The Bullet Point: Ohio Commercial Law Bulletin

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of in the area of commercial law and business practices. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of commercial intelligence to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

To further our goal of providing bullet points of commercial intelligence to help people do business better and better monitor the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs, the Bullet Point will provide previews of cases before the United States Supreme Court (SCOTUS) and the U.S. Sixth Circuit Court of Appeal. When appropriate, *The Bullet Point* will highlight industry issues that would benefit from amicus brief support. If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

The Bullet Point

Ohio v. American Express Co., Slip. Op. No. 16-1454 (June 25, 2018).

Several states sued American Express for violating the anti-steering provisions of the Sherman Antitrust Act. American Express is a credit card company that provides a "two-sided platform" – that is, it provides services to two groups, cardholders and merchants, that both rely on American Express to intermediate between them. This relationship requires a balancing act of the prices charged to each group, in order to maximize the service that American Express offers and to allow it to compete with rivals. To compete, American Express focused on cardholder

spending and offered a significant rewards program; however, the program required American Express to continually invest in it, leading the company to charge merchants more. This created tension with merchants, who, to avoid the higher fees, would sometimes dissuade cardholders from using American Express cards at the point of sale, known as "steering." To combat this practice, American Express placed an anti-steering provision in its merchant contracts.

Various states sued for this practice, contesting the anti-steering provision as a violation of the Sherman Antitrust Act. The district court agreed but the Second Circuit Court of Appeals reversed. The United States Supreme Court then affirmed that decision, finding that the anti-steering provision did not violate the Sherman Antitrust Act.

The Bullet Point: Section 1 of the Sherman Act prohibits "unreasonable restraints" on trade. Restraints may be unreasonable in one of two ways—unreasonable per se or unreasonable as judged under the "rule of reason." The rule of reason requires courts to conduct a fact-specific assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. The goal is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." Courts apply a three-step, burden-shifting test to see if a restraint violates the rule of reason. First, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. Here, the Court found that plaintiffs failed to carry their initial burden because the plaintiffs only focused on the increased fees to merchants and ignored the other side of the two-sided platform and the benefits that were afforded to cardholders under the program.

***City of Cleveland v. Embassy Realty Investments, Inc.*, 8th Dist. Cuyahoga No. 105091, 2018-Ohio-2513.**

This was an appeal of a trial court's decision to grant the city of Cleveland judgment against a company and its owner for violating various housing code ordinances. The appellant registered the trade name Embassy Realty Investments (Embassy) and used that company to purchase vacant commercial buildings. He purchased a former church that had been declared a public nuisance by the city a few years prior. Once he bought the property, the City began sending him notices of condemnation and demolition. Thereafter, he incorporated Embassy and then transferred title of the disputed property to it. After a number of legal disputes, the City eventually demolished the property. It then filed suit against Embassy and Appellant individually for the costs associated with the demolition. Regarding Appellant, the City sought to hold him liable under a "piercing the corporate veil" theory. The trial court eventually granted the City's motions and the Appellant appealed.

On appeal, the Eighth Appellate District affirmed in part and reversed in part. Specifically, the court found that the trial court erred in finding Appellant individually liable under a piercing the corporate veil theory, noting that there was a factual dispute as to whether the Appellant exercised control over the company as required to be held individually liable.

The Bullet Point: "[A] fundamental rule of corporate law is that, normally, shareholders, officers, and directors are not liable for the debts of the corporation." In *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, the Ohio Supreme Court explained the exception to this general principle, noting that shareholders are not absolutely immune from liability for the actions of their corporations, and that the "veil" of a corporation may be pierced where it would be unjust to allow a shareholder to hide behind corporate protections. Piercing the corporate veil is a rare exception and usually reserved for cases of fraud or other exceptional circumstances. Three elements must be met to pierce the corporate veil: (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own; (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

By design, it is very difficult to pierce the corporate veil, so companies should be very wary when attempting to do so. If you are concerned about future collectability or liability, securing a personal guarantee may be more effective.

***Phoenix Lighting Group LLC v. Genlyte Thomas Group LLC*, 9th Dist. Summit No. 28082, 2018-Ohio-2393.**

The owner and operator of two lighting companies entered into negotiations with two employees to sell Phoenix, one of the companies. The parties entered into confidentiality agreements during the negotiating process. During that process, confidential information about Phoenix was disclosed. While the negotiations were ongoing, the employees started their own lighting agency. As part of that process, the company for which they would be selling lights in the Cleveland market asked for a business plan. The employees utilized information they learned in negotiating with Phoenix for their plan and also contemplated hiring various employees of Phoenix. When Phoenix's owner found out, the employees ultimately resigned and proceeded with their lighting agency.

Phoenix then filed suit, alleging various business-related torts. The matter then proceeded to a jury trial that eventually found for Phoenix on a number of claims. Specifically, the jury found that the new lighting agency had tortiously interfered with Phoenix's business relationships, misappropriated Phoenix's trade secrets, and participated in a civil conspiracy to tortiously interfere with Phoenix's business relationships, to breach a duty of loyalty owed to

Phoenix, and to misappropriate Phoenix's trade secrets. Ultimately, the jury awarded Phoenix in excess of $1.6 million in compensatory damages and more than $7 million in punitive damages. The trial court reduced that amount to $2.7 million and awarded almost $4 million in attorneys' fees. The defendants appealed and on appeal, the Ninth Appellate affirmed in part and reversed in part. In so ruling, the court affirmed various findings by the jury that the defendants had tortiously interfered with business relationships, misappropriated trade secrets, and engaged in a conspiracy. It reversed the trial court's application of a punitive damages cap because it had applied the wrong one under statute.

The Bullet Point: "The elements of 'tortious interference with a business relationship are: (1) a contractual or business relationship; (2) knowledge of the relationship by the tortfeasor; (3) an intentional and improper act by the tortfeasor preventing formation of a contract, procuring breach of a contract, or termination of a business relationship; (4) lack of privilege on the part of the tortfeasor; and (5) resulting damage.'" "Tortious interference with a business relationship does not require the breach of contract, rather it is sufficient to prove that a third party does not enter into or continue a business relationship with the plaintiff." However, the tortfeasor must act maliciously before a party can recover under a theory of tortious interference with a business relationship.

To that end, courts consider the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

***Boehm v. Black Diamond Casino Events LLC*, 1st Dist. Hamilton No. C-170339, 2018-Ohio-2379.**

This was an appeal of a trial court's decision to grant a motion for involuntary dismissal by the plaintiff. Black Diamond operates a casino-games-themed events business for corporate and private parties. Roger Boehm, Jr., a former employee of Black Diamond, approached the owners about buying two of the four members' interests in Black Diamond. During the due diligence process, Mr. Boehm signed a nondisclosure agreement. He then obtained confidential information from Black Diamond, such as customer lists and tax and financial information. Mr. Boehm eventually decided to move forward with the purchase, but members of Black Diamond refused to sell. Mr. Boehm sued, and Black Diamond filed counterclaims for breach of contract and violation of the Ohio Uniform Trade Secrets Act. At a bench trial, the trial court orally granted a request for dismissal by Mr. Boehm, and Black Diamond appealed. The First Appellate District reversed, finding that the trial court erred in finding that Black Diamond's client lists and financial information were not trade secrets.

The Bullet Point: Under Ohio law, a trade secret is defined as information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The following factors should be considered when analyzing a trade secrets claim: (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

Customer lists are an intangible asset that is presumptively a trade secret when the owner takes measures to prevent its disclosure in the ordinary course of business. Likewise, taxes and quarterly profit-and-loss statements could constitute trade secrets assuming they are not known to those outside the business, not available to other people outside the business absent a nondisclosure agreement, and were kept confidential by a company.

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

OHIO ET AL. *v.* AMERICAN EXPRESS CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 16–1454. Argued February 26, 2018—Decided June 25, 2018

Respondent credit-card companies American Express Company and American Express Travel Related Services Company (collectively, Amex) operate what economists call a "two-sided platform," providing services to two different groups (cardholders and merchants) who depend on the platform to intermediate between them. Because the interaction between the two groups is a transaction, credit-card networks are a special type of two-sided platform known as a "transaction" platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. Unlike traditional markets, two-sided platforms exhibit "indirect network effects," which exist where the value of the platform to one group depends on how many members of another group participate. Two-sided platforms must take these effects into account before making a change in price on either side, or they risk creating a feedback loop of declining demand. Thus, striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

Visa and MasterCard—two of the major players in the credit-card market—have significant structural advantages over Amex. Amex competes with them by using a different business model, which focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than the other credit-card companies. Amex must continually invest in its cardholder rewards program to maintain its cardholders' loyalty. But to fund those investments, it must charge merchants higher fees than its rivals. Although this business model has stimulated competitive innovations in the credit-card market, it sometimes causes friction

with merchants. To avoid higher fees, merchants sometimes attempt to dissuade cardholders from using Amex cards at the point of sale—a practice known as "steering." Amex places antisteering provisions in its contracts with merchants to combat this.

In this case, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate §1 of the Sherman Antitrust Act. The District Court agreed, finding that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders—and that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. The Second Circuit reversed. It determined that the credit-card market is one market, not two. And it concluded that Amex's antisteering provisions did not violate §1.

Held: Amex's antisteering provisions do not violate federal antitrust law. Pp. 8–20.

(a) Section 1 of the Sherman Act prohibits "unreasonable restraints" of trade. *State Oil Co.* v. *Khan,* 522 U. S. 3, 10. Restraints may be unreasonable in one of two ways—unreasonable *per se* or unreasonable as judged under the "rule of reason." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723. The parties agree that Amex's antisteering provisions should be judged under the rule of reason using a three-step burden-shifting framework. They ask this Court to decide whether the plaintiffs have satisfied the first step in that framework—*i.e.*, whether they have proved that Amex's antisteering provisions have a substantial anticompetitive effect that harms consumers in the relevant market. Pp. 8–10.

(b) Applying the rule of reason generally requires an accurate definition of the relevant market. In this case, both sides of the two-sided credit-card market—cardholders and merchants—must be considered. Only a company with both cardholders and merchants willing to use its network could sell transactions and compete in the credit-card market. And because credit-card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services, they exhibit more pronounced indirect network effects and interconnected pricing and demand. Indeed, credit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole. Pp. 10–15.

(c) The plaintiffs have not carried their burden to show anticompetitive effects. Their argument—that Amex's antisteering provisions increase merchant fees—wrongly focuses on just one side of the market. Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exer-

cise of market power. Instead, plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the two-sided credit-card market. They failed to do so. Pp. 15–20.

(1) The plaintiffs offered no evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. It uses higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes it valuable to merchants. In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees: Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted. Pp. 16–17.

(2) The plaintiffs' evidence that Amex's merchant-fee increases between 2005 and 2010 were not entirely spent on cardholder rewards does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 237. There is no such evidence here. Output of credit-card transactions increased during the relevant period, and the plaintiffs did not show that Amex charged more than its competitors. P. 17.

(3) The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while they have been in place, the market experienced expanding output and improved quality. Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Amex's competitors have exploited its higher merchant fees to their advantage. Lastly, there is nothing inherently anticompetitive about the provisions. They actually stem negative externalities in the credit-card market and promote interbrand competition. And they do not prevent competing credit-card networks from offering lower merchant fees or promoting their broader merchant acceptance. Pp. 18–20.

838 F. 3d 179, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. BREYER, J., filed a

dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 16–1454

OHIO, ET AL., PETITIONERS *v.* AMERICAN EXPRESS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 25, 2018]

JUSTICE THOMAS delivered the opinion of the Court.

American Express Company and American Express Travel Related Services Company (collectively, Amex) provide credit-card services to both merchants and cardholders. When a cardholder buys something from a merchant who accepts Amex credit cards, Amex processes the transaction through its network, promptly pays the merchant, and subtracts a fee. If a merchant wants to accept Amex credit cards—and attract Amex cardholders to its business—Amex requires the merchant to agree to an antisteering contractual provision. The antisteering provision prohibits merchants from discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee. In this case, we must decide whether Amex's antisteering provisions violate federal antitrust law. We conclude they do not.

I

A

Credit cards have become a primary way that consumers in the United States purchase goods and services.

When a cardholder uses a credit card to buy something from a merchant, the transaction is facilitated by a credit-card network. The network provides separate but interrelated services to both cardholders and merchants. For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. Cardholders also can receive rewards based on the amount of money they spend, such as airline miles, points for travel, or cash back. For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment. This saves merchants the trouble and risk of extending credit to customers, and it increases the number and value of sales that they can make.

By providing these services to cardholders and merchants, credit-card companies bring these parties together, and therefore operate what economists call a "two-sided platform." As the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them. See Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667 (2008) (Evans & Schmalensee); Evans & Noel, Defining Antitrust Markets When Firms Operate Two-Sided Platforms, 2005 Colum. Bus. L. Rev. 667, 668 (Evans & Noel); Filistrucchi, Geradin, Van Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 296 (2014) (Filistrucchi). For credit cards, that interaction is a transaction. Thus, credit-card networks are a special type of two-sided platform known as a "transaction" platform. See *id.*, at 301, 304, 307; Evans & Noel 676–678. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. See Klein, Lerner, Murphy, & Plache, Competition in Two-Sided Markets: The Antitrust Eco-

nomics of Payment Card Interchange Fees, 73 Antitrust L. J. 571, 580, 583 (2006) (Klein). For example, no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network. See Filistrucchi 301.

Two-sided platforms differ from traditional markets in important ways. Most relevant here, two-sided platforms often exhibit what economists call "indirect network effects." Evans & Schmalensee 667. Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate. D. Evans & R. Schmalensee, Matchmakers: The New Economics of Multisided Platforms 25 (2016). In other words, the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A credit card, for example, is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it. See Evans & Noel 686–687; Klein 580, 584. To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. See Evans & Schmalensee 675; Evans & Noel 680; Muris, Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets, 2005 Colum. Bus. L. Rev. 515, 532–533 (Muris); Rochet & Tirole, Platform Competition in Two-Sided Markets, 1 J. Eur. Econ. Assn. 990, 1013 (2003). Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand. See Evans & Schmalensee 675; Evans & Noel 680–681. Two-sided platforms therefore must take these indirect network effects into account before making a change in price on either side. See Evans & Schmalensee 675; Evans &

Noel 680–681.[1]

Sometimes indirect network effects require two-sided platforms to charge one side much more than the other. See Evans & Schmalensee 667, 675, 681, 690–691; Evans & Noel 668, 691; Klein 585; Filistrucchi 300. For two-sided platforms, "'the [relative] price structure matters, and platforms must design it so as to bring both sides on board.'" Evans & Schmalensee 669 (quoting Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006)). The optimal price might require charging the side with more elastic demand a below-cost (or even negative) price. See Muris 519, 550; Klein 579; Evans & Schmalensee 675; Evans & Noel 681. With credit cards, for example, networks often charge cardholders a lower fee than merchants because cardholders are more price sensitive.[2] See Muris 522; Klein 573–574, 585, 595. In fact, the network might well *lose* money on the cardholder side by offering rewards such as cash back, airline miles, or gift cards. See Klein 587; Evans & Schmalensee 672. The network can do this because increasing the number of cardholders increases the value of accepting the card to merchants and, thus, increases the number of

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[1] In a competitive market, indirect network effects also encourage companies to take increased profits from a price increase on side A and spend them on side B to ensure more robust participation on that side and to stem the impact of indirect network effects. See Evans & Schmalensee 688; Evans & Noel 670–671, 695. Indirect network effects thus limit the platform's ability to raise overall prices and impose a check on its market power. See Evans & Schmalensee 688; Evans & Noel 695.

[2] "Cardholders are more price-sensitive because many consumers have multiple payment methods, including alternative payment cards. Most merchants, by contrast, cannot accept just one major card because they are likely to lose profitable incremental sales if they do not take [all] the major payment cards. Because most consumers do not carry all of the major payment cards, refusing to accept a major card may cost the merchant substantial sales." Muris 522.

merchants who accept it. Muris 522; Evans & Schmalensee 692. Networks can then charge those merchants a fee for every transaction (typically a percentage of the purchase price). Striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

B

Amex, Visa, MasterCard, and Discover are the four dominant participants in the credit-card market. Visa, which is by far the largest, has 45% of the market as measured by transaction volume.[3] Amex and MasterCard trail with 26.4% and 23.3%, respectively, while Discover has just 5.3% of the market.

Visa and MasterCard have significant structural advantages over Amex. Visa and MasterCard began as bank cooperatives and thus almost every bank that offers credit cards is in the Visa or MasterCard network. This makes it very likely that the average consumer carries, and the average merchant accepts, Visa or MasterCard. As a result, the vast majority of Amex cardholders have a Visa or MasterCard, but only a small number of Visa and MasterCard cardholders have an Amex. Indeed, Visa and MasterCard account for more than 432 million cards in circulation in the United States, while Amex has only 53 million. And while 3.4 million merchants at 6.4 million locations accept Amex, nearly three million more locations accept Visa, MasterCard, and Discover.[4]

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[3] All figures are accurate as of 2013.

[4] Discover entered the credit-card market several years after Amex, Visa, and MasterCard. It nonetheless managed to gain a foothold because Sears marketed Discover to its already significant base of private-label cardholders. Discover's business model shares certain features with Amex, Visa, and MasterCard. Like Amex, Discover interacts directly with its cardholders. But like Visa and MasterCard,

Amex competes with Visa and MasterCard by using a different business model. While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than other networks. Due to its superior rewards, Amex tends to attract cardholders who are wealthier and spend more money. Merchants place a higher value on these cardholders, and Amex uses this advantage to recruit merchants.

Amex's business model has significantly influenced the credit-card market. To compete for the valuable cardholders that Amex attracts, both Visa and MasterCard have introduced premium cards that, like Amex, charge merchants higher fees and offer cardholders better rewards. To maintain their lower merchant fees, Visa and MasterCard have created a sliding scale for their various cards—charging merchants less for low-reward cards and more for high-reward cards. This differs from Amex's strategy, which is to charge merchants the same fee no matter the rewards that its card offers. Another way that Amex has influenced the credit-card market is by making banking and card-payment services available to low-income individuals, who otherwise could not qualify for a credit card and could not afford the fees that traditional banks charge. See 2 Record 3835–3837, 4527–4529. In sum, Amex's business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.

Despite these improvements, Amex's business model sometimes causes friction with merchants. To maintain

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Discover uses banks that cooperate with its network to interact with merchants.

the loyalty of its cardholders, Amex must continually invest in its rewards program. But, to fund those investments, Amex must charge merchants higher fees than its rivals. Even though Amex's investments benefit merchants by encouraging cardholders to spend more money, merchants would prefer not to pay the higher fees. One way that merchants try to avoid them, while still enticing Amex's cardholders to shop at their stores, is by dissuading cardholders from using Amex at the point of sale. This practice is known as "steering."

Amex has prohibited steering since the 1950s by placing antisteering provisions in its contracts with merchants. These antisteering provisions prohibit merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on Amex cards; or promoting other cards more than Amex. The antisteering provisions do not, however, prevent merchants from steering customers toward debit cards, checks, or cash.

C

In October 2010, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate §1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1.[5] After a 7-week trial, the District Court agreed that Amex's antisteering provisions violate §1. *United States* v. *American Express* Co., 88 F. Supp. 3d 143, 151–152 (EDNY 2015). It found that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders. See *id.,* at 171–175. Evaluating the effects on the

[5] Plaintiffs also sued Visa and MasterCard, claiming that their antisteering provisions violated §1. But Visa and MasterCard voluntarily revoked their antisteering provisions and are no longer parties to this case.

merchant side of the market, the District Court found that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. See *id.,* at 195–224.

The Court of Appeals for the Second Circuit reversed. *United States* v. *American Express Co.*, 838 F. 3d 179, 184 (2016). It concluded that the credit-card market is one market, not two. *Id.*, at 196–200. Evaluating the credit-card market as a whole, the Second Circuit concluded that Amex's antisteering provisions were not anticompetitive and did not violate §1. See *id.,* at 200–206.

We granted certiorari, 583 U. S. ___ (2017), and now affirm.

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C. §1. This Court has long recognized that, "[i]n view of the common law and the law in this country" when the Sherman Act was passed, the phrase "restraint of trade" is best read to mean "undue restraint." *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 59–60 (1911). This Court's precedents have thus understood §1 "to outlaw only *unreasonable* restraints." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997) (emphasis added).

Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable *per se* because they "'"always or almost always tend to restrict competition and decrease output."'" *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723 (1988). Typically only "horizontal" restraints—restraints "imposed by agreement between competitors"—qualify as unreasonable *per se*. *Id.,* at 730. Restraints that are not unreasonable *per se* are judged under the "rule of reason." *Id.*, at 723. The rule of reason requires courts to conduct a fact-specific

assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984). The goal is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 886 (2007).

In this case, both sides correctly acknowledge that Amex's antisteering provisions are vertical restraints—*i.e.,* restraints "imposed by agreement between firms at different levels of distribution." *Business Electronics*, *supra*, at 730. The parties also correctly acknowledge that, like nearly every other vertical restraint, the antisteering provisions should be assessed under the rule of reason. See *Leegin*, *supra*, at 882; *State Oil*, *supra*, at 19; *Business Electronics*, *supra*, at 726; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 57 (1977).

To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. See 1 J. Kalinowski, Antitrust Laws and Trade Regulation §12.02[1] (2d ed. 2017) (Kalinowski); P. Areeda & H. Hovenkamp, Fundamentals of Antitrust Law §15.02[B] (4th ed. 2017) (Areeda & Hovenkamp); *Capital Imaging Assoc., P. C.* v. *Mohawk Valley Medical Associates, Inc.*, 996 F. 2d 537, 543 (CA2 1993). If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. See 1 Kalinowski §12.02[1]; Areeda & Hovenkamp §15.02[B]; *Capital Imaging Assoc.*, *supra,* at 543. If the defendant makes this showing, then the burden shifts back to the plaintiff

to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. See 1 Kalinowski §12.02[1]; *Capital Imaging Assoc.*, *supra,* at 543.

Here, the parties ask us to decide whether the plaintiffs have carried their initial burden of proving that Amex's antisteering provisions have an anticompetitive effect. The plaintiffs can make this showing directly or indirectly. Direct evidence of anticompetitive effects would be "'proof of actual detrimental effects [on competition],'" *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 460 (1986), such as reduced output, increased prices, or decreased quality in the relevant market, see 1 Kalinowski §12.02[2]; *Craftsman Limousine, Inc.* v. *Ford Motor Co.*, 491 F. 3d 381, 390 (CA8 2007); *Virginia Atlantic Airways Ltd.* v. *British Airways PLC*, 257 F. 3d 256, 264 (CA2 2001). Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition. See 1 Kalinowski §12.02[2]; *Tops Markets, Inc.* v. *Quality Markets, Inc.*, 142 F. 3d 90, 97 (CA2 1998); *Spanish Broadcasting System of Fla.* v. *Clear Channel Communications, Inc.*, 376 F. 3d 1065, 1073 (CA11 2004).

Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's antisteering provisions have caused anticompetitive effects in the credit-card market.[6] To assess this evidence, we must first define the relevant market. Once defined, it becomes clear that the plaintiffs' evidence is insufficient to carry their burden.

A

Because "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law," *Eastman Kodak Co.* v.

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[6] Although the plaintiffs relied on indirect evidence below, they have abandoned that argument in this Court. See Brief for United States 23, n. 4 (citing Pet. for Cert. i, 18–25).

Image Technical Services, Inc., 504 U. S. 451, 466–467 (1992), courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.[7] "Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965); accord, 2 Kalinowski §24.01[4][a]. Thus, the relevant market is defined as "the area of effective competition." *Ibid.* Typically this is the "arena within which significant substitution in consumption or production occurs." Areeda & Hovenkamp §5.02; accord, 2 Kalinowski §24.02[1]; *United States* v. *Grinnell Corp.*, 384 U. S.

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[7] The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. See Brief for United States 40–41 (citing *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447 (1986), and *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980) (*per curiam*)). We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. See *Indiana Federation of Dentists*, *supra,* at 450–451, 459 (agreement between competing dentists not to share X rays with insurance companies); *Catalano*, *supra,* at 644–645, 650 (agreement among competing wholesalers not to compete on extending credit to retailers). Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. See *Indiana Federation of Dentists*, *supra,* at 460–461; *Catalano*, *supra,* at 648–649. But vertical restraints are different. See *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 348, n. 18 (1982); *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 888 (2007). Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market. See *id.*, at 898 (noting that a vertical restraint "may not be a serious concern unless the relevant entity has market power"); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 160 (1984) ("[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power").

563, 571 (1966). But courts should "combin[e]" different products or services into "a single market" when "that combination reflects commercial realities." *Id.,* at 572; see also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 336–337 (1962) (pointing out that "the definition of the relevant market" must "'correspond to the commercial realities' of the industry").

As explained, credit-card networks are two-sided platforms. Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. See Evans & Schmalensee 674–675; Evans & Noel 680–681. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. See Klein 574, 595, 598, 626. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. See *id.,* at 575, 594, 626. Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.

To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. See Filistrucchi 321–322. Newspapers that sell advertisements, for example, arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. *Id.*, at 297, 315; Klein 579. But in the newspaper-advertisement market, the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. See Filistrucchi 321, 323, and n. 99; Klein 583. Because of these weak indirect network effects, the market for newspaper advertising

behaves much like a one-sided market and should be analyzed as such. See Filistrucchi 321; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610 (1953).

But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually. See Klein 583 ("Because cardholders and merchants jointly consume a single product, payment card transactions, their consumption of payment card transactions must be directly proportional"). To optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants.

Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as "suppl[ying] only one product"—transactions. Klein 580. In the credit-card market, these transactions "are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment." *Ibid.* Tellingly, credit cards determine their market share by measuring the volume of transactions they have sold.[8]

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[8] Contrary to the dissent's assertion, *post,* at 11–12, merchant services and cardholder services are not complements. See Filistrucchi 297 ("[A] two-sided market [is] different from markets for complemen-

Evaluating both sides of a two-sided transaction platform is also necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions. See Filistrucchi 301. A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex. See *ibid.* Only a company that had both cardholders and merchants willing to use its network could sell transactions and compete in the credit-card market. Similarly, if a merchant accepts the four major credit cards, but a cardholder only uses Visa or Amex, only those two cards can compete for the particular transaction. Thus, competition cannot be accurately assessed by looking at only one side of the platform in isolation.[9]

For all these reasons, "[i]n two-sided transaction markets, only one market should be defined." *Id.*, at 302; see also Evans & Noel 671 ("[F]ocusing on one dimension of . . . competition tends to distort the competition that actually exists among [two-sided platforms]"). Any other analysis would lead to "'"mistaken inferences"'" of the kind that could "'"chill the very conduct the antitrust laws are designed to protect."'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 226 (1993); see also *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*,

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tary products, in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices"). As already explained, credit-card companies are best understood as supplying only one product—transactions—which is jointly consumed by a cardholder and a merchant. See Klein 580. Merchant services and cardholder services are both inputs to this single product. See *ibid.*

[9] Nontransaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers. See Filistrucchi 301.

475 U. S. 574, 594 (1986) ("'[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition'"); *Leegin*, 551 U. S., at 895 (noting that courts should avoid "increas[ing] the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"). Accordingly, we will analyze the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects.

B

The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market. The plaintiffs stake their entire case on proving that Amex's agreements increase merchant fees. We find this argument unpersuasive.

As an initial matter, the plaintiffs' argument about merchant fees wrongly focuses on only one side of the two-sided credit-card market. As explained, the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market. See 1 Kalinowski §12.02[2]; *Craftsman Limousine, Inc.*,

491 F. 3d, at 390; *Virginia Atlantic Airways Ltd.*, 257 F. 3d, at 264. They failed to do so.

1

The plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. As the District Court found, the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins. 88 F. Supp. 3d, at 198, 215. And the evidence about whether Amex charges more than its competitors was ultimately inconclusive. *Id.,* at 199, 202, 215.

Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. Amex began raising its merchant fees in 2005 after Visa and MasterCard raised their fees in the early 2000s. *Id.,* at 195, 199–200. As explained, Amex has historically charged higher merchant fees than these competitors because it delivers wealthier cardholders who spend more money. *Id.,* at 200–201. Amex's higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants. See *id.*, at 192–193. On the other side of the market, Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants. *Id.,* at 160, 191–195. That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends. See Evans & Noel 670–671; Klein 574–575, 594–595, 598, 626.

In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees. Visa and MasterCard's merchant fees have continued to increase, even

at merchant locations where Amex is not accepted and, thus, Amex's antisteering provisions do not apply. See 88 F. Supp. 3d, at 222. This suggests that the cause of increased merchant fees is not Amex's antisteering provisions, but rather increased competition for cardholders and a corresponding marketwide adjustment in the relative price charged to merchants. See Klein 575, 609.

2

The plaintiffs did offer evidence that Amex increased the percentage of the purchase price that it charges merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on cardholder rewards. See 88 F. Supp. 3d, at 195–197, 215. The plaintiffs believe that this evidence shows that the price of Amex's transactions increased.

Even assuming the plaintiffs are correct, this evidence does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. "Market power is the ability to raise price profitably *by restricting output*." Areeda & Hovenkamp §5.01 (emphasis added); accord, *Kodak*, 504 U. S., at 464; *Business Electronics*, 485 U. S., at 723. This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd.*, 509 U. S., at 237. There is no such evidence in this case. The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%. See 838 F. 3d, at 206. "Where . . . output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." *Brooke Group Ltd.*, *supra,* at 237. And, as previously explained, the plaintiffs did not show that Amex charged more than its competitors.

3

The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while these agreements have been in place, the credit-card market experienced expanding output and improved quality. Amex's business model spurred Visa and MasterCard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served. Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%. See D. Evans & R. Schmalensee, Paying With Plastic: The Digital Revolution in Buying and Borrowing 88–89 (2d ed. 2005) (Paying With Plastic).

Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Instead, fierce competition between networks has constrained Amex's ability to raise these fees and has, at times, forced Amex to lower them. For instance, when Amex raised its merchant prices between 2005 and 2010, some merchants chose to leave its network. 88 F. Supp. 3d, at 197. And when its remaining merchants complained, Amex stopped raising its merchant prices. *Id.*, at 198. In another instance in the late 1980s and early 1990s, competition forced Amex to offer lower merchant fees to "everyday spend" merchants—supermarkets, gas stations, pharmacies, and the like—to persuade them to accept Amex. See *id.,* at 160–161, 202.

In addition, Amex's competitors have exploited its higher merchant fees to their advantage. By charging lower merchant fees, Visa, MasterCard, and Discover have achieved broader merchant acceptance—approximately 3 million more locations than Amex. *Id.*, at 204. This

broader merchant acceptance is a major advantage for these networks and a significant challenge for Amex, since consumers prefer cards that will be accepted everywhere. *Ibid.* And to compete even further with Amex, Visa and MasterCard charge different merchant fees for different types of cards to maintain their comparatively lower merchant fees and broader acceptance. Over the long run, this competition has created a trend of declining merchant fees in the credit-card market. In fact, since the first credit card was introduced in the 1950s, merchant fees—including Amex's merchant fees—have decreased by more than half. See *id.,* at 202–203; Paying With Plastic 54, 126, 152.

Lastly, there is nothing inherently anticompetitive about Amex's antisteering provisions. These agreements actually stem negative externalities in the credit-card market and promote interbrand competition. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance"—the promise of a frictionless transaction. 88 F. Supp. 3d, at 156. A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants. This externality endangers the viability of the entire Amex network. And it undermines the investments that Amex has made to encourage increased cardholder spending, which discourages investments in rewards and ultimately harms both cardholders and merchants. Cf. *Leegin*, 551 U. S., at 890–891 (recognizing that vertical restraints can prevent retailers from free riding and thus increase the availability of "tangible or intangible services or promotional efforts" that enhance competition and consumer welfare). Perhaps most importantly, antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader

merchant acceptance.[10]

In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects. Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions. And it is "[t]he promotion of interbrand competition," after all, that "is . . . 'the primary purpose of the antitrust laws.'" *Id.*, at 890.

* * *

Because Amex's antisteering provisions do not unreasonably restrain trade, we affirm the judgment of the Court of Appeals.

It is so ordered.

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[10] The plaintiffs argue that *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972), forbids any restraint that would restrict competition in part of the market—here, for example, merchant steering. See Brief for Petitioners and Respondents Nebraska, Tennessee, and Texas 30, 42. *Topco* does not stand for such a broad proposition. *Topco* concluded that a horizontal agreement between competitors was unreasonable *per se*, even though the agreement did not extend to every competitor in the market. See 405 U. S., at 599, 608. A horizontal agreement between competitors is markedly different from a vertical agreement that incidentally affects one particular method of competition. See *Leegin*, 551 U. S., at 888; *Maricopa County Medical Soc.*, 457 U. S., at 348, n. 18.

SUPREME COURT OF THE UNITED STATES

No. 16–1454

OHIO, ET AL., PETITIONERS *v.* AMERICAN EXPRESS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 25, 2018]

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

For more than 120 years, the American economy has prospered by charting a middle path between pure *lassez-faire* and state capitalism, governed by an antitrust law "dedicated to the principle that *markets*, not individual firms and certainly not political power, produce the optimal mixture of goods and services." 1 P. Areeda & H. Hovenkamp, Antitrust Law ¶100b, p. 4 (4th ed. 2013) (Areeda & Hovenkamp). By means of a strong antitrust law, the United States has sought to avoid the danger of monopoly capitalism. Long gone, we hope, are the days when the great trusts presided unfettered by competition over the American economy.

This lawsuit is emblematic of the American approach. Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. See GAO, Credit and Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist 31–35 (GAO–08–558, 2008). The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition over credit-card merchant fees by eliminating a contract-

ual barrier with anticompetitive effects. The majority rejects that effort. But because the challenged contractual term clearly has serious anticompetitive effects, I dissent.

I

I agree with the majority and the parties that this case is properly evaluated under the three-step "rule of reason" that governs many antitrust lawsuits. *Ante,* at 9–10. Under that approach, a court looks first at the agreement or restraint at issue to assess whether it has had, or is likely to have, anticompetitive effects. *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 459 (1986). In doing so, the court normally asks whether the restraint may tend to impede competition and, if so, whether those who have entered into that restraint have sufficient economic or commercial power for the agreement to make a negative difference. See *id.,* at 459–461. Sometimes, but not always, a court will try to determine the appropriate market (the market that the agreement affects) and determine whether those entering into that agreement have the power to raise prices above the competitive level in that market. See *ibid.*

It is important here to understand that in cases under §1 of the Sherman Act (unlike in cases challenging a merger under §7 of the Clayton Act, 15 U. S. C. §18), it may well be unnecessary to undertake a sometimes complex, market power inquiry:

> "Since the purpose [in a Sherman Act §1 case] of the inquiries into . . . market power is [simply] to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Federation of Dentists*, *supra*, at 460–461 (quoting 7 P. Areeda, Antitrust Law ¶1511, p. 429 (3d

ed. 1986)).

Second (as treatise writers summarize the case law), if an antitrust plaintiff meets the initial burden of showing that an agreement will likely have anticompetitive effects, normally the "burden shifts to the defendant to show that the restraint in fact serves a legitimate objective." 7 Areeda & Hovenkamp ¶1504b, at 415; see *California Dental Assn.* v. *FTC*, 526 U. S. 756, 771 (1999); *id.,* at 788 (BREYER, J., dissenting).

Third, if the defendant successfully bears this burden, the antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer, *i.e.*, that the agreement "on balance" remains unreasonable. 7 Areeda & Hovenkamp ¶1507a, at 442.

Like the Court of Appeals and the parties, the majority addresses only the first step of that three-step framework. *Ante,* at 10.

II

A

This case concerns the credit-card business. As the majority explains, *ante,* at 2, that business involves the selling of two different but related card services. First, when a shopper uses a credit card to buy something from a participating merchant, the credit-card company pays the merchant the amount of money that the merchant's customer has charged to his card and charges the merchant a fee, say 5%, for that speedy-payment service. I shall refer to that kind of transaction as a merchant-related card service. Second, the credit-card company then sends a bill to the merchant's customer, the shopper who holds the card; and the shopper pays the card company the sum that merchant charged the shopper for the goods or services he

or she bought. The cardholder also often pays the card company a fee, such as an annual fee for the card or an interest charge for delayed payment. I shall call that kind of transaction a shopper-related card service. The credit-card company can earn revenue from the sale (directly or indirectly) of each of these services: (1) speedy payment for merchants, and (2) credit for shoppers. (I say "indirectly" to reflect the fact that card companies often create or use networks of banks as part of the process—but I have found nothing here suggesting that that fact makes a significant difference to my analysis.)

Sales of the two basic card services are related. A shopper can pay for a purchase with a particular credit card only if the merchant has signed up for merchant-related card services with the company that issued the credit card that the shopper wishes to use. A firm in the credit-card business is therefore unlikely to make money unless quite a few merchants agree to accept that firm's card and quite a few shoppers agree to carry and use it. In general, the more merchants that sign up with a particular card company, the more useful that card is likely to prove to shoppers and so the more shoppers will sign up; so too, the more shoppers that carry a particular card, the more useful that card is likely to prove to merchants (as it obviously helps them obtain the shoppers' business) and so the more merchants will sign up. Moreover, as a rough rule of thumb (and assuming constant charges), the larger the networks of paying merchants and paying shoppers that a card firm maintains, the larger the revenues that the firm will likely receive, since more payments will be processed using its cards. Thus, it is not surprising that a card company may offer shoppers incentives (say, points redeemable for merchandise or travel) for using its card or that a firm might want merchants to accept its card exclusively.

B

This case focuses upon a practice called "steering." American Express has historically charged higher merchant fees than its competitors. App. to Pet. for Cert. 173a–176a. Hence, fewer merchants accept American Express' cards than its competitors'. *Id.,* at 184a–187a. But, perhaps because American Express cardholders are, on average, wealthier, higher-spending, or more loyal to American Express than other cardholders, vast numbers of merchants still accept American Express cards. See *id.*, at 156a, 176a–177a, 184a–187a. Those who do, however, would (in order to avoid the higher American Express fee) often prefer that their customers use a different card to charge a purchase. Thus, the merchant has a monetary incentive to "steer" the customer towards the use of a different card. A merchant might tell the customer, for example, "American Express costs us more," or "please use Visa if you can," or "free shipping if you use Discover." See *id.,* at 100a–102a.

Steering makes a difference, because without it, the shopper does not care whether the merchant pays more to American Express than it would pay to a different card company—the shopper pays the same price either way. But if steering works, then American Express will find it more difficult to charge more than its competitors for merchant-related services, because merchants will respond by steering their customers, encouraging them to use other cards. Thus, American Express dislikes steering; the merchants like it; and the shoppers may benefit from it, whether because merchants will offer them incentives to use less expensive cards or in the form of lower retail prices overall. See *id.,* at 92a, 97a–104a.

In response to its competitors' efforts to convince merchants to steer shoppers to use less expensive cards, American Express tried to stop, or at least to limit, steering by placing antisteering provisions in most of its con-

tracts with merchants. It called those provisions "nondiscrimination provisions." They prohibited steering of the forms I have described above (and others as well). See *id.,* at 95a–96a, 100a–101a. After placing them in its agreements, American Express found it could maintain, or even raise, its higher merchant prices without losing too many transactions to other firms. *Id.,* at 195a–198a. These agreements—the "nondiscrimination provisions"—led to this lawsuit.

C

In 2010 the United States and 17 States brought this antitrust case against American Express. They claimed that the "nondiscrimination provisions" in its contracts with merchants created an unreasonable restraint of trade. (Initially Visa and MasterCard were also defendants, but they entered into consent judgments, dropping similar provisions from their contracts with merchants). After a 7-week bench trial, the District Court entered judgment for the Government, setting forth its findings of fact and conclusions of law in a 97-page opinion. 88 F. Supp. 3d 143 (EDNY 2015).

Because the majority devotes little attention to the District Court's detailed factual findings, I will summarize some of the more significant ones here. Among other things, the District Court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions. See *id.,* at 195–196. In doing so, American Express did not take account of the possibility that large merchants would respond to the price increases by encouraging shoppers to use a different credit card because the nondiscrimination provisions prohibited any such steering. *Id.,* at 215. The District Court pointed to merchants' testimony stating that, had it not been for those provisions, the large merchants would have responded to the price increases by

encouraging customers to use other, less-expensive cards. *Ibid.*

The District Court also found that even though American Express raised its merchant prices 20 times in this 5-year period, it did not lose the business of any large merchant. *Id.,* at 197. Nor did American Express increase benefits (or cut credit-card prices) to American Express cardholders in tandem with the merchant price increases. *Id.,* at 196. Even had there been no direct evidence of injury to competition, American Express' ability to raise merchant prices without losing any meaningful market share, in the District Court's view, showed that American Express possessed power in the relevant market. See *id.*, at 195.

The District Court also found that, in the absence of the provisions, prices to merchants would likely have been lower. *Ibid.* It wrote that in the late 1990's, Discover, one of American Express' competitors, had tried to develop a business model that involved charging lower prices to merchants than the other companies charged. *Id.,* at 213. Discover then invited each "merchant to save money by shifting volume to Discover," while simultaneously offering merchants additional discounts "if they would steer customers to Discover." *Ibid.* The court determined that these efforts failed because of American Express' (and the other card companies') "nondiscrimination provisions." These provisions, the court found, "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *Id.,* at 214. Because the provisions eliminated any advantage that lower prices might produce, Discover "abandoned its low-price business model" and raised its merchant fees to match those of its competitors. *Ibid.* This series of events, the court concluded was "emblematic of the harm done to the competitive process" by the "nondiscrimination provisions." *Ibid.*

The District Court added that it found no offsetting procompetitive benefit to shoppers. *Id.,* at 225–238. Indeed, it found no offsetting benefit of any kind. See *ibid.*

American Express appealed, and the U. S. Court of Appeals for the Second Circuit held in its favor. 838 F. 3d 179 (2016). The Court of Appeals did not reject any fact found by the District Court as "clearly erroneous." See Fed. Rule Civ. Proc. 52(a)(6). Rather, it concluded that the District Court had erred in step 1 of its rule-of-reason analysis by failing to account for what the Second Circuit called the credit-card business's "two-sided market" (or "two-sided platform"). 838 F. 3d, at 185–186, 196–200.

III

The majority, like the Court of Appeals, reaches only step 1 in its "rule of reason" analysis. *Ante,* at 10. To repeat, that step consists of determining whether the challenged "nondiscrimination provisions" have had, or are likely to have, anticompetitive effects. See *Indiana Federation of Dentists*, 476 U. S., at 459. Do those provisions tend to impede competition? And if so, does American Express, which imposed that restraint as a condition of doing business with its merchant customers, have sufficient economic or commercial power for the provision to make a negative difference? See *id.,* at 460–461.

A

Here the District Court found that the challenged provisions have had significant anticompetitive effects. In particular, it found that the provisions have limited or prevented price competition among credit-card firms for the business of merchants. 88 F. Supp. 3d, at 209. That conclusion makes sense: In the provisions, American Express required the merchants to agree not to encourage customers to use American Express' competitors' credit cards, even cards from those competitors, such as Discover,

that intended to charge the merchants lower prices. See *id.,* at 214. By doing so, American Express has "disrupt[ed] the normal price-setting mechanism" in the market. *Id.,* at 209. As a result of the provisions, the District Court found, American Express was able to raise merchant prices repeatedly without any significant loss of business, because merchants were unable to respond to such price increases by encouraging shoppers to pay with other cards. *Id.,* at 215. The provisions also meant that competitors like Discover had little incentive to lower their merchant prices, because doing so did not lead to any additional market share. *Id.,* at 214. The provisions thereby "suppress[ed] [American Express'] . . . competitors' incentives to offer lower prices . . . resulting in higher profit-maximizing prices across the network services market." *Id.*, at 209. Consumers throughout the economy paid higher retail prices as a result, and they were denied the opportunity to accept incentives that merchants might otherwise have offered to use less-expensive cards. *Id.,* at 216, 220. I should think that, considering step 1 alone, there is little more that need be said.

The majority, like the Court of Appeals, says that the District Court should have looked not only at the market for the card companies' merchant-related services but also at the market for the card companies' shopper-related services, and that it should have combined them, treating them as a single market. *Ante,* at 14–15; 838 F. 3d, at 197. But I am not aware of any support for that view in antitrust law. Indeed, this Court has held to the contrary.

In *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610 (1953), the Court held that an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint. The Government in that case claimed that a newspaper's advertising policy violated the Sherman Act's "rule of reason." See *ibid.* In support of

that argument, the Government pointed out, and the District Court had held, that the newspaper dominated the market for the sales of newspapers to readers in New Orleans, where it was the sole morning daily newspaper. *Ibid.* But this Court reversed. We explained that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space." *Ibid.* We then added:

> "This case concerns solely one of those markets. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan." *Ibid.*

Here, American Express stands accused not of limiting or harming competition for shopper-related card services, but only of merchant-related card services, because the challenged contract provisions appear only in American Express' contracts with merchants. That is why the District Court was correct in considering, at step 1, simply whether the agreement had diminished competition in merchant-related services.

B

The District Court did refer to market definition, and the majority does the same. *Ante,* at 11–15. And I recognize that properly defining a market is often a complex business. Once a court has identified the good or service directly restrained, as *Times-Picayune Publishing Co.* requires, it will sometimes add to the relevant market what economists call "substitutes": other goods or services that are reasonably substitutable for that good or service.

See, *e.g., United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 395–396 (1956) (explaining that cellophane market includes other, substitutable flexible wrapping materials as well). The reason that substitutes are included in the relevant market is that they restrain a firm's ability to profitably raise prices, because customers will switch to the substitutes rather than pay the higher prices. See 2B Areeda & Hovenkamp ¶561, at 378.

But while the market includes substitutes, it does not include what economists call complements: goods or services that are used together with the restrained product, but that cannot be substituted for that product. See *id.,* ¶565a, at 429; *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 463 (1992). An example of complements is gasoline and tires. A driver needs both gasoline and tires to drive, but they are not substitutes for each other, and so the sale price of tires does not check the ability of a gasoline firm (say a gasoline monopolist) to raise the price of gasoline above competitive levels. As a treatise on the subject states: "Grouping complementary goods into the same market" is "economic nonsense," and would "undermin[e] the rationale for the policy against monopolization or collusion in the first place." 2B Areeda & Hovenkamp ¶565a, at 431.

Here, the relationship between merchant-related card services and shopper-related card services is primarily that of complements, not substitutes. Like gasoline and tires, both must be purchased for either to have value. Merchants upset about a price increase for merchant-related services cannot avoid that price increase by becoming cardholders, in the way that, say, a buyer of newspaper advertising can switch to television advertising or direct mail in response to a newspaper's advertising price increase. The two categories of services serve fundamentally different purposes. And so, also like gasoline and tires, it is difficult to see any way in which the price of

shopper-related services could act as a check on the card firm's sale price of merchant-related services. If anything, a lower price of shopper-related card services is likely to cause more shoppers to use the card, and increased shopper popularity should make it *easier* for a card firm to raise prices to merchants, not *harder*, as would be the case if the services were substitutes. Thus, unless there is something unusual about this case—a possibility I discuss below, see *infra,* at 13–20—there is no justification for treating shopper-related services and merchant-related services as if they were part of a single market, at least not at step 1 of the "rule of reason."

C

Regardless, a discussion of market definition was legally unnecessary at step 1. That is because the District Court found strong *direct* evidence of anticompetitive effects flowing from the challenged restraint. 88 F. Supp. 3d, at 207–224. As I said, *supra,* at 7, this evidence included Discover's efforts to break into the credit-card business by charging lower prices for merchant-related services, only to find that the "nondiscrimination provisions," by preventing merchants from encouraging shoppers to use Discover cards, meant that lower merchant prices did not result in any additional transactions using Discover credit cards. 88 F. Supp. 3d, at 213–214. The direct evidence also included the fact that American Express raised its merchant prices 20 times in five years without losing any appreciable market share. *Id.,* at 195–198, 208–212. It also included the testimony of numerous merchants that they would have steered shoppers away from American Express cards in response to merchant price increases (thereby checking the ability of American Express to raise prices) had it not been for the nondiscrimination provisions. See *id.,* at 221–222. It included the factual finding that American Express "did not even account for the pos-

sibility that [large] merchants would respond to its price increases by attempting to shift share to a competitor's network" because the nondiscrimination provisions prohibited steering. *Id.,* at 215. It included the District Court's ultimate finding of fact, not overturned by the Court of Appeals, that the challenged provisions "were integral to" American Express' "[price] increases and thereby caused merchants to pay higher prices." *Ibid.*

As I explained above, this Court has stated that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects . . . can obviate the need for" those inquiries. *Indiana Federation of Dentists*, 476 U. S., at 460–461 (internal quotation marks omitted). That statement is fully applicable here. Doubts about the District Court's market-definition analysis are beside the point in the face of the District Court's findings of actual anticompetitive harm.

The majority disagrees that market definition is irrelevant. See *ante,* at 11–12, and n. 7. The majority explains that market definition is necessary because the nondiscrimination provisions are "vertical restraints" and "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first determines the relevant market." *Ante,* at 11, n. 7. The majority thus, in a footnote, seems categorically to exempt vertical restraints from the ordinary "rule of reason" analysis that has applied to them since the Sherman Act's enactment in 1890. The majority's only support for this novel exemption is *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877 (2007). But *Leegin* held that the "rule of reason" *applied* to the vertical restraint at issue in that case. See *id.,* at 898–899. It said nothing to suggest that vertical restraints are not subject to the usual "rule of

reason" analysis. See also *infra*, at 24.

One critical point that the majority's argument ignores is that proof of actual adverse effects on competition *is*, *a fortiori*, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved. See *Indiana Federation of Dentists*, *supra,* at 460 ("[T]he purpose of the inquiries into market definition and market power is to determine *whether an arrangement has the potential for* genuine adverse effects on competition" (emphasis added)). The District Court's findings of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances. And so the majority's extensive discussion of market definition is legally unnecessary.

D

The majority's discussion of market definition is also wrong. Without raising any objection in general with the longstanding approach I describe above, *supra*, at 10–11, the majority agrees with the Court of Appeals that the market for American Express' card services is special because it is a "two-sided transaction platform." *Ante,* at 2–5, 12–15. The majority explains that credit-card firms connect two distinct groups of customers: First, merchants who accept credit cards, and second, shoppers who use the cards. *Ante,* at 2; accord, 838 F. 3d, at 186. The majority adds that "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use to the same credit-card network." *Ante,* at 3. And it explains that the credit-card market involves "indirect network effects," by which it means that shoppers want a card that many merchants will accept and merchants

want to accept those cards that many customers have and use. *Ibid.* From this, the majority concludes that "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market." *Ante,* at 12; accord, 838 F. 3d, at 197.

1

Missing from the majority's analysis is any explanation as to *why*, given the purposes that market definition serves in antitrust law, the fact that a credit-card firm can be said to operate a "two-sided transaction platform" means that its merchant-related and shopper-related services should be combined into a single market. The phrase "two-sided transaction platform" is not one of antitrust art—I can find no case from this Court using those words. The majority defines the phrase as covering a business that "offers different products or services to two different groups who both depend on the platform to intermediate between them," where the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other" side of the platform. *Ante,* at 2. I take from that definition that there are four relevant features of such businesses on the majority's account: they (1) offer different products or services, (2) to different groups of customers, (3) whom the "platform" connects, (4) in simultaneous transactions. See *ibid.*

What is it about businesses with those four features that the majority thinks justifies a special market-definition approach for them? It cannot be the first two features—that the company sells different products to different groups of customers. Companies that sell multiple products to multiple types of customers are commonplace. A firm might mine for gold, which it refines and sells both to dentists in the form of fillings and to investors in the form of ingots. Or, a firm might drill for both oil and natural gas. Or a firm might make both ignition

switches inserted into auto bodies and tires used for cars. I have already explained that, ordinarily, antitrust law will not group the two nonsubstitutable products together for step 1 purposes. *Supra,* at 10–11.

Neither should it normally matter whether a company sells related, or complementary, products, *i.e.*, products which must both be purchased to have any function, such as ignition switches and tires, or cameras and film. It is well established that an antitrust court in such cases looks at the product where the attacked restraint has an anticompetitive effect. *Supra,* at 9; see *Eastman Kodak*, 504 U. S., at 463. The court does not combine the customers for the separate, nonsubstitutable goods and see if "overall" the restraint has a negative effect. See *ibid.*; 2B Areeda & Hovenkamp ¶565a. That is because, as I have explained, the complementary relationship between the products is irrelevant to the purposes of market-definition. See s*upra,* at 10–11.

The majority disputes my characterization of merchant-related and shopper-related services as "complements." See *ante,* at 14, n. 8. The majority relies on an academic article which devotes one sentence to the question, saying that "a two-sided market [is] different from markets for complementary products [*e.g.,* tires and gas], in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices." Filistrucchi, Geradin, Van Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 297 (2014) (Filistrucchi). I agree that two-sided platforms—at least as some academics define them, but see *infra*, at 19–20—may be distinct from some types of complements in the respect the majority mentions (even though the services resemble complements because they must be used together for either to have value). But the distinction the majority mentions has nothing to do with

the relevant question. The relevant question is whether merchant-related and shopper-related services are *substitutes*, one for the other, so that customers can respond to a price increase for one service by switching to the other service. As I have explained, the two types of services are not substitutes in this way. *Supra,* at 11–12. And so the question remains, just as before: What is it about the economic relationship between merchant-related and shopper-related services that would justify the majority's novel approach to market definition?

What about the last two features—that the company connects the two groups of customers to each other, in simultaneous transactions? That, too, is commonplace. Consider a farmers' market. It brings local farmers and local shoppers together, and transactions will occur only if a farmer and a shopper simultaneously agree to engage in one. Should courts abandon their ordinary step 1 inquiry if several competing farmers' markets in a city agree that only certain kinds of farmers can participate, or if a farmers' market charges a higher fee than its competitors do and prohibits participating farmers from raising their prices to cover it? Why? If farmers' markets are special, what about travel agents that connect airlines and passengers? What about internet retailers, who, in addition to selling their own goods, allow (for a fee) other goods-producers to sell over their networks? Each of those businesses seems to meet the majority's four-prong definition.

Apparently as its justification for applying a special market-definition rule to "two-sided transaction platforms," the majority explains that such platforms "often exhibit" what it calls "indirect network effects." *Ante,* at 3. By this, the majority means that sales of merchant-related card services and (different) shopper-related card services are interconnected, in that increased merchant-buyers mean increased shopper-buyers (the more stores in the card's network, the more customers likely to use the card),

and vice versa. See *ibid.* But this, too, is commonplace. Consider, again, a farmers' market. The more farmers that participate (within physical and esthetic limits), the more customers the market will likely attract, and vice versa. So too with travel agents: the more airlines whose tickets a travel agent sells, the more potential passengers will likely use that travel agent, and the more potential passengers that use the travel agent, the easier it will likely be to convince airlines to sell through the travel agent. And so forth. Nothing in antitrust law, to my knowledge, suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good. See *supra,* at 10–11.

2

To justify special treatment for "two-sided transaction platforms," the majority relies on the Court's decision in *United States* v. *Grinnell Corp.*, 384 U. S. 563, 571–572 (1966). In *Grinnell*, the Court treated as a single market several different "central station services," including burglar alarm services and fire alarm services. *Id.,* at 571. It did so even though, for *consumers*, "burglar alarm services are not interchangeable with fire alarm services." *Id.*, at 572. But that is because, for *producers*, the services were indeed interchangeable: A company that offered one could easily offer the other, because they all involve "a single basic service—the protection of property through use of a central service station." *Ibid.* Thus, the "commercial realit[y]" that the *Grinnell* Court relied on, *ibid.*, was that the services being grouped were what economists call "producer substitutes." See 2B Areeda & Hovenkamp ¶561, at 378. And the law is clear that "two products produced interchangeably from the same production facili-

ties are presumptively in the same market," even if they are not "close substitutes for each other on the demand side." *Ibid.* That is because a firm that produces one such product can, in response to a price increase in the other, easily shift its production and thereby limit its competitor's power to impose the higher price. See *id.*, ¶561a, at 379.

Unlike the various types of central station services at issue in *Grinnell Corp.*, however, the shopper-related and merchant-related services that American Express provides are not "producer substitutes" any more than they are traditional substitutes. For producers as for consumers, the services are instead complements. Credit card companies must sell them together for them to be useful. As a result, the credit-card companies cannot respond to, say, merchant-related price increases by shifting production away from shopper-related services to merchant-related services. The relevant "commercial realities" in this case are thus completely different from those in *Grinnell Corp.* (The majority also cites *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 336–337 (1962), for this point, but the "commercial realities" considered in that case were that "shoe stores in the outskirts of cities compete effectively with stores in central downtown areas," and thus are part of the same market. *Id.,* at 338–339. Here, merchant-related services do not, as I have said, compete with shopper-related services, and so *Brown Shoe Co.* does not support the majority's position.) Thus, our precedent provides no support for the majority's special approach to defining markets involving "two-sided transaction platforms."

3

What about the academic articles the majority cites? The first thing to note is that the majority defines "two-sided transaction platforms" much more broadly than the

economists do. As the economists who coined the term explain, if a "two-sided market" meant simply that a firm connects two different groups of customers via a platform, then "pretty much any market would be two-sided, since buyers and sellers need to be brought together for markets to exist and gains from trade to be realized." Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006). The defining feature of a "two-sided market," according to these economists, is that "the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount." *Id.,* at 664–665; accord, Filistrucchi 299. That requirement appears nowhere in the majority's definition. By failing to limit its definition to platforms that economists would recognize as "two sided" in the relevant respect, the majority carves out a much broader exception to the ordinary antitrust rules than the academic articles it relies on could possibly support.

Even as limited to the narrower definition that economists use, however, the academic articles the majority cites do not support the majority's flat rule that firms operating "two-sided transaction platforms" should always be treated as part of a single market for all antitrust purposes. *Ante,* at 13–15. Rather, the academics explain that for market-definition purposes, "[i]n some cases, the fact that a business can be thought of as two-sided may be irrelevant," including because "nothing in the analysis of the practices [at issue] really hinges on the linkages between the demands of participating groups." Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667, 689 (2008). "In other cases, the fact that a business is two-sided will prove important both by identifying the real dimensions of competition and focusing on sources of constraints." *Ibid.* That flexible approach, however, is precisely the one the

District Court followed in this case, by considering the effects of "[t]he two-sided nature of the . . . card industry" throughout its analysis. 88 F. Supp. 3d, at 155.

Neither the majority nor the academic articles it cites offer any explanation for why the features of a "two-sided transaction platform" justify always treating it as a single antitrust market, rather than accounting for its economic features in other ways, as the District Court did. The article that the majority repeatedly quotes as saying that "'[i]n two-sided transaction markets, only one market should be defined,'" *ante,* at 14–15 (quoting Filistrucchi 302), justifies that conclusion only for purposes of assessing the effects of a merger. In such a case, the article explains, "[e]veryone would probably agree that a payment card company such as American Express is either in the relevant market on both sides or on neither side . . . . The analysis of a merger between two payment card platforms should thus consider . . . both sides of the market." *Id.,* at 301. In a merger case this makes sense, but is also meaningless, because, whether there is one market or two, a reviewing court will consider both sides, because it must examine the effects of the merger in each affected market and submarket. See *Brown Shoe Co.*, 370 U. S., at 325. As for a nonmerger case, the article offers only *United States* v. *Grinnell* as a justification, see Filistrucchi 303, and as I have already explained, *supra,* at 16–18, *Grinnell* does not support this proposition.

E

Put all of those substantial problems with the majority's reasoning aside, though. Even if the majority were right to say that market definition was relevant, and even if the majority were right to further say that the District Court should have defined the market in this case to include shopper-related services as well as merchant-related services, that *still* would not justify the majority in affirm-

ing the Court of Appeals. That is because, as the majority is forced to admit, the plaintiffs *made* the factual showing that the majority thinks is required. See *ante,* at 17.

Recall why it is that the majority says that market definition matters: because if the relevant market includes both merchant-related services and card-related services, then the plaintiffs had the burden to show that as a result of the nondiscrimination provisions, "the price of credit-card transactions"—considering both fees charged to merchants and rewards paid to cardholders—"was higher than the price one would expect to find in a competitive market." *Ante,* at 16. This mirrors the Court of Appeals' holding that the Government had to show that the "non-discrimination provisions" had "made *all* [American Express] customers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." 838 F. 3d, at 205.

The problem with this reasoning, aside from it being wrong, is that the majority admits that the plaintiffs *did* show this: they "offer[ed] evidence" that American Express "increased the percentage of the purchase price that it charges merchants . . . and that this increase was not entirely spent on cardholder rewards." *Ante,* 17 (citing 88 F. Supp. 3d, at 195–197, 215). Indeed, the plaintiffs did not merely "offer evidence" of this—they persuaded the District Court, which made an unchallenged factual finding that the merchant price increases that resulted from the nondiscrimination provisions "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and *resulted in a higher net price.*" *Id.*, at 215 (emphasis added).

In the face of this problem, the majority retreats to saying that even net price increases do not matter after all, absent a showing of lower output, because if output is increasing, "'rising prices are equally consistent with growing product demand.'" *Ante,* at 18 (quoting *Brooke*

Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 237 (1993)). This argument, unlike the price argument, has nothing to do with the credit-card market being a "two-sided transaction platform," so if this is the basis for the majority's holding, then nearly all of the opinion is dicta. The argument is also wrong. It is true as an economic matter that a firm exercises market power by restricting output in order to raise prices. But the relevant restriction of output is as compared with a hypothetical world in which the restraint was not present and prices were lower. The fact that credit-card use in general has grown over the last decade, as the majority says, see *ante,* at 17–18, says nothing about whether such use would have grown more or less without the nondiscrimination provisions. And because the relevant question is a comparison between reality and a hypothetical state of affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the Sherman Act does not apply at all.

In any event, there are features of the credit-card market that may tend to limit the usual relationship between price and output. In particular, merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders. See, *e.g.,* 88 F. Supp. 3d, at 216; Brief for John M. Connor et al. as *Amici Curiae* 34–35. Thus, higher credit-card merchant fees may have only a limited effect on credit-card transaction volume, even as they disrupt the marketplace by extracting anticompetitive profits.

IV

A

For the reasons I have stated, the Second Circuit was wrong to lump together the two different services sold, *at step 1.* But I recognize that the Court of Appeals has not

yet considered whether the relationship between the two services might make a difference at steps 2 and 3. That is to say, American Express might wish to argue that the nondiscrimination provisions, while anticompetitive in respect to merchant-related services, nonetheless have an adequate offsetting procompetitive benefit in respect to its shopper-related services. I believe that American Express should have an opportunity to ask the Court of Appeals to consider that matter.

American Express might face an uphill battle. A Sherman Act §1 defendant can rarely, if ever, show that a procompetitive benefit in the market for one product offsets an anticompetitive harm in the market for another. In *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 611 (1972), this Court wrote:

> "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking."

American Express, pointing to vertical price-fixing cases like our decision in *Leegin*, argues that comparing competition-related pros and cons is more common than I have just suggested. See 551 U. S., at 889–892. But *Leegin* held only that vertical price fixing is subject to the "rule of reason" instead of being *per se* unlawful; the "rule of reason" still applies to vertical agreements just as it applies to horizontal agreements. See *id.,* at 898–899.

Moreover, the procompetitive justifications for vertical price-fixing agreements are not apparently applicable to the distinct types of restraints at issue in this case. A vertically imposed price-fixing agreement typically involves a manufacturer controlling the terms of sale for its

own product. A television-set manufacturer, for example, will insist that its dealers not cut prices for the manufacturer's own televisions below a particular level. Why might a manufacturer want its dealers to refrain from price competition in the manufacturer's own products? Perhaps because, for example, the manufacturer wants to encourage the dealers to develop the market for the manufacturer's brand, thereby increasing *interbrand* competition for the same ultimate product, namely a television set. This type of reasoning does not appear to apply to American Express' nondiscrimination provisions, which seek to control the terms on which merchants accept *other brands'* cards, not merely American Express' own.

Regardless, I would not now hold that an agreement such as the one before us can never be justified by procompetitive benefits of some kind. But the Court of Appeals would properly consider procompetitive justifications not at step 1, but at steps 2 and 3 of the "rule of reason" inquiry. American Express would need to show just how this particular anticompetitive merchant-related agreement has procompetitive benefits in the shopper-related market. In doing so, American Express would need to overcome the District Court's factual findings that the agreement had no such effects. See 88 F. Supp. 3d, at 224–238.

B

The majority charts a different path. Notwithstanding its purported acceptance of the three-step, burden-shifting framework I have described, *ante,* at 9–10, the majority addresses American Express' procompetitive justifications now, at step 1 of the analysis, see *ante,* at 18–20. And in doing so, the majority inexplicably ignores the District Court's factual findings on the subject.

The majority reasons that the challenged nondiscrimination provisions "stem negative externalities in the credit-

card market and promote interbrand competition." *Ante,* at 19. The "negative externality" the majority has in mind is this: If one merchant persuades a shopper not to use his American Express card at that merchant's store, that shopper becomes less likely to use his American Express card at other merchants' stores. *Ibid.* The majority worries that this "endangers the viability of the entire [American Express] network," *ibid.*, but if so that is simply a consequence of American Express' merchant fees being higher than a competitive market will support. "The antitrust laws were enacted for 'the protection of *competition,* not *competitors.*'" *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 338 (1990). If American Express' merchant fees are so high that merchants successfully induce their customers to use other cards, American Express can remedy that problem by lowering those fees or by spending more on cardholder rewards so that cardholders decline such requests. What it may not do is demand contractual protection from price competition.

In any event, the majority ignores the fact that the District Court, in addition to saying what I have just said, also rejected this argument on independent factual grounds. It explained that American Express "presented no expert testimony, financial analysis, or other direct evidence establishing that without its [nondiscrimination provisions] it will, in fact, be unable to adapt its business to a more competitive market." 88 F. Supp. 3d, at 231. It further explained that the testimony that was provided on the topic "was notably inconsistent," with some of American Express' witnesses saying only that invalidation of the provisions "would require American Express to adapt its current business model." *Ibid.* After an extensive discussion of the record, the District Court found that "American Express possesses the flexibility and expertise necessary to adapt its business model to suit a market in which it is required to compete on both the cardholder and merchant

sides of the [credit-card] platform." *Id.,* at 231–232. The majority evidently rejects these factual findings, even though no one has challenged them as clearly erroneous.

Similarly, the majority refers to the nondiscrimination provisions as preventing "free riding" on American Express' "investments in rewards" for cardholders. *Ante,* at 19–20; see also *ante,* at 7 (describing steering in terms suggestive of free riding). But as the District Court explained, "[p]lainly . . . investments tied to card use (such as Membership Rewards points, purchase protection, and the like) are not subject to free-riding, since the network does not incur any cost if the cardholder is successfully steered away from using his or her American Express card." 88 F. Supp. 3d, at 237. This, I should think, is an unassailable conclusion: American Express pays rewards to cardholders only for transactions in which cardholders use their American Express cards, so if a steering effort succeeds, no rewards are paid. As for concerns about free riding on American Express' fixed expenses, including its investments in its brand, the District Court acknowledged that free-riding was in theory possible, but explained that American Express "ma[de] no effort to identify the fixed expenses to which its experts referred or to explain how they are subject to free riding." *Ibid.*; see also *id.,* at 238 (American Express' own data showed "that the network's ability to confer a credentialing benefit trails that of its competitors, casting doubt on whether there is in fact any particular benefit associated with accepting [American Express] that is subject to free riding"). The majority does not even acknowledge, much less reject, these factual findings, despite coming to the contrary conclusion.

Finally, the majority reasons that the nondiscrimination provisions "do not prevent Visa, MasterCard, or Discover from competing against [American Express] by offering lower merchant fees or promoting their broader merchant acceptance." *Ante,* at 20. But again, the District Court's

factual findings were to the contrary. As I laid out above, the District Court found that the nondiscrimination provisions *in fact did prevent* Discover from pursuing a low-merchant-fee business model, by "den[ying] merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." 88 F. Supp. 3d, at 214; see *supra,* at 7. The majority's statements that the nondiscrimination provisions are procompetitive are directly contradicted by this and other factual findings.

* * *

For the reasons I have explained, the majority's decision in this case is contrary to basic principles of antitrust law, and it ignores and contradicts the District Court's detailed factual findings, which were based on an extensive trial record. I respectfully dissent.

[Cite as *Cleveland v. Embassy realty investments, Inc.*, 2018-Ohio-2513.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105091

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

EMBASSY REALTY INVESTMENTS, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Civil Appeal from the
Cleveland Municipal Court
Case No. 2014 CVH 010418

BEFORE: Kilbane, P.J., McCormack, J., and Stewart, J.

RELEASED AND JOURNALIZED: June 28, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, John E. Barnes, Jr. ("Barnes"), appeals from the Cleveland Municipal Court's decision granting summary judgment in favor of plaintiff-appellee, the city of Cleveland ("the city"). For the reasons set forth below, we affirm in part, reverse in part and remand.

{¶2} In October 2005, Barnes registered the trade name Embassy Realty Investments ("Embassy") and purchased a vacant commercial building located at 3902 Lee Road in Cleveland, Ohio ("the property"). Barnes purchased the property from the Southeast Cleveland Church of Christ ("Southeast") for $15,000. Seven years before Barnes purchased the property from Southeast, the city's director of building and housing determined the property was a public nuisance and issued notices of condemnation and demolition to Southeast. The city sent these same notices to Barnes at his tax mailing address after he acquired the property.

{¶3} Less than six months after Barnes purchased the property from Southeast, he entered into a 12-year lease agreement with Clear Channel Outdoor, Inc. ("Clear Channel"), which allowed Clear Channel to maintain a billboard on the property. The lease provided for an initial one-time advance payment of $45,000 upon execution of the lease agreement and annual rent of $1,250, paid in monthly installments of $104.17.

{¶4} In January 2007, the city issued notice to Barnes of various building code violations existing on the property and for conducting work without the necessary permits. The city subsequently issued a notice of condemnation to Barnes and posted the notice at the property.

{¶5} In December 2008, Barnes incorporated Embassy and transferred the property to Embassy by quitclaim deed. The deed recorded with the Cuyahoga County Auditor reflects that Embassy paid no consideration for the property. Barnes claims, however, that Embassy issued a cognovit note to him in the amount of $150,000 as consideration. The cognovit note identifies Barnes as president, secretary, and treasurer of Embassy; it further lists Barnes and his father, John Barnes, Sr., as the only two members of Embassy's board of directors. Barnes acknowledges he is Embassy's sole shareholder. After transferring his interest in the property to Embassy, Barnes remained lessor to Clear Channel and continued to personally receive monthly lease payments from Clear Channel.

{¶6} In August 2009, the city's contractor began demolition of the building on the property. Demolition was temporarily halted when the common pleas court issued a temporary restraining order to Barnes in a separate matter. A few days after issuing the restraining order, the common pleas court granted the city's request to dissolve the restraining order, and the city's contractor completed demolition.

{¶7} In July 2011, Barnes and Embassy filed a complaint against the city in federal district court, alleging various constitutional violations related to demolition of the property. *Embassy Realty Invests., Inc. v. Cleveland*, 976 F.Supp.2d 931 (N.D.Ohio 2013). The district court granted summary judgment in favor of the city on Barnes and Embassy's claims, but declined to exercise jurisdiction over the city's counterclaim for demolition costs. *Id.* at 945.

{¶8} In July 2014, the city filed its initial complaint in the present matter, seeking its costs for demolition of the property from both Embassy and Barnes. In December 2015, the municipal court granted the city's motion for partial summary judgment as to Embassy, entering

judgment against it in the amount of $14,036, plus collection costs and $3,509 in attorney fees, with statutory interest from the date of demolition.

{¶9} In April 2016, the trial court granted the city's request to amend its complaint against Barnes. In the amended complaint, the city alleges that Barnes had complete control over Embassy and used its corporate form to "commit fraudulent and/or unlawful acts against [the city]." The city's amended complaint sought to pierce the corporate veil of Embassy to hold Barnes liable for the city's judgment against Embassy for the cost of demolition. Barnes subsequently moved to dismiss the city's amended complaint. In May 2016, the trial court denied Barnes's motion to dismiss.

{¶10} Later in May 2016, the city filed partial summary judgment as to Barnes. In September 2016, the municipal court granted the city's motion for summary judgment, and entered judgment against Barnes identical to that it previously rendered against Embassy.

{¶11} It is from this order that Barnes appeals, raising the following five assignments of error for review:

Assignment of Error One

> The trial court erred when it denied [Barnes's] motion to dismiss on the ground that [the city] failed to commence its causes of action within the [four-year statute of limitations] as mandated by [R.C.] 1336.09.

Assignment of Error Two

> The trial court erred when it denied [Barnes's] motion to dismiss on the ground that sections 3103.09(k) and 367.08(b) of the [Cleveland Codified Ordinances] only authorized [the city] to collect demolition costs from the named property owner on the date of the demolition of August 7, 2009[,] and thus, [the city] cannot collect demolition costs from [Barnes] and this matter should have been dismissed against him.

Assignment of Error Three

> The trial court erred when it denied [Barnes's] motion to dismiss on the ground that [the city] failed to join a necessary party to the action herein, [Southeast], which is jointly and severally liable for demolition costs pursuant to sections

> 3103.09(k) and 367.08(b) of the [Cleveland Codified Ordinances] only authorized [the city] in that it was an owner in the chain of title of the subject realty after the service of the notice of condemnation, and thus, this case should be dismissed.
>
> Assignment of Error Four
>
> The trial court erred when it granted summary judgment against [Barnes] on the ground that [Barnes] committed fraud by transferring his interest in the subject premises to [Embassy] pursuant to the doctrine established in *Belvedere Condominium Owners' Assn. v. R.E. Roark Cos.*, 67 Ohio St.3d 274, [1993-Ohio-119, 617 N.E.2d 1075], but failed to commence its causes of action within the [four-year statute of limitations] as mandated by [R.C.] 1336.09.
>
> Assignment of Error Five
>
> The trial court erred when it granted the motion for summary judgment against [Barnes] on the grounds that genuine issues of material fact prevail as to whether [Barnes] committed fraud by transferring his interest in the subject premises to [Embassy] pursuant to the doctrine established in [*Belvedere*].

Barnes's Motion to Dismiss

{¶12} In the first three assignments of error, Barnes contends the trial court erred in denying his motion to dismiss the city's amended complaint. He presents numerous arguments in support of this contention, including the expiration of the statute of limitations under R.C. 1336.09. Barnes also asserts that the city's codified ordinances do not authorize it to collect demolition costs from him because he did not own the property at the time of demolition. He further argues that the trial court should have dismissed the matter for the city's failure to join Southeast as an indispensable party under Civ.R. 19.

{¶13} This court's review of a motion to dismiss under Civ.R. 12(B)(6) is de novo. *Thomas v. Jackson Hewitt, Inc.*, 192 Ohio App.3d 732, 2011-Ohio-618, 950 N.E.2d 578, ¶ 7 (8th Dist.), citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. In resolving a Civ.R. 12(B)(6) motion, a trial court is confined to the allegations contained

in the complaint and, as an appellate court, we must independently review the complaint to determine if dismissal is appropriate. *Id.*

Statute of Limitations

{¶14} In the first assignment of error, Barnes argues that the trial court should have dismissed the present matter because it was not commenced within the four-year statute of limitations prescribed under R.C. 1336.09. In the fourth assignment of error, Barnes makes the same argument and asserts that the trial court should have denied the city's motion for summary judgment because the four-year statute of limitations had expired. The city disagrees, contending that the six-year statute of limitations under R.C. 2305.07 applies. We agree with the city.

{¶15} We determine the applicable statute of limitations "not from the form of pleading or procedure, but from the gist of the complaint." *Hibbett v. Cincinnati*, 4 Ohio App.3d 128, 131, 446 N.E.2d 832 (1st Dist.1982). Barnes, focusing on the city's argument that the 2008 property transfer was a "sham," contends the applicable statute of limitations is for fraudulent transfer claims under R.C. 1336.09. A review of the amended complaint demonstrates that the city does not rely on a theory of fraudulent transfer in arguing Barnes should be held liable, but rather alleges that Embassy was Barnes's alter ego and that Barnes should be held liable for the city's judgment against Embassy under a theory of piercing the corporate veil.

{¶16} The city, relying on the Cleveland Municipal Court Housing Division's decision in *Cleveland v. Bumpers*, Cleveland M.C. No. 2014 CVH010024 (Sept. 25, 2014), argues that because liability for demolition costs is created by state statute and city ordinance, the applicable statute of limitations is six years as provided in R.C. 2305.07.

{¶17} R.C. 2305.07 provides, in relevant part:

> [A]n action * * * upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

{¶18} In *Bumpers*, the municipal court determined that the six-year statute of limitations under R.C. 2305.07 applies to collection actions for nuisance abatement under R.C. 715.261(B) and Cleveland Codified Ordinance ("C.C.O.") 3103.09, and that a cause of action under those provisions does not accrue until the municipality incurs the cost, e.g., when a property is demolished and the nuisance abated. *Id.*, citing *Zion Nursing Home, Inc. v. Creasy*, 6 Ohio St.3d 221, 224, 452 N.E.2d 1272 (1983) ("[A] cause of action arising from a statute accrues and the period specified in the statute of limitations begins to run when the violation giving rise to the liability occurs.").

{¶19} Here, the property was demolished in August 2009, and the city brought the present action to recover its demolition costs under C.C.O. 3103.09 in July 2014. Thus, the city brought this action within the six-year statute of limitations under R.C. 2305.07, and the trial court did not err in denying Barnes's motion to dismiss on the basis of the statute of limitations.

{¶20} Accordingly, the first and fourth assignments of error are overruled.

C.C.O. 3103.09

{¶21} Barnes's second and third assignments of error focus on a 2011 amendment to C.C.O. 3103.09, the ordinance under which the city is authorized to collect its costs for nuisance abatement.

{¶22} As an initial matter, we note that the former version of C.C.O. 3103.09, in effect in August 2009 when the building on the property was demolished, controls. Former C.C.O. 3103.09 provided, in pertinent part:

> (j) Costs.

> (1) Any and all expenses or costs incurred under this section for the removal * * * of a building or structure shall be paid by the owner of such building or structure[.]
>
> * * *
>
> (4) Notwithstanding the method of collection set forth in this division, the Director of Law may take any action necessary to collect the costs of demolition or boarding from the owner or other responsible party.

Former C.C.O. 3103.09, effective May 20, 2002.

{¶23} Although the city instituted the present action in 2014, after the effective date of the current version of C.C.O. 3103.09, the city asserts that it brings this action under the former version of the statute, in effect at the time of the demolition. Notably, the city's initial complaint pled that Embassy and Barnes were both directly, jointly, and severally liable for demolition costs, whereas the amended complaint seeks to pierce the corporate veil of Embassy to attach liability to Barnes.

{¶24} Barnes asserts that former C.C.O. 3103.09 only authorized the city to bring suit to collect demolition costs against the named property owner. Therefore, he argues that because he was not the record title owner at the time of demolition, he cannot be held responsible for demolition costs under the new, amended law as an owner "in the chain of title from the time of receipt of a notice of condemnation until demolition." C.C.O. 3103.09(k)(2). He argues to hold otherwise would constitute an ex post facto violation of the Ohio Constitution.

{¶25} We find this argument unpersuasive. In asserting this argument, Barnes ignores language of former C.C.O. 3103.09 providing that the city's law director "may take any action necessary to collect the costs of demolition or boarding from the owner *or other responsible party*." (Emphasis added.) Former C.C.O. 3103.09(j)(4). The city argues that Barnes was the "alter ego" of Embassy and is responsible for Embassy's failure to remedy the housing code

violations that ultimately resulted in demolition of the property. Additionally, as discussed above, the city's amended complaint seeks to pierce the corporate veil of Embassy to hold Barnes liable, rather than asserting a direct theory of liability against Barnes.

{¶26} Barnes further contends that, under the current version of the statute, Southeast is jointly and severally liable and an indispensable party to this action under Civ.R. 19(A). He argues that the trial court should have granted his motion to dismiss under Civ.R. 19 for the city's failure to join Southeast.

{¶27} As discussed above, Barnes purchased the property from Southeast, the owner of the property at the time the city first issued a notice of condemnation in 1998. Barnes relies on language of the current version of C.C.O. 3103.09(k)(2), which provides that

> [a]ny and all owners of a building or structure, who appear in the chain of title from the time of receipt of a notice of condemnation until demolition of the building or structure, shall be jointly and severally responsible for all costs and expenses incurred relating to the demolition and all costs and expenses of prosecution or collection related thereto.

{¶28} He argues that under the current version of the ordinance, Southeast is a necessary party under Civ.R. 19 that should have been joined. We find this argument unpersuasive. As discussed above, the city brings this action under the former version of C.C.O. 3103.09 that was in effect at the time of the demolition. Under the former version of the ordinance, Southeast, and Barnes himself, are not jointly and severally liable as owners in the chain of title after condemnation of the building on the property.

{¶29} In support of this argument, Barnes cites to Civ.R. 19(A)(1), which provides that "[a] person who is subject to service of process shall be joined as a party in the action if * * * in his absence complete relief cannot be accorded among those already parties[.]"

{¶30} This court has held that an obligor who is jointly and severally liable is not necessarily a party who is needed for just adjudication under Civ.R. 19(A). *W. 11th St. Partnership v. Cleveland*, 8th Dist. Cuyahoga No. 77327, 2001 Ohio App. LEXIS 481, 15-16 (Feb. 8, 2001). The trial court should order the joinder of a joint and several tortfeasor if the party meets one of the criteria set out in Civ.R. 19(A). *Id.*

{¶31} Barnes states that "[c]learly, [Southeast is] a necessary and indispensable party to [this action]," but fails to demonstrate that in its "absence complete relief cannot be accorded among those already parties." Civ.R. 19(A)(1). We do not find that the absence of Southeast prevented complete relief from being accorded to the existing parties to this case.

{¶32} Based on the foregoing, we find that the trial court did not err in denying Barnes's motion to dismiss the city's amended complaint for failure to join Southeast. Accordingly, the second and third assignments of error are overruled.

Piercing the Corporate Veil

{¶33} In the fifth assignment of error, Barnes argues that the trial court erred in granting the city's motion for summary judgment against him. He asserts that his conduct did not amount to fraud, and therefore, the trial court erred in piercing the corporate veil of Embassy to hold him liable for the city's judgment against Embassy.

{¶34} We review an appeal from a grant of summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Kestranek v. Crosby*, 8th Dist. Cuyahoga No. 93163, 2010-Ohio-1208, ¶ 14.

{¶35} In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998), the Ohio Supreme Court stated the appropriate test as follows:

> Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

(Citations omitted.)

{¶36} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(D); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

{¶37} This court has recognized "[a] fundamental rule of corporate law is that, normally, shareholders, officers, and directors are not liable for the debts of the corporation." *State ex rel. Petro v. Mercomp, Inc.*, 167 Ohio App.3d 64, 2006-Ohio-2729, 853 N.E.2d 1193, ¶ 20 (8th Dist.), citing *Belvedere Condominium Unit Owners' Assn.*, 67 Ohio St.3d 274, 287, 1993-Ohio-119, 617 N.E.2d 1075. In *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, the Ohio Supreme Court explained the exception to this general principle, noting that shareholders are not absolutely immune from liability for the actions of their corporations, and that the "veil" of a corporation may be pierced where it would be unjust to allow a shareholder to hide behind corporate protections. The *Dombroski* court further explained:

"[L]ike every other fiction of the law, when urged to an intent and purpose not within its reason and policy, [the corporate form] may be disregarded." *State ex rel. Atty. Gen.* [*v. Std. Oil Co.*, 49 Ohio St. 137, 177, 30 N.E. 279 (1892),] at paragraph one of the syllabus. Shareholders may thus be held liable for their own bad acts notwithstanding the protections afforded by the corporate form when they use the corporation "for criminal or fraudulent purposes" to the detriment of a third party. *Belvedere* [at 289]. Piercing the corporate veil in this manner remains a "rare exception," to be applied only "in the case of fraud or certain other exceptional circumstances." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475, 123 S.Ct. 1655, 155 L.Ed.2d 643.

Id. at ¶ 17.

{¶38} In *Belvedere*, the Ohio Supreme Court established a three-prong test for courts to apply when deciding whether to pierce the corporate veil:

The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere at paragraph three of the syllabus.

{¶39} The *Dombroski* court modified the second prong of the *Belvedere* test, holding that in order "to fulfill the second prong of the *Belvedere* test for piercing the corporate veil, the plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Dombroski* at _ 29. The Supreme Court cautioned that courts should apply this limited expansion of the

piercing-the-corporate-veil test cautiously and only in instances of extreme shareholder misconduct. *Id.*

{¶40} The first prong of the *Belvedere* test requires the city to show that Barnes had such a level of control over Embassy that it was indistinguishable from or the "alter ego" of Barnes. *Belvedere*, 67 Ohio St.3d at 288, 1993-Ohio-119, 617 N.E.2d 1075. Ohio courts consider various factors to determine the extent to which a party sought to be held personally liable exercised dominance and control over the corporation, including:

> (1) grossly inadequate capitalization, (2) failure to observe corporate formalities, (3) insolvency of the debtor corporation at the time the debt is incurred, (4) shareholders holding themselves out as personally liable for certain corporate obligations, (5) diversion of funds or other property of the company property for personal use, (6) absence of corporate records, and (7) the fact that the corporation was a mere facade for the operations of the dominant shareholder(s).

Robert A. Saurber Gen. Contr., Inc. v. McAndrews, 12th Dist. Butler No. CA2003-09-239, 2004-Ohio-6927, ¶ 27, citing *LeRoux's Billyle Supper Club v. Ma*, 77 Ohio App.3d 417, 422-423, 602 N.E.2d 685 (6th Dist.1991). Although these factors are instructive, their presence is not required to pierce the corporate veil "where equity demands that the fiction of corporate personhood be ignored." *Mercomp*, 167 Ohio App.3d 64, 2006-Ohio-2729, 853 N.E.2d 1193, at ¶ 26, citing *Carter-Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 749 (6th Cir.2001).

{¶41} The record in the present matter is replete with evidence of Barnes's sole control over Embassy and further demonstrates the presence of nearly all of the foregoing factors. Barnes's deposition testimony indicates that Embassy was undercapitalized _ he explained that he put his own money into the property and received a personal loan for improvements to the property prior to transferring the property to Embassy. The evidence presented by the city demonstrates that, apart from Barnes's filing articles of incorporation for Embassy with the Ohio Secretary of State, no other corporate formalities were observed. Barnes admits that Embassy kept minimal

corporate records and had no separate bank account — he acknowledged the lease payments from Clear Channel continued to be paid to him personally after Embassy purchased the property.

{¶42} Additionally, Barnes stipulated that Embassy never filed a federal or state tax return, and that Embassy generated no income from its inception through the time of demolition. Thus, it is clear that Embassy was insolvent at the time of the demolition. Barnes also testified that after he sold the property to Embassy, he continued to pay the property taxes and property maintenance, including snow removal and having the grass cut.

{¶43} Despite the presence of these factors, Barnes denies any fraud related to his transfer of his interest in the property to Embassy. He further argues that he did not commit any fraud in conducting Embassy's affairs, and that he did not incorporate Embassy to defraud the city or any other potential creditor. The city contends, however, that the citations for building code violations and the violation notices issued to both Barnes and Embassy "are clear evidence of illegal and unlawful acts" that satisfy the second prong of the *Belvedere* test. We disagree with Barnes that the city can only pierce the corporate veil by proving fraud. However, we do not find that the city's presentation of the violation notices themselves satisfy the second prong of the test.

{¶44} To satisfy the second prong of *Belvedere* and *Dombroski*, the city must show that Barnes exercised control over Embassy in such a manner as to commit fraud or illegal or unlawful acts against the city. *Belvedere*, 67 Ohio St.3d at 289, 1993-Ohio-119, 617 N.E.2d 1075; *Dombroski*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, at _ 29.

{¶45} In *Springfield v. O'Sesco*, 2d Dist. Clark No. 94-CA-45, 1994 Ohio App. LEXIS 5995 (Dec. 28, 1994), the Second District Court of Appeals also considered an appeal from a trial court's summary judgment order allowing a municipality to pierce the corporate veil to hold an

individual named Long _ a corporate officer and sole shareholder _ liable for demolition costs to abate a nuisance on corporately owned property. The Second District held that "[m]aintaining a nuisance is a tort for which an officer may be held liable," but found that the city of Springfield had not presented sufficient evidence demonstrating that Long himself personally maintained the alleged nuisance. Similarly, in the instant case, although we find that Barnes exerted control over Embassy, we do not find the city presented sufficient evidence to support a finding that Barnes personally maintained the nuisance.

{¶46} Although the city presented evidence of Barnes's control over Embassy, from which one could infer that Barnes was personally responsible for Embassy's unlawful act, i.e., the continued failure to remedy the building code violations to avoid demolition, the record lacks evidence demonstrating that Barnes exercised this control over Embassy in such a manner as to commit this unlawful act. *Dombroski* at _ 29.

{¶47} Our de novo review of a summary judgment motion requires us to view the evidence and any inferences to be drawn therefrom in a light most favorable to the nonmoving party. *Grafton*, 77 Ohio St.3d at 105, 671 N.E.2d 241; *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 433, 424 N.E.2d 311 (1981). If after viewing the evidence and any inferences in this light reasonable minds can come to differing conclusions, the motion should be overruled. *Id*.

{¶48} Here, we find that reasonable minds could come to different conclusions as to whether Barnes did in fact exercise his control over Embassy to unlawfully maintain the nuisance.

{¶49} Based on the foregoing, we cannot find that the city presented sufficient evidence to satisfy all elements required to pierce the corporate veil and hold Barnes personally liable. We further find that a genuine issue of material fact exists for trial as to whether Barnes personally maintained the nuisance after he sold the property to Embassy. Therefore, the trial court erred in granting

the city's motion for summary judgment.

{¶50} Accordingly, the fifth assignment of error is sustained.

{¶51} Judgment affirmed in part, reversed in part, and the matter remanded for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY;
TIM McCORMACK, J., DISSENTS IN PART (SEE SEPARATE OPINION)

TIM McCORMACK, J., DISSENTING IN PART:

{¶52} I dissent in part in that I would fully affirm the decision of the trial court.

[Cite as *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 2018-Ohio-2393.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

PHOENIX LIGHTING GROUP LLC, et al.	C.A. No. 28082
Appellee/Cross-Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2012-08-4444
GENLYTE THOMAS GROUP LLC, et al.	
Appellant/Cross-Appellee	

DECISION AND JOURNAL ENTRY

Dated: June 20, 2018

SCHAFER, Presiding Judge.

{¶1} Defendant-Appellant/Cross-Appellee, Genlyte Thomas Group, L.L.C. ("DCO"), appeals the judgment of Summit County Court of Common Pleas in favor of Appellee/Cross-Appellant, Phoenix Lighting Group, L.L.C. ("Phoenix"). Phoenix also appeals the judgment. This Court affirms in part, reverses in part, and remands for further proceedings consistent with this opinion.

I.

{¶2} Patrick Duffy is the sole owner of Jack Duffy and Associates, Inc. ("JDA") a light sales agency for Acuity Brands Lighting, Inc. ("Acuity") operating in the Akron, Ohio market. Duffy created Phoenix in order to facilitate the purchase of Lighting Sales, Inc., an Acuity lighting sales agency then owned by Stu Eisenberg and operating in the Cleveland, Ohio market. Phoenix ultimately purchased LSI on January 1, 2014, paying Eisenberg $50,000.00 prior to closing, $100,000.00 at closing, and an additional $40,000.00 a year for the following five years,

for a total purchase amount of $350,000.00. Thereafter, Phoenix did business as LSI in the Cleveland market, continuing to represent Acuity and a number of other vendors with products that complimented the Acuity products. Although Duffy owned both Phoenix and JDA, the two companies were operated separately. Specifically, the two companies had separate tax identification numbers, filed taxes separately, had separate financial records, had separate employees, and with a few exceptions, operated in distinct geographical markets. Additionally, Phoenix operated as an LLC and JDA as an S corporation. In order to smooth the transition in ownership and continue the success of LSI, Phoenix retained Eisenberg as its vice president pursuant to a five-year employment agreement and a covenant not to compete. Including Eisenberg, Phoenix had ten employees, including Guy Day, Jason Brown, Sean Cunningham, Tom Sonneborn, Kerry Freeborn, Linda Rath, Jason Breckner, Kathy Levine, and Rick Racey.

{¶3} During the time that Duffy owned Phoenix, the company's sales and profitability increased. Then, in early 2008, Brown and Day approached Duffy about purchasing Phoenix and the parties entered into negotiations. Recognizing that it would be necessary for Phoenix to disclose certain confidential information during the course of the negotiations, Brown, Day, and Duffy signed a mutual confidentiality agreement. Brown and Day eventually sent an offer to Duffy in August 2008 proposing a purchase price significantly below Duffy's expectations. Nonetheless, negotiations continued through the end of 2008.

{¶4} Meanwhile, Brown and Day also considered starting their own lighting sales agency representing products manufactured by DCO, a competitor of Acuity. Accordingly, Day contacted Mark Hughes, a regional sales manager at DCO, in late summer 2008 to inquire about creating an agency relationship. During this conversation, Day disclosed to Hughes that he and Brown were negotiating with Duffy to purchase Phoenix. Nevertheless, DCO had become

dissatisfied with the performance of the current agency representing it in the Cleveland market and Hughes asked to meet with Brown and Day. Hughes, Brown, and Day met in Cleveland about two weeks later. Hughes then asked Brown and Day to create a business plan for the potential new agency.

{¶5} In creating their business plan for the new agency, Brown and Day utilized information they gained while working for Phoenix and through their negotiations with Duffy for the purchase of Phoenix. The business plan identified several Phoenix employees as the future employees of the new agency. The business plan also contemplated financial support from DCO. Brown and Day shared the business plan with Hughes. Hughes subsequently shared the plan with other executives from DCO, including Robert Carswell, DCO's vice president of sales, and Jim O'Hargan, DCO's general manager (collectively "DCO executives").

{¶6} Subsequently, in late January 2009, Brown, Day, and Eisenberg traveled to DCO's headquarters in Tupelo, Mississippi, and then to Texas, without Duffy's knowledge, to meet with DCO executives. During those meetings Brown and Day expressed to the DCO executives that they were in negotiations with Duffy to potentially purchase Phoenix and that they would need financial assistance if they were to start a new agency representing DCO. Although Brown, Day, and Eisenberg kept their contact with DCO a secret from Duffy, Duffy eventually learned of the discussions. In response, Duffy fired Eisenberg pursuant to the non-compete agreement and asked Brown and Day to sign a non-compete agreement. Brown and Day declined and resigned in February 2009.

{¶7} Ultimately, Brown and Day decided to start their own lighting sales agency. Brown and Day formed Intelligent Illumination and signed a contract on behalf of Intelligent Illumination to represent DCO in an agency capacity. After contracting with DCO, Brown and

Day returned Phoenix's confidential information they had received from Duffy during their negotiations. In addition to Brown and Day, Intelligent Illumination hired a number of Phoenix's key employees and four additional employees. Although Phoenix's business was essentially destroyed after Brown and Day's resignations, Duffy announced a plan to consolidate Phoenix with JDA.

{¶8} On April 1, 2009, Phoenix filed a complaint against Brown, Day, and a then unknown business entity later identified as DCO, alleging various business related torts. The matter then proceeded through the pretrial process. However, on June 1, 2012, Phoenix dismissed the matter without prejudice. Phoenix subsequently refiled this matter against Brown, Day, and DCO on August 2, 2012. The original trial judge recused herself and the matter was reassigned. Phoenix filed an amended complaint in May 2013.

{¶9} The matter ultimately proceeded to a four week jury trial beginning May 12, 2014. After a number of witnesses testified, Phoenix entered into a confidential settlement agreement with Brown and Day and the trial court dismissed them from the case. On June 11, 2014, the jury returned a verdict in favor of Phoenix and against DCO on a number of the claims in the complaint. Specifically, the jury found that DCO had tortiously interfered with Phoenix's business relationships, misappropriated Phoenix's trade secrets, and participated in a civil conspiracy to tortiously interfere with Phoenix's business relationships, to breach a duty of loyalty owed to Phoenix, and to misappropriate Phoenix's trade secrets.

{¶10} The jury awarded compensatory damages in the aggregate amount of $1,680,970.00. Following a punitive damages hearing, the jury found that DCO's conduct was malicious and awarded Phoenix an additional $7,000,000.00 on Phoenix's claims of tortious interference with a business relationship and civil conspiracy. However, pursuant to R.C.

2315.21(D), the trial court reduced the punitive damages award to $2,761,940.00. Additionally, the trial court awarded treble damages on the claim of direct misappropriation of trade secrets pursuant to R.C. 1333.63(B), trebling the $300,000.00 jury awarded compensatory damages to $900,000.00. The jury also found that Phoenix was entitled to recover reasonable attorney fees. Following a hearing, the trial court awarded Phoenix $3,983,014.00 for attorney fees plus litigation expenses, costs, and prejudgment interest. The trial court awarded Phoenix a total of $9,511,435.07, plus court costs.

{¶11} DCO filed post-trial a motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial or motion for remittitur. The trial court subsequently denied the motion.

{¶12} DCO filed a timely appeal, raising seven assignments of error for our review. For ease of the analysis, we elect to consider the assignments of error out of order. Since assignments of error II, III, and IV implicate similar issues, we elect to consider them together.

{¶13} Phoenix also filed a timely appeal, raising two assignments of error for our review.

II.

DCO's Assignment of Error II

The trial court erred as a matter of law by not granting a directed verdict or judgment notwithstanding the verdict in favor of DCO on Plaintiff's claim for tortious interference with business relationships because Plaintiffs failed to present sufficient evidence in support of this claim.

DCO's Assignment of Error III

The trial court erred as a matter of law by not granting a directed verdict or judgment notwithstanding the verdict in favor of DCO on Plaintiff's claim for misappropriation of trade secrets because Plaintiffs failed to present sufficient evidence in support of this claim.

DCO's Assignment of Error IV

The trial court erred as a matter of law by not granting a directed verdict or judgment notwithstanding the verdict in favor of DCO on Plaintiff's claim for civil conspiracy because Plaintiffs failed to present sufficient evidence in support of this claim.

{¶14} In its second, third, and fourth assignments of error, DCO contends that the trial court erred by not granting its motions for directed verdict or its motions for judgment notwithstanding the verdict on Phoenix's claims for tortious interference with business relationships, misappropriation of trade secrets, and civil conspiracy because Phoenix failed to present sufficient evidence to support its claims. We disagree.

{¶15} As a motion for directed verdict presents a question of law, our review is de novo. *Roberts v. Falls Family Practice, Inc.*, 9th Dist. Summit No. 27973, 2016-Ohio-7589, ¶ 11, citing *Spero v. Avny*, 9th Dist. Summit No. 27272, 2015-Ohio-4671, ¶ 17. "A trial court must grant a motion for directed verdict after the evidence has been presented if, 'after construing the evidence most strongly in favor of the party against whom the motion is directed, * * * reasonable minds could come to but one conclusion upon the evidence submitted[.]'" *Roberts* at ¶ 11, citing Civ.R. 50(A)(4) and *Parrish v. Jones*, 138 Ohio St.3d 23, 2013-Ohio-5224, ¶ 16. Nonetheless, "if there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied." *Hawkins v. Ivy*, 50 Ohio St.2d 114, 115 (1977). "A motion for a directed verdict assesses the sufficiency of the evidence, not the weight of the evidence or the credibility of the witnesses." *Jarvis v. Stone*, 9th Dist. Summit No. 23904, 2008-Ohio-3313, ¶ 7, citing *Strother v. Hutchinson*, 67 Ohio St.2d 282, 284 (1981).

{¶16} After a trial court enters a judgment on a jury's verdict, a party may file a motion for judgment notwithstanding the verdict to have the judgment set aside on grounds other than the weight of the evidence. Civ.R. 50(B). Judgment notwithstanding the verdict "is proper if upon viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the non-moving party reasonable minds could come to but one conclusion, that being in favor of the moving party." *Williams v. Spitzer Auto World, Inc.*, 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶ 9. However, if "there is substantial evidence to support [the non-moving party's] side of the case, upon which reasonable minds may reach different conclusions the motion must be denied." *Jackovic v. Webb*, 9th Dist. Summit No. 26555, 2013-Ohio-2520, ¶ 15, quoting *Osler v. City of Lorain*, 28 Ohio St.3d 345, 347 (1986). "As with an appeal from a court's ruling on a directed verdict, this Court reviews a trial court's grant or denial of a judgment notwithstanding the verdict de novo." *Jackovic* at ¶ 15, quoting *Williams* at ¶ 9.

A. Tortious Interference with a Business Relationship

{¶17} Phoenix alleged in its complaint that DCO individually and in cooperation with Brown and Day tortiously interfered with Phoenix's business relationships with its former employees. After the trial, the jury found that DCO had tortiously interfered with Phoenix's business relationship with one or more of the former employees, but did not specify with which relationship or relationships DCO interfered. "The elements of 'tortious interference with a business relationship are: (1) a contractual or business relationship; (2) knowledge of the relationship by the tortfeasor; (3) an intentional and improper act by the tortfeasor preventing formation of a contract, procuring breach of a contract, or termination of a business relationship; (4) lack of privilege on the part of the tortfeasor; and (5) resulting damage.'" *Bindra v.*

Fuenning, 9th Dist. Summit No. 26489, 2013-Ohio-5722, ¶ 14, quoting *Tripp v. Beverly Ent.-Ohio, Inc.*, 9th Dist. Summit No. 21506, 2003-Ohio-6821, ¶ 48. "Tortious interference with a business relationship does not require the breach of contract, rather it is sufficient to prove that a third party does not enter into or continue a business relationship with the plaintiff." *Gentile v. Turkoly*, 7th Dist. Mahoning No. 16 MA 0071, 2017-Ohio-1018, ¶ 24, citing *Magnum Steel & Trading L.L.C. v. Mink*, 9th Dist. Summit Nos. 26127, 26231, 2013-Ohio-2431, ¶ 10. "A tortfeasor in such a case must act maliciously before courts will permit recovery." *Tripp* at ¶ 48, citing *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 16 (1990).

{¶18} The Supreme Court of Ohio has stated the following,

> In determining whether an actor has acted improperly in intentionally interfering with a contract or prospective contract of another, consideration should be given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Fred Siegel Co., LPA v. Arter & Hadden, 85 Ohio St.3d 171, 1999-Ohio-260, paragraph three of the syllabus (adopting Restatement of the Law 2d, Torts, Section 767 (1979)). Although the listed factors are important, the weight carried by the factors may vary considerably. Restatement of the Law 2 Torts, Section 767, Comment a. "In particular, the 'nature of the actor's conduct' and 'the relation between the parties' are both important factors in determining whether the interference was improper." *Paramount Farms Intl., L.L.C. v. Ventilex B.V.*, 12th Dist. Butler No. CA2015-02-029, 2016-Ohio-1150, ¶ 37, citing Restatement of the Law 2d, Torts, Section 767, Comments c and i. "The issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does cause it." *Id.* at ¶ 38, citing Restatement, Section 767, Comment c.

{¶19} It is undisputed that the former Phoenix employees, including Brown and Day, had a business relationship with Phoenix, that DCO knew those employees had a business relationship with Phoenix, and that those employees terminated that business relationship. Accordingly, DCO limits its argument on appeal to the contention that Phoenix failed to present evidence that DCO improperly or maliciously interfered with Phoenix's business relationships and that Phoenix failed to present evidence that DCO's conduct was not privileged. DCO specifically argues that (1) "exploring potential employment or business opportunities with at-will employees who are not subject to noncompetition agreements does not constitute tortious interference as a matter of law," (2) DCO could not have interfered as a matter of law because Brown and Day severed their relationship with Phoenix before entering into a business relationship with DCO; (3) DCO did not have any direct communication with the former Phoenix employees prior to their resignations from Phoenix; and (4) DCO's conduct was privileged as fair competition.

{¶20} Upon review of the record in this matter, we determine that Phoenix presented sufficient evidence from which reasonable minds could reach differing conclusions as to whether DCO acted improperly and without privilege when it interfered with Phoenix's business relationships with its employees.

{¶21} The Supreme Court of Ohio has held that the "establishment of the privilege of fair competition, as set forth in Section 768 of the Restatement, will defeat a claim of tortious interference with contract where the contract is terminable at will." *Siegel* at 179-180. "Pursuant to Section 768, competition is proper if (a) the relation between the actor (here [DCO]) and his or her competitor (here [Phoenix]) concerns a matter involved in the competition between the actor and the other, and (b) the actor does not employ wrongful means, and (c) his

action does not create or continue an unlawful restraint of trade, and (d) his purpose is at least in part to advance his interest in competing with the other." *Id.* at 180. Thus, the Supreme Court of Ohio has specifically recognized that "where an existing contract is terminable at will, *and* where all the elements of Section 768 of the Restatement are met, a competitor may take action to attract business, even if that action results in an interference with another's existing contract." (Emphasis added.) *Id.* at 179.

{¶22} It is undisputed in the case that the former Phoenix employees were at-will employees. Thus, Phoenix had the burden to demonstrate that DCO's conduct was improper. *See Long v. Mount Carmel Health System*, 10th Dist. Franklin No. 16AP-511, 2017-Ohio-5522, ¶ 27. "To determine whether the conduct is improper or privileged, Ohio courts look to the nature of the actor's conduct, motive, interests interfered with, interests of the actor, societal interest, remoteness of the interference, and the relationship of the parties." *Thompson Thrift Construction v. Lynn*, 5th Dist. Delaware No. 16 CAE 10 0044, 2017-Ohio-1530, ¶ 115, citing *Dryden v. Cincinnati Bell Telephone*, 135 Ohio App.3d 394, 400 (1st Dist.1999).

{¶23} Day testified that he and Hughes discussed the problems DCO had with the previous agency representing DCO in the Cleveland market. Hughes testified that the reason he believed the previous agency was underperforming was because "they were understaffed on the outside sales team and they had damaged relationships in the market." Carswell also stated that the previous agency did not have enough properly trained sales people. As a result, DCO was looking to replace them due to "their lack of sales" and "their lack of responsiveness in hiring a better outside team." Although DCO did not have any direct contact with any of the former Phoenix employees other than Brown and Day, it is undisputed that Brown and Day submitted a business plan to DCO in October 2008 at Hughes' request. That business plan states that "[t]he

future employees of [the new agency] are currently employed by the top lighting manufacturer's agency in Northeast Ohio, Lighting Sales, Inc./Jack Duffy and Associates (LSI/JDA)" and that Brown and Day's "current fellow employees are prepared to take the next step with Day-Brown and [DCO] and are very excited about it." The business plan then specifically lists seven additional employees by name, six of which were then employed by Phoenix. Eisenberg was included among those employees. The business plan also stresses that while the right combination of lighting manufacturers is "critical," the new agency's "people are much more so." The business plan further states,

> [w]ith our successful team at Lighting Sales, Inc fully converted over the products and systems of DCO along with our top tier manufacturers, who have verbally committed to this venture, we are prepared to bring sales and profitability unseen to DCO in the Northeast Ohio market. In one fell swoop we will start a new business while knocking out the current top player.

Day testified that Phoenix was indeed the "current top player" in the Cleveland lighting sales market. Day testified that the representations and statements in the business plan were true to the best of his knowledge.

{¶24} Prior to the Mississippi/Texas trip, Hughes emailed Day, stating that "[a]ll parties have your business plan and are reviewing." Day understood "all parties" to mean at least Carswell and O'Hargan were reviewing the business plan. Indeed, both Hughes and Carswell testified they had reviewed the business plan submitted by Day and Brown. Although O'Hargan testified he did not read through the business plan, he stated that he was sure he was given the business plan and that he was sure Hughes spoke with him about it. Additionally, Day testified that during the Tupelo, Mississippi trip, he spoke with the DCO executives about the Phoenix employees he and Brown intended to take with them to the new agency. Day also stated that no one from DCO ever expressed any concern about the propriety or legality of the business plan.

{¶25} Hughes acknowledged that although he believed it to be "fluff," he did speak with Carswell and O'Hargan about the business plan's "concept of taking all of the employees of [Phoenix] and making them employees of Intelligent Illumination." Hughes described his conversation with Carswell and O'Hargan as "they asked some questions, one of which was, Mark, do you believe they'll get all of these employees? The answer is, No, I do not. They asked why. I'm, like, guys, statistically it's almost impossible for that to happen." Although O'Hargan did not recall Hughes or Carswell discussing Brown and Day's plan regarding the Phoenix employees, he also stated that he believed it would be "impossible" to "pull off something like that." Nonetheless, O'Hargan did acknowledge that "[f]rom a business ethic standpoint" he would "have a problem with [the plan]," but as the new agency would be an independent business, he "wouldn't have made any comment or given any advice, one way or another."

{¶26} During the Mississippi/Texas trip, the DCO executives also learned Eisenberg was subject to a covenant not to compete with Phoenix, yet allowed him to participate as an advisor to Day and Brown in the meetings that followed. The evidence also shows that the DCO executives remained interested in Eisenberg's "status" for months after he was fired from Phoenix.

{¶27} Jason Breckner, a former employee of Phoenix testified that Brown, Day, and Eisenberg had created an atmosphere and belief at Phoenix that Duffy did not know how to lead an agency. Kathy Levine, another former employee of Phoenix, buttressed Breckner's testimony, stating that although she did not have any firsthand experience with Duffy she had gotten the impression he was not a good businessperson from statements made by Day, Brown, and Cunningham. Breckner and Levine also testified that they and other employees were told by Day and Brown in the Spring of 2008 that they were in negotiations to purchase Phoenix.

However, in late summer of that year, Day and Brown told a number of employees during a closed door meeting that they were going to approach another manufacturer to sponsor them to start a new agency. Breckner stated that during that meeting, Brown and Day solicited or invited the Phoenix employees to be a part of the new agency. Levine testified that she was personally asked to join the new agency in late 2008. Breckner stated the employees "were all on board" whether Day and Brown purchased Phoenix or started a new agency representing DCO. Additionally, Breckner and Levine testified that after Brown, Day, and Eisenberg returned from the Mississippi/Texas trip the focus at Phoenix was going to a new agency. Levine further testified that "nobody" was paying attention to the business of Phoenix in January and February of 2009.

{¶28} Taken in a light most favorable to Phoenix, the above testimony suggests that DCO knew of and encouraged Brown and Day, while in the employ of Phoenix, to not only develop a business plan with the intention of usurping nearly all of Phoenix's workforce, but to also solicit those employees while employed in key positions at Phoenix. *See Gracetech Inc. v. Perez*, 8th Dist. Cuyahoga No. 96913, 2012-Ohio-700, ¶ 22 (concluding that reliance on the fair competition privilege is misplaced where an employee set up a competing business and solicited a client while having management-type responsibilities to keep business operating after death of owner.) The testimony also suggests that although DCO knew Eisenberg was subject to a covenant not to compete with Phoenix, DCO continued to encourage his role as an advisor to Brown and Day both during and after the time all three were employed at Phoenix. *See Gracetech* at ¶ 24 (implying that solicitation of employees known to have signed an agreement to not compete can form the basis of a claim for tortious interference). The testimony further suggests that DCO knew Brown and Day had access to confidential business records since they

were in negotiations to purchase Phoenix and subject to a mutual confidentiality agreement. As such, we conclude that there was sufficient evidence presented at trial from which reasonable minds could reach a different conclusion as to whether DCO acted improperly.

{¶29} Therefore, the trial court did not err in denying DCO's motion for directed verdict or motion for judgment notwithstanding the verdict as they related to Phoenix's claim for tortious interference with a business relationship. Accordingly, DCO's second assignment of error is overruled.

B. Misappropriation of Trade Secrets

{¶30} Phoenix also alleged in its complaint, and the jury found by a preponderance of the evidence, that DCO misappropriated Phoenix's trade secrets. Although Phoenix alleged at trial that DCO had misappropriated its personnel, sales, and business strategy trade secrets, the jury's verdict does not specify if it found DCO had misappropriated all of the alleged trade secrets, one of the alleged trade secrets, or a combination of the alleged trade secrets.

{¶31} R.C. 1333.61 defines a trade secret as

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

"The question whether a particular knowledge or process is a trade secret is a question of fact to be determined by the trier of fact upon the greater weight of the evidence." *Siegel*, 85 Ohio St.3d 171 at paragraph six of the syllabus. "[A] complainant in a civil action is entitled to recover

damages for misappropriation [of trade secrets]." R.C. 1333.63(A). Misappropriation is the "[a]cquistion of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." R.C. 1333.61(B)(1). The Supreme Court of Ohio has recognized that "listings of names, addresses, or telephone numbers that have not been published or disseminated, or otherwise become a matter of general public knowledge, constitute trade secrets if the owner of the list has taken reasonable precautions to protect the secrecy of the listing to prevent it from being made available to persons other than those selected by the owner to have access to it in furtherance of the owner's purposes." *Siegel Co.*, 85 Ohio St.3d at paragraph 5 of the syllabus.

{¶32} On appeal, DCO contends that Phoenix failed to present sufficient evidence to establish that the information at issue constitutes trade secrets. Specifically, DCO argues that (1) the sales projections created by Day and submitted to DCO as part of the business plan were not Phoenix's sales figures nor were the projections derived from Phoenix's sales figures; (2) Phoenix's employee information was publicly available and known through the industry; and (3) Phoenix failed to identify what trade secret business strategies were allegedly misappropriated by DCO, what their economic value was, nor what efforts were undertaken to maintain them as confidential.

{¶33} Nonetheless, upon review of the record, we determine that Phoenix presented sufficient evidence at trial so as to create a factual question for the jury on the issue of whether DCO misappropriated Phoenix's trade secrets. The evidence in this case shows that DCO knew Brown and Day were in negotiations with Duffy to potentially purchase Phoenix and were subject to a mutual non-disclosure agreement. The evidence also shows that the business plan submitted to Hughes and DCO listed specific personnel information of current Phoenix

employees. Day acknowledged that business strategies within the business plan "could have been" or were strategies he had discussed with Duffy with respect to Phoenix. Day also acknowledged upon cross-examination that DCO was a competitor of Acuity and that if Phoenix's financial information was provided to DCO, it would allow DCO to know what Phoenix's sales force was capable of selling as an agency.

{¶34} Breckner, an employee of Phoenix from 2006 until it closed in 2009, testified that he did "quotations" work for Phoenix. Breckner confirmed that employees of Phoenix were given an employee policy manual or handbook that contained provisions relating to confidentiality. Breckner stated that he understood Phoenix's policy to maintain the confidentiality of personnel information including employee's résumés, names, phone numbers, and personal information. He also stated that he understood that sales data was confidential information and that access to that information was "kind of on a need-to-know basis." For example, Breckner testified that in his position he did not have access to "sales data for a quarter for a particular manufacturer or any kind of measurable profit-and-loss kind of statement or kind of sales data from a manufacturer," but that salespeople were sometimes privy to such information. Breckner also testified that financial information such as commission rates, financial statements, and margin rates were "extremely sensitive material" and "confidential" and that such information needed "to be kept pretty much under lock and key in the agency." Breckner further testified that business strategies including marketing strategy and employee structure were kept confidential because the company spent a lot of time developing strategy and "you definitely don't want your competitor knowing what your strategy is, how you go to the market, what you're looking for." Breckner believed that it was common knowledge at Phoenix that the above confidential information was owned by the company and not for personal use. He

also testified regarding the security measures Phoenix put in place to protect this information, such as the employee policy manual with confidentiality provisions, computer passwords, Wi-Fi firewalls, locked doors with security code access, security system, and visitors always being accompanied.

{¶35} Levine's testimony and Duffy's testimony buttressed Breckner's testimony with regard to confidential information at Phoenix. Levine stated that she considered "anything under the roof" of Phoenix to be confidential. Specifically, she identified financial information such as quotes, orders, and pricing. Similarly, Duffy agreed that information regarding sales figures, personnel information, and business and marketing strategies were kept confidential at Phoenix since its business is not known in the community. He stated that personnel information remained confidential so that competitors would not know what the strategic value was of the staff Phoenix employed. He stated that sales information had significant economic value because it "confirms the outcome of what we're able to generate, and that is unique to [Phoenix] based on who we are and how we go about it." Duffy further stated that certain information, such as the billing statistics sent to him by Acuity, were only shared with Eisenberg, who was subject to a confidentiality agreement. Duffy also described the methods by which the information was kept confidential, such as the employee policy manual with confidentiality provisions, computer passwords, Wi-Fi firewall, and locked doors.

{¶36} O'Hargan testified that he understood Brown and Day were negotiating a potential purchase of Phoenix and acknowledged that under a "due diligence process," obtaining financial information from the seller is standard in the acquisition of a business. Brown and Day both testified that after reviewing their initial business plan, Hughes recommended modifications to make the plan more "effective." As a result, Day expanded the financial section of the

business plan. Upon resubmitting the business plan, Day sent an email to Hughes wherein he stated he asked Hughes to take into consideration that he and Brown were unable to provide DCO with "specific financial information (sales dollars or commission dollars paid) * * * due to the non-disclosure/confidentiality agreement [Brown and Day] signed for [the] ongoing negotiations with the current owner." Day did, however, disclose to Hughes a range of the average commissions earned through all Acuity product segments. The evidence also shows that Hughes was aware that Duffy did not know Brown and Day were pursuing a business relationship with DCO.

{¶37} Based upon the above evidence, we conclude that there was sufficient evidence to create a question of fact for the jury as to whether DCO acquired Phoenix's trade secrets when it knew or had reason to know those trade secrets were acquired by improper means. Accordingly, the trial court did not err when it denied DCO's motion for directed verdict or when it denied DCO's motion for judgment notwithstanding the verdict as they related to Phoenix's claims for misappropriation of trade secrets. Therefore, DCO's third assignment of error is overruled.

C. Civil Conspiracy

{¶38} In its fourth assignment of error, DCO contends that the trial court erred when it did not grant DCO's motions for directed verdict and motion for judgment notwithstanding the verdict as they related to Phoenix's claim of civil conspiracy because Phoenix failed to demonstrate that DCO maliciously conspired with Brown and Day. DCO also argues in its fourth assignment of error that the trial court erred when it awarded damages for both the underlying torts and separate additional damages for conspiracy to commit those torts.

{¶39} Phoenix alleged in its complaint and the jury found by a preponderance of the evidence that DCO engaged in a civil conspiracy with Day and/or Brown to tortiously interfere

with business relationships, tortiously interfere with contractual relationship, misappropriate trade secrets, and breach the duty of loyalty, good faith, and trust.

{¶40} The tort of civil conspiracy is defined as "'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.'" *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419 (1995), quoting *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 126 (1987). "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475 (1998), citing *Godsen v. Louis*, 116 Ohio App.3d 195, 219 (9th Dist.1996). "The malice involved in the tort is 'that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another.'" *Williams* at 475, quoting *Pickle v. Swinehart*, 170 Ohio St. 441, 443 (1960). "The element of 'malicious combination to injure' does not require a showing of an express agreement between defendants, but only a common understanding or design, even if tacit, to commit an unlawful act." *Gosden* at 219. Additionally, "'[i]n a conspiracy, the acts of coconspirators are attributable to each other.'" *Gibson v. City Yellow Cab Co.*, 9th Dist. Summit No. 20167, 2001 WL 123467 (Feb. 14, 2001), quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475 (1998).

{¶41} "Some Ohio cases have held that a plaintiff must allege and prove damages attributable to the conspiracy that are above and beyond those resulting from any underlying or supporting torts." *Gosden* at 220, citing *Crosby v. Beam*, 83 Ohio App.3d 501, 515-516 (6th Dist.1992), and *Stiles v. Chrysler Motors Corp.*, 89 Ohio App.3d 256, 266 (6th Dist.1993), both citing *Minark v. Nagy*, 8 Ohio App.2d 194, 195-196 (8th Dist.1963). However, this Court has previously held that those holdings "were based on a misreading" of previous cases and that "[t]he 'gist' of a conspiracy action is not the conspiracy itself, and the conspiracy only becomes

important after the wrong is committed. A civil conspiracy claim, therefore, serves only to enlarge the pool of potential defendants from whom a plaintiff may recover damages and, possibly, an increase in the amount of those damages[.]" *Gosden* at 220-221.

{¶42} Therefore, based upon the evidence outlined above, we conclude that there was sufficient evidence to create a question of fact for the jury as to whether DCO conspired with Brown and Day to tortiously interfere with Phoenix's business relationships and misappropriate Phoenix's trade secrets, and breach the duty of loyalty, good faith, and trust.

1. Damages for Civil Conspiracy

{¶43} In this case, the jury found that DCO had tortiously interfered with Phoenix's business relationships, misappropriated Phoenix's trade secrets, and participated in a civil conspiracy to tortiously interfere with Phoenix's business relationships, to breach a duty of loyalty owed to Phoenix, and to misappropriate Phoenix's trade secrets. Consequently, the jury awarded Phoenix $101,500.00 on its claim for tortious interference with business relationships and $300,000.00 on its claim for misappropriation of trade secrets. After finding DCO liable for civilly conspiring to commit those torts and additionally for conspiring with Brown and Day to breach their duty of loyalty to Phoenix, the jury awarded Phoenix an additional $476,470.00 on its claim against DCO for conspiring to tortiously interfere, $203,000.00 on its claim against DCO for conspiring to misappropriate trade secrets, and $600,000.00 on its claim against DCO for conspiring with Brown and Day to breach their duty of loyalty.

{¶44} DCO argued, inter alia, in its motion for new trial or remittitur that the jury instructions improperly permitted the jury to award duplicate damages. The trial court denied DCO's motion. "This Court's standard of review of an order denying a motion for a new trial depends upon the grounds of the motion." *Jackovic v. Webb*, 9th Dist. Summit No. 26555, 2013-

Ohio-2520, ¶ 17. As the basis of DCO's motion involves a question of law, we review de novo. *See id*.

{¶45} On appeal, DCO argues that "the trial court erred by awarding damages for the injury caused by the underlying torts and separate additional damages from conspiracy to commit those same torts." DCO bases its argument on this court's statement in *Gosden* that the element of "resulting in actual damages" essentially "restricts the measure of recovery for a conspiracy claim to those damages caused by the underlying tort (or torts) necessary to support the claim for civil conspiracy in the first place." *Gosden* at 220. On the contrary, Phoenix argues that the jury did not award it additional or duplicative damages, rather, the jury merely allocated the total damages to which Phoenix was entitled between different theories of recovery.[1]

{¶46} Initially, we note that DCO's reliance on this Court's statement in *Gosden* is misplaced as it is taken out of context. In *Gosden*, this Court was called upon to determine whether the trial court had incorrectly granted a directed verdict in favor of the defendants on the plaintiffs' claim for civil conspiracy. On appeal, the plaintiffs argued that they had presented sufficient evidence on all elements of civil conspiracy to allow the matter to be decided by the jury. In discussing the meaning of the element "resulting in actual damages," this Court stated:

> Some Ohio cases have held that a plaintiff must allege and prove damages attributable to the conspiracy that are above and beyond those resulting from any underlying or supporting torts. These holdings, however, were based on a misreading of *Minarik*. It is stated in *Minarik* that any damages must be "directly

[1] Although our holding in Phoenix's assignment of error two below recognizes that a claim for conspiracy to misappropriate trade secrets is displaced by the Ohio UTSA, DCO did not raise the issue below nor does DCO raise this issue on appeal. Indeed, a review of DCO's proposed jury instructions shows that DCO proposed a separate instruction for Phoenix's claim for civil conspiracy to misappropriate trade secrets. Accordingly, our review is limited to the issues DCO has chosen to raise in its respective assignments of error. *See Bank of America, N.A. v. Edwards*, 9th Dist. Lorain Nos. 15CA010848, 15CA010851, 2017-Ohio-4343, ¶ 8.

> attributable" to the conspiracy. In the context of that case, however, that statement did not mean the damages had to be attributable only to the conspiracy to the exclusion of the underlying tort. It meant that damages, in order to be recoverable under a civil conspiracy claim, cannot be the result of just any tort committed by a conspirator, or just any act committed in furtherance of the conspiracy. They must have been caused by a tort committed in furtherance of the conspiracy. Essentially, this simply restricts the measure of recovery for a conspiracy claim to those damages caused by the underlying tort (or torts) necessary to support the claim for civil conspiracy in the first place.
>
> This is borne out by another passage in Minarik. The court quoted a passage from Cooley on Torts that the significance of the conspiracy claim is not damages caused by the conspiracy alone, but rather additional pockets from which to collect damages, and a possible increase in those damages[.]

(Internal citations omitted.) *Id*. at 220-221. Moreover, this Court subsequently concluded that "[a] civil conspiracy claim, therefore, serves only to enlarge the pool of potential defendants from whom a plaintiff may recover damages and, *possibly, an increase in the amount of those damages*; it does not increase the plaintiff's burden by requiring proof of additional damages." (Emphasis added.) *Id*. at 221.

{¶47} "It is fundamental that a plaintiff cannot recover twice on the same incident." *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Summit Nos. 22098, 22099, 2005-Ohio-4931, ¶ 97, citing *P.C. & S.L. R.R. Co. v. Hedges*, 41 Ohio St. 233, 233-34 (1884). In this case, however, Phoenix argued at trial that its entire business was destroyed. This Court has specifically stated, "'[w]hen an entire business is wrongfully interrupted and injured,' as [Phoenix] alleged here, 'the measure of damages is the decrease in volume traceable to the wrong, as reflected by loss of profits, expenses incurred or similar concrete evidences of injury.'" *World Metals, Inc. v. AGA Gas, Inc.*, 142 Ohio App.3d 283, 288 (9th Dist.2001), quoting *Guntert v. Stockton*, 55 Cal.App.3d 131, 143 (1976). Phoenix's expert, Mr. Zeleznik, estimated the value of Phoenix in December 2008 to be a little bit over $1.35 million, falling to $46,670.00 by March 2009. Consequently, Mr. Zeleznik opined that Phoenix's damages were

about $1,315,000.00. However, Mr. Zeleznik also stated that he had used several different approaches to determine the value of Phoenix at the end of 2008. One of those methods calculated Phoenix's business to be worth $1,549,000.00. Additionally, Phoenix introduced as evidence valuations its CPA had prepared during negotiations with Brown and Day for the purchase of Phoenix. Those estimates calculated Phoenix's value as of December 31, 2007, as between $1.7 million and $2.4 million.

{¶48} When the possibility exists that a jury could, in finding for a plaintiff on multiple claims, award duplicate damages for the same pecuniary injury, the jury should at a minimum be cautioned that such an award is improper. *Titanium Industries v. S.E.A., Inc.*, 118 Ohio App.3d 39, 52, (7th Dist.1997). As to damages, the jury in this case was instructed, in pertinent part, as follows:

> If you find for Phoenix on one or more of its claims, you will separately determine by a preponderance of the evidence, the amount of money that will reasonably compensate Phoenix for damages proximately caused by the wrongful act(s)
>
> *You should be cautious in consideration of damages not to overlap or duplicate the amounts of your award, which would result in double damages.* For instance, an award, if granted, for unfair competition should relate to that claim only and should not include compensation for a different claim such as misappropriation of a trade secret.
>
> * * *
>
> <u>COMPENSATORY DAMAGES</u>
>
> You must determine what monetary amount of damages, if any, will reasonably compensate Phoenix for the damages it incurred by reason of the causes of action or claims that it has successfully proven. You will set forth this amount as an award of "compensatory damages."
>
> Phoenix's position is that DCO's actions caused a loss of its business value. Where a regularly established business is wrongfully injured, interrupted, or destroyed, the business may recover the damages sustained by ascertaining how

> much less valuable the business was by reason of the interruption or destruction and to allow that amount as damages.
> * * *
>
> Therefore, if you have found DCO has acted wrongfully either directly or as a part of a conspiracy, you must decide what the value of Phoenix's business was before DCO's wrongful conduct and what the value of it became after DCO's wrongful act. The difference will be the damages that Phoenix is owed.

(Emphasis added.) We note that DCO has not challenged these instructions on appeal. Accordingly, as a jury is presumed to have followed the trial court's instruction, we cannot say that the jury awarded double damages in this case. *See State v. Knight*, 9th Dist. Wayne No. 15AP0019, 2016-Ohio-8505, ¶ 9 (recognizing that a "jury is presumed to have followed the trial court's instruction."). The verdict in this case can be construed as representative of the jury's belief that Phoenix was entitled to a total compensatory damage amount of $1,680,970.00 and that the jury merely allocated that award among Phoenix's various theories of recovery.

{¶49} Therefore, DCO's fourth assignment of error is overruled.

DCO's Assignment of Error I

> **The trial court erred by failing to rule that Plaintiff caused its own damages, and by improperly excluding evidence that it did not suffer damages because the consolidation of Phoenix with JDA fully mitigated any harm that Defendants allegedly caused, or that Phoenix as a matter of law failed to mitigate damages.**

{¶50} In its first assignment of error, DCO contends that the trial court erred by not concluding as a matter of law that Phoenix caused its own damages and by excluding DCO's evidence and expert testimony regarding the consolidation of Phoenix into JDA. We disagree on both points.

A. Evidence of Causation

{¶51} DCO also argues in its first assignment of error that the trial court erred by not finding that Phoenix had failed to offer sufficient proof of causation and that the evidence

demonstrated that the only damages suffered by Phoenix were caused by Duffy's decision to consolidate Phoenix and JDA. Nonetheless, our resolution of DCO's second, third, and fourth assignments of error render this argument moot and we decline to address it. *See* App.R. 12(A)(1)(c).

B. Exclusion of Evidence

{¶52} DCO contends on appeal that the trial court erred by excluding DCO's expert evidence regarding the consolidation of Phoenix and JDA. Although the trial court allowed extensive testimony regarding the consolidation, DCO argues that it should have been allowed to present additional evidence that: (1) Duffy hired two experienced individuals to work for JDA who had inquired about employment with Phoenix; (2) JDA's revenue increased by roughly the same amount that was previously earned by Phoenix; (3) JDA did not pay any value for Phoenix; and (4) JDA took over Phoenix's accounts, projects, customers, territory, and employees. DCO argues that if it had been able to present this evidence, it would have been able to show that Phoenix could have remained viable, or alternatively that no damages were suffered by virtue of the consolidation or if there were damages, that Phoenix failed to mitigate those damages.

{¶53} Trial courts are "'vested with broad discretion'" with regard to the admission or exclusion of evidence, "'and an appellate court should not interfere absent a clear abuse of that discretion.'" *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 40, quoting *State v. Allen*, 73 Ohio St.3d 626, 633 (1995). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219. When reviewing for an abuse of discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶54} Evid.R. 402 limits the admission of evidence to relevant evidence. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Phoenix filed a motion in limine prior to trial to exclude evidence of JDA's financial information as irrelevant because Phoenix and JDA are separate legal entities. The trial court initially determined that JDA's financial information "may be relevant" and denied Phoenix's motion. However, the trial court cautioned trial counsel that after hearing the evidence, the trial court could decide the information was not relevant and exclude it. Just as the trial court had warned, after hearing a significant amount of testimony, the court ultimately determined that JDA's worth or how it may have benefited by the events alleged in the complaint were not relevant to the issue of Phoenix's damages in this case. The trial court specifically recognized that "[Phoenix] is the corporation that is suing, and it is the value of [Phoenix] that is at issue in this case."

{¶55} Nonetheless, the trial court specifically acknowledged that DCO was "free to defend this case by proving that [Phoenix] has a lot of value and therefore there's no damage" and that DCO could "attack the issue of causation of the alleged damages [of Phoenix]." Indeed, DCO's expert testified that Phoenix failed to mitigate its damages because: (1) "Phoenix Lighting could have been saved as a whole;" (2) "the business could have been sold" because "there was value there;" and (3) "the assets of [Phoenix] could have been sold for fair value." These assets include the tangible assets such as physical equipment as well as the account numbers and customers of Phoenix who were "migrated" to JDA since they were "revenue-producing." DCO was also able to elicit testimony regarding Duffy's prior contemplation to consolidate Phoenix and JDA from Duffy and multiple former employees of Phoenix.

{¶56} Therefore, we conclude that the trial court did not abuse its discretion in excluding evidence that related to JDA's worth and in what way it may have ultimately benefited from the actions alleged in complaint.

{¶57} Accordingly, DCO's first assignment of error is overruled.

DCO's Assignment of Error V

The trial court erred by awarding compensatory damages in an amount greater than Plaintiff admitted it could prove and by failing to remit the compensatory and punitive damages awards.

{¶58} In its fifth assignment of error, DCO contends that there was insufficient evidence to support the compensatory damages awarded in this case and that this "Court should order the trial court to remit the compensatory and punitive damages amounts and reconsider its attorneys' fees award." We disagree.

{¶59} In this case, the jury awarded Phoenix an aggregate award of $1,680,970.00 in compensatory damages. Following the jury's verdict, DCO filed a motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial or motion for remittitur. DCO's alternative motion for new trial or remittitur argued in part that the trial court erred when it "[e]ntered judgment against DCO in an amount greater than Plaintiffs' counsel said he could prove at closing and was not supported by the evidence." The trial court summarily denied DCO's motion.

{¶60} Civ.R. 59(A)(4) states that "[a] new trial may be granted * * * on all or part of the issues upon * * * [e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice." "In Ohio, it has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's assessment absent an affirmative finding of passion and prejudice *or* a finding

that the award is manifestly excessive." (Emphasis sic.) *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 655 (1994).

{¶61} The grant or denial of a motion for a new trial on the ground of excessive damages rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Pena v. Northeast Ohio Emergency Affiliates, Inc.*, 108 Ohio App.3d 96, 103 (9th Dist.1995). An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore*, 5 Ohio St.3d at 219. "'An appellate court reviewing whether a trial court abused its discretion on a motion for a new trial pursuant to Civ.R. 59(A)(4) must consider (1) the amount of the verdict, and (2) whether the jury considered improper evidence, improper argument by counsel, or other inappropriate conduct which had an influence on the jury.'" *Dragway 42, L.L.C. v. Kokosing Constr. Co., Inc.*, 9th Dist. Wayne No. 09CA0073, 2010-Ohio-4657, ¶ 35, quoting *Pena* at 104. "To support a finding of passion or prejudice, it must be demonstrated that the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities." *Prince v. Jordan*, 9th Dist. Lorain No. 04CA008423, 2004-Ohio-7184, at ¶ 20. Nonetheless, when applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons*, 66 Ohio St.3d 619 at 621.

{¶62} On appeal, DCO argues that the compensatory damages award was excessive in this case because it was above the amount of damages calculated by Phoenix's expert. However, after a review of the testimony and evidence presented at trial, we cannot say the jury's award is so overwhelmingly disproportionate that is shocks reasonable sensibilities. Phoenix's expert, Mr. Zeleznik, estimated the value of Phoenix in December 2008 to be a little bit over $1.35 million, falling to $46,670.00 by March 2009. Consequently, Mr. Zeleznik opined that

Phoenix's damages were about $1,315,000.00. However, Mr. Zeleznik also stated that he had used several different approaches to determine the value of Phoenix at the end of 2008. One of those methods had calculated Phoenix's business to be worth $1,549,000.00. Additionally, Phoenix introduced as evidence valuations its CPA had prepared during negotiations with Brown and Day for the purchase of Phoenix. Those estimates calculated Phoenix's value as of December 31, 2007, as between $1.7 million and $2.4 million. Phoenix also submitted evidence that Brown and Day first contacted DCO in late summer 2008 and that the majority of Phoenix's employees were told during a closed door meeting at that time that Brown and Day were approaching another manufacturer to sponsor them to start a new agency.

{¶63} DCO also contends that Phoenix's trial counsel made statements during closing argument that amount to a judicial admission and thus, the trial court could not award damages in excess of $1.4 million. During closing argument, Phoenix's trial counsel made the following statement with regard it's expert witness' valuation of Phoenix:

> Regarding damages, Mr. Zeleznik estimated the value of this business before and after immediately before the tortious conduct and immediately after, and it's $1,315,000.00.
>
> Mr. Duffy, he felt when he was negotiating with Mr. Brown and [Mr.] Day[,] he checked and he believed it's one times revenue. The revenue in 2008 was $1.4 million, so the number is somewhere between $1.35 million and/or $1.4 million.
>
> The law, unfortunately, limits us to that value. * * * It doesn't allow us to speculate as to what could have been. We are stuck with that number. That's our limit, either the $1.315 or else the $1.4 million.

{¶64} "A judicial admission is a 'formal statement, made by a party or party's counsel in a judicial proceeding, that act[s] as a substitute for legal evidence at trial.'" *Williams v. Williams*, 12th Dist. Warren No. CA2012-08-074, 2013-Ohio-3318, ¶ 12, quoting *Haney v. Law*, 1st Dist. Hamilton No. C070313, 2008-Ohio-1843, ¶ 7. In support of its argument, DCO cites

Hake v. George Wiedemann Brewing Co., 23 Ohio St.2d 65 (1970), for the proposition that trial counsel's statement during closing argument can be a judicial admission. In *Hake*, the defendant's trial counsel admitted acts by plaintiff's employee during opening argument that the Supreme Court of Ohio determined were sufficient to establish an element of the plaintiff's cause of action. Nonetheless, such a statement will only be binding where there is indication that the statement was intended to dispense with formal proof of material facts for which witnesses would otherwise be called at trial. *See Holeski v. Lawrence*, 85 Ohio App.3d 824, 833 (11th Dist.1993), citing *Harrison Constr. Co. v. Ohio Turnpike Comm.* 316 F.2d. 174, 177 (6th Cir.1963). Moreover, "such a statement, to be operative as an admission, must be one of 'fact' and not merely a statement of a legal conclusion." *Faxon Hills Const. Co. v. United Broth. of Carpenters and Joiners of America*, 168 Ohio St. 8, 10-11 (1958). As such, we determine that Phoenix's trial counsel's statement did not constitute a judicial admission.

{¶65} Therefore, we conclude that the trial court did not abuse its discretion when it denied DCO's motion for a new trial or remittitur. Accordingly, DCO's fifth assignment of error is overruled.

DCO's Assignment of Error VI

The trial court erred by applying a 2x multiplier to the attorney's fees award, which shocks the conscience and is unsupported by Ohio law.

{¶66} In its sixth assignment of error, DCO contends that the trial court erred when it applied a multiplier of two to the award of attorney fees.

{¶67} Following a punitive damages hearing, the jury determined that Phoenix was entitled to reasonable attorney fees. The trial court subsequently held a hearing on the issue and determined that a lodestar calculation of $1,991,507.00 accurately represented the amount of attorney fees that would have been charged to Phoenix. The trial court further determined that

considering all the relevant factors pursuant to Ohio Prof. Cond. Rule 1.5(a)(1)-(8), Phoenix's overall success, and the detailed and lengthy procedural records of the case that Phoenix was entitled to an enhancement of the lodestar amount by a multiplier of two. Accordingly, the trial court awarded a total attorney fee amount of $3,983,014.00.

{¶68} A trial court's award of attorney fees is reviewed for an abuse of discretion. *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146 (1991). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary[,] or unconscionable." *Blakemore*, 5 Ohio St.3d at 219. When reviewing for an abuse of discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons*, 66 Ohio St.3d at 621.

{¶69} As required under the lodestar method, the court first calculated the number of hours reasonably expended on this case times a reasonable hourly fee. *See Bittner* at 145. After calculating this lodestar amount, "[t]he next step is to raise or lower the lodestar based upon factors that may include:

> the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent.

Welch v. Prompt Recovery Servs., Inc., 9th Dist. Summit No. 27175, 2015-Ohio-3867, ¶ 21, quoting *Bittner* at 145-146.

{¶70} In determining that Phoenix was entitled to a multiplier of two times the lodestar amount, the trial court considered "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." In so considering, the trial court determined that the case was complex, both factually and legally, and

that the litigation involved the prosecution of nine claims and the defense of counterclaims through "numerous dispositive and procedural motions" and a lengthy trial. The trial court also considered that: (1) due to the complexity of this case, Phoenix's attorneys were hindered and/or precluded from accepting and pursuing other cases and clients; (2) Phoenix obtained a highly favorable outcome, prevailing on the majority of its claims; (3) Phoenix's counsel was forced to assume a great financial risk when the litigation became financially overwhelming; and (4) that all of the attorneys involved in this case were of high caliber, highly experienced, and maintained excellent reputations.

{¶71} Accordingly, we cannot say that the trial court abused its discretion in applying a multiplier of two to the lodestar amount in this case. Therefore, DCO's sixth assignment of error is overruled.

DCO's Assignment of Error VII

Judgment against DCO was against the manifest weight of the evidence.

{¶72} In its seventh assignment of error, DCO contends that the judgment was against the manifest weight of the evidence. However, DCO fails to conduct any analysis of its argument. Pursuant to App.R. 16(A)(7), the brief of an appellant shall include "[a]n argument containing the contentions of the appellant * * * and the reasons in support of the contentions[.]" "Where an appellant fails to develop an argument in support of [its] assignment of error, we will decline to do so for [it]." (Internal quotation omitted.) *State v. Powell*, 9th Dist. Summit No. 28170, 2017-Ohio-5629, ¶ 22. "If an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone v. Cardone*, 9th Dist. Summit Nos. 18349 and 18673, 1998 Ohio App. LEXIS 2028, *22 (May 6, 1998).

{¶73} Therefore, DCO's seventh assignment of error is overruled.

Phoenix's Assignment of Error I

The trial court erroneously interpreted the punitive damages cap for direct misappropriation of trade secrets [R.C. § 1333.63(B)] as a treble damages statute, thus potentially precluding Phoenix from receiving up to an additional $300,000 of punitive damages.

{¶74} In its first assignment of error, Phoenix contends that the trial court erroneously interpreted R.C. 1333.63(B) as a treble damages statute, thus potentially precluding Phoenix from receiving up to an additional $300,000.00. We disagree.

{¶75} Following a punitive damages hearing, the trial court awarded punitive damages as to the misappropriation of trade secrets claim, specifically stating, "As to the Misappropriation of Trade Secrets claim the [c]ourt hereby awards punitive damages on such claim and trebles the $300,000.00 in compensatory damages the jury awarded to a total of $900,000.00 on that claim." Thereafter, Phoenix filed a motion for reconsideration requesting the trial court to reconsider its calculation method and award an additional $300,000.00 in punitive damages relating to the misappropriation of trade secrets claim. The trial court summarily denied Phoenix's motion to reconsider.

{¶76} "Punitive damages are not meant to compensate an injured party. Rather, punitive damages are awarded for the purpose of punishing and deterring certain conduct." (Internal citations omitted.) *Desai v. Franklin*, 177 Ohio App.3d 679, 2008-Ohio-3957, ¶ 40 (9th Dist.). R.C. 1333.63(A) allows an aggrieved party to recover damages for the misappropriation of a trade secret. Additionally, R.C. 1333.63(B) allows a trial court to impose punitive damages in the case of a willful and malicious misappropriation of trade secrets. That statute specifically provides, "[i]f willful and malicious misappropriation exists, the court may award punitive or exemplary damages in an amount not exceeding three times any award made under [R.C. 1333.63(A)]." In light of the "may award" language used, "the decision whether to award

punitive damages * * * rests within the trial court's discretion, and its decision will not be reversed on appeal absent an abuse thereof." *InfoCision Mgt. Corp v. Donor Car Center, Inc.*, 9th Dist. Summit No. 27034, 2016-Ohio-789, ¶ 33, citing *Becker Equip. Inc., v. Flynn*, 12th Dist. Butler No. CA2002-12-313, 2004-Ohio-1190, ¶ 11. An abuse of discretion requires more than an error in judgment, rather it "implies that the court's attitude is unreasonable, arbitrary[,] or unconscionable." *Blakemore*, 5 Ohio St.3d at 219.

{¶77} In this case, nothing in the trial court's journal entry suggests that the trial court believed it was restricted to awarding no more than treble damages on Phoenix's misappropriation of trade secrets claim rather than awarding punitive damages in an amount up to three times the compensatory damages. The fact that the trial court used the word "trebles" and did not award the maximum allowed by the statute is not enough to infer that the trial court misinterpreted the statute. Indeed, "[t]he focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant" and the "award should not go beyond what is necessary to achieve its goals." *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, ¶ 178. After a review of the record, we cannot say that the trial court abused its discretion when it trebled its award of compensatory damages to calculate the punitive damages it awarded to Phoenix for DCO's misappropriation of its trade secrets.

{¶78} Therefore, Phoenix's first assignment of error is overruled.

Phoenix's Assignment of Error II

The trial court erroneously applied the R.C. § 2315.21(D) punitive damage cap instead of the R.C. § 1333.63(B) punitive damages cap to the jury's award for punitive damages on the conspiracy to maliciously misappropriate trade secrets, thus improperly "capping off" $203,000 of the jury's punitive damages award.

{¶79} In its second assignment of error, Phoenix contends that the trial court erroneously applied the punitive damage cap of R.C. 2315.21(D) instead of the punitive damages cap of R.C. 1333.63(B) to Phoenix's claim for conspiracy to maliciously misappropriate trade secrets. We agree.

{¶80} R.C. 1333.67(A) states that Ohio's Uniform Trade Secrets Act ("OUTSA") "displace(s) conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." "This language was intended to prevent inconsistent theories of relief for the same underlying harm and has been interpreted to bar claims that are based solely on allegations of misappropriation of trade secrets or other confidential information." *Rogers Indus. Prods. Inc. v. HF Rubber Mach., Inc.*, 188 Ohio App.3d 570, 2010-Ohio-3388, ¶ 29 (9th Dist.), citing *Glasstech, Inc. v. TGL Tepmering Sys., Inc.*, 50 F.Supp.2d 722, 730 (N.D.Ohio.1999). Accordingly, "'[P]laintiffs alleging theft or misuse of their ideas, data, or other commercially valuable information are confined to the single cause of action provided by the [O]UTSA.'" *Id.* quoting *Hauck Mfg. Co. v. Astec Industries, Inc.*, 375 F.Supp.2d 649, 659 (E.D.Tenn.2004). The Ohio UTSA statute does not affect "[o]ther civil remedies that are not based on misappropriation of a trade secret." R.C. 1333.67(B)(2).

{¶81} However, "[t]he precise scope of the preemption clause has not been interpreted uniformly across UTSA jurisdictions. And, unfortunately, '[t]he Ohio Supreme Court has yet to speak to the scope of the OUTSA's preemption clause.'" (Internal citations omitted.) *Stolle Machinery Co., LLC v. RAM Precision Industries*, 605 Fed.Appx. 473, 484 (6th Cir.2015), quoting *Office Depot, Inc. v. Impact Office Prods., LLC*, 821 F.Supp.2d 912, 919 (N.D.Ohio 2011). Nonetheless, courts applying OUTSA generally seem to have subscribed to the majority rule that the statute should be broadly interpreted so as to abolish all other causes of action for

theft, misuse, or misappropriation of any confidential or secret information. *Id.* citing *Office Depot* at 918-919 (citing *Allied Erecting and Dismantling Co. v. Genesis Equip. & Mfg.*, 649 F.Supp.2d 702, 720 (N.D.Ohio 2009) and *Rogers Indus. Prods. Inc.* at ¶ 29. ("This language was intended to prevent inconsistent theories of relief for the same underlying harm and has been interpreted to bar claims that are based solely on allegations of misappropriation of trade secrets or other confidential information.")

{¶82} Accordingly, we conclude that damages relating to a claim for civil conspiracy to misappropriate trade secrets are governed by OUTSA and, thus, the punitive damages cap in R.C. 1333.63 is applicable this matter.

{¶83} Therefore, Phoenix's second assignment of error is sustained. The trial court's journal entry is hereby reversed as it pertains to the punitive damages cap for the claim of civil conspiracy to misappropriate trade secrets and this matter is remanded for the trial court to apply R.C. 1333.63.

III.

{¶84} DCO's first, second, third, fourth, fifth, sixth, and seventh assignments of error are overruled. Phoenix's first assignment of error is overruled. Phoenix's second assignment of error is sustained. Therefore, the judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Defendant-Appellant/Cross-Appellee, Genlyte Thomas Group, L.L.C..

JULIE A. SCHAFER
FOR THE COURT

CALLAHAN, J.
CONCURS.

CARR, J.
DISSENTING.

{¶85} I respectfully dissent from the judgment of the majority as I would sustain a portion of DCO's first assignment of error and remand the matter for a new trial.

{¶86} In the first assignment of error, DCO has argued that the trial court erred in excluding expert evidence related to the consolidation of Phoenix/LSI into JDA. Prior to DCO's expert's testimony, the trial court specifically instructed the expert about the areas of permitted and prohibited testimony. The trial court stated:

> [T]he defense has been limited to talk about – they certainly can criticize [Phoenix/LSI's expert's] valuation through cross-examination of [him], his valuation of the corporation at one point, $3.4 million, and the process that he went through to determine that valuation.
>
> And they can also criticize the lack of mitigation on Mr. Duffy's part, Phoenix's part in failing to hire anybody for Phoenix specifically.
>
> But I'm not going to permit you to talk about how much money the combined offices made and how that compares to what Phoenix made prior.
>
> So your charts in [the expert report] are not going to come in. Basically when you discuss Section A under the analysis, that beginning part you talk about how [Phoenix/LSI's expert] has failed to identify any specific actions or inactions of any defendants on behalf of Phoenix, you can talk about that as that relates to Phoenix, not JDA. You're not including JDA in any of that.
>
> So you're basically saying that he failed to show any causation in his – I don't know that you're necessarily alleging that that's [Phoenix/LSI's expert] as much as plaintiffs aren't showing any causation here.
>
> But as to Section A, merger of Phoenix and JDA, from there on none of that is going to be permitted. Combined section B, combined Phoenix/JDA sales and income, none of that's going to be permitted, which I realize is the bulk of your report.
>
> So it will be question-by-question deposition. If there are objections, you have to wait till the Court rules on the objection.
>
> The main point I want to make to you is even if [counsel] asks an open-ended question that doesn't suggest an answer, which he shouldn't because you're his witness, they should be open-ended questions. You cannot on your own bring in information about events that occurred after April 17 of 2009 or you'd be in violation of the Court's order.

Thus, DCO's expert was prohibited from testifying about most of the contents of his report. Part of DCO's argument concerning Phoenix/LSI's damages was that DCO's actions did not cause Phoenix/LSI's damages. In support of this, DCO's expert's report pointed to two main areas: (1) evidence that the consolidation was contemplated by Mr. Duffy prior to February 2009; and (2) evidence of the downturn in the economy in 2009.

{¶87} With respect to the consolidation, it appears that the trial court viewed the evidence concerning JDA's post-consolidation condition as being irrelevant because it was the value of Phoenix/LSI that was primarily at issue in terms of the *amount* of damages. This, however, ignores the fact that the post-consolidation condition of JDA, which by 2010, in terms of sales, appeared to be very similar to the combined status of Phoenix/LSI and JDA in 2008, could provide circumstantial evidence in support of the notion that the consolidation was a planned event and not an emergency measure taken because of DCO's actions. Thus, the evidence of what Mr. Duffy did with Phoenix/LSI and JDA around the time of the consolidation could be relevant to whether Phoenix/LSI's damages were caused by DCO. To the extent that testimony and evidence could have been misused or misinterpreted by the jury, the trial court could have supplied a limiting instruction instead of excluding the evidence.

{¶88} While the majority ultimately concludes that the trial court did not abuse its discretion in excluding the evidence on the basis of lack of relevancy, the majority does not expressly state that the evidence was irrelevant. Instead, the majority seems to engage in somewhat of a harmless error analysis, focusing on the evidence that was admitted. While I agree that DCO was permitted to present some evidence related to Phoenix/LSI's failure to mitigate and evidence demonstrating the prior contemplation of the consolidation, DCO's expert was prohibited from presenting a substantial amount of information contained in his expert report. In fact, DCO's expert's entire testimony totaled fewer than 30 pages. This trial was not a simple, straightforward matter. Even though the jury heard that the consolidation may have been contemplated before February 2009, it was not allowed to hear an expert's opinion of why that fact would matter in terms of the causation of Phoenix/LSI's damages or to hear evidence that could buttress the idea that the consolidation was planned. Therefore, I cannot conclude that the

exclusion of that evidence was harmless. Accordingly, I would sustain the relevant portion of DCO's first assignment of error and remand the matter for a new trial.

APPEARANCES:

BRUCE J. L. LOWE, JULIE A. CROCKER, JOHN B. NALBANDIAN, and AARON M. HERZIG, Attorneys at Law, for Appellant/Cross-Appellee.

JEFFREY T. WITSCHEY and BETSY L. B. HARTSCHUH, Attorneys at Law, for Appellee/Cross-Appellant.

[Cite as *Boehm v. Black Diamond Casino Events, LLC*, 2018-Ohio-2379.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ROGER BOEHM, JR.,	:	APPEAL NO. C-170339 TRIAL NO. A-1406309
Plaintiff/Third-Party Defendant-Appellee,	:	*O P I N I O N.*
	:	
vs.		
	:	
BLACK DIAMOND CASINO EVENTS, LLC,	:	
Intervenor/Third-Party Plaintiff-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 20, 2018

Eugene R. Butler, for Plaintiff/Third-Party Defendant-Appellee,

Edward J. Collins and *Zachary D. Bahorik*, for Intervenor/Third-Party Plaintiff-Appellant.

MILLER, Judge.

{¶1} Intervenor/third-party plaintiff-appellant Black Diamond Casino Events, LLC ("Black Diamond") appeals the decision of the trial court to grant plaintiff/third-party defendant-appellee Roger Boehm, Jr.'s ("Boehm") motion for involuntary dismissal under Civ.R. 41(B)(2). For the following reasons, we affirm.

Facts and Procedural History

{¶2} Black Diamond operates a casino-games-themed events business for corporate and private parties. Roger Boehm, Jr., a former employee of Black Diamond, approached the owners about buying two of the four members' interests in Black Diamond. In connection with his due diligence, Boehm signed a nondisclosure agreement to review Black Diamond's business records. Boehm obtained Black Diamond customer information, tax returns, financial statements, and vendor information. Boehm elected to move forward on the purchase of the two members' interests, but the members refused to sell. Boehm commenced this action, alleging that the members breached an oral agreement to sell him their membership interests. Black Diamond intervened, asserting counterclaims for breach of contract and violations of the Ohio Uniform Trade Secrets Act. Boehm ultimately dismissed his complaint. Black Diamond moved for partial summary judgment on its breach-of-contract claim, which was granted. The trial court held a bench trial on the trade-secrets claim and rendered an oral judgment of dismissal under Civ.R. 41(B)(2) finding in favor of Boehm at the conclusion of Black Diamond's case.

Analysis

{¶3} The dismissal of a plaintiff's case under Civ.R. 41(B)(2) during a bench trial allows the trial court to weigh the evidence, resolve any conflicts therein, and render judgment for the defendant at the close of the plaintiff's case if the plaintiff

has shown no right to relief. *Bank One, Dayton, N.A. v. Doughman*, 59 Ohio App.3d 60, 63, 571 N.E.2d 442 (1st Dist.1988). On appeal, the dismissal will be set aside only if erroneous as a matter of law or against the manifest weight of the evidence. *Id.*

Black Diamond's Client List and Financial Data are Trade Secrets

{¶4} Black Diamond presents three assignments of error for review. In its first assignment of error, Black Diamond contends that the trial court erred as a matter of law in finding that no trade secrets existed. A trade secret is defined as

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> > (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
> >
> > (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.C. 1333.61(D). The following factors should be considered when analyzing a trade-secrets claim:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret

> to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

State ex rel. The Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 687 N.E.2d 661 (1997), citing *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 134-135, 454 N.E.2d 588 (8th Dist.1983).

{¶5} Here, Black Diamond claims that its client list, tax returns, and quarterly profit and loss statements are trade secrets under the Ohio Revised Code. "An entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy." *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 732 N.E.2d 373 (2000).

{¶6} Testimony established that Black Diamond's client list, which the parties also referred to as an event bid calendar, was not known to the public or those outside of the business. "A customer list is an intangible asset that is presumptively a trade secret when the owner of the list takes measures to prevent its disclosure in the ordinary course of business to persons other than those selected by the owner." *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 724 N.E.2d 411 (2000). The client list was primarily on a password-protected computer, though some information pertaining to clients was occasionally posted on clipboards inside the business's warehouse that employees could see in order to prepare for that client's event. Evidence established that the complete client list was not accessible to nonemployees unless a nondisclosure agreement was signed. Repeat

clients made up approximately 25 to 30 percent of Black Diamond's clientele. Testimony established that at one time a former member of Black Diamond opened up a competing business and Black Diamond lost approximately 25 to 30 percent of its business revenue, in part, through the loss of clients. Black Diamond obtained a judgment against the former member for a misappropriation of trade secrets, including the client list.

{¶7} With respect to the tax returns and quarterly profit-and-loss statements, evidence established that this financial information was not known to the public or those outside the business. The financial information was also not generally accessible by employees of Black Diamond, except for those employees who helped create it. The financial information was primarily on a password-protected computer, and the financial records were not available to anyone unless a nondisclosure agreement was signed. Testimony established that the judgment against the former member of Black Diamond was also based on the loss of the financial information. Accordingly, we find that Black Diamond's client list, tax returns, and quarterly profit-and-loss statements are trade secrets under the Ohio Revised Code. We sustain Black Diamond's first assignment of error.

Damages Are Not Necessary To Establish Misappropriation

{¶8} In its second assignment of error, Black Diamond claims that the trial court erred as a matter of law in requiring proof of damages for a claim of misappropriation of trade secrets. Under R.C. 1333.61, "misappropriation" means any of the following:

> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

> (2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:
>
> > (a) Used improper means to acquire knowledge of the trade secret;
> >
> > (b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;
> >
> > (c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Misappropriation of trade secrets is a recognized tort in Ohio for which damages may be obtained. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E.2d 853 (1999), citing *Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 19 Ohio App.3d 246, 484 N.E.2d 280 (1st Dist.1985); *see* R.C. 1333.63. But, as evident from the text of the statute, proof of damages is not an element for a valid claim of misappropriation. Therefore, we sustain Black Diamond's second assignment of error.

Misappropriations Occurred, but the Trial Court Was Correct Not To Afford Additional Relief beyond the Return of the Trade Secrets

{¶9} In its third assignment of error, Black Diamond claims that the trial court erred in finding that no misappropriation of trade secrets occurred, as that

finding was contrary to the manifest weight of the evidence. Black Diamond argues that misappropriations occurred when Boehm refused to return some of Black Diamond's records for over a year and again when Boehm shared confidential information covered under the nondisclosure agreement with an employee of Black Diamond, Drew Winter, and with his accountant, Ronald Evans.

{¶10} In the first instance, Boehm retained the records to prepare for litigation and later returned them, after being ordered to do so by the trial court. It is undisputed that Boehm initially acquired the records properly as part of his due diligence and pursuant to his nondisclosure agreement with Black Diamond. Black Diamond claims that retaining the records, however, violated a clause in the nondisclosure agreement regarding the return of confidential information, and was therefore an improper use of a trade secret. The "use of trade secrets of another without the express or implied consent of the other person by a person who * * * [u]sed improper means to acquire knowledge of the trade secret" is a misappropriation. "Improper means" includes * * * breach * * * of a duty to maintain secrecy * * *. R.C. 1333.61(A). Boehm breached his duty to maintain secrecy of the records by retaining them for himself beyond the period for which he had Black Diamond's consent. Boehm's retention of records that he had an obligation to return, even though he kept them to prepare for litigation, was a misappropriation under Ohio's Uniform Trade Secrets Act.

{¶11} In the second instance, Boehm denied sharing the records with Drew Winter. There is no evidence in the record that Boehm shared the records with Winter. Black Diamond only presented evidence that Boehm discussed an audit of the company by the Ohio Department of Job and Family Services, which Boehm argued was a public record. The trial court agreed with Boehm. There is no indication that the trial court so lost its way in weighing the evidence presented with regards to Winter as to cause a

manifest miscarriage of justice warranting a reversal. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶12} Boehm admitted to sharing the records with his accountant as part of his due diligence and claimed his accountant did not retain a copy of the documents. This was permitted so long as Boehm had his accountant also sign a nondisclosure agreement. This was a technical misappropriation under Ohio's Uniform Trade Secrets Act. Boehm shared records that he was under obligation to keep secret without obtaining an executed nondisclosure agreement. Accordingly, we sustain Black Diamond's third assignment of error in part.

{¶13} While we have sustained Black Diamond's three assignments of error, Black Diamond has still not demonstrated a right to relief warranting a reversal of the trial court's judgment. The trial court found that Black Diamond was no longer entitled to injunctive relief under R.C. 1333.62, because Boehm had already returned the financial records during the litigation, and there was no other action to enjoin. The trial court found that Black Diamond was not entitled to damages under R.C. 1333.63, because there was no evidence put forth demonstrating actual loss or unjust enrichment from Boehm sharing the records with his accountant, and insufficient evidence put forth to award a reasonable royalty. Nor was there a liquidated-damages clause upon which Black Diamond could rely. Our review fails to persuade us that the factfinder clearly lost its way and created such a manifest miscarriage of justice that we must reverse the judgment of the trial court and order a new trial. *See Thompkins* at 386-387.

{¶14} The trial court did not explicitly address whether Black Diamond was entitled to attorney fees under R.C. 1333.64, which Black Diamond argued it was

because Boehm's appropriation was willful. Under R.C. 1333.64, a court may award attorney fees to the prevailing party if the misappropriation is willful *and* malicious. Black Diamond did not argue before the trial court that Boehm's misappropriation was malicious. "Willful and malicious" has been interpreted as meaning "actual malice," given the common and ordinary meaning of the words. *Becker Equip., Inc. v. Flynn*, 12th Dist. Butler No. CA 2002-12-313, 2004-Ohio-1190, ¶ 16.

> "Willful" means voluntary and intentional, but not necessarily malicious. "Malicious" is the adjective for "malice," which is defined as the intent, without justification or excuse, to commit a wrongful act; reckless disregard of the law or of a person's legal rights; ill will; wickedness of heart. The combined definitions of "willful" and "malicious" are, in turn, similar to the definition of "actual malice" used for purposes of determining the appropriateness of a punitive damages award at common law * * *.

(Internal quotations omitted.) *Id.*

{¶15} Here, it is undisputed that Boehm allowed his accountant to view the financial records in order to assess the profitability of an investment with Black Diamond. Boehm protected the information to some extent by not allowing the accountant to keep the information. Black Diamond knew that Boehm shared the records, and merely wanted Boehm's accountant to sign a nondisclosure agreement. It was not against the manifest weight of the evidence for the trial court to conclude that Black Diamond did not prove Boehm's misappropriation was malicious or without just cause. Consequently, Black Diamond was not entitled to attorney fees. We, therefore, determine that the trial court's entry of judgment in favor of Boehm at the close of Black Diamond's case was proper under the standards set forth under Civ.R. 41(B)(2).

Conclusion

{¶16} Although we sustain Black Diamond's first and second assignments of error in full and third assignment of error in part, we nonetheless affirm the judgment of the trial court.

Judgment affirmed.

MOCK, P.J., and **ZAYAS, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.