



1 **BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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5 LA COLLINA DAL LAGO, L.P.; and BERNAU  
DEVELOPMENT CORPORATION,

6 Complainants,

7 v.

8 Pacific Bell Telephone Company, dba AT&T  
9 California (U 1001 C)

10 Defendant.

Case No. 09-08-021  
(Filed August 27, 2009)

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13 **RESPONSE OF PACIFIC BELL TELEPHONE COMPANY**  
14 **d/b/a AT&T CALIFORNIA (U 1001 C)**  
15 **TO COMPLAINANTS' MOTION TO EXCLUDE**  
16 **CONTRARY ASSERTIONS UNDER THE DOCTRINE OF**  
17 **JUDICIAL ESTOPPEL**

18 Pacific Bell Telephone Company, doing business as AT&T California ("AT&T" or  
19 "AT&T California"), respectfully submits its opposition to Complainants' motion for judicial  
20 estoppel in this matter.  
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1 **I. INTRODUCTION**

2 The motion for judicial estoppel of Complainants La Collina dal Lago (“La Collina”) and  
3 Bernau Development Corporation (“BDC”), filed December 4, 2009, should be denied. The  
4 motion misstates the parties’ contentions in this matter; mischaracterizes the evidence and  
5 assertions made in a related matter, *Jensen v. Oldcastle, et al*; ignores the absence of any relevant  
6 factual findings by the Court in *Jensen*; and misapplies the law of judicial estoppel, all in an  
7 effort to limit Defendant’s ability to put on a defense in this case.

8 Complainants’ primary contention in this matter is that Pacific Bell Telephone Company  
9 (“AT&T”) has illegally failed to provide reimbursement to property developers for their full costs  
10 in constructing underground telephone structures that connect new developments to AT&T’s  
11 telephone network (known as “line extensions”). Specifically, Complainants contend that  
12 Schedule CAL.P.U.C. No. A2.1.15 in AT&T’s tariff (commonly known as “Rule 15”) requires  
13 AT&T to reimburse developers at a prescribed rate for their actual expenditures when installing  
14 line extensions.

15 AT&T contends to the contrary, and asserts that Rule 15 does not set forth any specific  
16 rate of reimbursement and that, absent some clear restriction in the tariff, there is no legal  
17 principle that prevents AT&T and developers from individually negotiating and agreeing to a  
18 mutually acceptable reimbursement amount with respect to a given line extension (which  
19 historically has been the practice).

20 As discussed below, AT&T has not taken any previous positions contrary to the above  
21 assertions. Nor has any court or tribunal ruled upon the above assertions, or accepted them as  
22 true. As such, there is no basis for judicial estoppel in this case, and Complainants’ motion  
23 should be denied.

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1 **III. ARGUMENT**

2 **A. Judicial Estoppel Is Inappropriate in This Case.**

3 Complainants quote broadly from oral argument and deposition testimony given in the  
4 *Jensen* case, in an attempt to cast AT&T as somehow duplicitous in its statements regarding its  
5 reimbursement practices. At the end of their motion, Complainants request that the Commission  
6 preclude AT&T from making the following assertions in this proceeding: (1) that AT&T  
7 negotiates with property developers regarding the terms and conditions pursuant to which  
8 developers agree to provide materials and trenching under Rule 15 (known as “trench  
9 agreements”); and (2) that AT&T is only required to pay developers the amount agreed to in the  
10 trench agreements for Rule 15 line extensions. Complainants have no factual or legal basis for  
11 this request.

12 **1. The Elements of Judicial Estoppel**

13 Judicial estoppel is an equitable doctrine applied to prevent a party from successfully  
14 taking one position in a judicial or quasi-judicial proceeding, and then taking the opposite  
15 position in a subsequent proceeding. *See Jackson v. County of Los Angeles* (1997) 60  
16 Cal.App.4th 171, 181 (the doctrine “is invoked to prevent a party from changing its position over  
17 the course of judicial proceedings when such positional changes have an adverse impact on the  
18 judicial process”) (citations). The doctrine is based on the belief that it is “patently wrong to  
19 allow a person to abuse the judicial process by first [advocating] one position, and later, if it  
20 becomes beneficial, to assert the opposite.” *Id.* The doctrine is primarily “aimed at “preventing  
21 fraud on the courts.” *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 169 (citing *M. Perez Co., Inc.*  
22 *v. Base Camp Condo Assn.* (2003) 111 Cal.App.4th 456, 463). Judicial estoppel is an  
23 “extraordinary remedy,” and should only be invoked to prevent a “miscarriage of justice.”  
24 *Jogani* at 169 (citing *Daar & Newman v. VRL Int’l* (2005) 129 Cal.App.4th 482, 490-91).

25 In California, five factors must be present before a court may apply the doctrine: (1) the  
26 same party has taken two positions; (2) the positions were taken in a judicial or quasi-judicial  
27 administrative proceeding; (3) the party was successful in asserting the first position (*i.e.*, the

1 tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent;  
2 and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Jackson v.*  
3 *County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 (citations omitted).

4 Moreover, “even where all the necessary elements are present,” application of the doctrine  
5 is still “discretionary.” *Jogani*, 141 Cal.App.4th at 170 (citing *MW Erectors Inc. v. Niederhauser,*  
6 *etc.* (2005) 36 Cal.4th 412, 422). “The doctrine should be applied with caution and limited to  
7 egregious circumstances.” *Jogani* at 170 (citing *Haley v. Dow Lewis Motors, Inc.* (1999) 72  
8 Cal.App.4th 497, 511) (other citations omitted).

9 Here, Complainants fail to meet the above five factors and nothing they discuss rises to  
10 the level of a “fraud on the court.” The statements or positions of AT&T which Complainants  
11 point to in their motion are not “totally inconsistent” with any of AT&T’s positions in this matter.  
12 Moreover, the Court in the underlying *Jensen* case did not adopt or accept as true any of the  
13 positions in making its ruling dismissing Jensen’s claims, a necessary element for a finding of  
14 judicial estoppel.<sup>2</sup>

15 **2. AT&T Made No Prior Contradictory Assertions in *Jensen*.**

16 The positions which AT&T supposedly argued to the Court in *Jensen* and which  
17 supposedly contradict AT&T’s positions in this case (as set out in Complainants’ motion) are,  
18 essentially: (1) AT&T does not independently negotiate with developers regarding the terms of  
19 trench installations; (2) AT&T always reimburses developers in full for materials and trenching;  
20 (3) AT&T owes an obligation to reimburse developers for the cost of materials and trenching that  
21 they provide to AT&T; and (4) AT&T does not negotiate with developers concerning  
22 reimbursement prices that it pays to them, but rather sets these prices according to internal

23 <sup>2</sup> Although Complainants allude to a “broader standard” for judicial estoppel (Mot. at 17:17), they  
24 do not cite any law that would eliminate their need to satisfy the third element of the *Jackson* test, which  
25 requires the *Jensen* Court to have adopted or accepted certain assertions by AT&T in the underlying  
26 matter as true. *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1990) (cited, but not discussed by  
27 Complainants), does not hold to the contrary; nor do any of the other authorities cited by the  
Complainants. *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 960 (decided before  
*Jackson*) states specifically that judicial estoppel needs to be decided according to state law when the  
subject case is filed in state court.

1 policies. (See Complainants' Motion at 11:8–12:8 and 14:12-27.) According to Complainants,  
2 the statements which underlie these supposed assertions were made by AT&T's counsel at a  
3 hearing on AT&T's federal motion to dismiss in *Jensen* in 2006, and by AT&T witnesses in  
4 depositions in the *Jensen* case. As set forth below, these statements either were not inconsistent  
5 with AT&T's positions in this case, or in one instance were made in error but thereafter corrected  
6 before the District Court issued summary judgment.

7 Specifically, AT&T counsel's argument at the hearing on its motion to dismiss in 2006  
8 (See Complainants' Motion at 11:8-12:8) was based on counsel's understanding that, as of  
9 August 2005, AT&T required all of its authorized vendors selling vaults to developers to charge  
10 only the AT&T contract price for the vaults, thereby assuring that developers would receive like-  
11 for-like full reimbursement from AT&T. While factually correct as to the pricing, counsel's  
12 conclusion that the pricing resulted in full reimbursement turned out to be in error, and was based  
13 on the erroneous belief at the time (which was prior to full investigation and prior to any  
14 discovery being conducted in the *Jensen* case) that AT&T uniformly based its material  
15 reimbursement rates on its vendors' contract pricing. In fact, as set out in AT&T's motion for  
16 summary judgment filed in July 2008 (following 2 years of discovery), AT&T employs a number  
17 of reimbursement pricing practices throughout California, depending on the region. *See* Ex. B to  
18 Bolaños Dec. at 3:21-28. *See also* Bolaños Dec., ¶ 4. This error, however, had no prejudicial  
19 effect on *Jensen* or the parties herein (and no benefit to AT&T) given that AT&T's motion to  
20 dismiss *Jensen*'s antitrust claims was denied. Moreover, in ruling on the motion the District  
21 Court did not adopt or accept as true any arguments or positions advanced by AT&T. The 2006  
22 *Jensen* hearing was a federal 12(b)(6) motion to dismiss, and thus the only facts accepted by the  
23 Court as true for purposes of that hearing (by law), were the allegations made by the plaintiff  
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1 Jensen in its complaint.<sup>3</sup> *See also* Bolaños Dec., ¶ 5.

2 Thereafter, in 2008, AT&T made its motion for summary judgment at which point (after  
3 two years of discovery and investigation) AT&T introduced evidence of -- and accurately  
4 described for the Court -- its reimbursement practices as follows:<sup>4</sup>

5 When a property developer constructs a new development, AT&T will install the  
6 necessary infrastructure – including manhole vaults – needed to provide telephone service  
7 to the development. These installations are known as “line extensions.” All manholes or  
8 telecommunications vaults placed in the Pacific Bell or Nevada Bell networks must  
9 ultimately be owned by that telephone company pursuant to state public utility tariffs. In  
10 general the tariffs provide that AT&T will construct the line extension at its expense.  
11 However, rather than wait for AT&T to do so, developers frequently prefer to construct  
12 the line extensions themselves to better accommodate their own plans and schedules. In  
13 such cases, AT&T and the developer enter into a “trench agreement.” Such agreements  
14 ensure that the work the developers perform and the equipment they install – which will  
15 become part of AT&T’s network and for which AT&T is ultimately responsible – meet  
16 AT&T’s specifications. Among other things, AT&T specifies the type of manholes that  
17 the developer must install. As part of the trench agreement, AT&T and the developer also  
18 agree on the amount that AT&T will pay (or reimburse) the developer for the installation,  
19 once it is completed to AT&T’s satisfaction.

20 Oversight of installations and negotiation of trench agreements – including the amount of  
21 reimbursement – is the responsibility of AT&T’s several district engineering offices.  
22 AT&T has not adopted a uniform methodology for calculating the amount of  
23 reimbursement, which has been handled in different ways by different offices.

24 Ex. B to Bolaños Dec. (“AT&T MSJ”) at 4:12 – 5:9 (citations to the record omitted). These  
25 assertions do not contradict the assertions which AT&T is making in this case.

26 **a. AT&T Witness Statements in Jensen Were Not Contradictory.**

27 The witness testimony cited and discussed in Complainants’ motion, because it was made  
28 in deposition and not before a judicial officer or advanced before the Court, cannot be the subject  
of a ruling pursuant to judicial estoppel. *See generally* *Jogani* 141 Cal.App.4<sup>th</sup> at 177-181  
(deposition testimony not offered to the court, and not adopted or accepted as true “not relevant”

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23 <sup>3</sup> In ruling on motion made under Federal Rules of Civil Procedure, Rule 12(b)(6), a Court must  
24 construe the complaint in the light most favorable to the plaintiff, and accept all of the plaintiff’s factual  
25 allegations as true. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9<sup>th</sup> Cir. 1996). As a matter of  
26 law, any factual arguments or assertions made by AT&T in regard to the motion could not and were not  
27 accepted as true by the Court. Moreover, in this instance the District Court ultimately denied AT&T’s  
28 motion notwithstanding any of the arguments, assertions or positions advanced by AT&T.

<sup>4</sup> Significantly, counsel for Jensen, which is the same counsel for Complainants herein, never  
asserted judicial estoppel when faced with this same evidence.

1 to a “judicial estoppel analysis”) (citations). Even if deposition testimony was relevant to a  
2 determination of judicial estoppels, the testimony cited is not contradictory to the positions being  
3 taken by AT&T herein.

4 In regard to the deposition testimony of Melissa Stanton, Ms. Stanton stated only that if  
5 AT&T specified a manhole for a job, AT&T was required to reimburse for that manhole. Ms.  
6 Stanton also stated that when a developer placed a manhole “on behalf of AT&T,” AT&T was  
7 “required to reimburse [the developer] for that work.” (See Complainants’ Motion at 12:15-28.)  
8 Ms. Stanton did not testify to the manner of calculating the reimbursement, or state that it was not  
9 or could not be negotiated with the developer, or state that the tariff set a particular level or rate  
10 of reimbursement. Ms. Stanton was not asked any of those questions, and the testimony she did  
11 provide was not inconsistent with AT&T’s positions in this case.

12 In regard to the deposition testimony of Robert Nolasco, Mr. Nolasco merely confirmed  
13 that AT&T pays “reasonable reimbursement” to developers for line extensions. (See  
14 Complainants’ Motion at 13:8-11.) He was not asked by counsel and did not state what  
15 “reasonable reimbursement” is, or how it is determined – *i.e.* if it is based on rates set by AT&T,  
16 or rates negotiated by AT&T and developers, or based on the developers’ actual costs, etc. Mr.  
17 Nolasco’s testimony was not inconsistent with AT&T’s positions in this case.

18 Likewise, the remainder of the testimony attached as Exhibit 4 to Complainants’ motion  
19 also is not inconsistent with AT&T’s positions in this case, and merely underscores the diversity  
20 of reimbursement methods used by AT&T throughout its regional locations in California.

21 In short, because none of the prior statements regarding AT&T’s reimbursement practices  
22 are inconsistent with AT&T’s positions in this case, they are not subject to a judicial estoppel  
23 ruling.

24 **3. The Jensen Court Did Not Adopt Any of the Subject Assertions.**

25 In addition to the lack of any true contradiction between the positions taken by AT&T in  
26 the *Jensen* case and those taken in this matter, Complainant’s motion for judicial estoppel also  
27 fails because Complainants cannot establish the District Court’s adoption or acceptance as true of

1 any of the prior assertions, , a necessary finding for imposing the doctrine of judicial estoppel.  
2 *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4<sup>th</sup> 171, 181. Indeed, Complainants fail to  
3 even argue the “accepted as true” element of the judicial estoppel test, and have cited to no law  
4 which would relieve them of their obligation to satisfy this standard. *See generally*, Motion at  
5 16:27-17:2; 17:20-25. Nowhere in Complainants’ brief do they provide evidence of any  
6 argument or assertion made to the *Jensen* Court which was actually adopted or accepted as true  
7 by that Court, and which they now contend is contradictory.

8 The District Court’s Order granting AT&T’s motion for summary judgment was the only  
9 opportunity in the underlying *Jensen* case for the District Court to adopt any of AT&T’s factual  
10 assertions “as true.” In making its ruling, the *Jensen* Court made the following observations  
11 about AT&T’s reimbursement practices:

12 After extensive discovery and expert analysis discussed *infra*, the evidence shows that  
13 Oldcastle did not in fact charge developers supra-competitive prices for vaults. The  
14 evidence is disputed regarding AT&T’s reimbursement practices; Jensen contends that  
15 AT&T used the “Oldcastle price list” to set its reimbursement rates, while defendants  
16 contend that AT&T’ reimbursement practices varied widely depending on region, that  
17 several regions use the Oldcastle contract prices in varying ways (e.g., reimbursing at  
18 Oldcastle contract prices plus 25% or using Oldcastle prices as a ceiling on  
19 reimbursement rates), and that in many regions the reimbursement rates have no  
20 connection to the Oldcastle contract prices.

21 Order, Ex. B to Bolaños Dec. at 3:21-28.

22 In short, not only were AT&T’s assertions to the District Court regarding its  
23 reimbursement practice (as quoted above) not “inconsistent” with any assertion in this case, the  
24 District Court did not adopt any of those assertions as true. Rather, the Court stated the different  
25 positions of the parties and did not adopt either as true, merely finding that the “evidence is  
26 disputed.” Order at 3:22. The District Court did not need to do otherwise, because a finding as to  
27 AT&T’s reimbursement practices was not necessary to its ruling. The only *legal* question which  
28 the *Jensen* Court needed to resolve to grant summary judgment was the absence of alleged  
antitrust harm. To rule on that issue, the only *factual* issue the Court needed to resolve was the  
absence of supra-competitive prices in the alleged vault market: “it is now undisputed that  
Oldcastle did not charge developers supra-competitive prices for vaults.” Order at 6:10-11. The

1 Court made no other findings, and did not adopt any of AT&T's assertions regarding its  
2 reimbursement practices as true, or untrue, or rule on any alleged contradictory assertions.

3 **IV. CONCLUSION**

4 Complainants have failed to meet the standards for judicial estoppel set forth in *Jackson v.*  
5 *County of Los Angeles* (1997) 60 Cal.App.4th 171, 183. AT&T's assertions to the Court in the  
6 *Jensen* case regarding its reimbursement practices were not inconsistent with its assertions in this  
7 case. Regardless, the *Jensen* Court did not adopt those assertions, or accept them as true, in  
8 ruling in favor of AT&T on summary judgment. The determination of the facts concerning  
9 AT&T's reimbursement practices – and whether those practices are consistent with Rule 15 – is  
10 the ultimate issue to be determined herein, and will be made by the Commission based on the  
11 evidence presented by the parties. Complainants' attempt to truncate that process under the  
12 guise of "judicial estoppel" should be denied.

13  
14 Dated: December 18, 2009

Respectfully submitted,

15  
16 By: \_\_\_\_\_ /s/  
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1 **BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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5 LA COLLINA DAL LAGO, L.P.; and BERNAU  
DEVELOPMENT CORPORATION,

6 Complainants,

7 v.

8 Pacific Bell Telephone Company, dba AT&T  
9 California (U 1001 C)

10 Defendant.

Case No. 09-08-021  
(Filed August 27, 2009)

11  
12 **DECLARATION OF RAYMOND P. BOLAÑOS IN SUPPORT OF RESPONSE**  
13 **TO COMPLAINANTS' MOTION TO EXCLUDE**  
14 **CONTRARY ASSERTIONS UNDER THE DOCTRINE OF**  
15 **JUDICIAL ESTOPPEL**

16 1. I am an attorney licensed to practice law before the Courts of the State of  
17 California, and the attorney for Defendant Pacific Bell Telephone Company, doing business as  
18 AT&T California ("AT&T" or "AT&T California") in this matter. I have personal knowledge of  
19 the matters set forth herein, and could testify thereto if called upon to do so.

20 2. I represented AT&T in the matter of *Jensen v. Oldcastle, et al.*, US District Court  
21 for the Northern District of California Case No. 06-247 SI.

22 3. On July 21, 2006, a hearing was held in the *Jensen* case on AT&T's motion to  
23 dismiss under FRCP 12(b)(6).

24 4. During that hearing, I made a representation to the Court which assumed (1) that  
25 AT&T required its exclusive vendors to charge the AT&T contract price to contractors (or  
26 developers) installing materials in AT&T's rights of way, and also assumed (2) that AT&T  
27 reimbursed developers for these materials installed in its rights of way (when reimbursement was



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# EXHIBIT A

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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

16 JENSEN ENTERPRISES, INC., )  
17 )  
Plaintiff, )  
18 )  
v. )  
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OLDCASTLE PRECAST, INC.; )  
20 )  
PACIFIC BELL TELEPHONE COMPANY; )  
AT&T SERVICES, INC.; and NEVADA BELL )  
21 )  
TELEPHONE COMPANY, )  
22 )  
Defendants. )

Case No. C 06-0247 SI

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**NOTICE OF MOTION AND MOTION  
FOR SUMMARY JUDGMENT BY  
PACIFIC BELL TELEPHONE  
COMPANY, AT&T SERVICES, INC.,  
AND NEVADA BELL TELEPHONE  
COMPANY ("AT&T")**

Date: August 22, 2008

Time: 9:00 a.m.

Place: Courtroom 10, 19th Floor

The Hon. Susan Illston

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**NOTICE OF MOTION AND STATEMENT OF RELIEF SOUGHT**

PLEASE TAKE NOTICE that, on August 22, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 10, 19th floor, 450 Golden Gate Avenue, San Francisco, California, defendants Pacific Bell Telephone Company, AT&T Services, Inc., and Nevada Bell Telephone Company (collectively, "AT&T" or the "AT&T defendants") will move, pursuant to Federal Rule of Civil Procedure 56(b), for summary judgment in the above-captioned matter on the grounds that there is no genuine issue of material fact and that AT&T is entitled to judgment as a matter of law on all of plaintiff's claims against it, in that:

- (1) plaintiff cannot proffer evidence of harm to competition in any relevant market;
- (2) plaintiff cannot proffer evidence of antitrust injury;
- (3) plaintiff cannot proffer evidence of a *per se* unlawful concerted refusal to deal; and,
- (4) plaintiff cannot proffer evidence in support of its state common law claims of tortious interference and commercial defamation.

The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Ray Kozul and exhibits thereto, the Declaration of Raymond P. Bolaños and exhibits thereto, any papers filed on reply, the pleadings and papers on file in this matter, and any argument or other materials to be presented at the hearing in this matter.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. STATEMENT OF ISSUES**

Whether defendants are entitled to judgment as a matter of law where plaintiff has failed to proffer evidence of harm to competition or antitrust injury in support of its antitrust claims or evidence in support of its related state common-law claims.

**II. INTRODUCTION AND SUMMARY OF ARGUMENT**

This is an antitrust action brought by Plaintiff Jensen Enterprises, Inc. against Oldcastle, Inc., one of Jensen's competitors, and Pacific Bell Telephone Company, Nevada Bell Telephone Company, and AT&T Services, Inc. (collectively "AT&T" or the "AT&T defendants"). Jensen and Oldcastle are manufacturers of pre-cast concrete products, including telephone vaults used by

1 AT&T in its wireline networks in California and Nevada. Jensen's claims arise from AT&T's  
2 choice to make Oldcastle the exclusive supplier of its vaults. Based thereon, Jensen asserts  
3 claims for violation of the Sherman Act Sections 1 and 2, along with derivative state law antitrust  
4 and common law claims. (See Jensen's Fourth Amended Complaint, the operative pleading.)

5 AT&T moved for summary judgment on June 8, 2007. In opposition, Jensen argued that  
6 AT&T had given Oldcastle a "monopoly" in the market for vaults used in AT&T's networks and  
7 that, as a result, AT&T had delivered to Oldcastle a "captive" group of property developers who  
8 had to buy Oldcastle's vaults when installing the infrastructure for AT&T's networks in their  
9 property developments. According to Jensen, Oldcastle then used that monopoly to charge supra-  
10 competitive prices for its vaults which the developers were forced to buy.

11 In its Order dated July 6, 2007, the Court denied AT&T's motion for summary judgment.  
12 Since then, the parties have engaged in extensive discovery, the result of which is to demonstrate  
13 that there is no factual merit to any of Jensen's claims.

14 *First*, Jensen's own expert has now admitted that the "Oldcastle-only" policy had *no*  
15 impact on price or output in any vault market. Absent such an impact, Jensen cannot establish the  
16 requisite harm to competition necessary to establish an unreasonable restraint of trade. Jensen  
17 attempts to cure this fatal deficiency by arguing that the Oldcastle agreement nevertheless violated  
18 the antitrust laws because it resulted in "under-reimbursement" of developers and contractors who  
19 purchased the vaults from Oldcastle and then had to convey them to AT&T, allegedly at a lower  
20 price than they had paid for the vaults. *All* of Jensen's claims – under Sections 1 and 2 of the  
21 Sherman Act, state antitrust law, and tort law – now rest solely on this alleged "under-  
22 reimbursement." There is nothing in the antitrust laws, however, that requires AT&T to pay the  
23 developers any particular price for the vaults when they transfer them to AT&T. AT&T's alleged  
24 under-reimbursement is an entirely legal exercise of AT&T's power in the market for land-line  
25 telephone service, un-enhanced by any agreement with Oldcastle or any Oldcastle-only "policy."  
26 AT&T could, consistent with the antitrust laws, choose to pay the same allegedly low prices for  
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1 vaults regardless of the Oldcastle agreement and regardless of whether developers were able to  
2 buy from one, two, or a dozen vault manufacturers.

3 *Second*, and as an independent reason to grant this motion, Jensen cannot proffer any  
4 evidence that it has suffered antitrust injury, that is, injury that stems from the allegedly illegal  
5 aspect of the conduct being challenged. Here, as indicated, Jensen takes the position that the  
6 antitrust harm of the challenged conduct arises entirely from AT&T's alleged under-  
7 reimbursement of the developers. However, that under-reimbursement caused no injury to  
8 Jensen. Rather, any harm to Jensen (by way of lost sales and profits) occurred when Jensen  
9 decided not to compete to be an approved AT&T vault supplier, and AT&T selected Oldcastle  
10 instead – a perfectly legal choice for AT&T to make and one that Jensen does not challenge.  
11 Even if AT&T had fully reimbursed the developers – thereby removing any supposed unlawful  
12 conduct from the equation – Jensen's position in the market and its alleged injury would be  
13 exactly the same: Jensen was no longer an approved AT&T supplier and it lost sales and revenue  
14 as a result. Any losses suffered by Jensen were not the result of any alleged under-reimbursement  
15 involving the developers. The absence of any causal connection between the supposedly unlawful  
16 aspect of the challenged conduct and Jensen's alleged injury is fatal to *all* of Jensen's claims for  
17 relief under the antitrust laws.

18 *Third*, Jensen's claim of a "per se" unlawful refusal-to-deal agreement fails because there  
19 is no evidence of any agreement *among competitors* not to deal. Rather, the only agreement at  
20 issue is between a buyer and a supplier, *i.e.*, AT&T and Oldcastle.

21 Thus, Jensen's federal antitrust claims fail as a whole, and, absent such claims, Jensen's  
22 derivative state-law antitrust claims and common-law claims fail as well.

### 23 **III. STATEMENT OF FACTS**

#### 24 **A. The AT&T Wireline Network and the Purchase of Concrete Vaults**

25 AT&T's wireline telephone infrastructure is an extensive network of wire, cable, conduit,  
26 manholes, poles, switches, and other facilities making up its wireline telephone system. *See*  
27 Fourth Amended Complaint (or "FAC") ¶ 12. The wireline telephone infrastructure in California  
28

1 and Nevada is placed in rights of way owned by AT&T affiliates Pacific Bell in California and  
2 Nevada Bell in Nevada, in those areas where AT&T and its predecessors are the wireline  
3 incumbent. *See* Sibley Report (11/15/07), ¶ 10; Hall Report (12/26/07), ¶ 18. Manholes, when  
4 used as telecommunications vaults, are placed in the ground and provide an access point for  
5 running conduit and making connections or performing maintenance on underground or buried  
6 telephone cable. *See* Sibley Report (11/15/07), ¶ 10. Pacific Bell and Nevada Bell have  
7 traditionally purchased manholes for their wireline network from companies such as Jensen and  
8 Oldcastle, both of which manufacture precast concrete products. *See* Hall Report (9/28/07), ¶ 23.  
9 Plaintiff Jensen, like its competitor Oldcastle, sells manholes and other concrete products,  
10 primarily to the construction industry, state and local agencies, and utilities. *See* Shanks Depo.  
11 (2/15/07), at 12:8 – 13:15.

12           When a property developer constructs a new development, AT&T will install the  
13 necessary infrastructure – including manhole vaults – needed to provide telephone service to the  
14 development. These installations are known as “line extensions.” All manholes or  
15 telecommunications vaults placed in the Pacific Bell or Nevada Bell networks must ultimately be  
16 owned by that telephone company pursuant to state public utility tariffs. *See* Nolasco Depo.  
17 (1/28/08), at 98:25 – 99:8; *see also* Schedule Cal. P.U.C. No. A2; Tariff P.S.C.N. No. A4 (Exs. F  
18 and G to Bolaños Decl.) (“Tariffs”).<sup>1</sup> In general the tariffs provide that AT&T will construct the  
19 line extension at its expense. *See generally* Tariffs; Stanton Depo. (1/29/08), at 225:12-16;  
20 219:20 – 220:9. However, rather than wait for AT&T to do so, developers frequently prefer to  
21 construct the line extensions themselves to better accommodate their own plans and schedules.  
22 *See* Stanton Depo. (1/29/08) at 227:12-24. In such cases, AT&T and the developer enter into a  
23 “trench agreement.” *See id.* at 246:23 – 247:2. Such agreements ensure that the work the  
24 developers perform and the equipment they install – which will become part of AT&T’s network  
25 and for which AT&T is ultimately responsible – meet AT&T’s specifications. Among other

26 \_\_\_\_\_  
27 <sup>1</sup> The tariffs set forth the rates, terms, and conditions under which AT&T offers to provide  
28 common-carrier telecommunications services. Once effective, a tariff is binding and has the force  
of law. *See Trammell v. Western Union Tel. Co.*, 57 Cal. App. 3d 538, 550-51 (1st Dist. 1976).

1 things, AT&T specifies the type of manholes that the developer must install. *See Nolasco Depo.*  
2 (1/28/08) at 27:6 – 28:2; 38:23 – 40:21; 99:9-20. As part of the trench agreement, AT&T and the  
3 developer also agree on the amount that AT&T will pay (or reimburse) the developer for the  
4 installation, once it is completed to AT&T's satisfaction. *See Stanton Depo.* (1/28/08) at 245:25 –  
5 247:4.

6 Oversight of installations and negotiation of trench agreements – including the amount of  
7 reimbursement – is the responsibility of AT&T's several district engineering offices. AT&T has  
8 not adopted a uniform methodology for calculating the amount of reimbursement, which has been  
9 handled in different ways by different offices. *See Baird Depo.* (1/29/08), at 19:1 – 20:2

10 **B. The 2002 AT&T – Oldcastle Contract**

11 In 2001, AT&T (then known as SBC) issued a Request for Quotations (“RFQ”),  
12 asking its manhole vendors to bid on a contract to supply manholes and related equipment to  
13 various affiliates, including Pacific Bell in California. *See Kozul Decl.* ¶ 4 and Ex. A thereto.  
14 The RFQ contained contract provisions (including warranty and indemnification terms designed  
15 to ensure that potential suppliers were willing to stand behind the quality of their products), which  
16 AT&T was asking the bidders to accept, and it also sought bids on pricing. *See id.* Oldcastle  
17 presented the lowest prices in response to the RFQ for California. *See id.* ¶ 5.

18 Jensen did not immediately respond to the RFQ and balked at certain language in the  
19 AT&T-proposed contract. Specifically, Jensen objected to language governing the  
20 indemnification of AT&T, and the requirement of a 20-year warranty for its products. *See id.*  
21 Ultimately, Jensen decided it did not want to sell vaults to AT&T under the terms that AT&T was  
22 asking for. *See Depo.* of Don Jensen (12/11/06), at 202:14-17; 212:17-21; 213:10-12. Oldcastle,  
23 however, did, and was awarded the contract, becoming the authorized supplier of manholes to  
24 Pacific Bell in California for a contract term of two years. *See Kozul Decl.* ¶ 5.

25 **C. The 2006 AT&T – Oldcastle Contract**

26 The 2002 Oldcastle contract was extended by amendment and remained in effect for  
27 approximately three years. In 2005, AT&T issued another RFQ for a new contract covering  
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1 California. AT&T sought Jensen's bid on the new RFQ, but Jensen again refused to bid.  
2 Oldcastle was again the low bidder and was awarded the 2006 contract. *See* Kozul Decl. ¶ 9.  
3 Prior to the 2006 contract, and although Jensen had refused to accept AT&T's contract terms,  
4 Jensen had remained Nevada Bell's exclusive supplier of manholes and related equipment under a  
5 letter agreement entered into in 2000. *See id.* ¶ 7. In response to the 2005 RFQ, however,  
6 Oldcastle submitted a bid and sought to be designated as the approved supplier for vaults in  
7 Nevada as well. In part because Jensen refused to bid, Oldcastle was named the preferred  
8 supplier of manholes and related equipment in Nevada. *See id.* ¶ 9.

9 **D. The 2008 AT&T – Teichert Contract**

10 The 2006 AT&T-Oldcastle contract lasted for a period ending on October 31, 2007. *See*  
11 Kozul Decl. ¶ 11. On October 19, 2007, AT&T issued a new RFQ to replace the expiring 2006  
12 contract. *See id.* Yet again, Jensen declined to bid for the business. *See id.* A new supplier,  
13 however, Teichert Construction, submitted a bid, as did Oldcastle. *See id.* On May 29, 2008,  
14 Teichert was awarded the contract for Northern California, and Oldcastle was awarded the  
15 contract for Southern California and Nevada. *See id.* Exs. B and C.

16 **IV. ARGUMENT**

17 **A. SUMMARY JUDGMENT STANDARD**

18 Summary judgment is appropriate “if the pleadings, the discovery and disclosure materials  
19 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
20 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Anderson v.*  
21 *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). “In opposing a motion for summary judgment in  
22 an antitrust case, the nonmoving party ‘must do more than simply show that there is some  
23 metaphysical doubt as to the material facts.’” *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 853 (9th  
24 Cir. 1995) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
25 (1986)). Once the moving party has established the absence of a genuine dispute of material fact,  
26 “the nonmoving party must go beyond the pleadings and identify facts showing the existence of a  
27 genuine issue for trial.” *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).  
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1 Now that discovery is complete, Jensen's allegations in this case fail as a matter of law  
2 and as a matter of fact. In alleging that AT&T and Oldcastle conspired to take advantage of  
3 developers, Jensen attempts to cast the exercise of lawful market power by AT&T as unlawful  
4 harm to competition. Jensen has now made it clear that the source of the alleged "antitrust injury"  
5 in this case is *not* the designation of Oldcastle as the sole supplier of pre-cast concrete vaults, but  
6 rather the alleged "under-reimbursement" by AT&T of developers. See Hall Report (5/2/08), ¶ 32  
7 ("the antitrust harm from the challenged conduct arises entirely from the under-reimbursement of  
8 developers"); see also Hall Depo. (5/27/08), at 45:2-18. But any such "under-reimbursement"  
9 does not, without more, violate the antitrust laws and does not amount to harm to competition.  
10 Moreover, Jensen cannot prove that it suffered any injury as a result of the alleged under-  
11 reimbursement. For these reasons and the others discussed below, the Court should grant this  
12 motion.

13 **B. THE FIRST CLAIM FOR RELIEF FOR VIOLATION OF 15 U.S.C. § 1 –**  
14 **UNREASONABLE RESTRAINTS OF TRADE – FAILS AS A MATTER OF LAW**  
15 **AND FACT**

16 **1. Jensen Cannot Prove Harm to Competition in Any Market for Vault Sales**

17 The first count of Jensen's Fourth Amended Complaint alleges that the agreement  
18 between AT&T and Oldcastle constituted an unreasonable restraint of trade, that is, an agreement  
19 that causes harm to competition and that is not justified by any corresponding competitive benefit.  
20 See *Paladin Assocs. v. Montana Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003). "Proving  
21 injury to competition in a rule of reason case almost uniformly requires a claimant to prove the  
22 relevant market *and to show the effects o[n] competition within that market.*" *Adaptive Power*  
23 *Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 951 (9th Cir. 1998) (internal quotation  
24 marks omitted). Specifically, the plaintiff must prove "that the business practice injured  
25 competition by increasing the prices consumers paid in that market." *Id.*; see also *Pool Water*  
26 *Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) ("Antitrust injury 'means injury from  
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1 higher prices or lower output, the principal vices proscribed by the antitrust laws.”) (quoting  
2 *Nelson v. Monroe Reg'l Med. Ctr.*, 925 F.2d 1555, 1564 (7th Cir. 1991)).

3 Jensen survived AT&T's prior motion for summary judgment by arguing that the  
4 arrangement between AT&T and Oldcastle led to higher prices for AT&T-compatible vaults and  
5 excluded competitors. See FAC at 3 (“Oldcastle . . . forces the property developers to pay  
6 unreasonably high prices for the vaults”); ¶ 29 (“excessively high prices for its vaults”); ¶ 30  
7 (“Oldcastle has enjoyed windfall profits”); ¶ 31 (“property developers have been forced to pay  
8 higher prices”); ¶ 33 (Oldcastle “charge[s] higher prices that would be uncompetitive if others  
9 could compete against it”); ¶ 36 (“high prices”); ¶ 63 (“higher prices”).

10 *Jensen now concedes that those allegations are not true.*

11 Jensen's economic and antitrust expert, Dr. Robert Hall, has unambiguously testified that  
12 the arrangement between Oldcastle and AT&T has *not* led to any increase in the prices paid by  
13 developers for vaults. In his most recent report, Professor Hall concluded that “Oldcastle's  
14 AT&T Vault prices *were not affected by the Oldcastle-only policy.*” Hall Report (5/2/08), ¶ 72  
15 (emphasis added). In his deposition, Professor Hall underscored the point, confirming that there  
16 was no evidence that Oldcastle had charged prices for vaults that were above the competitive  
17 level. See Hall Depo. (5/27/08) at 44:20 – 45:18; 167:17-20; 184:5-11. That concession is fatal  
18 to Jensen's claim.

19 Professor Hall does argue that the “net” price that developers paid for vaults – that is, the  
20 difference between what developers pay for vaults and the amount they receive from AT&T –  
21 increased as the result of the AT&T-Oldcastle agreement. See Hall Report (5/2/08), ¶ 10. That,  
22 however, is simply another way of saying that AT&T under-reimbursed the developers for the  
23 installations that developers performed on AT&T's behalf. As discussed below, any such  
24 under-reimbursement – as a lawful exercise of AT&T's power in the market for telephone service  
25 – cannot be the basis for a claim under Section 1. And that is particularly clear in this case where  
26 Oldcastle did not – as Jensen admits – exercise any ability to raise the prices that developers *paid*  
27 above the competitive level. See Hall Rebuttal Report (7/21/08), ¶ 151 (arguing that Jensen need  
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1 not show that Oldcastle “gained durable market power” or “harm to consumers in the form of  
2 higher prices” but rather may establish harm to consumers by showing that AT&T “exercised  
3 market power”).

4           **2.     AT&T’s Alleged “Under-Reimbursement” of Developers Does Not Implicate**  
5           **the Antitrust Laws**

6           **a.     A Lawful Monopolist May Charge Monopoly Prices (or “Under-**  
7           **Reimburse”) for the Right To Connect to Its Network**

8           Absent any competitive harm in the vault market – the lynchpin of Jensen’s claims in its  
9 complaint – Jensen now maintains that “[t]he antitrust harm from the challenged conduct arises  
10 *entirely* from the under-reimbursement of developers.” Hall Report (5/2/08), ¶ 32 (emphasis  
11 added). This claim has no merit under the antitrust laws.

12           In substance, plaintiff’s claim is that, as a result of the AT&T-Oldcastle agreement, it  
13 costs property developers more to connect to AT&T’s network – because they receive less  
14 reimbursement relative to the price of the vaults when they convey the vaults to AT&T in  
15 exchange for interconnection. But it is not any agreement between AT&T and Oldcastle that  
16 causes the developers to pay more to connect to AT&T’s network. Rather, the alleged higher  
17 costs are entirely a function of AT&T’s market power in the provision of land-line telephone  
18 services, exercised in the contractual arrangements between AT&T and the developers – *i.e.*, the  
19 “trench agreements.” As Professor Hall states, “AT&T’s market power in the wireline business  
20 arises from natural monopoly.” Hall Report (9/28/07), ¶ 15. AT&T is able to under-reimburse  
21 developers for installations because the developers either want to or need to connect to AT&T’s  
22 network. *See* Hall Report (9/28/07), ¶ 13. The amount that AT&T offers to pay a developer for  
23 an installation is simply one of the terms under which AT&T will agree to provide service to a  
24 new development. *See* Sibley Report (6/24/08), ¶¶ 10-12.

25           This legal market power, and AT&T’s exercise of it, is neither enhanced by nor dependent  
26 upon any contract with Oldcastle. Regardless of the number of vault suppliers, regardless of the  
27 retail prices for vaults, and regardless of any contract between AT&T and Oldcastle, AT&T still  
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would possess the lawful power and the lawful right to charge (through under-reimbursement or otherwise) whatever price the market might bear to developers seeking to connect to its network.

1 Jensen's antitrust claim thus boils down to nothing more than the claim that a *lawful* monopolist  
2 is imposing costs or charges on developers that the developers should not have to bear to connect  
3 to its network, and that Jensen somehow has been collaterally damaged as a result thereof  
4 (though, as explained below, Jensen's loss does not flow from the alleged failure of AT&T to  
5 reimburse developers – the challenged conduct – but rather from Jensen's failure to bid for  
6 AT&T's business). The Supreme Court's consistent response to such claims is that they do not  
7 amount to violations of the antitrust law. "The mere possession of monopoly power, and the  
8 concomitant charging of monopoly prices, is not only not unlawful; it is an important element of  
9 the free-market system." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,  
10 540 U.S. 398, 407 (2004). In short, the alleged under-reimbursement of developers is a  
11 consequence of AT&T's monopoly power in the telephone service market, the exercise of which  
12 is not unlawful.

13 **b. AT&T's Regulatory Obligations Do Not Change the Antitrust Analysis**

14 Nor does the analysis change because AT&T may have regulatory obligations with respect  
15 to line extensions or the reimbursement of developers. *See* Hall Report (9/28/07), ¶¶ 26, 27  
16 (describing Hall's understanding of regulatory obligations with respect to line extensions); Hall  
17 Depo. (5/27/08) at 110:6-18 (claiming that public utility is not permitted to "fob off its costs on  
18 others"). Jensen has argued that AT&T is obligated under its tariffs to bear the cost of line  
19 extensions and to reimburse developers for their reasonable costs of installations. Jensen further  
20 suggests that AT&T's alleged under-reimbursement allows it to evade regulatory limitations on  
21 its rates. Assuming for the sake of argument that this is correct (and it is not), the argument does  
22 not alter the analysis under the Sherman Act. As the Supreme Court made clear in *NYNEX Corp.*  
23 *v. Discon, Inc.*, 525 U.S. 128, 136-37 (1998), and in *Trinko*, 540 U.S. at 406-07, 415-16, the claim  
24 that a regulated monopolist has engaged in conduct designed to evade regulatory limits on  
25 exercise of power does not implicate the antitrust laws.

1            *NYNEX v. Discon* is practically on all fours with this case. There, a regulated local  
2 telephone company with alleged monopoly power designated a sole supplier (in that case, of  
3 “removal services” for disposal of obsolete switching equipment). The plaintiff alleged that the  
4 selection of the supplier was not motivated by legitimate competitive considerations. Rather, the  
5 defendant allegedly had agreed to pay inflated prices for services – part of which the supplier  
6 would rebate – as part of a scheme to evade regulatory limitations on local telephone charges.  
7 The Supreme Court rejected the holding of the Second Circuit that such allegations implicated  
8 any rule of *per se* legality under Section 1 of the Sherman Act or supported a claim for conspiracy  
9 to monopolize the market for removal services. Critical to the Supreme Court’s analysis was the  
10 recognition that any alleged overpayment by consumers “naturally flowed not so much from a less  
11 competitive market for removal services, as from the exercise of market power that is *lawfully* in  
12 the hands of a monopolist.” *See NYNEX v. Discon*, 525 U.S. at 136; *see also Discon, Inc. v.*  
13 *NYNEX Corp.*, 86 F. Supp. 2d 154 (W.D.N.Y. 2000), wherein the district court, upon remand,  
14 dismissed the plaintiff’s companion rule-of-reason claim, for the same reason: “regulatory  
15 misconduct – even if it results in inappropriately high charges to telephone customers – is not  
16 equivalent to a violation of the Sherman Act.”

17            Here, as in *Discon*, plaintiff argues that AT&T’s agreement with Oldcastle was part of a  
18 scheme to evade a supposed regulatory obligation – in this case, to reimburse developers fully for  
19 extensions of AT&T’s network. Likewise here, however, even if developers were “under-  
20 reimbursed,” that effect flowed from AT&T’s exercise of lawful monopoly power. Such  
21 allegations do not implicate the Sherman Act.

22            **3. Jensen Cannot Prove That It Has Suffered Antitrust Injury**

23            In addition to its inability to demonstrate any harm to competition, Jensen’s claims also  
24 fail because Jensen cannot prove that it suffered any antitrust injury, *i.e.*, injury that stems from  
25 that which makes the challenged conduct unlawful under the antitrust laws. *See Brunswick Corp.*  
26 *v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

1           “To show antitrust injury, a plaintiff must prove that his loss flows from an  
2 *anticompetitive* aspect or effect of the defendant’s behavior, since it is inimical to the antitrust  
3 laws to award damages for losses stemming from acts that do not hurt competition. If the injury  
4 flows from aspects of the defendant’s conduct that are beneficial or neutral to competition, there  
5 is no antitrust injury, even if the defendant’s conduct is illegal *per se*.” *Rebel Oil Co. v. ARCO*,  
6 51 F.3d 1421, 1433 (9th Cir. 1995) (citation omitted; emphasis added). Thus, “to demonstrate  
7 that it has suffered ‘antitrust injury,’ [a plaintiff] must prove that its alleged injury ‘flows from  
8 that which makes defendants’ acts unlawful.’” *Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone,*  
9 *Inc.*, 140 F.3d 1228, 1233 (9th Cir. 1998) (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479  
10 U.S. 104, 113 (1986)). Jensen has proffered no evidence of such injury here.

11           Jensen has made clear that the sole conduct being challenged – “that which makes  
12 defendants’ acts unlawful” – is the under-reimbursement of developers, not the designation of  
13 Oldcastle as AT&T’s preferred supplier. Again, in Professor Hall’s words: “[t]he antitrust harm  
14 from the challenged conduct arises *entirely* from the under-reimbursement of developers. Had  
15 AT&T fully reimbursed developers . . . the Oldcastle-only policy *would not have had an*  
16 *anticompetitive effect*.” Hall Report (5/2/08), ¶ 32 (emphases added).

17           But Jensen’s alleged injury – loss of sales and profits – has nothing to do with whether  
18 developers are fully reimbursed. Rather, it flows directly and entirely from Jensen’s decision not  
19 to bid on AT&T’s RFQs and AT&T’s ultimate selection of Oldcastle as the approved supplier.  
20 Regardless of whether the developers are under-reimbursed, fully reimbursed, or over-reimbursed,  
21 Jensen’s injury remains precisely the same.<sup>2</sup> Jensen no longer is an approved AT&T supplier, and  
22 it lost sales as a result. Those losses in no way “stem” from AT&T’s reimbursement policies.

23  
24 <sup>2</sup> This Court allowed Jensen’s claims to proceed at an earlier stage on the understanding that a  
25 possible antitrust injury is “[c]oercive activity that prevents its victims from making free choices  
26 between market alternatives,” *i.e.*, the alleged inability of developers to seek lower prices from  
27 competing vault manufacturers. See *Jensen Enters. Inc. v. AT&T Inc.*, No. C 06-247, 2007 WL  
28 2009797, at \*6 (N.D. Cal. July 6, 2007) (internal quotation marks omitted). But, as discussed  
throughout this brief, Jensen has now disclaimed any such injury because there is no evidence that  
the price for vaults increased above market rates due to the Oldcastle agreement. The *sole* injury  
now claimed is under-reimbursement to the developers, an injury for which the Court has never  
suggested Jensen had standing to complain. See *id.* at \*6 n.6.

1           Indeed, as Professor Hall admits, there is nothing inherently unlawful about the AT&T-  
2 Oldcastle exclusive-supply agreement so long as – in Professor Hall’s opinion – there is full  
3 reimbursement of the developers. The challenged conduct that is supposedly unlawful – under  
4 reimbursement – can be eliminated, yet Jensen’s injury would not change. Thus, Jensen cannot  
5 prove that it suffered antitrust injury stemming from that conduct. See *Lucas Auto.*, 140 F.3d at  
6 1233 (“[E]loss incurred because of an unlawful acquisition that would also have been incurred had  
7 the acquisition been lawful is not antitrust injury because it does not flow from that which makes  
8 the defendant’s conduct unlawful.”) (emphasis added).

9           Far from reflecting the allegedly anticompetitive aspect of AT&T’s conduct, Jensen’s  
10 injury stems from the *pro-competitive* elements of the challenged conduct. AT&T organized a  
11 process to secure one or more suppliers of pre-cast concrete vaults that would offer it superior  
12 prices, guarantees of quality and reliability, more efficient procurement, and simplified  
13 maintenance. Oldcastle emerged as the winner in that process, with Jensen declining to compete,  
14 not once, but three times. See generally *Kozul Decl.* A primary benefit of competition is that it  
15 delivers to the consumer – here, AT&T – products and services that it wants at the best prices it  
16 can command. The corollary to that proposition is that competitors that decline to meet customer  
17 requirements lose sales. See *Paladin*, 328 F.3d at 1158 (“In competition, there are winners and  
18 losers.”). Jensen failed to win the AT&T business and lost sales as a result thereof. That is  
19 competition. It is not antitrust injury.

20    **C. THE SECOND CLAIM FOR RELIEF FOR VIOLATION OF 15 U.S.C. § 1 –**  
21    **IMPROPER REFUSAL TO DEAL FAILS AS A MATTER OF LAW AND FACT**

22           Jensen’s second claim for relief alleges that AT&T and Oldcastle engaged in a *per se*  
23 unlawful group boycott – that is, an agreement that should be deemed unlawful without any  
24 inquiry into actual effects on competition or possible pro-competitive justifications. See FAC  
25 ¶ 85; *Paladin*, 328 F.3d at 1153. That claim likewise fails.

26           In some circumstances, an agreement among horizontal competitors not to deal with a  
27 disfavored buyer or seller may be treated as a *per se* violation of the Sherman Act. But the  
28

1 Supreme Court has made clear that “precedent limits the *per se* rule in the boycott context to  
2 cases involving horizontal agreements among *direct competitors*.” *NYNEX v. Discon*, 525 U.S. at  
3 135 (emphasis added). There is no such horizontal agreement alleged here. The sole alleged  
4 agreements are vertical – between AT&T and Oldcastle on the one hand (the supplier contract)  
5 and between AT&T and developers on the other (the trench agreements). None of the parties to  
6 these agreements competes with the other. Accordingly, Jensen’s group boycott claim fails.

7 **D. THE FOURTH CLAIM FOR RELIEF FOR VIOLATION OF 15 U.S.C. § 2 –**  
8 **CONSPIRACY TO MONOPOLIZE, FAILS AS A MATTER OF LAW AND FACT**

9 “Because [plaintiffs’] claim under § 1 fails, its claim of a conspiracy to monopolize under  
10 § 2 based on the same conduct necessarily fails as well.” *Nova Designs, Inc. v. Scuba Retailers*  
11 *Ass’n*, 202 F.3d 1088, 1092 (9th Cir. 2000); see *NYNEX v. Discon*, 525 U.S. at 139 (“Unless those  
12 agreements harmed the competitive process, they did not amount to a conspiracy to  
13 monopolize.”). Thus, the failure of Jensen’s first claim for relief under Section 1 is fatal to its  
14 claim for conspiracy to monopolize under Section 2. Likewise, because Jensen has not suffered  
15 any antitrust injury, it cannot maintain a claim under Section 2. *Paladin*, 328 F.3d at 1158.<sup>3</sup>

16 **E. THE SEVENTH AND EIGHTH CLAIMS FOR RELIEF FOR VIOLATION**  
17 **STATE ANTITRUST LAWS ARE DERIVATIVE OF THE FEDERAL CLAIMS**  
18 **AND THUS FAIL FOR THE SAME REASONS**

19 Jensen’s claims under California and Nevada state antitrust laws fail for the same reasons  
20 as its claims under the Sherman Act. “The Cartwright Act is patterned after the Sherman Act and  
21 ‘federal cases interpreting the Sherman Act are applicable to problems arising under the  
22 Cartwright Act.’” *Nova Designs*, 202 F.3d at 1092 (quoting *Marin County Bd. of Realtors, Inc. v.*  
23 *Palsson*, 16 Cal. 3d 920, 925 (Cal. 1976) (in bank)). Likewise, the provisions of the Nevada  
24 Unfair Trade Practice Act shall be “construed in harmony with prevailing interpretations of the  
25

26 <sup>3</sup> The third, fifth, and twelfth claims for relief in the Fourth Amended Complaint are asserted  
27 against Oldcastle only and thus are not addressed by AT&T. Similarly, the sixth claim for relief,  
28 being merely a request for injunctive relief that is rendered moot by the failure of Jensen’s  
substantive claims, is not separately addressed.

1 federal antitrust statutes.” Nev. Rev. Stat. § 598A.050. Accordingly, the failure of Jensen’s  
2 federal claims under Sections 1 and 2 is fatal to its derivative state-law antitrust claims.

3 **F. PLAINTIFF’S COMMON-LAW CLAIMS – THE NINTH, TENTH, AND**  
4 **ELEVENTH CLAIMS FOR RELIEF – FAIL AS A MATTER OF LAW AND FACT**

5 1. **Plaintiff Cannot Present Evidence of Improper Conduct or Interference with**  
6 **Any Contractual Relationship or Prospective Advantage**

7 The ninth claim for relief of the Fourth Amended Complaint alleges tortious interference  
8 with contracts, and the tenth claim for relief pleads a claim for tortious interference with  
9 prospective economic advantage. Jensen cannot proffer evidence in support of either claim.

10 To make out a claim of tortious interference with contract, Jensen must establish (1) the  
11 existence of a valid contract with a third party; (2) AT&T’s knowledge of the contract; (3) that  
12 AT&T engaged in intentional acts designed to induce a breach of the contract; (4) actual breach;  
13 and (5) resulting damages. *See Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212,  
14 237-38 (4th Dist. 2005). Jensen cannot proffer evidence to support any of these elements: it has  
15 not identified any Jensen contract of which AT&T had knowledge; it has not identified any  
16 tortious acts taken to induce a breach of any such a contract; it has not proffered evidence of  
17 breach; and it has not claimed any resulting damages. AT&T is entitled to judgment on the ninth  
18 claim for relief.

19 Likewise, to establish a claim for tortious interference with prospective economic  
20 advantage, Jensen must show the existence of “an economic relationship between it and a third  
21 party that carries a probability of future economic benefit to the plaintiff, defendant’s knowledge  
22 of the relationship, intentional acts by the defendant designed to disrupt the relationship, actual  
23 disruption of the relationship, and economic harm to the plaintiff.” *Stevenson Real Estate Servs.,*  
24 *Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App. 4th 1215, 1220 (2d Dist. 2006).  
25 Further, the plaintiff must establish that the defendant’s conduct was “wrongful by some measure  
26 beyond the fact of the interference itself,” *i.e.*, that the conduct “is proscribed by some  
27 constitutional, statutory, regulatory, common law, or other determinable legal standard.” *Id.*

1 (internal quotation marks omitted) (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11  
2 Cal. 4th 376, 392-93 (1995); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159  
3 (2003)). Jensen cannot proffer evidence to support this claim. While it has identified in  
4 discovery responses contractors that allegedly failed to purchase Jensen vaults as a result of the  
5 "Oldcastle-only policy," it has not proffered any evidence that AT&T had knowledge of any such  
6 relationship. Nor has Jensen proffered evidence of intentional acts on the part of AT&T targeted  
7 specifically at disruption of any relationship. Moreover, because Jensen's antitrust claims fail,  
8 Jensen cannot prove that AT&T's conduct was "independently wrongful." *Stevenson Real Estate*,  
9 138 Cal. App. 4th at 1220 (internal quotation marks omitted). AT&T is entitled to judgment on  
10 the tenth claim for relief.

11 **2. Plaintiff Cannot Proffer Evidence That AT&T Defamed Jensen**

12 Finally, Jensen's eleventh claim for relief is for commercial defamation. Commercial  
13 defamation – commonly referred to as "trade libel" – is "publication of matter disparaging the  
14 quality of another's property, which the publisher should recognize is likely to cause pecuniary  
15 loss to the owner." *Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 384 (4th Dist.  
16 2004) (internal quotation marks omitted). "The *sina qua non* of recovery for defamation . . . is the  
17 existence of falsehood." *Id.* (internal quotation marks omitted). Jensen has not proffered any  
18 evidence that AT&T made any false statement concerning Jensen's products. AT&T is entitled to  
19 judgment on the eleventh claim for relief.

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**CONCLUSION**

The Court should grant AT&T judgment as a matter of law and dismiss the complaint.

Dated: July 25, 2008

Respectfully submitted,

AT&T Services, Inc. -- Legal Dept.

By:



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# EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JENSEN ENTERPRISES INC.,

No. C 06-247 SI

Plaintiff,

**ORDER GRANTING DEFENDANTS'  
MOTIONS FOR SUMMARY  
JUDGMENT; DENYING ALL OTHER  
MOTIONS AS MOOT**

v.

OLDCASTLE PRECAST INC., *et al.*,

Defendants.

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Various motions are pending before the Court.<sup>1</sup> For the reasons set out below, the Court concludes that plaintiff's federal and state antitrust claims fail because plaintiff cannot prove harm to competition in any market for vault sales, and because plaintiff cannot prove that it has suffered antitrust injury. Plaintiff's common law tortious interference claims fail for the same reason, and plaintiff's common law commercial defamation claim against AT&T fails for lack of evidence. Accordingly, the Court GRANTS defendants' motions for summary judgment and DENIES all other motions as moot.

**BACKGROUND<sup>2</sup>**

**1. Telephone vault market**

Plaintiff Jensen Enterprises Inc. ("Jensen") manufactures and sells precast concrete vaults that are used by telephone companies to connect newly constructed homes and businesses to the existing

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<sup>1</sup> Presently pending are: Plaintiff's motion to file fifth amended complaint (Docket No. 335); defendant Oldcastle's motion for summary judgment (Docket No. 346); defendant AT&T's motion for summary judgment (Docket No. 349); plaintiff's motion for partial summary judgment (Docket No. 355); and plaintiff's motion for adverse jury inference (Docket No. 358).

<sup>2</sup> The Court notes that the parties dispute a number of facts in this case. Because the Court is granting defendants' motions for summary judgment, the Court draws all factual inferences in favor of plaintiff.

1 land-line telephone network. The vaults are underground rooms that contain telephone equipment and  
2 wiring and serve as modern replacements for traditional telephone poles. According to Jensen, these  
3 vaults are an “indispensable part of the modern-day telecommunications infrastructure.” Fourth  
4 Amended Complaint (“FAC”) ¶ 45. Defendant Oldcastle, Inc. (“Oldcastle”) also manufactures the  
5 vaults and is a direct competitor of Jensen. Defendants Pacific Bell, Nevada Bell and SBC Services  
6 (collectively referred to as “AT&T”)<sup>3</sup> are allegedly the sole providers of land-line telephone service in  
7 most of California and Nevada. FAC ¶ 11.

8 The parties largely agree that the market for telephone vaults in California and Nevada works  
9 in the following way. When a new property is constructed, the vaults are purchased and installed either  
10 by the property developer or, on infrequent occasions, by AT&T itself. When a developer performs the  
11 installation, the developer is typically required to resell the installed vault to AT&T before AT&T will  
12 provide land-line telephone service to the property. For many years, Jensen sold vaults to AT&T in  
13 California and Nevada, primarily through developers but also through direct sales. In 2000, AT&T  
14 offered Jensen a new contract covering direct sales in California. Jensen alleges that the proposed  
15 contract contained “onerous, one-sided provisions” that Jensen could not reasonably accept given  
16 prevailing market conditions. In particular, the contract purportedly required Jensen to offer blanket  
17 indemnities to AT&T, a 20 year warranty, and to make direct sales to AT&T at unreasonably low prices.  
18 Although Jensen rejected the offer, Oldcastle accepted a contract on similar terms in 2002. The contract  
19 had a two year term from November 12, 2002 through November 14, 2004. The contract was amended  
20 in May 2005 extending the contract to December 31, 2006, and again in January 2006 to extend the  
21 contract to October 31, 2007.<sup>4</sup> The amendments also affected pricing, as discussed below.

22 The parties agree that it was expected that under the Oldcastle-AT&T contract, AT&T would  
23 purchase most of the vaults installed in its rights of way in California directly from Oldcastle, and not  
24 through contractors or developers. For reasons that are not entirely clear, this did not actually occur,

25 \_\_\_\_\_  
26 <sup>3</sup> As a result of various mergers, all three defendants are now affiliates of AT&T.

27 <sup>4</sup> On October 19, 2007, AT&T issued a new RFQ to replace the expiring 2006 contract. Kozul  
28 Decl. ¶ 11. Jensen did not bid for the business. *Id.* A new supplier, Teichert Construction, submitted  
a bid, as did Oldcastle. *Id.* On May 29, 2008, Teichert was awarded the contract for Northern  
California, and Oldcastle was awarded the contract for Southern California and Nevada. *Id.*

1 and between 2002 and 2004, developers and contractors continued to purchase vaults from Oldcastle  
2 and its competitors, including Jensen, and then resell those vaults to AT&T. Defendants state that  
3 Oldcastle felt it was not receiving the benefit of its contract with AT&T in California, and in  
4 approximately mid-2003, Oldcastle started charging contractors and developers the “market price” for  
5 vaults, and only honoring the contract price for direct sales to SBC. Scott Decl. ¶ 24 (Docket No. 173).  
6 Oldcastle complained to SBC about this state of affairs in 2003 and 2004.

7 In July 2004, AT&T issued specifications to property developers and their contractors informing  
8 them that they must use Oldcastle vaults when connecting their property developments to AT&T’s  
9 landline network (with a few limited exceptions). AT&T did not monitor the prices that Oldcastle  
10 charged developers, and it appears that between mid-2003 and at least August 1, 2005, Oldcastle  
11 charged developers higher prices than the AT&T reimbursement rate. On January 18, 2006, AT&T and  
12 Oldcastle amended the contract that imposed uniform pricing for all AT&T vaults, with pricing given  
13 retroactive effect to August 1, 2005. After this lawsuit was filed, AT&T implemented its “Oldcastle-  
14 only” policy in Nevada.

15 Plaintiff claims that Oldcastle and AT&T conspired to exclude other sellers from the two  
16 relevant markets, which Jensen defines as “[t]he sale of telephone vaults to property developers and  
17 contractors for the purpose of connecting properties to the Wireline Network” in both California and  
18 Nevada. FAC ¶ 23(1)-(2). Plaintiff alleges that as a result of the Oldcastle-AT&T arrangement,  
19 Oldcastle gained a monopoly in selling vaults to the “captive” developers, and AT&T was able to justify  
20 its low reimbursement rates by reference to the low prices for direct sales contained in the Oldcastle-  
21 AT&T contract. After extensive discovery and expert analysis discussed *infra*, the evidence shows that  
22 Oldcastle did not in fact charge developers supra-competitive prices for vaults. The evidence is disputed  
23 regarding AT&T’s reimbursement practices; Jensen contends that AT&T used the “Oldcastle price list”  
24 to set its reimbursement rates, while defendants contend that AT&T’s reimbursement practices varied  
25 widely depending on region, that several regions use the Oldcastle contract prices in varying ways (e.g.,  
26 reimbursing at Oldcastle contract prices plus 25% or using Oldcastle prices as a ceiling on  
27 reimbursement rates), and that in many regions the reimbursement rates have no connection to the  
28 Oldcastle contract prices.

1    **2.     Electrical vault market**

2           Jensen and Oldcastle also produce precast concrete vaults for electric utilities. Jensen alleges  
3 that Oldcastle has been using the excess profits generated from its arrangement with AT&T in order to  
4 significantly lower its prices on electrical vaults in northern California. FAC ¶ 64. Because it is  
5 convenient for developers to choose the same supplier for both telephone and electric vaults, Oldcastle's  
6 alleged predatory pricing, combined with its purported monopoly of the telephone vault market,  
7 allegedly threatens the market for electrical vaults. *Id.* ¶¶ 108, 116.

8  
9    **3.     This lawsuit**

10           In January 2006, Jensen initiated this lawsuit against Oldcastle and AT&T. Several amended  
11 complaints followed, culminating in February 2007 with a fourth amended complaint which lists the  
12 following twelve causes of action against defendants: (1) Section 1 of the Sherman Antitrust Act,  
13 unreasonable restraints of trade; (2) Section 1 of the Sherman Act, improper refusal to deal; (3) Section  
14 2 of the Sherman Act, monopolization (against Oldcastle only); (4) Section 2 of the Sherman Act,  
15 conspiracy to monopolize; (5) Section 2 of the Sherman Act, attempted monopolization (against  
16 Oldcastle only); (6) Section 26 of the Sherman Act, Injunctive Relief; (7) California Cartwright Act;  
17 (8) Nevada Unfair Trade Practice Act; (9) tortious interference with contracts; (10) tortious interference  
18 with prospective business opportunity; (11) commercial defamation (against SBC); and (12) Section 14  
19 of the Sherman Act, improper exclusive supplier contract (against Oldcastle only).

20           In July 2007, the Court denied defendants' first motions for summary judgment. Those motions  
21 focused largely on the definition of the relevant markets, and discovery had been limited to that issue  
22 at the time those summary judgment motions were filed. In denying those motions, the Court held that  
23 there were disputed issues of fact sufficient to defeat summary judgment on the question of the proper  
24 market definitions. The Court also rejected defendants' arguments that Jensen was simply a  
25 disappointed competitor who lost a contract to another bidder, and therefore had not suffered antitrust  
26 injury. The Court noted that even in those circumstances, there can be antitrust injury if there is harm  
27 to competition and/or consumers. *See* July 6, 2007 Order at 8-9, citing *Ferguson v. Greater Pocatello*  
28 *Chamber of Commerce, Inc.*, 848 F.2d 976, 982 (9th Cir. 1988) (no injury where defendants put on

1 evidence that competition not harmed and where plaintiff did not show that consumers were harmed),  
2 and *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 374 (9th Cir. 2003) (plaintiff had  
3 antitrust standing to challenge joint venture where “injury alleged flowed from the discontinuation of  
4 the only competing product on the market by agreement between the only two competitors in the  
5 market.”).

6 Defendants contend that the complexion of this case has changed in critical respects since the  
7 first round of summary judgment motions in July 2007. The Court agrees.<sup>5</sup> At that time, Jensen alleged  
8 and argued that the Oldcastle-AT&T agreement had raised prices that developers paid in the alleged  
9 market for AT&T vaults. For example, Jensen alleged that “Oldcastle, armed with this monopoly  
10 concession, forces the property developers to pay unreasonably high prices for the vaults – prices that  
11 Oldcastle could not charge if Jensen and others were allowed to compete against it.” FAC at 3:5-7; *see*  
12 *also id.* at ¶ 29 (“Oldcastle, as the only authorized seller, requires property developers to pay excessively  
13 high prices for its vaults – prices it could never charge if it had to face competition from Jensen and  
14 others.”); *id.* at ¶ 30 (“In this manner, Oldcastle has enjoyed windfall profits from the prices it can  
15 charge because it is the only seller . . . .”); *id.* at ¶ 31 (“property developers have been forced to pay  
16 higher prices and receive lower reimbursements”); *id.* at ¶ 33 (Oldcastle “charge[s] higher prices that  
17 would be uncompetitive if others could compete against it.”); *id.* at ¶ 63 (“Since obtaining the monopoly  
18 concession in the California Market, Oldcastle has charged developers comparatively higher prices for  
19 its telephone vaults . . . .”).

20 Similarly, in opposing defendants’ first motions for summary judgment, plaintiff’s expert stated,  
21 “In situations where AT&T’s requirement that developers purchase AT&T telephone vaults only from  
22 Oldcastle was in effect, basic principles of economics show that Oldcastle would be able to charge  
23 higher prices and make more sales than if developers could have shopped from two or more suppliers.  
24 It is a premise of my analysis that Oldcastle received higher prices than it would have absent AT&T’s  
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26 <sup>5</sup> Indeed, although plaintiff contends that this case has not changed, that assertion is undercut  
27 by plaintiff’s desire to file a fifth amended complaint, which, *inter alia*, no longer alleges that Oldcastle  
28 charged developers excessive prices for vaults, and instead alleges that developers were forced to pay  
higher “net” prices as a result of the Oldcastle-AT&T arrangement due to AT&T’s low reimbursement  
rates.

1 requirement that developers purchase only from Oldcastle.” May 18, 2007 Robert E. Hall Decl. ¶ 8.  
2 Dr. Hall also stated that “[t]he exclusion of competing sellers from a market achieved by granting of  
3 exclusivity to one seller is harmful to the excluded seller, in terms of lost profit, as well as to the buyers  
4 who pay higher prices.” *Id.* ¶ 13; *see also id.* at ¶ 23 (“The conduct described in the Complaint results  
5 in a low price that is beneficial to the buyers, AT&T, but not costly to the winning seller, Oldcastle, who  
6 benefitted from becoming the winner and having its exclusive arrangement enforced by AT&T, so it  
7 enjoyed the high prices it could extract from developers thanks to the exclusive position AT&T granted  
8 as part of the deal.”). Jensen also argued that Oldcastle sold vaults to property developers at  
9 “uncontrolled prices.”<sup>6</sup>

10 Since the July 2007 summary judgment order, the parties have completed discovery. It is now  
11 undisputed that Oldcastle did not charge developers supra-competitive prices for vaults. Jensen’s  
12 economic and antitrust expert, Dr. Hall, analyzed the prices charged by Oldcastle, Jensen, and other  
13 suppliers, and concluded:

14 Over the entire period 2002 through 2006, I find essentially no evidence that Oldcastle’s  
15 prices for AT&T Vaults behaved differently from the other categories. They rose a bit  
16 less than Jensen’s prices for AT&T vaults, exactly the same compared to Jensen’s  
17 electric vaults, and a bit more than Oldcastle’s electric vaults. Evidence for the  
intervening years is similar. I conclude that Oldcastle’s AT&T Vault prices were not  
affected by the Oldcastle-only policy.

18 May 2, 2008 Hall Report ¶ 72. Mr. Hall confirmed this conclusion in his deposition. *See* Hall Depo.  
19 at 184:5-11 (“Oldcastle unambiguously exercised its market power in the sense of gaining the extra  
20 volume. The question of whether it exercised market power to raise prices, it appears that they did not  
21 in a way that shows up in the statistical analysis that I did. Although they had the monopoly power, they  
22 chose not to exercise it.”). In light of the evidence showing that Oldcastle’s prices did not increase as

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23  
24 <sup>6</sup> During the first round of summary judgment briefing, the parties did not present any specific  
25 evidence regarding how Oldcastle’s prices to developers compared to a “competitive” price; instead,  
26 Jensen simply asserted that Oldcastle charged developers more than it charged AT&T for direct sales,  
27 and that property developers were held captive because they were forced to purchase vaults from  
28 Oldcastle and sell them at a loss to AT&T. Oldcastle’s West Region President Michael Scott filed a  
declaration stating that for approximately six to nine months after the November 2002 execution of the  
Oldcastle-SBC contract, Oldcastle offered the contract price to anyone who ordered a vault meeting  
SBC specifications. Scott Decl. ¶ 22. (Docket No. 173). Mr. Scott stated that in approximately mid-  
2003, Oldcastle decided to honor the contract price only for direct sales to SBC, and to “charge market  
price for sales to contractors.” *Id.* at ¶ 24.

1 a result of the Oldcastle-AT&T contract, plaintiff's theory of antitrust violation and injury has slightly  
2 shifted. Jensen now contends that the "net" price that developers paid for vaults increased as a result  
3 of the Oldcastle-AT&T contract because AT&T used the Oldcastle "price list" as the basis for its low  
4 reimbursements. Under this theory, "[t]he antitrust harm from the challenged conduct arises entirely  
5 from the under-reimbursement of developers. Had AT&T fully reimbursed developers – as would have  
6 occurred under conduct that avoided the antitrust harm – the Oldcastle-only policy would not have had  
7 an anticompetitive effect." May 2, 2008 Hall Report ¶ 32.

8 Now before the Court are defendants' second motions for summary judgment, plaintiff's motion  
9 for partial summary judgment, plaintiff's motion for a jury instruction authorizing an adverse inference,  
10 and plaintiff's motion for leave to file a fifth amended complaint. Defendants contend, *inter alia*, that  
11 Jensen's antitrust claims fail because there was no harm to competition in the alleged vault market, and  
12 that Jensen cannot prove that it has suffered antitrust injury.

#### 14 LEGAL STANDARD

15 Summary adjudication is proper when "the pleadings, depositions, answers to interrogatories,  
16 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any  
17 material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.  
18 56(c). In a motion for summary judgment, "[if] the moving party for summary judgment meets its initial  
19 burden of identifying for the court those portions of the materials on file that it believes demonstrate the  
20 absence of any genuine issues of material fact, the burden of production then shifts so that the non-  
21 moving party must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that  
22 there is a genuine issue for trial." See *T.W. Elec. Service, Inc., v. Pac. Elec. Contractors Ass'n*, 809 F.2d  
23 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

24 In judging evidence at the summary judgment stage, the Court does not make credibility  
25 determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the  
26 non-moving party. See *T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v.*  
27 *Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).  
28 The evidence presented by the parties must be admissible. See Fed. R. Civ. P. 56(e). Conclusory,

1 speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and  
2 defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.  
3 1979).

## 4 5 DISCUSSION

### 6 1. Antitrust claims

7 Defendants contend that plaintiff's federal and state<sup>7</sup> antitrust claims fail because the evidence  
8 now shows that Oldcastle did not charge developers supra-competitive prices for vaults, and instead the  
9 alleged injury flows solely from AT&T's reimbursement practices. Oldcastle argues that there is no  
10 evidence showing that Oldcastle participated in setting any of AT&T's reimbursement practices, and  
11 that to the contrary, AT&T unilaterally sets its own reimbursement rates. AT&T defends its  
12 reimbursement practices as a lawful exercise of its market power as a natural monopolist. In addition,  
13 AT&T argues that even if AT&T has a regulatory obligation to reimburse developers for their costs, and  
14 even if AT&T's agreement with Oldcastle somehow assisted AT&T in evading that regulatory  
15 obligation, these facts do not amount to an antitrust claim.

16 AT&T contends that *NYNEX Corporation v. Discon, Incorporation*, 525 U.S. 128 (1998), is  
17 dispositive. In *Discon*, a regulated local telephone company with alleged monopoly power switched  
18 its purchases of "removal services"<sup>8</sup> from the plaintiff, Discon, to Discon's competitor, AT&T  
19 Technologies, "as part of an attempt to defraud local telephone service customers by hoodwinking  
20 regulators." *Id.* at 132. Under the alleged scheme, the local telephone company paid AT&T  
21 Technologies more than Discon would have charged for similar removal services: "It did so because it  
22 could pass the higher prices on to New York Telephone, which in turn could pass those prices on to  
23 telephone consumers in the form of higher regulatory-agency-approved telephone service charges. At  
24

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25 <sup>7</sup> The requirements for maintaining an antitrust suit under California and Nevada law mirror the  
26 federal requirements. *See Kentmaster Mfg. Co. v. Jarvis Prods. Corp.*, 146 F.3d 691, 695 (9th  
27 Cir.1998), as amended 164 F.3d 1243 (9th Cir. 1999); Nev. Rev. Stat. § 598A.050 (provisions of  
28 Nevada Unfair Trade Practice Act shall be "construed in harmony with prevailing interpretations of the  
federal antitrust statutes.").

<sup>8</sup> "Removal services" is the business of removing and disposing of old telephone switching  
equipment. *Id.* at 131.

1 the end of the year, [the telephone company] would receive a special rebate from AT&T Technologies  
2 . . . .” *Id.* Discon alleged that it refused to participate in this fraudulent scheme, with the result that the  
3 telephone company would not purchase from Discon, forcing Discon out of business. *Id.*

4 The Supreme Court held that these allegations did not state a claim for *per se* illegality under  
5 Section 1 of the Sherman Act, nor did they support a claim for conspiracy to monopolize the market for  
6 removal services. The Court analyzed whether “an antitrust court considering an agreement by a buyer  
7 to purchase goods or services from one supplier rather than another should (after examining the buyer’s  
8 reasons or justifications) apply the *per se* rule if it finds no legitimate business reason for that purchasing  
9 decision.” *Id.* at 135. The Court concluded that no *per se* rule applied, and that the plaintiff must allege  
10 and prove harm, not just to a single competitor, but to competition itself. *Id.* With regard to the specific  
11 alleged fraudulent scheme, the Court stated,

12 We concede Discon’s claim that the petitioners’ behavior hurt consumers by raising  
13 telephone rates. But that consumer injury naturally flowed not so much from a less  
14 competitive market for removal services, as from the exercise of market power that is  
15 *lawfully* in the hands of a monopolist, namely, New York Telephone, combined with a  
deception worked upon the regulatory agency that prevented the agency from controlling  
New York Telephone’s exercise of its monopoly power.

16 To apply the *per se* rule here – where the buyer’s decision, though not made for  
17 competitive reasons, composes part of a regulatory fraud – transform cases involving  
business behavior that is improper for various reasons, say, cases involving nepotism or  
personal pique, into treble-damages antitrust cases.

18 *Id.* at 136-37 (emphasis in original). On remand, the district court dismissed Discon’s companion rule-  
19 of-reason antitrust claim. The court analyzed Discon’s allegations that the alleged conspiracy caused  
20 anticompetitive harm in the form of consumer injury through alleged overcharging of captive ratepayers.  
21 *Discon Inc. v. NYNEX Corp.*, 86 F. Supp. 2d 154, 163 (W.D.N.Y. 2000). Citing the Supreme Court’s  
22 decision, the district court held that “regulatory misconduct – even if it results in inappropriately high  
23 charges to telephone customers – is not equivalent to a violation of the Sherman Act. Both may harm  
24 consumers, but the appropriate legal claims and remedies arise from different bodies of law.” *Id.* at 164.  
25 The district court further noted that “any such harm occurred in a market – the *telephone* services (not  
26 removal services) market – which is not even at issue in this case.” *Id.* at 164 n.9 (emphasis in original).

27 Plaintiff argues that *Discon* is distinguishable because here competition has been “destroyed”  
28 in the relevant market of sales of vaults, while in *Discon* there was no discernible harm to competition

1 for any good or service. However, like Jensen, the *Discon* plaintiff alleged that competition had been  
2 harmed because it could no longer sell its goods or services in the non-regulated market for removal  
3 services.<sup>9</sup> As the Supreme Court held, there must be injury to competition, not just to a competitor, to  
4 state a claim for antitrust injury. See *Discon*, 525 U.S. at 135; *Brown Shoe Co. v. United States*, 370  
5 U.S. 294, 344 (1962); see also *Cargill, Inc. v. Montfort of Colorado*, 479 U.S. 104, 116 (1986) (“The  
6 kind of competition that [plaintiff] alleges here, competition for increased market share, is not activity  
7 forbidden by the antitrust laws.”).

8 “[T]he antitrust laws are only concerned with acts that harm allocative efficiency and raise the  
9 price of goods above their competitive level or diminish their quality.” *Pool Water Prods. v. Olin Corp.*,  
10 258 F.3d 1024, 1034 (9th Cir. 2001) (internal citation and quotation omitted); see also *Nelson v. Monroe*  
11 *Reg’l Med. Ctr.*, 925 F.2d 1555, 1564 (7th Cir. 1991) (Antitrust injury “means injury from higher prices  
12 or lower output, the principal vices proscribed by the antitrust laws.”). Jensen concedes that Oldcastle  
13 did not charge developers supra-competitive prices for vaults. However, Jensen argues that there is  
14 antitrust injury because “net” prices for vaults increased due to the low reimbursement rates. Jensen  
15 does not cite any authority for the proposition that the failure to receive full or reasonable  
16 reimbursement for a product is treated as an elevation of the price of the product for antitrust purposes.

17 The Court concludes that under *Discon*, Jensen’s antitrust claims fail. The evidence is  
18 undisputed that Oldcastle did not charge supra-competitive prices for vaults in the only markets alleged  
19 in the complaint: *the sale of telephone vaults to property developers and contractors for the purpose*  
20 *of connecting properties to the Wireline Network in both California and Nevada.*<sup>10</sup> Instead, as in  
21 *Discon*, the alleged injury occurs entirely as a result of a different transaction involving alleged  
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23 <sup>9</sup> On remand, the district court held that *Discon*’s alleged relevant market – telephone equipment  
24 removal services for NYNEX – was too narrow, and that the proper relevant market was the total  
25 demand for telephone equipment removal services. *Discon*, 86 F. Supp. 2d at 160-61. Jensen similarly  
26 alleges a narrow antitrust market consisting of the sale of telephone vaults to property developers and  
contractors for the purpose of connecting properties to AT&T’s wireline network. The Court need not  
resolve the question of the proper antitrust market because even assuming that Jensen’s definition is  
correct, under *Discon* there is no antitrust violation.

27 <sup>10</sup> Jensen does assert that Oldcastle imposed unreasonable indemnity requirements and delivery  
28 costs (in Nevada only) on the developers. However, neither Jensen nor Dr. Hall argues that the  
indemnity requirements and delivery costs are evidence of supra-competitive prices.

1 regulatory misconduct. While AT&T may have violated a regulatory obligation to reasonably reimburse  
2 developers and contractors for the cost of the vaults – a question that the Court need not resolve – such  
3 a regulatory violation is not tantamount to an antitrust violation. *See Discon*, 525 U.S. at 136-37.

4 Relatedly, the Court concludes that Jensen’s antitrust claims fail because Jensen cannot prove  
5 that it suffered any antitrust injury. “To show antitrust injury, a plaintiff must prove that his loss flows  
6 from an anticompetitive aspect or effect of the defendant’s behavior, since it is inimical to the antitrust  
7 laws to award damages for losses stemming from acts that do not hurt competition. If the injury flows  
8 from aspects of the defendant’s conduct that are beneficial or neutral to competition, there is no antitrust  
9 injury, even if the defendant’s conduct is illegal per se.” *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433  
10 (9th Cir. 1995) (“*Rebel I*”) (internal citation omitted) (emphasis added). Jensen does not contend that  
11 its exclusion from the vault market as a result of the Oldcastle-AT&T contract is unlawful in itself. *See*  
12 May 2, 2008 Hall Report ¶ 32 (“Had AT&T fully reimbursed developers . . . the Oldcastle-only policy  
13 would not have had an anticompetitive effect.”). If AT&T had designated Oldcastle as its exclusive  
14 supplier while fully reimbursing developers and contractors – an arrangement that Jensen says would  
15 have been legal and without antitrust implications – Jensen still would have suffered the same harm (lost  
16 profits) due to its legal exclusion from the market. *See Lucas Auto. Eng’g, Inc. v.*  
17 *Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1233 (9th Cir. 1998) (no antitrust standing where “As a  
18 competitor of Coker Tire, Lucas Automotive’s alleged injury is that it has been foreclosed from serving  
19 as a primary-line supplier of vintage tires. However, Lucas Automotive would have suffered the same  
20 injury had a small business acquired the exclusive right to manufacture and distribute Firestone Tires.”).

21 The Court GRANTS defendant’s motion for summary judgment on the federal and state antitrust  
22 claims.

23  
24 **2. Common law claims**

25 **A. Tortious interference**

26 The ninth claim for relief alleges tortious interference with contracts, and the tenth claim for  
27 relief alleges tortious interference with prospective interference with prospective economic advantage.

28 The fourth amended complaint alleges that through the “exclusive vendor/reimbursement policy”

1 defendants have disrupted, impaired, interfered with, and caused the breach of contracts made between  
2 Jensen and various property developers and their contractors. FAC ¶ 123.

3 The elements of a claim for tortious interference with contract are (1) the existence of a valid  
4 contract with a third party; (2) defendants' knowledge of that contract; (3) intentional acts by defendants  
5 designed to induce a breach of the contract; (4) actual breach; and (5) resulting damages. *See Sole*  
6 *Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212, 237-38 (2005). To maintain a claims for  
7 tortious interference with prospective economic advantage, Jensen must similarly show the existence  
8 of "an economic relationship between it and a third party that carries a probability of future economic  
9 benefit to the plaintiff, defendant's knowledge of the relationship, intentional acts by the defendant to  
10 disrupt the relationship, actual disruption of the relationship, and economic harm to the plaintiff."  
11 *Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App. 4th 1215,  
12 1220 (2006). In addition, Jensen must show that defendants' conduct was "wrongful by some measure  
13 beyond the fact of the interference itself, [that the conduct] is proscribed by some constitutional  
14 statutory, regulatory, common law, or other determinable legal standard." *Id.*

15 Both defendants argue that Jensen's claims fail because Jensen has not identified any contract  
16 of which defendants had knowledge or with which defendants intended to interfere, and because Jensen  
17 has not demonstrated any tortious or wrongful conduct. Jensen's opposition simply asserts that since  
18 Jensen can maintain its antitrust claims, it can also maintain the tortious interference claims. *See*  
19 *Plaintiff's Opposition* at 50.<sup>11</sup>

20 The Court agrees with plaintiff that, under the facts of this case, plaintiff's tortious interference  
21 claims depend on its antitrust claims. Since the Court has determined that plaintiff cannot establish  
22 antitrust violation or antitrust injury, plaintiff has not established the tortious or wrongful conduct  
23 essential to a tortious interference claim. The Court GRANTS defendant's motion for summary  
24 judgment on the tortious interference claims.

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28 <sup>11</sup> Plaintiff's opposition reads, in its entirety: "Since Jensen can maintain its federal antitrust claims, it can likewise maintain its state antitrust claims and claims for tortious interference."



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DENIES as moot all other pending motions. (Docket Nos. 355, 346, 349, 355, 358). The Court does not rule on defendants' evidentiary objections because even assuming that the evidence at issue is admissible, the Court would reach the same result.

**IT IS SO ORDERED.**

Dated: February 23, 2009

  
\_\_\_\_\_  
SUSAN ILLSTON  
United States District Judge

1 **CERTIFICATE OF SERVICE**

2  
3 I hereby certify that I have this day served a copy of the **RESPONSE OF**  
4 **PACIFIC BELL TELEPHONE COMPANY d/b/a AT&T CALIFORNIA (U 1001 C) TO**  
5 **COMPLAINANTS' MOTION TO EXCLUDE CONTRARY ASSERTIONS UNDER THE**  
6 **DOCTRINE OF JUDICIAL ESTOPPEL**, filed this day in **C.09-08-021**, by electronic mail  
7 and/or by hand-delivery to the persons on the attached official Service List.  
8

9 Executed this 18<sup>th</sup> day of December 2009, at San Francisco, California.

10 **AT&T CALIFORNIA**  
11 525 Market Street, 20th Floor  
12 San Francisco, CA 94105

13 \_\_\_\_\_  
14 /s/  
15 Hugh Osborne  
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