

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

<b>SD3, LLC and SawStop, LLC,</b>	)	
	)	
<b>Plaintiffs</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 1:14-cv-191-CMH-IDD</b>
	)	
<b>Black &amp; Decker (U.S.) Inc., <i>et. al</i>,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT  
MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) ON BEHALF OF  
BLACK & DECKER (U.S.) INC., THE BLACK & DECKER CORPORATION,  
HITACHI KOKI USA, LTD., MAKITA U.S.A., INC., MILWAUKEE ELECTRIC  
TOOL CORP., ONE WORLD TECHNOLOGIES INC., OWT INDUSTRIES, INC.,  
ROBERT BOSCH TOOL CORPORATION, RYOBI TECHNOLOGIES, INC.,  
STANLEY BLACK & DECKER, INC., AND TECHTRONIC INDUSTRIES  
NORTH AMERICA, INC. (COLLECTIVELY “DEFENDANTS”)**

May 13, 2014

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Defendants respectfully state as follows in support of their Rule 12(b)(6) Joint Motion to Dismiss.

### **INTRODUCTION**

After selling tens of thousands of their own table saws equipped with their flesh sensing SawStop technology, SD3, LLC and SawStop, LLC (collectively “Plaintiffs”) bring this self-styled antitrust complaint to attack conduct that occurred more than a decade ago, well after the expiration of the Clayton Act four year statutory period. Specifically, Plaintiffs allege: (1) beginning in 2001, suppliers named in the Complaint (“Defendants”) agreed that none of them would license SawStop technology because if *any* saw supplier had equipped its saws with SawStop, then *all* firms would need to license the SawStop technology to avoid “catastrophic” product liability exposure; (2) beginning in 2003, certain Defendants refused to support *requiring* use of SawStop’s proprietary technology to obtain Underwriters Laboratory (“UL”) certification; and (3) beginning in 2004, certain Defendants conspired to implement an alternative “blade guard” standard that Plaintiffs then chose to incorporate into their own table saws.

While the Amended Complaint (“Am. Compl.”) includes a host of fatal defects, it should be dismissed under Rule 12(b)(6) for three principal reasons.

- Plaintiffs allege that three of the Defendants—Emerson, Ryobi and Black & Decker—continued to negotiate for licenses with Plaintiffs *for months after these same firms allegedly agreed not to negotiate* with Plaintiffs, and a fourth, Bosch, ceased negotiating *before the alleged conspiracy began*. The Plaintiffs do not allege any licensing negotiations occurred with any other Defendant.
- Plaintiffs fail to allege how consumers or competition were injured by the alleged conspiracy. Plaintiffs have sold thousands of table saws equipped with the SawStop technology over the last decade, meaning consumers were not deprived of their product. Indeed, turning the antitrust laws on their heads, Plaintiffs complain that their “harm” flowed from lower prices and more consumer choice.



- Plaintiffs were well aware of the facts alleged in the Complaint for more than a decade and yet did not bring suit within the statutory period.

Stripped of all rhetoric, this case is nothing more than an effort by Plaintiffs to force their current rivals to license Plaintiffs' technology on Plaintiffs' terms and to prevent them from competing with less expensive alternatives to Plaintiffs' proprietary technology. Plaintiffs' action essentially seeks to impose, by judicial fiat, mandatory standards that are currently the subject of an ongoing rulemaking proceeding at a Federal Agency, the U.S. Consumer Product Safety Commission ("CPSC").

### **BACKGROUND**

In 1998, the CPSC asked table saw manufacturers to consider new safety standards for table saws. (Am. Compl. ¶ 56.) This led to a meeting between the CPSC and Defendants, through the Power Tool Institute ("PTI") trade association, where PTI underscored the importance of convincing operators to use saw guards. (Am. Compl. ¶ 58.)<sup>1</sup>

In 2000, Plaintiffs' principal, Dr. Gass, approached Defendants to see if they wanted to license his Active Injury Mitigation Technology ("AIMT"). (Am. Compl. ¶ 66.) This technology, which he called SawStop, purported to substantially reduce the risk of table saw accidents. Plaintiffs allege that in October 2001, Defendants agreed to boycott SawStop to avoid product liability exposure. Specifically, Plaintiffs allege Defendants were concerned that if *any* Defendant adopted Plaintiffs' technology, thus proving its commercial viability, then *all* non-adopting Defendants would face product liability lawsuits for ignoring a viable safety technology. (Am. Compl. ¶¶ 78–81, 90.)

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<sup>1</sup> PTI is composed of various tool manufacturers, including certain of the Defendants. PTI seeks "to encourage high standards of safety in the manufacture of power tools." (Am. Compl. ¶ 31.)

Three of the four “conspirators” discussed in the Complaint—Black & Decker, Emerson and Ryobi—engaged in licensing negotiations with Dr. Gass for *months after the conspiracy allegedly started*. (Am. Compl. ¶¶ 87–89.) For example, Ryobi signed a “non-exclusive” license agreement and sent it to Plaintiffs in January 2002, but it was Dr. Gass who refused to sign because of what he describes were “minor” issues. (Am. Compl. ¶ 87.) Conspicuously absent from the Complaint is any allegation that Ryobi ever rescinded the offer. At least two other suppliers, Black & Decker and Emerson, exchanged or negotiated licensing proposals with Dr. Gass well after the concerted refusal to deal allegedly began in October 2001. (Am. Compl. ¶¶ 87–89.) And the fourth, Bosch, stopped its negotiations with Plaintiffs a month before the conspiracy purportedly even began. (Am. Compl. ¶ 75.)

In December 2002, Plaintiffs lobbied UL to change its table saw safety standard to mandate use of AIMIT technology. (Am. Compl. ¶ 104.) Despite the theoretical prospect of alternative AIMIT technologies to SawStop (Am. Compl. ¶ 61), Plaintiffs allege that “SawStop Technology,” not other AIMIT technologies, “would have been fully implemented on *all* table saws by no later than 2008.” (Am. Compl. ¶ 90) (emphasis added.)<sup>2</sup> In response to Plaintiffs’ attempt to *mandate* that the industry pay royalties to them, some industry members sought to develop alternatives not subject to Plaintiffs’ patents. (Am. Compl. ¶ 109.) In late 2003, these discussions led to the publication by the federal antitrust agencies of the “Notice Pursuant to the National Cooperative Research and Production Act of 1993 Power Tool Institute Joint Venture Project.” 68 Fed. Reg. 67216 (Dec. 1, 2003) (Exhibit 1). The 2003 joint venture’s purpose was:

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<sup>2</sup> Some but not all suppliers participate in UL’s standards development process. UL “provides safety-related certification, validation, testing, inspection, auditing, advising, and training services to a wide range of clients, including manufacturers, retailers, policymakers, regulators, service companies, and consumers.” (Am. Compl. ¶ 33.) UL Standards Technical Panel 745 (“STP 745”) oversees the content of UL Safety Standard 987, which sets safety standards for table saws. (Am. Compl. ¶ 35.) UL Safety standard 987 is voluntary. (Am. Compl. ¶ 35.)

the research and development of technology for power saw blade contact injury avoidance, including skin sensing systems, blade braking systems, and/or blade guarding systems. . . . The participants intend to share intellectual property that is contributed, and any intellectual property or technology that is developed through the joint venture, among themselves and the Power Tool Institute.<sup>3</sup>

The Plaintiffs then allege that, beginning in 2003, Defendants, acting under the auspices of PTI and with full knowledge of Plaintiffs, opposed Plaintiffs' proposal that the federal government, through the CPSC, *mandate* that all table saws use the SawStop Technology; advocating instead for a variety of "incremental safety improvements." (Am. Compl. ¶¶ 84, 103, 126.)

In 2005, UL substantially amended Standard 987 to include improved safety features designed to reduce table saw accidents. (Am. Compl. ¶ 113.) With full knowledge of Plaintiffs, UL again amended the standard in 2007 to add other safety elements. (Am. Compl. ¶ 115.) While Plaintiffs assert that manufacturers' safety-related joint ventures were designed to prevent competition with Plaintiffs (Am. Compl. ¶¶ 103, 109, 111), the CPSC Staff Briefing Package cited by Plaintiffs (Am. Compl. ¶¶ 113, 115) characterizes the "new modular blade guard system" as a "significant improvement."<sup>4</sup> Plaintiffs concede that Defendants improved table saw safety over the years. (Am. Compl. ¶¶ 103, 126.)

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<sup>3</sup> On a motion to dismiss, this Court is permitted to consider documents that are cited in the Amended Complaint to determine whether they are accurately reflected as well as documents subject to judicial notice under Federal Rule of Evidence 201. For example, in *Twombly*, the Supreme Court held that the district court properly considered the full contents of newspaper articles referenced in the complaint, in addition to the truncated quotations. *Bell Atlantic v. Twombly*, 550 U.S. 544, n.13 (2007) (citing Fed. R. Evid. 201); *see also Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (citations omitted) (court may consider a document attached to a motion to dismiss without converting to a motion for summary judgment if "it was integral to and explicitly relied on in the complaint, and [if] the plaintiffs do not challenge its authenticity"). The NCRPA Notice is subject to judicial notice.

<sup>4</sup> Caroleene Paul, Briefing Package, Recommended Advance Notice of Proposed Rulemaking for Performance Requirements to Address Table Saw Blade Contact Injuries, CPSC, at 19 (Sept. 14, 2011), available at <http://www.cpsc.gov/PageFiles/90189/tablesaw.pdf>. ("CPSC Staff Briefing

The Plaintiffs do not allege that the UL amendments or other conduct by Defendants prevented Plaintiffs from installing SawStop on their own products and promoting that feature as a competitive advantage. (Am. Compl. ¶¶ 41, 101.) Consistent with Plaintiffs' assertion that they sell table saws equipped with SawStop (Am. Compl. ¶¶ 41, 102), CPSC staff reported in 2011 that "the SawStop technology is already available to consumers who are willing to purchase it. While the retail prices for the SawStop technology tend to be relatively high, roughly 28,000 contactor and cabinet saws with the SawStop technology have been sold in recent years."<sup>5</sup>

In addition, although the CPSC has called for public comments on a mandatory AIMT standard, CPSC staff noted a number of commercial issues with the existing technology and product, including:

- "The increased costs could be substantial enough to reduce table saw sales significantly, especially for the least expensive bench saws, which could more than double in price."<sup>6</sup>
- "There are also additional costs to consumers when the SawStop brake is activated, because the brake damages the blade in engaging the teeth of the blade. According to SawStop, a replacement brake cartridge currently costs \$69 and the average price of a replacement blade is approximately \$30."<sup>7</sup>
- "The industry environment is complicated further, due to SawStop's ownership of potentially key patents. . . . Royalty fees may be a barrier to the development and adoption of alternatives to SawStop, and this could limit manufacturer options for meeting any mandatory performance-based standard related to blade contact."<sup>8</sup>

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Package"). Plaintiffs cite the Briefing Package on multiple occasions and its authenticity is not subject to challenge. More importantly, the CPSC Staff Briefing Package meets the judicial notice requirements of Federal Rules of Evidence 201, particularly for this limited purpose.

<sup>5</sup> CPSC Staff Briefing Package, "Performance Standards for a System to Reduce or Prevent Injuries from Contact With the Blade of a Table Saw: Economic Issues," Tab C, at 9 (Sept. 9, 2011).

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.* at 9.

- “The saw was received with a brake cartridge preinstalled. If the system activates, this brake cartridge will need to be replaced. . . . CPSC staff found this task [of resetting the brake system] to be extremely difficult and time-consuming . . . .”<sup>9</sup>

In short, ten years after the commencement of the alleged conspiracy, and six years after Plaintiffs began selling saws with the SawStop technology, CPSC staff reported that Plaintiffs’ AIMT technology still presented issues relating to commercial acceptability.

### **LEGAL STANDARD ON MOTION TO DISMISS**

To survive a motion to dismiss, the complaint’s “factual allegations must produce an inference of liability strong enough to nudge the plaintiff’s claims ‘across the line from conceivable to plausible.’” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009)). This requires “more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs must set forth “factual allegations” that are “plausible” and “raise a right to relief above the speculative level.” *Id.*

The court begins by “identifying the allegations in the complaint that are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 680. Allegations that are not entitled to the assumption of truth include formulaic recitations of the elements of the claim, *id.* at 678, “‘the legal conclusions drawn from the facts’ nor ‘unwarranted inferences, unreasonable conclusions, or arguments,’” *Glassman v. Arlington County*, 628 F.3d 140, 146 (4th Cir. 2010) (citations omitted), and allegations that conflict with documents properly considered on a motion to dismiss. *Twombly*, 550 U.S. at 568 n.13.

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<sup>9</sup> CPSC Staff Briefing Package, “Human Factors Evaluation of Technology Intended to Address Blade-Contact Injuries with Table Saws,” Tab E, at 15 (July 2011).

## ARGUMENT

### **I. THE AMENDED COMPLAINT FAILS TO ALLEGE SUFFICIENT FACTS UNDER *TWOMBLY* TO ESTABLISH AN AGREEMENT TO RESTRAIN TRADE**

All of the federal law claims in the Amended Complaint allege that Defendants violated Section 1 of the Sherman Act, which prohibits concerted conduct to unreasonably restrain trade. 15 U.S.C. § 1; *Twombly*, 550 U.S. at 553. The mere fact that a group of defendants, like the members of the PTI, have communications, contacts, and the theoretical capacity to conspire, “does not mean, however, that every action taken” by the group “satisfies the contract, combination, or conspiracy requirement of section one.” *Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696, 706 (4th Cir. 1991). Likewise, allegations that defendants ultimately came to the same conclusion on a particular issue do not suggest conspiratorial behavior. *Twombly*, 550 U.S. at 557 (“Parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a §1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory”). Claims based on refusal to deal must sufficiently allege a *concerted* refusal, because “[a] manufacturer . . . generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). A unilateral refusal to deal is not a group boycott. *See, e.g., Fran Welch Real Estate Sales, Inc. v. Seabrook Island Co., Inc.*, 809 F.2d 1030, 1033 (4th Cir. 1987).

#### **A. The Continued Licensing Negotiation by Individual Defendants Contradicts the Existence of the Alleged Conspiracy**

The most glaring defect in the Amended Complaint is that none of the four Defendants specifically attacked by Plaintiffs acted consistent with the alleged October 2001 “group boycott.” For example, Emerson and Ryobi each negotiated until at least January 2002 (Am. Compl. ¶¶ 87–89); and Black & Decker negotiated until June 2002. (Am. Compl. ¶ 89.)

Moreover, a fourth Defendant—Bosch—is alleged to have ceased negotiations “at that time” in September 2001, the month *before* the alleged conspiracy began (Am. Compl. ¶ 75) and, therefore, not as a result of any conspiracy. Plaintiffs then admit that licensing discussions renewed with Bosch “many years later,” *id.*, which is hardly consistent with the conspiracy theory.

This internal contradiction alone is enough to warrant dismissal of the Amended Complaint. *See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 396 (7th Cir. 1993) (“Plaintiffs have failed to show a Section 1 violation . . . . Indeed, the conspiracy claim is belied by the fact that four of the eight defendants—Amoco, Arco, Chevron and Mobil—sold alcohol-blended gasoline during the time of the alleged conspiracy to restrain trade in gasohol.”).

The Ryobi negotiations demonstrate how Plaintiffs have pleaded themselves out of court. According to the Plaintiffs, Ryobi “seemingly reached” an “agreement on terms of the licensing agreement” with Plaintiffs in October 2001, the same period that the alleged conspiracy formed. (Am. Compl. ¶ 87.) Rather than abandoning this tentative agreement pursuant to a conspiracy, Ryobi did the exact opposite. The Amended Complaint admits that Ryobi “*signed the agreement and sent it to Plaintiffs for signature*” on January 18, 2002. (Am. Compl. ¶ 87) (emphasis added.) The Amended Complaint continues: “This agreement called for a 3% royalty that would rise to 5% or 8% depending on the success of the technology in the marketplace, and was also non-exclusive so that SD3 could license the technology to other companies.” (Am. Compl. ¶ 87.) This occurred more than three months *after* the alleged conspiracy was formed, and the success of the alleged boycott depended on *Plaintiffs’* refusal to execute the license. Such conduct clearly shows independent, not conspiratorial, behavior. *See Cascades Computer*

*Innovation LLC v. RPX Corp.*, 12-CV-01143 YGR, 2013 WL 316023, \*7 (N.D. Cal. Jan. 24, 2013) (where “[t]he alleged conspiracy was not to negotiate a license . . . , even a spurious and bad faith offer, is not conduct consistent with participation in the conspiracy as pled.”).

The allegation that Black & Decker made an offer to Plaintiffs is similarly inconsistent with the existence of a conspiracy. *Id.* “In discussions between . . . April and June 2002,” six to eight months after the formation of the alleged conspiracy, Black & Decker proposed a licensing agreement containing a 1% royalty and requiring indemnification by Plaintiffs of Black & Decker, a term that Plaintiffs allege is disingenuous. (Am. Compl. ¶ 89.) Given the product liability concerns that Plaintiffs allege consumed the Defendants, it hardly seems disingenuous for Black & Decker to seek indemnification for a new technology that promised “a person accidentally contacting a spinning blade in a saw equipped with the SawStop Technology typically would receive only a small nick.” (Am. Compl. ¶ 60.) *It is perhaps for this reason that Plaintiffs fail to allege that Black & Decker was part of the conspiracy.* (Am. Compl. ¶ 83.)

During 2000 and 2001, Plaintiffs also negotiated with Emerson, which sent a draft licensing agreement to Plaintiffs sometime around September 2001. (Am. Compl. ¶ 77.) One would have expected a conspirator to quickly withdraw such an offer if a concerted refusal to deal dependent on uniform conduct was formed in October, but the Complaint makes no allegation that Emerson rescinded the offer. Instead, the Amended Complaint acknowledges that licensing negotiations continued into January 2002. (Am. Compl. ¶ 89.)

In evaluating the sufficiency of the Amended Complaint, the Court must consider all of a plaintiff’s allegations, even those contradicting the plaintiff’s own conspiracy theory. *See, e.g., Aero Techs., LLC v. Lockton Cos. Int’l, Ltd.*, No. 09-20610-CIV, 2011 WL 7657475, at \*6 (S.D. Fla. Apr. 25, 2011) (dismissing complaint when “Plaintiff’s claims . . . are directly contradicted



by Plaintiff's own allegations and the exhibits to Plaintiff's Complaint"), *aff'd*, 467 F. App'x 824 (11th Cir. 2012). Under circumstances similar to those here, a recent Eastern District of Virginia decision granted a Rule 12(b)(6) motion where the plaintiff "pleaded itself out of court" by alleging "conceivable" but implausible timing of the conspiracy. *Alliance Tech. Grp. v. Achieve I*, 3:12-CV-701-HEH, 2013 WL 143500, at \*3, \*9 (E.D. Va. Jan. 11, 2013) (fatal "temporal deficiency").

As to the remaining Defendants, including Hitachi Koki USA, Makita, Milwaukee Electric Tool, OWT, and TINA, there are no allegations of licensing negotiations at all, much less specific allegations as to each Defendant's refusal to license.<sup>10</sup> Plaintiffs' failure to allege anything more than a conclusory assertion that "Defendants" participated in a conspiracy is insufficient to satisfy Rule 12(b)(6). *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905–06 (6th Cir. 2009). This alone is another reason to dismiss the Amended Complaint as to Hitachi Koki USA, Makita, Milwaukee Electric Tool, OWT and TINA. In sum, Plaintiffs have alleged a conspiracy composed of no members.

**B. The Amended Complaint Alleges Facts that Are Facially Inconsistent with the Motive Behind the Alleged Conspiracy**

To plead a plausible conspiracy, a plaintiff must allege some economic reason that required defendants to put aside their individual interests and agree to collectively pursue a joint

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<sup>10</sup> Plaintiffs' half-hearted attempt to plead factual allegations that Hitachi Koki USA agreed to participate in a conspiracy fails. The closest Plaintiffs come to a factual allegation—as opposed to conclusory statements—about Hitachi Koki USA is when Plaintiffs admit that "collective action would proceed only if all, or at least a substantial majority, of participants [at the October 2001 meeting] voted to participate [in a conspiracy]." (Am. Compl. ¶ 80.) Plaintiffs at best allege that it is possible that a "substantial majority" of Defendants reached an agreement, but Plaintiffs make no allegations that suggest Hitachi Koki USA was any part of that majority. Because Plaintiffs' allegations do not cross the line from merely possible to plausible, they should be dismissed. *See Twombly*, 550 U.S. at 555–56.

objective. To this end, Plaintiffs allege that if SawStop became commercially available, then consumers “would point to the viability of [SawStop] as evidence that other products were inherently unsafe because they lacked [SawStop]” thus exposing Defendants to “catastrophic product liability.” (Am. Compl. ¶ 81.) But Plaintiffs have sold more than 28,000 saws with the SawStop technology over the last decade<sup>11</sup> and, according to Plaintiffs, AIMT has been proven viable. (Am. Compl. ¶¶ 102, 126.) Yet, as conceded in the Complaint, Defendants did not rush to adopt the technology to avoid the predicted massive product liability exposure.<sup>12</sup> Defendants’ purported motivation for the alleged conspiracy has already been proven non-existent.

What’s more, Plaintiffs’ own allegations show why it would have been in the unilateral interest of each defendant *not* to reach agreement with Plaintiffs. For example, Plaintiffs concede that the technology was unproven as of 2001, was not ready for commercialization until at least 2004, was not technologically viable until 2007, and that full implementation might not have occurred until 2008. (Am. Compl. ¶¶ 73, 90, 126.) Not to mention the fact that even the CPSC staff reported that, as late as 2011, Plaintiffs’ technology could cause bench saws to “more than double in price,”<sup>13</sup> cause substantial damage to the blade,<sup>14</sup> and require “difficult and time-consuming”<sup>15</sup> manual reconfiguration by the operator. With untested technology and unknown demand, the industry had “the natural, unilateral reaction,” *Twombly*, 550 U.S. at 546, to move cautiously with respect to engaging with Plaintiffs. *See id.* at 554 (conduct is not unlawful if “in

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<sup>11</sup> CPSC Briefing Package, “Performance Standards for a System to Reduce or Prevent Injuries from Contact With the Blade of a Table Saw: Economic Issues,” Tab C, at 9 (Sept. 9, 2011).

<sup>12</sup> Indeed, Plaintiffs could have licensed Ryobi at an 8% royalty, which according to Plaintiffs, would have started the dominoes falling for the other manufacturers to license, but did not.

<sup>13</sup> CPSC Briefing Package, “Performance Standards for a System to Reduce or Prevent Injuries from Contact With the Blade of a Table Saw: Economic Issues,” Tab C, at 8 (Sept. 9, 2011).

<sup>14</sup> *Id.* at 7.

<sup>15</sup> CPSC Staff Briefing Package, “Human Factors Evaluation of Technology Intended to Address Blade-Contact Injuries with Table Saws,” Tab E, at 15 (July 2011).

line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”). The court need not weigh the various alternatives to determine that the one proffered by Plaintiffs is implausible. *See Nemet*, 591 F.3d at 256 (to survive motion to dismiss, allegations must be in accord with “common sense”).

**C. The Amended Complaint Alleges No Specific Facts Providing Direct Evidence of a Concerted Refusal to Deal by Defendants**

Lacking even circumstantial evidence of agreement, Plaintiffs paraphrase testimony from David Peot, one Ryobi engineer, and follow with a conclusory accusation of an industry-wide conspiracy.<sup>16</sup> (Am. Compl. ¶ 80.) Direct evidence is “explicit and requires no inferences to establish the proposition or conclusion being asserted.” *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226 (4th Cir. 2004) (citation omitted). Thus, a written agreement or unambiguous testimony that the Defendants collectively reached an agreement not to license Plaintiffs’ technology would be direct evidence of such an agreement. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010). The Plaintiffs have no such evidence. Mr. Peot was answering questions relating to an October 2001 email describing the PTI’s interest in developing competitive safety devices and technologies at a time when the feasibility of the then-existing SawStop prototype was undetermined. This effort eventually culminated in the formation of the PTI R&D joint venture in December 2003. Far from revealing a secret concerted refusal to deal, the full quotation reveals only that Mr. Peot agreed as follows:

- One reason the industry decided to cooperate in a joint venture was “concern[] that if one manufacturer adopted SawStop and the other manufacturers didn’t that they would be subject to potential liability for not adopting something that was shown to be feasible because one manufacturer put it out on the market . . . [a]nd that’s why . . . they got together and decided that they would work collectively so

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<sup>16</sup> The trial transcript is publicly available, cited in the Amended Complaint, and properly considered by the Court on a motion to dismiss. *Twombly*, *supra*. The relevant pages are attached as Exhibit 2, and the most pertinent parts are quoted herein.

that they would all put it on the market if and when they wanted to and decided that it was in their interests to do so.”

- “The [PTI R&D] joint venture was created to find an alternative technology so that the industry did not have to use Mr. Gass’ technology . . . [or] pay him a royalty fee.”<sup>17</sup>

On its face, the testimony upon which Plaintiffs rely is not evidence, direct or otherwise, that suggests a concerted refusal to deal. Instead, the testimony describes a collaboration to determine whether any alternatives were available. The absence of a concerted refusal to deal is further demonstrated just a few pages later on in the same transcript, where Mr. Peot testified:

Q. And one of the ground rules was that we would not use technology developed by Dr. Gass, we’d try to find a way to do it without using his technology, correct?

A. No, it was not.

Q. So were you considering his technology –

A. We were chartered to use whatever technology we felt would be best to prevent table saw accidents. There were no limitations that I can remember one way or the other.

(Exhibit 2, Tr. 146). From the onset of discussions relating to the SawStop technology, the industry was free to, and industry participants did in fact, consider adopting that nascent technology, as well as other alternatives.

Even if a common fear of product liability actions motivated manufacturers to form a joint venture to improve saw safety in 2003 (which was two years after the conspiracy allegedly began), a “conclusory assertion that Defendants shared a common motive is, at best, merely consistent with a conspiracy” and is insufficient to withstand a motion to dismiss. *In re Online Travel Co. Hotel Booking Antitrust Litig.*, 3:12-CV-3515-B, 2014 WL 626555, at \*9 (N.D. Tex.

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<sup>17</sup> Peot Trial Testimony, Day 4, *Osario v. One World Techs. Inc.*, Case No. 06-CV-10725, at 111:14-112:9, 125:2-126:8 (D. Mass. Feb. 25, 2010)) (“Tr.”) (Exhibit 2).

Feb. 18, 2014) (citing *Twombly*). Here, there is even less—the Peot testimony shows only a desire of individual suppliers to explore alternatives before adopting wholly new technology that had yet to be proven feasible.<sup>18</sup>

Significantly, Defendants’ desire to find royalty-free alternatives to the SawStop Technology (Am. Compl. ¶¶ 80, 81, 127) does not provide a plausible basis for inferring a concerted refusal to deal. In fact, the antitrust laws permit joint activity to seek an alternative to a patented technology. *See In re Rambus Inc.*, No. 9302, 2006-2 Trade Cas. (CCH) ¶ 75,364 (FTC July 31, 2006) (consumers may benefit where, in lieu of adopting the royalty-bearing technology, the SSO “could have turned to unpatented alternative technologies in each of the relevant product markets”), *rev’d on other grounds, Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *see also* U.S. DOJ & FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 42 (2007) (“Some SSOs require the incorporated IP to be licensed on royalty-free terms.”).<sup>19</sup>

Seen in this context, bare allegations in the Amended Complaint that at the PTI meeting in October 2001 “members discussed developing something like SawStop, without having to pay a royalty fee to Dr. Gass” (Am. Compl. ¶ 80) do not allow for an inference of conspiracy. Manufacturer desire to develop a royalty-free AIMT technology states no bad motive, but is analogous to typical standard setting organization patent policy. *See also* Herbert Hovenkamp et. al., *IP and Antitrust: An Analysis Of Antitrust Principles Applied To Intellectual Property*

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<sup>18</sup> Moreover, as explained earlier, the Amended Complaint must be read as a whole. Any inference of collusion from the Peot testimony is contradicted by other allegations, which show that the Defendants acted independently by negotiating and offering contracts to Plaintiffs well after the alleged conspiracy began. No plausible inference of conspiracy can exist where Plaintiffs have pled themselves out of court. *See, e.g., Alliance Tech, supra.*

<sup>19</sup> Available at <http://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf>.

*Law*, Ch. 35.5a (2d ed. 2010 & 2013 Supp.) (“It is to be expected that companies will lobby for the standard that best suits their needs . . .”).

## II. PLAINTIFFS’ “STANDARDS CONSPIRACY” CLAIMS ARE PROPERLY DISMISSED FOR FAILURE TO ALLEGE HARM TO COMPETITION

In the Second and Third Counts of the Amended Complaint, Plaintiffs allege economic injury due to Defendants’ alleged “Standards Conspiracy” by which UL amended its table saw standard in 2005 and 2007 to make safety improvements but did not *mandate* the use of SawStop’s patented AIMT technology. (Am. Compl. ¶ 152.) According to Plaintiffs, these safety improvements made at the behest of Defendant power tool suppliers increased the *minimum*<sup>20</sup> safety standards for table saws by requiring an anti-kickback device and new blade guard. (Am. Compl. ¶¶ 113–15.) Plaintiffs even admit that these amendments made “incremental improvements” in saw safety, but assert that UL should have gone further so as “to implement a standard requiring” AIMT technology on all table saws. (Am. Compl. ¶ 126.) At the outset, Plaintiffs allege that only Black & Decker, Emerson, Makita, Bosch, and Ryobi had representatives on the relevant standard setting committee.<sup>21</sup> (Am. Compl. ¶ 106.) However,

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<sup>20</sup> UL, as a voluntary standards organization, only establishes recommended “minimum” safety standards. *ECOS Elec. Corp. v. Underwriters Laboratories*, 743 F.2d 498, 500 (7th Cir. 1984). Nothing prevents a manufacturer from exceeding the UL standard and competing on that basis.

<sup>21</sup> Makita U.S.A., Inc. (“Makita”) is alleged only to make “power tools and outdoor power equipment” (Am. Compl. ¶ 26), to belong to and have attended meetings of a trade association (Am. Compl. ¶¶ 71, 78–83), to have participated on a UL technical panel (Am. Compl. ¶ 84), and to have been a party to a joint venture agreement to develop safer blade guards. (Am. Compl. ¶ 111.) As with numerous other defendants, it is not alleged that Makita refused to accept a license from Plaintiffs, or even that Plaintiffs ever tendered Makita a license. Makita’s only participation in the alleged boycott was entirely passive; it allegedly “refrained from requesting a license” that Plaintiffs never offered. Makita’s participation in developing UL standards is also innocuous and not probative of a conspiracy. *Advanced Tech. Corp. v. Instron, Inc.*, 925 F. Supp. 170, 179 n.50 (D. Mass. 2013) (dismissing complaint); *Corr Wireless Communc’s., L.L.C. v. AT&T, Inc.*, 893 F. Supp. 2d 789, 803 (N.D. Miss. 2012) (“[O]ther than Plaintiffs’ conclusory statements that an agreement happened regarding the creation of [the standard], the only factual allegations provided show that [defendants] participated in the [standards development] process.”) (dismissing complaint). The Complaint here is just as

“Defendants’ mere participation in a standards setting body does not give rise to an inference of conspiracy.” *Advanced Tech. Corp. v. Instron, Inc.*, 925 F. Supp. 2d 170, 179 n.50 (D. Mass. 2013). Plaintiffs do not allege that Hitachi Koki, Milwaukee Electric Tool, OWT, or TINA had any involvement other than being members of PTI. But, as with participation in a standards setting body, mere membership in a trade association is insufficient to state a claim. *See Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 664 (E.D.N.C. 2003). Therefore, Counts II and III should be dismissed with regard to Hitachi Koki USA, Milwaukee Electric Tool, OWT and TINA, as should be the pendent state law claims in Counts V and VI.

Furthermore, ignoring that the purpose of the antitrust laws is to promote competition and consumer choice, Plaintiffs contend that the “Standards Conspiracy” prevented UL from mandating AIMT technology on all UL-certified table saws. This, they claim, harmed competition even though all it did was preserve consumers’ ability to choose between Plaintiffs’ allegedly safer, but more expensive saws and those offered by Defendants. (Am. Compl. ¶ 126.) Plaintiffs’ description of its own injuries from the UL’s “failure to mandate” AIMT further reveal their misuse of the antitrust laws, complaining that “Defendants’ illegal actions . . . , such as the sale of lower safety, lower price table saws, caused SawStop, LLC to lose sales and profits . . . .” (Am. Compl. ¶ 8.)

Plaintiffs’ claims in Counts II and III, predicated on Defendants’ alleged participation in a “Standards Conspiracy” to promote and adopt an improved blade guard instead of *mandating*

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inadequate, alleging that Makita and other defendants participated in a standards development process and adorning those allegations with conclusory claims of conspiracy, *e.g.*, that the UL panel was “under the firm control of the Defendants.” (Am. Compl. ¶ 106.) Nor does Makita’s participation in “weekly” trade association conference calls on the subject of table saw safety and the UL safety standard suggest a conspiracy. (Am. Compl. ¶ 121.) The fact that table saw manufacturers had regular conference calls on UL standards and injury reduction, a legitimate subject of industry-wide and governmental concern, does not imply a “conspiracy.”

SawStop's AIMT technology, should be dismissed. Given Plaintiffs' affirmative allegations that it has been harmed due to increased consumer choice and lower-priced options (Am. Compl. ¶ 118), the Amended Complaint's standard-setting claims are not only unsupported by the antitrust laws, they are antithetical to those laws.

**A. Standard-Setting Activity of the Type Alleged in the Amended Complaint Is Not Analyzed under the *Per Se* Rule**

Section 1 of the Sherman Act analyzes restraints on trade under either the *per se* rule or the Rule of Reason. “[A] *per se* rule is applied when ‘the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.’” *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100 (1984) (citation omitted). As such, the *per se* rule is typically applied to hard-core agreements among competitors to fix prices or divide customers or markets. The balanced approach of the Rule of Reason, on the other hand, is applied in most other types of concerted action, and the Supreme Court has specifically cautioned against expanding use of the *per se* rule. *See, e.g., FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 458–59 (1986).

Plaintiffs ask the Court to find the alleged conduct *per se* unlawful. (Am. Compl. at 41 (Prayer for Relief).) Standard-setting activity, however, like UL’s establishment of the voluntary table saw safety standards, has the potential to generate substantial pro-competitive benefits such as improvements in product safety, quality, and consumer information. *See, e.g., ECOS Elec. Corp. v. Underwriters Laboratories*, 743 F.2d 498, 500 (7th Cir. 1984) (discussing procompetitive benefits of UL standards); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 487 (1st Cir. 1988) (“joint development and promulgation of the [standard] . . . provid[es] information to makers and to buyers less expensively and more effectively than without the standard.”). As a result, Section 1 claims based on private standard-setting conduct must be



evaluated under the full Rule of Reason, requiring the court to balance the procompetitive and anticompetitive effects of the challenged restraint. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (“It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason analysis to product standard setting by private associations.”); *Consol. Metal Prods. v. Am. Petroleum Inst.*, 846 F.2d 284, 292 (5th Cir. 1988) (“a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate section 1 when, for whatever reason, it fails to evaluate a product favorably to the manufacturer”).

Application of the Rule of Reason is especially appropriate where, as here, certain defendants and UL responded to concerns raised by the CPSC and worked together to increase the UL’s voluntary safety features. Plaintiffs admit that these revised standards made “incremental improvements” in table saw safety, and never claim that these UL standards precluded the use of SawStop’s AIMT for those wanting additional safety protections. (Am. Compl. ¶¶ 113, 126.) Rather, again, Plaintiffs simply complain that, on balance, UL should have opted for mandating the “higher safety, higher cost” AIMT technology instead of the features adopted in UL 987. (Am. Compl. ¶ 124.) It is not *per se* unlawful for competitors to vote to adopt a standard other than the one Plaintiffs prefer. *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 57 (1st Cir. 1999).

**B. Plaintiffs Fail to Allege the Essential Elements Necessary for a Rule of Reason Analysis**

Under the Rule of Reason, Plaintiffs must allege, *inter alia*, that “the conspiracy produced adverse, anticompetitive effects within the relevant product and geographic market.” *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 144 (4th Cir. 1990). For conduct to have an “anticompetitive effect” it “must harm the competitive *process* and

thereby harm consumers.” *Dickson v. Microsoft Corp.*, 309 F.3d 193, 206 (4th Cir. 2002) (emphasis in original; citation omitted).

Counts II and III say nothing about the relevant market(s), Defendants’ power in those markets, or barriers to entry. In addition, Plaintiffs do not allege any anticompetitive effect, such as that SawStop’s table saws or AIMT safety technology have been excluded from the market. Nor is it sufficient to challenge the “unreasonableness” of a standard, absent allegations of specific unlawful or illegal actions by Defendants to “corrupt” that standard setting process. *DM Research, Inc.*, 170 F.3d at 57 (“Merely to say that the standards are disputable or have some market effects has not generally been enough to condemn them as ‘unreasonable’ under the Sherman Act.”).

### **1. Plaintiffs Fail to Allege Harm to Competition**

It is not an antitrust violation for a standard-setting organization to approve a competitor’s product. *See DM Research, Inc.*, 170 F.3d at 54; *ECOS Elec. Corp.*, 743 F.2d at 502 (standard-setting organization that certifies a competitor’s offering does not thereby harm plaintiff’s access to the market). To state a claim under the antitrust laws in the standard setting context, the defendant’s acts must, as the leading antitrust treatise notes, “actually remove the innovation or lower-cost alternative from the market or suppress its growth significantly.” 13 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2234b, at 433 (2d ed. 2005) (summarizing cases). In other words, “exclusion” is a necessary but not sufficient element of an antitrust claim based on standard setting.<sup>22</sup> Thus, it is not enough that a plaintiff “complains of lost sales” if it “fails to allege that [product] users are in some way constrained from buying its products.” *See Consol. Metal Prods.*, 846 F.2d at 292.

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<sup>22</sup> As set forth in the section below, even the denial or exclusion of a plaintiff’s product is not enough to state an antitrust claim given the nature of the “judgment calls” inherent in the standard-setting process. *See infra* Section II.B.2

But Plaintiffs admit that they not only compete in the sale of table saws but also trumpet the claimed superiority of SawStop's safety features as a competitive advantage. (Am. Compl. ¶ 41.) As noted above, Plaintiffs have sold more than 28,000 saws. Thus, Plaintiffs cannot allege that the UL standard excluded, disallowed, or even disadvantaged their table saws or AIMT technology, as required under the Rule of Reason.

What Plaintiffs are really complaining about is that Defendants caused UL to set its safety standards *too low* so that table saws equipped with other safety devices could compete with Plaintiffs' saws and technology. (Am. Compl. ¶¶ 141–42.) As such, Plaintiffs' claimed economic losses do not result from a *reduction* in competition, but rather that SawStop is forced to compete with “lower price table saws” with different safety characteristics (Am. Compl. ¶ 8.) While Plaintiffs may have benefitted financially had the UL or CPSC “mandated” their proprietary AIMT technology, such losses are not cognizable under the antitrust laws. In short, notwithstanding Plaintiffs' preference that UL require the use of their technology, the failure to eliminate consumer choice does not qualify as harm to competition.

The deficiencies in Plaintiffs' allegations mirror those found to be fatal by the Seventh Circuit in rejecting a similar challenge to a UL standard in *ECOS Electronics Corp.* 743 F.2d 498. There, the court upheld the dismissal of ECOS's claims based on allegations that UL should not have approved a rival's allegedly less-effective alternative product. *Id.* at 500. As here, ECOS claimed that UL had “set the bar too low” by certifying a competitor's offering as safe and thereby reduced interest in its allegedly superior offering. *Id.* at 502. Importantly, the court found that UL could have only restrained trade if it had “exclud[ed] competitors from a market *by denying them the needed stamp of approval.*” *Id.* at 502 (emphasis in original). Because ECOS, like SawStop here, remained able to sell its own products—and promote their

alleged superiority—the court recognized that ECOS’s real goal was not to increase competition, but to “deny its competitors UL listings” by creating a “standard that only ECOS could meet.” *Id.* at 503. The Seventh Circuit treated such a claim as “a poorly disguised attempt to use [the antitrust] laws to stifle competition,” a purpose “antithetical to the goals of the antitrust laws.” *Id.* at 501–02.

As noted antitrust jurist Judge Posner has written, “the nature of the remedy sought in an antitrust case is often . . . an important clue to the soundness of the antitrust claim.” *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 267 (7th Cir. 1984). Here, Plaintiffs request that the Court do what the UL—and the CPSC—have to date declined to do: effectively compel the use of SawStop technology on all table saws. In *Brunswick*, Judge Posner affirmed the dismissal of antitrust claims where the plaintiff asked the court to take the defendant’s monopoly and award it to the plaintiff. *Id.* SawStop asks this Court to do something more radical: rather than replace one monopoly with another, as in *Brunswick*, SawStop seeks the imposition of a monopoly in saw safety technology where a competitive market, *including* AIMT, exists today. It is axiomatic that many consumers would trade some incremental gain in safety for other benefits or features, including lower prices or smaller, lighter saws. Contrary to Plaintiffs’ paradigm, in a world of choices, not all consumers elect to purchase a Volvo, notwithstanding its superior safety claims.<sup>23</sup>

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<sup>23</sup> Plaintiffs’ belief that society would benefit from an industry-wide requirement to adopt AIMT technology to reduce table saw injuries is an argument best directed to the CPSC, not to a court enforcing the laws directed at the preservation of consumer choice. As a result of the UL standard, consumers who wish to purchase a safer but more expensive saw with SawStop technology are completely free to do so: antitrust requires nothing more. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (finding that an award of damages to a competitor because it faced more, not less, competition was “inimical to the purposes of [the antitrust] laws”) (citation omitted). Plaintiffs also allege that Defendants’ conduct prevented the “mass production” of table saws with SawStop’s AIMT technology. (Am. Compl. ¶ 126.) Yet,

## 2. Plaintiffs Fail to Allege Facts Sufficient to Show that Defendants Corrupted the UL Process

Antitrust concerns in the standard-setting area arise only when the decision to exclude a new technology or product is the result of a “standard [that] was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms of influence, in addition to a further showing of market foreclosure.” *DM Research, Inc.*, 170 F.3d at 57–58; *accord Consol. Metal Prods.*, 846 F.2d at 294–96 (rejecting claims where no evidence trade association “product approval program is merely a ploy to obscure a conspiracy against competing producers”). The Sherman Act requires a plaintiff to show more than that the standards body “unreasonably” refused plaintiff’s product:

Were this not so, the federal courts would become boards of automatic review for trade association standards committees . . . . Not only would this tax the abilities of the federal courts, but fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards. Under such a regime, the antitrust laws would stifle, not protect, the competitive market.

*Consol. Metal Prods.*, 846 F.2d at 297.

The risks associated with Plaintiffs’ invitation for the Court to interject itself as a “super-standards board” to evaluate the “reasonableness” of the UL table-saw safety standards is particularly high in this case, where Plaintiffs admit that the CPSC, the government body specifically charged with consumer safety, has been actively involved in analyzing table-saw safety standards since at least 1998. (Am. Compl. ¶ 56.) According to Plaintiffs, Dr. Gass himself has been “advocating before the CPSC starting in or around late 2002” and continues to

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Plaintiffs were in the market and selling table saws with AIME technology before the 2005 and 2007 standards revisions in question. There is a difference, of course, between not “compelling,” “requiring” or “mandating” use of AIME technology and a boycott “preventing” or “precluding” any table saw manufacturer from “choosing” to offer AIME. As Plaintiffs concede, nothing about the UL standard has precluded or prevented them from selling tens of thousands of AIME-equipped table saws.

advocate that SawStop's AIMT become a required table saw feature up to this day. (Am. Compl. ¶ 99.)

As a review of the Amended Complaint reveals, there are only two "facts" offered in support of Defendants' alleged "corruption" of the UL process. First, Plaintiffs allege that Defendants and the PTI trade association participated in and dominated the UL standard-setting process by voting against a proposal to require AIMT. (Am. Compl. ¶¶ 106–107.) Yet, Plaintiffs do not allege that the participation by some of the Defendants was undisclosed, or otherwise impermissible under UL's rules. *See Greater Rockford Energy*, 998 F.2d at 397 (observing that the standard setting organization "did not stray from its normal procedures"). In fact, Plaintiffs affirmatively allege that standards participants "are not required to consider public interests over their own interests when considering changes to UL Safety Standard 987." (Am. Compl. ¶ 36.)

Tellingly, Plaintiffs allege that they also participated in the process and urged the UL to act in Plaintiffs' private financial interests by requiring AIMT. More than standards participation by interested parties is required to state a claim. *See, e.g., DM Research, Inc.*, 170 F.3d at 58 (affirming dismissal where plaintiff alleged only that "members somehow involved in the writing of the guidelines were connected with" the defendant); *Clamp-All*, 851 F.2d at 488 (rejecting claim where plaintiff showed only that competitors sat on SSO subcommittee evaluating plaintiff's proposal).

Second, Plaintiffs allege that some Defendants created two joint ventures for the purpose of developing new safety technologies, which they then promoted to the UL. (Am. Compl. ¶¶ 103, 109, 111, 113, 115.) According to Plaintiffs, these joint ventures functioned as a "smokescreen" to prevent the UL and CPSC from mandating AIMT and to "vote as a block"

against its adoption. (Am. Compl. ¶¶ 105, 109.) But the Sherman Act is not implicated when one advocates for a standard that serves one's own economic interest at the expense of a competitor's.

In the end, all Plaintiffs allege is that each Defendant opposed giving a table saw competitor an effective monopoly on UL-certified table saws, which would have permitted Plaintiffs to charge monopolistic royalties. As such conduct is fully within each Defendant's economic self-interest, it does not support an inference of collective action. *Twombly*, 550 U.S. at 566 ("there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway"). As explained in *Advanced Tech. Corp.*, there is nothing to suggest a preceding unlawful agreement when a standards participant votes in a manner consistent with its own economic self-interest. 925 F. Supp. 2d at 179. As here, *Advanced Tech. Corp.* involved allegations that defendants/competitors had "stacked the vote" within a standards body to avoid a standard adopting plaintiff's innovative, competing service. *Id.* at 173. According to the court, "[t]he crux of [plaintiff's] antitrust claim is simply that competitors in a market decline to support a standard that would promote another competitor's technology," and thus, showed merely parallel conduct that is "likely explained by, lawful, unchoreographed free-market behavior." *Id.* at 178 (citing *Twombly*, 550 U.S. at 554).

For all these reasons, SawStop's "Standards Conspiracy" claims must be dismissed. Plaintiffs allege nothing more than certain Defendants voted in their unilateral self-interest against mandating a standard only Plaintiffs could meet. Nothing about those Defendants' alleged votes to prevent handing a competitor a monopoly for its saw safety technology supports an inference of a pre-existing agreement to boycott.

**III. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AND ARE NOT SAVED BY CONCLUSORY ALLEGATIONS OF FRAUDULENT CONCEALMENT**

**A. Rule 12(b)(6) Requires Dismissal of Plaintiffs' Untimely Section 1 Conspiracy Claims as a Matter of Law**

Rule 12(b)(6) dismissal is appropriate because “the complaint shows on its face that the action was not brought within the statutory period.” *Day v. Walker*, 206 F. Supp. 32, 33 (W.D.N.C. 1962). *See also Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007). Plaintiffs' Amended Complaint alleges a boycott that began “in or around 2001” and a conspiracy that allegedly began “in or around 2002.” (Am. Compl. ¶ 2.) Plaintiffs obviously did not file their antitrust complaint within four years of these alleged events as required by 15 U.S.C. § 15(b).

**B. Plaintiffs Have Not Pled an Overt Act within the Statutory Period in Furtherance of the Alleged Boycott or Conspiracy**

The statute of limitations began to run upon the occurrence of the alleged acts that Plaintiffs characterize as a “boycott” and “conspiracy.” *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 290 (4th Cir. 2007) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)). To be timely, Plaintiff's antitrust claims should have been asserted in 2005 or, at the very latest, 2006.

For a continuing conspiracy, the statute of limitations runs from the last overt act causing injury to the plaintiff's business, *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 572 (4th Cir. 1976), and a claim is barred unless those overt acts caused injury which occurred in the statutory period. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189–90 (1997) (a new overt act does not permit recovery of injury caused by old overt acts). No such acts have been alleged to restart the statute of limitations. *See, e.g., Rx.com v. Medco Health Solutions*,



322 F. App'x 394 (5th Cir. 2009) (no continuing violation where defendants did not reiterate their refusals to deal with plaintiff).

Plaintiffs' allegations as to the purported standards conspiracy are similarly deficient because Plaintiffs fail to state how any alleged acts caused injury within the statutory period, since the UL standards at issue went into effect in 2005 and 2007. *Klehr*, 521 U.S. at 189–90.

### **C. Plaintiffs' Allegations Fail to Establish Fraudulent Concealment**

Plaintiffs reliance on the fraudulent concealment doctrine to excuse their delay is misplaced. That doctrine requires Plaintiffs to establish: “(1) [Defendants] fraudulently concealed facts that are the basis of [Plaintiffs'] claim[s], and (2) [Plaintiffs] failed to discover those facts within the statutory period, despite (3) the exercise of due diligence.” *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 541 (4th Cir. 1997); *see also Roach v. Option One Mortg. Corp.*, 598 F. Supp. 2d 741, 752 (E.D. Va. 2009). Mere conclusory allegations are insufficient to plead the essential elements of a fraudulent concealment claim.

Fed. R. Civ. P. 9(b) requires a plaintiff that alleges fraud to “state with particularity ‘the time, place, and contents of the false representations, as well as the identity of the [entity] making the misrepresentation and what [it] obtained thereby.’” *United States v. Collegiate Funding Servs.*, 469 F. App'x 244, 258 (4th Cir. 2012); *see also Carlucci v. Han*, 886 F. Supp. 2d 497, 509 (E.D. Va. 2012) (*quoting In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 120 (4th Cir. 2009)). Plaintiffs cannot satisfy the requirements of Federal Rule 9(b) by making undifferentiated allegations of fraudulent concealment against Defendants. *In re Cable & Wireless, PLC*, 321 F. Supp. 2d 749, 773 (E.D. Va. 2004); *see also Iron Workers Local 16 Pension Fund v. Hilb Rogal & Hobbs Co.*, 432 F. Supp. 2d 571, 594 (E.D. Va. 2006). Thus, Plaintiffs must provide “‘the who, what, when, where, and how’ of the alleged fraud” for *each Defendant*. *See United States ex rel. Godfrey v. KBR, Inc.*, 360 F. App'x 407, 410 (4th Cir.

2010) (quoting *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008)).

To establish the first element, Plaintiffs must “provide evidence of affirmative acts of concealment by [Defendants].” *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 125 (4th Cir. 1995); *see also Chao v. Virginia Department of Transportation*, 291 F.3d 276, 283 (4th Cir. 2002) (“[T]he essence of a fraudulent concealment claim is that the plaintiff ‘has been induced or tricked by [her] adversary’s misconduct into allowing the filing deadline to pass.’”); *Pocahontas*, 828 F.2d at 218–19 (“To permit a claim of fraudulent concealment to rest on no more than an alleged failure to own up to illegal conduct. . . . would effectively nullify the statute of limitations.”).

Plaintiffs’ threshold deficiency is that none of the operative facts alleged in the Amended Complaint was concealed from Plaintiffs. To the contrary, Plaintiffs allege:

- In February 2001, Daniel Lanier, Esq., counsel for B&D, made a **public** presentation in at the Defense Research Institute in Las Vegas titled “Evidentiary Issues Relating to SawStop Technology for Power Saws.” During that presentation, Mr. Lanier made the **public** statement that “if a couple years passed without implementation of the SawStop Technology, manufacturers could argue in product liability lawsuits that the technology was not viable as evidenced by the fact that no one had adopted it and because it was not an industry standard.” (Am. Compl. ¶ 72.)
- In January 2002, Defendants allegedly stopped negotiating, offering only pretextual reasons to Plaintiffs for doing so. (Am. Compl. ¶¶ 87–88.)
- Defendants provided public notice in 2003 of their intention to “work collectively to develop technology for blade contact injury avoidance.” (Am. Compl. ¶ 109.) The purpose of this collaboration was for the manufacturers to develop their own proprietary technology—to wit, to avoid using Plaintiffs’ royalty-bearing technology.<sup>24</sup>

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<sup>24</sup> Notice Pursuant to the National Cooperative Research and Production Act of 1993 Power Tool Institute Joint Venture Project.” 68 Fed. Reg. 67216 (Dec. 1, 2003).

At most, Plaintiffs allege that Defendants concealed the alleged AIMT conspiracy by “holding their key meetings in secret” (Am. Compl. ¶ 96), “giving separate excuses for not taking a license” (Am. Compl. ¶ 96), and agreeing that “all discussions concerning a collaborative response to SawStop would be confidential and concealed from persons other than PTI members who manufactured table saws.” (Am. Compl. ¶ 82.) But these do not constitute affirmative acts of fraudulent concealment. *See Boland v. Consol. Multiple Listing Serv., Inc.*, 868 F. Supp. 2d 506, 518 (D.S.C. 2011) (finding that allegations that defendants were “(1) meeting secretly, (2) giving pretextual reasons for [increased prices], and (3) agreeing not to discuss publicly the nature of their communications in furtherance of their illegal scheme” amounted to “no more than a failure to admit to wrongdoing”), *aff’d and rem’d sub nom. Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278 (4th Cir. 2012).

Plaintiffs also claim that Defendants fraudulently concealed the alleged conspiracy by agreeing: “don’t make paper trail - delete old copies” (Am. Compl. ¶ 95) and by requesting “highly unusual protective orders” (Am. Compl. ¶ 97). Keeping only current copies of documents outlining the alleged conspiracy, of course, would not conceal a conspiracy; Plaintiffs seize on a non sequitur. Nor is there anything unusual about a protective order that keeps sensitive information out of the hands of a competitor involved in litigation.<sup>25</sup>

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<sup>25</sup> Plaintiffs assert that “Defendants also demanded highly unusual special protective orders in product liability cases” specifically precluding sharing of certain documents with Plaintiffs or its founder Dr. Gass. But Plaintiffs’ 196 paragraph Amended Complaint nowhere discloses Dr. Gass’ role as a quasi-expert in numerous product liability cases. *See, e.g., Thull v. Techtronic Indus.*, No. 3:13-mc-0010, at \*4 (Opinion and Order of Civil Contempt) (D. Or. Feb. 3, 2014) (“In the Underlying Action (as well as in other similar actions throughout the United States), Dr. Gass, as a volunteer and without compensation, filed an expert report...” (Exhibit 3). Plaintiffs were held in contempt for failing to produce documents, such as “documents referencing false activations of AIMT incorporated into SawStop’s commercially available saws” and “SawStop’s annual sales figures and other financial information relating to AIMT-equipped saws.” *Id.* at \*5. As Plaintiffs well understand, that manufacturers included provisions relating to disclosure of

Likewise, Plaintiffs fall well short of alleging fraudulent concealment of the alleged standards conspiracy. Plaintiffs offer only their own self-serving conclusion that the parties “agreed that [the conspiracy] would be kept confidential,” and not disclosed to non-conspirators. (Am. Compl. ¶ 128.) This conclusory allegation “amount[s] to no more than a failure to admit to wrongdoing, which does not suffice.” *Boland*, 868 F. Supp. 2d at 518.

To establish the next two elements, the Fourth Circuit requires “distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether by the exercise of ordinary diligence, the discovery might not have been before made.” *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir. 1974) (quoting *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 88 (2d Cir. 1961)). A plaintiff must demonstrate that “it was not (and should not have been) aware of facts that should have excited further inquiry on its part.” *Supermarket of Marlinton*, 71 F.3d at 128.

Plaintiffs’ vague and conclusory allegations of fraudulent concealment simply lack the specific “who,” “when,” or “where” required to avoid dismissal. *See Weinberger*, 498 F.2d at 555–56 (plaintiff “knew he had been injured, who was responsible, how the injury occurred, and the methods utilized to prevent him from discovering the injury.”); *Jones v. Shooshan*, 855 F. Supp. 2d 594, 603–04 (E.D. Va. 2012).

Even if Mr. Peot’s 2010 testimony is to be construed in the manner articulated by Plaintiffs, the information about which he testified was—according to the Amended Complaint—known to Plaintiffs long before 2010. Mr. Peot testified that (1) Defendants were concerned about products liability if one manufacturer adopted the technology and (2)

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confidential information to an admitted competitor/potential licensor is to be expected. *Cf.* Gass Testimony, Vol. 4A, 1010:6–9, *Stollings v. Ryobi*, No. 08-C-4006 (N.D. Ill. July 26, 2012) (“... would I like all of my competitors to go away? Of course.”) (Exhibit 4). The *Stollings* transcript is cited by Plaintiffs. (Am. Compl. ¶¶ 95, 97.)

Defendants joined together to find a royalty-free alternative. But, as noted above, Plaintiffs already knew these two facts by 2003. At a minimum, “enough red flags were up . . . to put [SawStop], as a matter of law, on inquiry notice of its claims.” *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 175 (4th Cir. 2007).

As for the “Standards Conspiracy,” after the promulgation of industry standards in 2005 and 2007, Plaintiffs knew about the purported voting bloc adopting industry standards from their own market research and from the membership of Dr. Gass himself on UL technical panel STP 745. Indeed, Plaintiffs allege that these standards caused them to incur costs and forced them to create subpar products during that time period. As was the case in *Weinberger*, here there was no concealment of the conduct of which Plaintiffs now complain.

As a matter of law, Plaintiffs had a duty to investigate once information would have led a reasonable person to do so. “Inquiry notice is triggered by evidence of the possibility of fraud, not by complete exposure of the alleged scam.” *GO Computer*, 508 F.3d at 179. Having been on inquiry notice of their claims for more than a decade before they filed suit, Plaintiffs cannot establish the third requirement for fraudulent concealment as a matter of law. *See id.*

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court dismiss all claims and to do so with prejudice because Plaintiffs have already tried and failed to cure the deficiencies in the original Complaint.<sup>26</sup>

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<sup>26</sup> Because Illinois and Ohio’s antitrust laws were modeled after the Sherman Act, Plaintiffs’ state law claims should fail as well. *House of Brides, Inc. v. Alfred Angelo, Inc.*, No 11-C-07834, 2014 WL 64657 at \*8 (N.D. Ill. Jan. 8, 2014); *Nilavar v. Mercy Health System-Western Ohio*, 494 F. Supp. 2d 604, 621 (S.D. Ohio 2005). In any event, Plaintiffs have waived any claim of diversity jurisdiction; accordingly, supplemental jurisdiction over state law claims may be declined if this Court dismisses the federal claims. 28 U.S.C. 1367(c)(3).

**Dated: May 13, 2014**

**Respectfully submitted,**

**By Counsel**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY on this 13<sup>th</sup> day of May, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

\_\_\_\_\_  
/s/ Bernard J. DiMuro  
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# **EXHIBIT 1**

Act on September 13, 2000 (65 FR 55283).

The last notification was filed with the Department on August 8, 2003. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 29, 2003 (68 FR 52055).

**Dorothy B. Fountain,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 03-29833 Filed 11-28-03; 8:45 am]

BILLING CODE 4410-11-M

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Nano-Engineered Thermal Interfaces Enabling Next Generation Microelectronics

Notice is hereby given that, on October 2, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Nano-Engineered Thermal Interfaces Enabling Next Generation Microelectronics has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identities of the parties are General Electric Global Research, Niskayuna, NY; Superior MicroPowders, LLC, Albuquerque, New Mexico; and The Research Foundation of SUNY at Binghamton, Binghamton, NY. The nature and objectives of the venture are to develop and demonstrate nano-engineered thermal interfaces materials enabling next generation microelectronics.

**Dorothy B. Fountain,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 03-29762 Filed 11-28-03; 8:45 am]

BILLING CODE 4410-11-M

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Notice Pursuant to the National Cooperative Research and Production Act of 1993 Power Tool Institute Joint Venture Project

Notice is hereby given that, on October 23, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), the Power Tool Institute Joint Venture Project has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties are The Black & Decker Corp., Towson, MD; Hitachi Koki, U.S.A., Ltd., Norcross, GA, a subsidiary of Hitachi Koki Company Ltd., Tokyo, Japan; Pentair Tools Group, Jackson, TN, a subsidiary of Pentair Corporation, Golden Valley, MN; Robert Bosch Tool Corporation, Mount Prospect, IL, an affiliated entity of Robert Bosch GMBH, Gerlingen, Germany and Scintilla AG, Solothurn, Switzerland; and Ryobi Technologies, Inc., Anderson, SC and One World Technologies, Inc., Anderson, SC, both subsidiaries of Techtronics Inc., Tsuen Wan, Hong Kong, China. The nature and objectives of the venture are the research and development of technology for power saw blade contact injury avoidance, including skin sensing systems, blade braking systems, and/or blade guarding systems. The participants intend to share confidential information and intellectual property rights in order to achieve the goals of the joint venture. The participants intend to share intellectual property that is contributed, and any intellectual property or technology that is developed through the joint venture, among themselves and the Power Tool Institute. Any royalties generated by the licensing of any technology or intellectual property created through the joint venture will be shared among the joint venture participants and the Power Tool Institute pursuant to the terms of the joint venture agreement and the accompanying confidentiality agreements. The technology or intellectual property created through the joint venture will be available to the

public for a licensing fee, which will be non-discriminatory and determined in accordance with the costs to develop the intellectual property to be licensed.

**Dorothy B. Fountain,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 03-29834 Filed 11-28-03; 8:45 am]

BILLING CODE 4410-11-M

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Roll to Roll Processing To Enable the Organic Electronic Revolution

Notice is hereby given that, on October 16, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Roll to Roll Processing to Enable the Organic Electronic Revolution has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties are GE Global Research, Niskayuna, NY; and Energy Conversion Devices, Inc., Rochester Hills, MI. The nature and objectives of the venture are to develop and demonstrate roll to roll processing to enable the organic electronics industry by providing highly functional devices at low cost and high volume.

**Dorothy B. Fountain,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 03-29832 Filed 11-28-03; 8:45 am]

BILLING CODE 4410-11-M

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### Evaluation of International Electrotechnical Commission's (IEC) Standards for Intrinsic Safety and Explosion-Proof Enclosures

**AGENCY:** Mine Safety and Health Administration (MSHA), Labor.

**ACTION:** Notice of intent to review international (IEC) standards for

# **EXHIBIT 2**

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MASSACHUSETTS  
3

4 CARLOS OSORIO, )  
5 Plaintiff, )  
6 vs. ) CA No. 06-10725-NMG  
7 )  
8 ONE WORLD TECHNOLOGIES, INC., )  
9 et al, )  
10 Defendants. )

11 BEFORE: THE HONORABLE NATHANIEL M. GORTON  
12

13 JURY TRIAL DAY FOUR  
14

15 John Joseph Moakley United States Courthouse  
16 Courtroom No. 4  
17 One Courthouse Way  
18 Boston, MA 02210  
19 Thursday, February 25, 2010  
20 9:10 a.m.

21 Cheryl Dahlstrom, RMR, CRR  
22 Debra M. Joyce, RMR, CRR  
23 Official Court Reporters  
24 John Joseph Moakley United States Courthouse  
25 One Courthouse Way, Room 3209  
Boston, MA 02210  
Mechanical Steno - Transcript by Computer

1 this memo for this aborted committee, do you recall that the  
2 CPSC gave Mr. Gass an award?

3 A. Yes, I was.

4 Q. And you wrote a memo to these guys, Dils and Whiffen and  
5 Bugos, and said, Let me tell you something, guys. And you sent  
6 a list of all the things that you wanted to point out to them  
7 about what was going on, correct?

8 A. That's correct.

9 MR. CARPINELLO: May I have a hard copy of that memo.

12:03 10 Q. I'm going to show you, sir, an email that you wrote to  
11 Jeff Dils, Dennis Pinkleton, and Bob Bugos. Who is Dennis  
12 Pinkleton in October, 2001?

13 A. I believe he was the chief executive officer of Ryobi  
14 North America.

15 Q. He was the head guy in the United States, correct?

16 A. I think that's correct.

17 Q. Okay. And is that, in fact, a memo from you to those  
18 individuals and then a second memo on top of that, second  
19 email, that you wrote to Dennis Pinkleton and Jeff Dils on  
12:04 20 October 8, 2001?

21 Now, I'm going to represent to you, sir, that the markings  
22 on the margin there and the underlining is mine, and I  
23 apologize for that.

24 A. Okay.

25 Q. Do you recall that?



1 A. I believe it was, yes.

2 Q. And, in fact, the venture that was set up by PTI spent a  
3 whole lot of time meeting with patent lawyers to figure out how  
4 to, as the term is, work around --

5 MR. APPEL: Objection, your Honor.

6 THE COURT: Sustained.

7 Q. Without reference to the patent lawyers, let's talk about  
8 -- you and other nonlawyers, members, discussed, how to work  
9 around Stephen Gass's patent, correct?

12:11 10 A. No.

11 Q. You don't recall that?

12 A. I don't recall saying that the joint venture was supposed  
13 to try and work around Steve Gass' patents.

14 Q. I apologize if I said it, sir. The joint venture was  
15 created to find an alternative technology so that the industry  
16 did not have to use Mr. Gass' technology, correct?

17 A. That's probably one of the reasons, yes.

18 Q. Okay. And if they came up with a technology that didn't  
19 use Doctor Gass' technology, they wouldn't have to pay him a  
12:12 20 royalty fee, correct?

21 A. Yes, that would be a correct statement.

22 Q. All right. And you said it was surprising to you that all  
23 these people would -- all these industry members would get  
24 together and suggest this?

25 A. Correct.

1 Q. Why was it surprising to you, sir?

2 A. Well, members of the industry -- this is a very  
3 competitive industry, and the people who belong to the Power  
4 Tool Institute are very fierce competitors. Never before in my  
5 30, 35 years of working with the Power Tool Institute had I  
6 ever been exposed to something where they said let's get  
7 together and jointly develop something.

8 Q. This was completely unprecedented, wasn't it?

9 A. Yes, it was.

12:13 10 Q. Now, it's true, sir, is it not, that you and the other  
11 members of industry recognized that SawStop could be used not  
12 just on big cabinet saws but on all kinds of saws? It had the  
13 potential for that, did it not?

14 A. Yeah, I believe the feeling was that if that technology  
15 proved workable and could be adopted to power tools that it  
16 could be used on more products than table saws, yes.

17 Q. Indeed, you said, "All members agree that SawStop's goal  
18 is to get the device in table saws and then, having set a  
19 precedence, try to move on to other high-volume products such  
12:14 20 as miter saws and portable circular saws," correct?

21 A. Yes.

22 Q. Now, also discussed at the meeting was a mechanism whereby  
23 people could vote to get on the committee, and those  
24 manufacturers who got on the committee would then be allowed to  
25 use the information they gained to defend product liability

1 A. Not that I'm aware of, no.

2 Q. Now, isn't it true, sir, that the manufacturers got  
3 together and decided that they would take this unprecedented  
4 step specifically because they were concerned that if one  
5 manufacturer adopted SawStop and the other manufacturers didn't  
6 that they would be subject to potential liability for not  
7 adopting something that was shown to be feasible because one  
8 manufacturer put it out on the market? Wasn't that their  
9 concern?

12:35 10 A. That was one of those concerns, yes.

11 Q. And that's why, is it not, that they got together and  
12 decided that they would work collectively so that they would  
13 all put it on the market if and when they wanted to and decided  
14 that it was in their interests to do so? Isn't that true, sir?

15 A. Again, that's one of the reasons but wasn't the primary  
16 reason.

17 Q. But that was one of the reasons, wasn't it?

18 A. That's correct.

19 Q. Because if Black & Decker, God forbid, would come out with  
12:36 20 a saw with SawStop, Ryobi, in your view, would be in real legal  
21 trouble, is that correct?

22 A. It could be.

23 Q. Well, you expressed a view that they would be; isn't that  
24 true, sir?

25 A. Pardon?

1 Q. You expressed the view that they would be? You were  
2 concerned -- you had real concern that if Black & Decker or  
3 Makita or Rexon or Delta or anybody else came out with a  
4 SawStop saw before Ryobi, Ryobi was going to be in trouble in a  
5 courtroom like this?

6 A. Yeah, no.

7 Q. I'm sorry?

8 A. I don't remember "would be" as much as "could be."

9 Q. Let me get your testimony, sir.

12:37 10 And it's true, sir, is it not, that in the fall of 2001,  
11 neither you nor Mr. Domeny, nor Mr. Rodriguez of Makita, nor  
12 Mr. Keller of Delta ever thought that Stephen Gass had the  
13 wherewithal to actually put a saw on the market himself; isn't  
14 that true, sir?

15 MR. APPEL: Objection, your Honor.

16 THE COURT: Sustained.

17 A. I don't remember that --

18 THE COURT: There's no question before you.

19 Q. Mr. Peot, I'm going to read your testimony from your first  
12:37 20 deposition on November 6, 2008, Page 256, Line 10. "QUESTION:  
21 Do you recall during this discussion that you are summarizing  
22 in this document, in October of 2001 -- do you recall any  
23 discussion of any concern raised by anyone on the board of  
24 directors about the possibility that one manufacturer may  
25 develop the product and what the impact would be on the other

1 be considered. In fact, one of the rules was that we will not  
2 consider SawStop or any intellectual property. We will enter  
3 with a wide open, broad mind to try and develop the best system  
4 we possibly could.

5 Q. And one of the ground rules was that we would not use  
6 technology developed by Dr. Gass, we'd try to find a way to do  
7 it without using his technology, correct?

8 A. No, it was not.

9 Q. So were you considering his technology --

02:07 10 A. We were chartered to use whatever technology we felt would  
11 be best to prevent table saw accidents. There were no  
12 limitations that I can remember one way or the other.

13 Q. Okay. And the first meeting of that group was in May of  
14 2003; is that correct, sir?

15 A. I think it's correct.

16 Q. And you made a presentation at that meeting in May of  
17 2003, correct?

18 A. I believe so.

19 Q. And in that presentation you told the group that the  
02:08 20 technology, that the SawStop system consistently stopped in six  
21 milliseconds or less, correct?

22 A. We measured a stopping time of six milliseconds. I don't  
23 remember the consistency part of it, but we measured a six  
24 millimeter -- excuse me, a six millisecond stop time on the  
25 prototype saw.

# **EXHIBIT 3**

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF OREGON**

**ADAM THULL,**

Plaintiff,

v.

**TECHTRONIC INDUSTRIES CO., LTD.,**  
*et al.,*

Defendants.

Case No. 3:13-mc-00102

**OPINION AND ORDER**  
**OF CIVIL CONTEMPT**

**Michael H. Simon, District Judge.**

This action involves a discovery dispute arising out of third-party subpoenas served in the District of Oregon on an individual and his two affiliated companies (the “Subpoenaed Entities”) by Defendants in a lawsuit pending in the United States District Court for the District of Minnesota (the “Underlying Action”).<sup>1</sup> In the Underlying Action, Plaintiff alleges a product liability claim arising out of personal injuries received by Plaintiff while using a power table saw manufactured or sold by Defendants. Also in the Underlying Action, the individual served by Defendants with a third-party subpoena seeking documents had already “volunteered” to present

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<sup>1</sup> *Thull v. Techtronic Indus. Inc., et al.*, No. 11-cv-02368-PAM-LIB (D. Minn.).

testimony as an unpaid expert witness in support of Plaintiff's claim. Further, the two subpoenaed companies, which are affiliated with Plaintiff's "volunteer" expert witness, manufacture and sell power saws, or hold related patents, in competition with Defendants. The subpoenaed individual (Plaintiff's "volunteer" expert witness) and his two affiliated companies filed timely objections to the subpoenas, and Defendants moved to compel. After holding a hearing, the Court granted in part and denied in part Defendants' motion to compel and entered a protective order regarding the treatment of confidential and competitively sensitive material.

The Subpoenaed Entities, however, only partially complied with the Court's discovery order and willfully "declined" to comply with other portions of the Court's order. Defendants then moved for an order of civil contempt against the Subpoenaed Entities for failure to comply with the Court's order. Dkt. 39. The Court held an evidentiary hearing (Dkts. 49 and 50), during which the Subpoenaed Entities candidly admitted that they willfully failed to produce certain responsive documents and explained that they sought a "friendly" order of civil contempt so that they may appeal the Court's discovery rulings. Plaintiff in the Underlying Action took no position on the contempt motion. As more fully explained below, the Court will give to Defendants and the Subpoenaed Entities what they each seek—a "friendly" order of civil contempt with appropriately and narrowly crafted conditional coercive relief.

### **BACKGROUND**

Plaintiff Adam Thull sued Defendants Techtronic Industries Co., Ltd.; Techtronic Industries North America, Inc.; One World Technologies, Inc.; Ryobi Technologies, Inc.; and Home Depot U.S.A., Inc. (collectively, "Defendants") for product liability in the Underlying Action. The court in the Underlying Action has directed Plaintiff and Defendants to be ready for trial by April 1, 2014.



In the Underlying Action, Defendants caused third-party subpoenas to be issued by the United States District Court for the District of Oregon and served on three related non-parties: SawStop, LLC (“SawStop”), SD3, LLC (“SD3”), and Stephen F. Gass, Ph.D. (“Dr. Gass”) (collectively “SawStop” or the “Subpoenaed Entities”). Defendants’ subpoenas required the production of responsive documents in Oregon, where the Subpoenaed Entities reside or are found. The Subpoenaed Entities timely objected to Defendants’ requests. Thereafter, Defendants commenced this miscellaneous action in the District of Oregon, pursuant to Federal Rule of Civil Procedure 45(c)(2)(B)(i), seeking an order compelling discovery. Dkt. 1.

Dr. Gass invented and patented active injury mitigation technology (“AIMT”) for power saws and other similar woodworking equipment.<sup>2</sup> Dr. Gass is president of SawStop and holds both a Ph.D. in physics and a law degree. He has worked as a patent attorney and is a lifelong “woodworker.” “The SawStop technology includes a safety system that detects accidental contact between a person and the spinning blade of a saw, and then reacts to minimize any injury.” *Santella v. Grizzly Indus., Inc.*, No. 3:12-mc-00131-SI (D. Or.), Dkt. 2, at 13 ¶ 3. Dr. Gass filed the first patent application describing the SawStop technology in 1999, and “[s]ince then, the U.S. Patent and Trademark Office has issued numerous patents disclosing various implementations, features and improvements related to the technology.” *Id.* at 14 ¶ 8. Dr. Gass commercialized the first table saw incorporating AIMT in 2004. SD3 holds the patents covering AIMT.

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<sup>2</sup> This action is substantially similar to a matter the Court previously addressed, *Santella v. Grizzly Industrial, Inc.*, No. 3:12-mc-00131-SI (D. Or.). The Court’s brief recitation of the background of the present dispute is taken in part from the Court’s September 26, 2012 Opinion and Order in the *Santella* case, *Santella* Dkt. 40.

Defendants manufactured or sold a table saw to Plaintiff that does not incorporate AIMT. Dkt. 3-1, at 4 ¶¶ 11-13. Plaintiff suffered injuries when using this saw. *Id.* at 7 ¶ 33. Plaintiff brought suit, alleging claims of, *inter alia*, strict product liability, breach of implied warranty, and negligence. *Id.* at 8-16.

In the Underlying Action (as well as in other similar actions throughout the United States), Dr. Gass, as a volunteer and without compensation, filed an expert report in which he opines: “It is both economically and technically feasible to redesign the saw at issue to incorporate the SawStop technology.” Dkt. 3-2, at 29 ¶ 67. Dr. Gass begins his expert report by noting that he has been asked by Plaintiff’s attorneys to “provide fact and expert testimony” in that particular case and is “willing to do so.” *Id.* at 1. Dr. Gass then adds: “However, I am neither retained nor specially employed to provide expert testimony, and therefore, I understand a written report of my opinion is not required.” *Id.* Presumably, this is why Defendants sought discovery relating to the Subpoenaed Entities through a Rule 45 subpoena to non-parties, rather than under Federal Rule of Civil Procedure 26(a)(2)(B), which relates to discovery from expert witnesses who have been “retained or specially employed to provide expert testimony in the case.”

In resolving Defendants’ motion to compel, the Court addressed three issues: (1) the validity of Defendants’ document requests under Rule 45; (2) whether Defendants’ chosen expert witness for trial, Mr. Peter Domeny, may have access to SawStop’s confidential documents over the objection of SawStop; and (3) whether SawStop’s costs of compliance should be shifted, in whole or in part, to Defendants. The Court granted in part and denied in part Defendants’ motion to compel and allowed Mr. Domeny to review SawStop’s documents subject to a protective

order. Dkt. 32. The Court's protective order specifically referenced Mr. Domeny. Dkt. 35, at ¶ 3(f).

SawStop provided some of the requested documents, but deliberately declined to provide all responsive discovery that the Court ordered. Defendants then moved for an order of civil contempt. Dkt. 39. During the oral argument and evidentiary hearing on Defendants' motion for civil contempt, SawStop admitted that it willfully did not produce certain documents in response to the Court's order, explaining that it was seeking a "friendly" contempt order so that SawStop could appeal the Court's discovery rulings. Specifically, SawStop acknowledged that it did not produce documents created or received after approximately 2011 that were responsive to the following requests by Defendants:

1. Request for Production No. 5 (requesting documents referencing false activations of AIMT incorporated into SawStop's commercially available saws);<sup>3</sup>
2. Request for Production No. 6 (requesting documents showing SawStop's annual sales figures and other financial information relating to AIMT-equipped saws);
3. Request for Production No. 7 (requesting documents showing SawStop's annual sales figures and other financial information relating to brake cartridges); and
4. Request for Production No. 8 (requesting documents evidencing or relating to complaints or dissatisfaction with SawStop's AIMT-equipped saws).

See Dkt. 32.

## DISCUSSION

### A. Standards for Civil Contempt

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<sup>3</sup> As explained by SawStop during the evidentiary hearing held on January 21, 2014, a "false activation" is an activation of the active injury mitigation technology caused by something other than contact with human flesh. Dkt. 50 (transcript from hearing).

The court has the inherent power to enforce compliance with its lawful orders. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). The court is also empowered to enforce compliance with its orders pursuant to 18 U.S.C. § 401(3) (“A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.”). *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1409 n. 4 (9th Cir. 1990) (finding civil contempt encompassed within 18 U.S.C. § 401); *see generally Nilva v. United States*, 352 U.S. 385, 392-96 (1957) (holding that failure of corporation to produce records in its control when requested by subpoena constitutes criminal contempt); *see also* Fed. R. Civ. P. 45(e).

In a civil contempt action, “[t]he moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply.” *Fed. Trade Comm’n v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting *Stone v. City and Cnty. of S. F.*, 968 F.2d 850, 856 n. 9 (9th Cir. 1992)).

## **B. Findings of Fact**

1. After providing all interested parties (Plaintiff, Defendants, and the Subpoenaed Entities) with a full and fair opportunity to be heard on Defendants’ motion to compel, both in writing and in oral argument, the court issued its written Opinion and Order (“Order”) dated August 12, 2013. Dkt. 32. In that Order, the court stated:

Defendants’ Motions to Compel (*Thull* Dkt. 1; *Santillan* Dkt. 1) are GRANTED in part AND DENIED in part as follows: SawStop’s objections to *Thull* Requests 1, 6-8, 21, 23, 28, and 30 and *Santillan* Requests 6 and 15 are OVERRULED; SawStop’s objections to *Thull* Requests 5, 16-20, 24, and 26 are OVERRULED in part and SUSTAINED in part, and the requests are modified as described in this Opinion and

Order; and SawStop's objections to *Thull* Requests 9-15 and *Santillan* Requests 7-12 are SUSTAINED. In addition, SawStop's Motion for Discovery Sanctions (*Thull* Dkt. 8, at 21-23) is DENIED, and SawStop's Motion for Costs of Compliance (*Thull* Dkt. 8, at 21-23) is DENIED without prejudice. Not later than August 30, 2013, the parties shall confer and submit either a joint proposed protective order or separate briefing, not to exceed five pages, explaining why the protective order previously entered in *Santella* needs to be substantively modified.

Order (Dkt. 32), at 23.

2. On October 21, 2013, the Court signed a protective order in this matter. Dkt. 35.

That protective order triggered SawStop's obligation to produce the responsive documents ordered by the Court.

3. On January 21, 2014, the Court held an oral argument and evidentiary hearing on Defendants' motion for civil contempt. Dkts. 49 and 50. During that hearing, the Subpoenaed Entities admitted that they had not produced documents responsive to Defendants' subpoenas, which the Subpoenaed Entities were required to produce. These documents include, at least, documents responsive to Defendants' Requests for Production Nos. 5, 6, 7, and 8. At the hearing, the Subpoenaed entities failed to demonstrate that they were unable to comply with this Court's Order that these documents be produced. In fact, the Subpoenaed Entities candidly admitted that they did not produce these documents because they wanted to obtain a "friendly" order of civil contempt so that they could appeal the Court's underlying discovery rulings. The Subpoenaed Entities suggested a conditional fine in the amount of \$1,000.

4. Defendants, as the parties moving for a citation of civil contempt against the Subpoenaed Entities, have shown by clear and convincing evidence that contemnors (the Subpoenaed Entities) violated a specific and definite order of the Court, namely the Court's Order dated August 12, 2013 (Dkt. 32).

### C. Conclusions of Law

1. The failure to produce documents or other information in response to a court order can constitute contemptuous conduct. *Fed. Trade Comm'n v. Productive Mktg., Inc.*, 136 F. Supp. 2d 1096, 1010-11 (C.D. Cal. 2001); *see also* 18 U.S.C. § 401.

2. The Subpoenaed Entities have not substantially complied with the Court's Order dated August 12, 2013 (Dkt. 32).

3. The Subpoenaed Entities have willfully disregarded their obligations under the Court's Order dated August 12, 2013 (Dkt. 32).

4. Compulsory sanctions, otherwise known as civil sanctions, are intended to coerce a contemnor into compliance with a Court's order. *Productive Mktg., Inc.*, 136 F. Supp. 2d at 1112 (citing *United States v. Ayres*, 166 F.3d 991, 997 (9th Cir. 1999)).

5. Civil sanctions are appropriate when the "contemnor is able to purge the contempt by his own affirmative act and 'carries the keys of the prison in his own pocket.'" *Id.* (quoting *Ayres*, 166 F.3d at 997).

6. Conditional fines are appropriate civil sanctions when imposed to coerce compliance. *Id.*

7. Courts have wide discretion to determine what compensatory contempt fine should be imposed. *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980) (citing *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947)). Where compensation is intended, any contempt fine payable to the complainant must "be based upon evidence of complainant's actual loss." *United Mine Workers*, 330 U.S. at 304.

8. Where the purpose of an order of civil contempt is to make the contemnor comply, the court "must then consider the character and magnitude of the harm threatened by

continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” *Id.* at 304 (footnote omitted).

**D. Order of Civil Contempt and Sanctions**

The Court hereby GRANTS Defendants’ Motion for Contempt Order for Failure to Comply with Court Order (Dkt. 39) and finds SawStop, LLC; SD3, LLC, and Stephen F. Gass, Ph.D. each to be in contempt of court for failing to comply with this Court’s Order dated August 12, 2013 (Dkt. 32). The Court issued a lawful and valid Order on that date directing the Subpoenaed Entities to produce responsive documents to counsel for Defendants. The Subpoenaed Entities did not do so and have not shown good cause or any other valid excuse for their failure to comply with this Court’s Order. Accordingly, the Court concludes that each of the three Subpoenaed Entities are in contempt of court for their failure to provide documents as required in the Court’s Order dated August 12, 2013 (Dkt. 32). Coercive sanctions are necessary to obtain compliance. Civil contempt sanctions are thus ordered against the Subpoenaed Entities as follows:

1. As of the date of entry of this order, the Court imposes a conditional fine of \$1,000 (the amount suggested by the Subpoenaed Entities), unless the Subpoenaed Entities purge themselves of contempt by producing the documents directed in the Court’s Order dated August 12, 2013 (Dkt. 32), not later than 5:00 p.m. Pacific time on Monday, February 10, 2014. If the Subpoenaed Entities produce the required documents by that date and time, then this conditional fine need not be paid. The Court concludes that the amount of the conditional civil contempt sanction stated above is fair and appropriate, especially because the Subpoenaed Entities can avoid the imposition of any conditional sanction merely by providing in a timely

fashion the documents directed in the Court's Order dated August 12, 2013 (Dkt. 32). No punitive sanctions are being awarded at this time.

2. In addition, the Court, exercising its equitable powers in this matter, further orders as follows:

a. Until the Subpoenaed Entities have purged themselves of this civil contempt by producing to Defendants the documents directed to be provided by the Court's Order of August 12, 2013 (Dkt. 32), none of the Subpoenaed Entities, including Dr. Gass, may provide any declaration, affidavit, deposition testimony, or trial testimony in either the Underlying Action or in any similar action related to the Subpoenaed Entities' active injury mitigation technology. It is the opinion of this Court that the documents that are the subject of this civil contempt order are reasonably necessary for a comprehensive and fair cross-examination of Dr. Gass by Defendants in the Underlying Action and by the defendants in any similar lawsuits and that the Subpoenaed Entities should not benefit by their willful refusal to provide this needed—and court-ordered—discovery.

b. The Court recognizes, however, that the additional equitable coercive relief extended by paragraph 2(a) above may work a hardship on the Plaintiff in the Underlying Action and on any plaintiffs in any similar lawsuits where Dr. Gass's expertise may be relevant. Thus, if any presiding trial court judge in the Underlying Action or any similar lawsuit affected by this order believes it appropriate for this civil contempt order to be modified in any way, then:

i. if, and to the extent that, any such presiding trial court judge has the legal authority to modify this civil contempt order as it may apply in the case pending before that judge, such judge may do so; and



ii. if any such presiding trial court judge does not have (or does not believe that he or she has) the legal authority to modify this civil contempt order as it may apply in any case pending before that judge, then, upon request from any such judge, this Court will consider making whatever modifications that judge may suggest or request that may be appropriate.

c. Defendants are directed to provide a copy of this Opinion and Order of Civil Contempt to the presiding judge in the Underlying Action.

### **CONCLUSION**

Defendants' Motion for Contempt Order for Failure to Comply with Court Order (Dkt. 39) is GRANTED.

IT IS SO ORDERED.

DATED this 3rd day of February, 2014.

/s/ Michael H. Simon  
Michael H. Simon  
United States District Judge

# **EXHIBIT 4**

# **STOLLINGS v. RYOBI**

## **GASS TESTIMONY**

**7/26/12 A.M.**

1 mandate, and you've testified that you're not aware of any  
2 such technology that wouldn't infringe your patents, isn't  
3 that correct?

4 A. Well, I'm not aware of any that's actually been produced,  
5 no. But I've seen quite a number of patent applications from  
6 PTI and Bosch and others that potentially could be implemented  
7 to meet such a standard without infringing any of our patents.

8 Q. So, you think it's possible that somebody could come along  
9 and do what your performance standard is requiring without  
10 infringing your patents?

11 A. Well, there's kind of multiple pieces to that. It's not  
12 my performance standard. But what I would suggest a  
13 performance standard should be, yes, I think that there are  
14 other patents that have been filed both before and after our  
15 patent application was initially filed, anyway, that  
16 potentially could meet such a standard -- could protect the  
17 user sufficiently without infringing our patents.

18 Q. And it's your hope that they can't do that without  
19 infringing your patents, isn't that right?

20 A. It's my hope that they can't do it in any practical way, I  
21 would probably clarify, yeah. I would like the industry to  
22 adopt the technology that I've developed, and I'd like to get  
23 a royalty for that. I think that would be great. I don't  
24 deny that in any way. And so I hope that's the way it plays  
25 out. I hope I've got the best technology.

1 But it may well be that I don't. It may well be that  
2 PTI is able to develop some alternative of their own that  
3 overwhelms my technology in terms of performance or cost; and  
4 if so, I'm out of luck.

5 Q. You don't really want any competition, do you?

6 A. I'm in business, and I sell saws. So, in some abstract  
7 sense, would I like all of my competitors to go away? Of  
8 course. Anybody in business would like to not have any  
9 competitors.

10 But I'd like the bank to deliver me a million dollars  
11 a day, but that's not going to happen. I have to deal with  
12 reality that those competitors are going to be there. And,  
13 you know, I -- there's not going to be anything I can do, nor  
14 would I, because it wouldn't be proper to eliminate that.

15 I can only patent and get protection for what we've  
16 invented and protect that for the benefit of the company, and  
17 then other people can do the same.

18 THE COURT: Mr. Bell, how much longer do you have on  
19 this particular line?

20 MR. BELL: I'm going to be a while, your Honor. As  
21 I've told you, I've got a lot to cover here.

22 THE COURT: Okay. Do you think this -- I'm just  
23 wondering what would be a good breaking point.

24 MR. BELL: This would be a fine point. I mean, we're  
25 going to be here for a while with Mr. Gass.

1 THE COURT: That's fine. I just didn't want to cut  
2 you off in the middle of a topic that you were on.

3 MR. BELL: No, no.

4 THE COURT: Okay. So, why don't we adjourn for the  
5 day.

6 Ladies and gentlemen, please don't discuss --  
7 continue not to discuss any of the issues in the case, any of  
8 the witnesses, any observations about any of the evidence,  
9 whether it's testimony or exhibits, nothing about the case.  
10 Please don't discuss it with anybody, your fellow jurors or  
11 anybody else.

12 Please don't communicate about this case or reference  
13 your status as a juror or your service as a juror on any  
14 social media of any kind.

15 Please don't do any research. And that includes  
16 research into books, research on the Internet, or looking at  
17 tools that you might come across either in your home or  
18 elsewhere.

19 And please continue to keep an open mind about this  
20 case. We've heard three days of testimony. There are more  
21 days to come. And please keep an open mind. Because we have  
22 to hear the testimony. We have to hear the closing arguments  
23 from the lawyers. And you at that point get to here the --  
24 have the benefit of hearing the views of your fellow jurors.

25 Tomorrow, I don't have a motion or a status call, so