate result of Defendant's multi-dimensional anticompetitive scheme, McLane has been deprived of a meaningful choice to purchase high-quality, less-expensive and environmentally friendly Competitor Cups and forced to pay supracompetitive prices for K-Cups.").) Allegations of injury because "Defendant [] reduced output and increased prices," are "precisely the kinds of harms to competition that the antitrust laws were intended to prevent." *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 457 (9th Cir. 2021).

Consequently, Keurig's argument on this point fails and Keurig's motion for summary judgment on all of McLane's claims for lack of antitrust injury is DENIED.

I. *Unclean Hands and In Pari Delicto*

Plaintiffs assert they are entitled to summary judgment on the affirmative defenses of unclean hands and *in pari delicto*, because "a plaintiff's own anticompetitive conduct generally cannot be raised as a defense to liability in an antitrust action." *See U.S. Football League*, 842 F.2d at 1369. The Second Circuit has declined to broach the question of whether there exists an absolute bar on the use of *in pari delicto* as a defense, and "several of our sister circuits have recognized an *in pari delicto* defense in civil antitrust litigation." *Gatt*, 711 F.3d at 80–81. However, I need not determine whether or not *in pari delicto* is ever available in antitrust cases, as it is clear that it is not an appropriate defense in this matter.

On this point, Keurig argues only "that Plaintiffs used exclusive contracts with their own suppliers and partners, just as they accuse Keurig of doing." (Def's Opp'n 86.) That this kind of contractual arrangement was standard in the industry is of course relevant to the question of whether the exclusive contracts are anticompetitive or not. *See supra* § IV.D.1. However, unlike in the cases cited by Keurig, there are no allegations that Plaintiffs were involved in the same "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States," as Keurig, *but see* 15 U.S.C. § 1, but only parallel conduct that entailed a similar kind of contract. Nor are there any allegations that Plaintiffs held market power themselves, an essential predicate to any Sherman Act claim. *See Berkey Photo, Inc.*, 603 F.2d at 272 ("existence of monopoly power . . . is the primary requisite to a finding of monopolization."). Therefore, there are no credible allegations that the Plaintiffs were "active, voluntary participant[s] in the unlawful activity that is the subject of the suit." *Ross v. Bolton*, 904 F.2d 819, 825 (2d Cir. 1990) (quoting *Pinter v. Dahl*, 486 U.S. 622, 636 (1988)). Plaintiffs are therefore entitled to summary judgment on the *in pari delicto* defense with respect to their

exclusive dealing claims. Plaintiffs' motion to strike Keurig's *in pari delicto* defense is GRANTED. Keurig cannot raise *in pari delicto* as a defense as it does not identify any evidence it obtained during discovery that any of the Plaintiffs monopolized or attempted to monopolize any market, (*but see* Def's Opp'n 85–87).

With regard to Plaintiffs' false advertising claims, the unclean hands defense is only available when the opposing party has "committed some unconscionable act that is directly related to the subject matter in litigation and has injured the party attempting to invoke the doctrine." *PenneCom, B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493 (2d Cir. 2004) (internal quotation marks omitted). "Misconduct . . . unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands." *A.H. Emery Co. v. Marcan Prods. Corp.*, 389 F.2d 11, 18 (2d Cir. 1968) (quoting *Republic Molding Corp. v. B. W. Photo Utilities*, 319 F.2d 347, 349 (9th Cir. 1963)). Here, Keurig puts forward allegations that JBR and Treehouse engaged in false advertising, with separate lawsuits having been brought against both TreeHouse, (Def's Opp'n 83–84), and JBR, (*id.* at 84), based on advertisements about the quality of their single-serve portion packs. These advertisements, which concern the precise subject matter that Plaintiffs allege Keurig deceived consumers about, *see supra* § IV.F, constitute conduct "relat[ing] directly to the transaction concerning which the complaint is made, i.e., [they] . . . pertain to the very subject matter involved and affect the equitable relations between the litigants," *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1096 (C.D. Cal. 2016). Therefore, Plaintiffs' motion to strike Keurig's unclean hands defense as to their false advertising claims is DENIED.

J. *Non-Party Declarations*

In its response to Plaintiffs' motion for summary judgment, Keurig also effectively moves to strike nine non-party declarations used by Plaintiffs in their motion for summary judgment. (Def's Opp'n 90 ("[N]ine days before discovery ended and continuing well after, Plaintiffs dropped more than a dozen non-party declarations on Keurig, one after another, with no prior notice.").) These declarants include: Timothy Canale of AVA Coffee & Distribution; Andy Eyrise of Master Wholesale & Vending Supply, Inc.; Paul Naylor of Kohl's Corporation; Larry Atnip of Atnip Co., Inc.; Ken Cain of AVB Sales & Marketing, LLC; Guido Gallicchio of Thayer Distribution, Inc.; Charles Hall of Alpine Valley Water Company; Thomas Tomaselli of Price Chopper Supermarkets; and Mark Nichols of B.C. Coffee & Supplies, Inc. (*Id.* at 91.) I note from the onset that I did not consider these declarations for the purposes of my ruling on these cross-motions for summary judgment.

Parties must provide the names and known addresses for "each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). A party must further supplement its disclosures and other discovery responses "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A).

Here, Plaintiffs only listed the employers of the non-party declarants and not the non-party witnesses themselves. This is insufficient under Rule 26(a)(1): "The parties must provide the specific names of the individuals they might use as witnesses. Rule 26 "requires parties to disclose *the name* of each individual likely to have discoverable information. . . . It is not

sufficient to identify witnesses through the use of a collective description, such as 'employees or representatives of the defendant." *Chinn v. Elmwood Franklin Sch.*, No. 15-CV-00938, 2018 WL 6738326, at *2 (W.D.N.Y. Nov. 1, 2018) (emphasis in original) (quoting *Smith v. Pfizer Inc.*, 265 F.R.D. 278, 283 (M.D. Tenn. 2010) and 6 Moore's Federal Practice, §26.22[4][a][i] (Matthew Bender 3d ed. 2018)), *report and recommendation adopted*, 2018 WL 6266193 (W.D.N.Y. Nov. 29, 2018); *see also Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006) (finding that, in the context of damages disclosures, which are also governed by the same rule, that, "Rule 26(a) requires more than providing—without any explanation—undifferentiated [] statements").

"If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "[D]espite the seeming 'self-executing' nature of the preclusion sanction contained in the Rule, imposition of the preclusion sanction remains within the trial court's discretion." *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 280 F.R.D. 147, 156 (S.D.N.Y. 2012) (internal citations omitted).

However, Keurig raises this motion for sanctions under Rule 37 under the auspices of its opposition to Plaintiffs' summary judgment motion. This is not the appropriate vehicle for such a motion. Local Rule 37.2 provides that: "Unless the individual practices of the judge presiding over discovery require a different procedure, no motion under Fed. R. Civ. P. 26 through 37 inclusive and Fed. R. Civ. P. 45 will be heard unless counsel for the moving party has first requested an informal conference with the court by letter-motion for a premotion discovery conference and that request has either been denied or the discovery dispute has not been resolved

as a consequence of the conference." Failure to request such a conference warrants denial of Defendant's request. *Williams v. Rosenblatt Sec. Inc.*, No. 14-CV-4390, 2016 WL 590232, at *3 (S.D.N.Y. Feb. 11, 2016) ("The plaintiff's failure to request [] a conference requires that his Rule 37 motion be denied."). Because Keurig failed to request a pre-motion conference and comply with Local Rule 37.2, Defendant's motion to preclude the non-party declarations is denied. *See Meadowbrook-Richman, Inc. v. Associated Fin. Corp.,* 253 F. Supp. 2d 666, 680 (S.D.N.Y. 2003) (request for sanctions brought under the aegis of a summary judgment brief was denied because it was "appropriately either a discovery dispute or a motion for sanctions"). However, this denial is without prejudice to Keurig bringing a separate motion seeking sanctions under Rule 37 for failure to disclose the names of the declarants that complies with Local Rule 37.2. Plaintiffs may oppose that motion.

K. *Declaratory and Injunctive Relief*

Because I deny Plaintiffs' motion for summary judgment on liability and find that Keurig raises a dispute of material fact concerning whether Plaintiffs are entitled to judgment as a matter of law, I consequently do not award any declaratory relief in favor of Plaintiffs at this juncture. *See Performing Arts Ctr. v. Actor's Equity Ass'n*, No. 20-cv-2531, 2022 WL 16755284, at *16 (E.D.N.Y. Aug. 25, 2022) ("[A] request for a declaratory judgment is not a cause of action; it is a request for a remedy that does not exist independent of a plausible underlying claim for relief."). As for injunctive relief, Plaintiffs briefly claim that they are entitled to an injunction under Section 16 of the Clayton Act. However, "where the challenged conduct has been in place long enough for potential effects to manifest themselves and there is no evidence of injury, the difference between Clayton Act Section 4's requirement of actual injury and Section 16's requirement of threatened injury disappears." *AngioDynamics, Inc.*, 537 F. Supp. 3d 273, 344

(N.D.N.Y. 2021). Here, Plaintiffs have put forward "no argument that future conditions will change in such a way as to make the injuries they claim to have suffered more pronounced than currently alleged." *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202, 215 (2d Cir. 2015). In any event, as I deny Plaintiffs' motion for summary judgment on liability in its entirety, injunctive relief would not be appropriate. *See Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006) ("To obtain a permanent injunction, a plaintiff must succeed on the merits and 'show the absence of an adequate remedy at law and irreparable harm if the relief is not granted.'" (quoting *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989)).

V. Conclusion

Plaintiffs' motion for summary judgment is DENIED in all respects except as to the affirmative defense of *in pari delicto*. Keurig's motion for summary judgment is GRANTED as to Plaintiffs' Sherman Act exclusive dealing claims based on the Retail Agreements, Plaintiffs' tortious interference with contract claims, Plaintiffs' *Ayerst*-style claims, claims based on the introduction of the 2.0 Brewer, sham litigation, patent misuse, and roaster acquisitions, and analogous state law claims. Keurig's motion is also GRANTED as to the Lanham Act claims predicated on Statements 5, 9, 14–25, and 28, which are non-actionable, and analogous state law claims.

Keurig's motion for summary judgment is DENIED in all other respects. Plaintiffs may proceed to trial with their exclusive dealing and conspiracy claims based on the Roaster Agreements, exclusive dealing and tying claims based on the Distributor Agreements, exclusive dealing claims based on Supplier Agreements, Lanham Act claims based on Statements 1–4, 6–

8, 10–13,[34] 26–27, and 29–32, analogous state law claims, and tortious interference with prospective business relations claims.

The parties are instructed to submit a briefing schedule regarding the status of the DPPs' claims following the issuance of a decision on the motion for leave to amend.

Due to potential references to sealed filings and information, this Opinion & Order is being issued temporarily under seal. By October 19, 2026, the parties are directed to submit any proposed redactions to this Opinion & Order.

SO ORDERED.

Dated: September 18, 2026
New York, New York

Vernon S. Broderick
United States District Judge

[34] Statements 6–8 and 10–13 are only actionable to the extent made after Keurig had actual knowledge of the compatibility between unlicensed packs and the 2.0 Brewer. Plaintiffs may proceed with claims regarding the portion of Statement 3 that relates to performance and life of the 2.0 Brewer.