UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Applera Corporation and Roche Molecular Systems, Inc., plaintiffs,	:	
v.	:	**3:98cv1201 (JBA)**
MJ Research Inc. and Michael and John Finney, defendants.	:	

Rulings on Motion of MJ Research, Inc. for Summary Judgment Determining that Plaintiffs Have Engaged in Price Fixing [Doc. # 1141]; and Plaintiffs' Cross Motion for Partial Summary Judgment Determining that MJ Lacks Standing to Assert Horizontal Price Fixing and that Applera's Supplier Licenses Are Not a Price Fixing Arrangement and Opposition to Defendants' Motion for Summary Judgment Determining that Plaintiffs Have Engaged in Price Fixing [Doc. # 1163]

In its counterclaim MJ Research, Inc. ("MJ") charges Applera Corporation ("Applera")[1] and Roche Molecular Systems ("Roche") with horizontal price fixing, alleging that Applera's Supplier Authorization Program ("SAP")[2] coordinates the pricing of the

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[1]On June 28, 2002, Applera Corporation and Perkin-Elmer ("PE") Corporation, its wholly owned subsidiary, entered into an agreement and liquidation plan in which PE Corporation was liquidated and its assets, including intellectual property rights, were transferred to Applera Corporation. On June 3, 2003, this Court granted plaintiff's motion to amend the caption in this lawsuit to reflect the official change in Plaintiff's identity from "PE Corporation" to "Applera Corporation." See [Docs. # 664, 674]. For simplicity, this Court will refer to plaintiff/counterclaim defendant as Applera, even when referring to pre-2002 events.

[2]A detailed description of the Supplier Authorization Program is contained in this Court's prior rulings, and the Court assumes familiarity with its basic components. See, e.g. Ruling on Plaintiff's Motion in Limine to Exclude MJ's Evidence and Arguments Claiming PCR Rights are Tied to Authorized Thermal

thermal cyclers of each supplier in an effort to raise prices and restrain competition in the market for thermal cyclers. The parties have filed cross motions for summary judgment on this issue. For the reasons that follow, summary judgment in Applera's favor is GRANTED.

I. Background

Applera and MJ Research, Inc. are competing manufacturers and suppliers of thermal cycler machines, which are instruments capable of performing automated PCR.[3] Applera holds the patents for the PCR process in certain fields, and, beginning in 1994, instituted a licensing program granting rights for the performance of PCR on a thermal cycler, or automated PCR, in Applera's fields.[4] The Supplier Authorization Program ("SAP"), the licensing program aimed at suppliers of thermal cyclers, serves as a means of administering the licensing of end users to perform PCR on thermal cyclers purchased, and allows suppliers to promote their thermal cyclers for PCR without risk of liability

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Cyclers, January 28, 2004 [Doc. # 874].

[3]PCR, or "polymerase chain reaction," is a method of replicating DNA for which the inventor received a Nobel Prize.

[4]Applera's '188 patent (U.S. Patent No. 4,965,188) covers the performance of PCR on a thermal cycler by covering "the performance of PCR using a thermostable enzyme, in which the heating and cooling steps required by PCR . . . are automated by a machine that controls temperature levels, transitions from one temperature to another, and the timing of the temperature levels." Joint Stipulation Regarding Claim Construction of the '202, '195, and '188 Patents [Doc. # 640] at ¶ 4.

for inducing infringement of Applera's PCR process patents.

Applera aggressively sought thermal cycler suppliers' participation in the SAP, accusing reluctant suppliers of inducing infringement of its process patents and threatening litigation. Applera made clear its intention to license all suppliers in the thermal cycler market, as it informed suppliers that it was adopting its licensing program "in response to inquiries from thermal cycler manufacturers," informed them that it was negotiating with other suppliers, and informed them when others joined the SAP. For example, Hanna Fischer, Director of Licensing for Applera, stated in a letter to thermal cycler supplier MWG Biotech GmbH that "I have given you our licensing terms with the clear indication that a number of other manufacturers have accepted licenses." Letter from Hanna Fischer to Bernhard Ganahl, July 21, 1998 [Doc. # 1140, Ex. 56].[5]

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[5]See also Letter from Hanna Fischer to Geoff Rampton, Director, PROTEAN PLC, Nov. 20, 1995 [Doc. # 1140, Ex. 48] ("[Applera] has already licensed three thermal cycler suppliers and, therefore, the financial terms of the Thermal Cycler Supplier Agreement are already set and no longer negotiable."); Letter from Hanna Fischer to Geoff Rampton, Director PROTEAN, Aug. 15, 1997 [Doc. # 1140, Ex. 57] ("Important changes affecting thermal cycler supplier licenses have occured since we last corresponded. European manufacturers Eppendorf and, perhaps more notable from your standpoint, Life Sciences International have concluded licenses."); Letter from Hanna Fischer to Michael Finney, MJ Research, Aug. 15, 1997 [Doc. # 1140, Ex. 58] ("Numerous of your competitors have taken licenses of this type, namely Stratagene, Takara Shuzo, Life Sciences International, Eppendorf and Sanyo."); Letter from Hanna Fischer to Richard Coy, Coy Corporation, Aug. 3, 1997 [Doc. # 1140, Ex. 59] ("Although negotiations with other companies are confidential, I can tell

Suppliers joining the SAP wanted assurances from Applera that Applera would enforce its patent rights and pursue other suppliers to join the SAP. As Joseph Smith, an executive with Applera, recalled in his deposition testimony, "I think it was [thermal cycler supplier] Hybaid that was saying, you know, 'If you're not going to go after and license other people, why should we license?'" Smith Dep., Jan. 12, 2000 [Doc. # 1140, Ex. 4] at 381. The supplier Scinics wrote to Applera, "[t]he information are needed before we make our final decision. 1) What kind of action are you willing to take to such a firm/company who is manufacturing Thermal Cyclers without your license. (For example, MJ Research, Techne)." E-mail from Mobutaka Araki, Scinics Corporation to Hanna Fischer, Jul. 6, 1999 [Doc. # 1140, Ex. 61]. The concern of these suppliers was that they not be "placed at a competitive disadvantage by paying these royalties." Letter of GR Rampton, PROTEAN PLC to Hanna Fischer , Aug. 18, 1995 [Doc. # 1140, Ex. 63]. <u>See</u> <u>also</u> Memorandum from John Corbett, Corbett Research to Hanna Fischer, Sept. 6, 1994 [Doc. # 1140, Ex. 64]. Hybaid, one of the first large thermal cycler manufacturers to sign on to the SAP, has explicitly stated that it joined the SAP on the assumption that other suppliers would be forced to join as well. <u>See</u> Affidavit of Simon J. Constantine,

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you that we are discussing licenses with other thermal cycler suppliers. . . .").

Jan. 15, 2001 [Doc. # 427] at ¶ 4 ("[W]e determined that it would be cost effective for Hybaid to pay authorisation fees rather than to litigate the validity of the Thermal Cycler Patents, particularly since we assumed other companies would also be forced to become 'authorised' . . . .").

After joining the SAP, several thermal cycler suppliers wrote to Applera, questioning why unauthorized thermal cyclers were still being sold on the market. Representatives from thermal cycler supplier Takara Shuro Co., Ltd., for example, wrote to Hanna Fischer, the licensing director at Applera, to express their concern that MJ, which continued to sell unlicensed thermal cyclers, remained on the market. See, e.g. Letter of Junichi Mineno, Takara Surzo Co., Ltd. to Hanna Fischer, June 4, 1996 [Doc. # 788, Ex. 7] ("We, the licensees, are bothered with other non-authorized cyclers like of MJ Research (we think they do not have been licenced). We expect they will be removed with your effort."); Letter from Hiroshi Kihara, Takara Shuro Co., Ltd. to Hanna Fischer, Aug. 6, 1996 [Doc. # 788, Ex. 7] ("We appreciate your effort on negotiating with the suppliers. But I would like to point out that both Stratagene and Sanyo are not the major suppliers of unauthorized thermal cyclers in the market. We really would like to see the major suppliers, such as MJ Research, Hybaid, to be removed from the market. I would appreciate if you could clarify the current situation with those suppliers.").[6] The supplier Hybaid told Applera in a letter that "[a]s a result of Perkin-Elmer's inaction, we have been placed at a severe competitive disadvantage vis-a-vis unauthorized manufacturers." Letter from Brian Wilkinson, Hybaid Ltd. to Mike Hunkapiller, Applera, February 1998 [Doc. # 788, Ex. 7] at PE 019356. Hybaid noted:

> At the time we entered this agreement, Perkin Elmer widely and aggressively publicized its right to these patents and its intent to stop any and all infringement of them by all means necessary, including active litigation as required. This threat . . . was a major factor in inducing us to be among the first to take a license from you despite our reservations as to the underlying patents. Seven months have passed since our license, and we find that, rather than aggressively pursuing infringers as indicated, Perkin Elmer has delayed taking action again and again, with the result that Hybaid has been placed at a severe competitive disadvantage with other manufacturers who do not have the burden of license payments to you. Indeed, Perkin Elmer's inaction has the effect of granting what amounts to a royalty-free license to these others.

Letter from Simon J. Constantine to Mike Hunkapiller, July 25, 1997 [Doc. # 788, Ex. 7] at PE 019456.

The supplier Stratagene similarly expressed concern to Applera about its competitive losses to unlicensed suppliers. <u>See</u> Letter from Brent W. Keller, Stratagene, to Hannah Fischer, July 8, 1998 [Doc. # 788, Ex. 7] at PE 022418. ("Stratagene has suffered a

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[6] The letter goes on to state: "As the Licensee of Thermal Cycler, I would like to express our great concern against your idea of to make the end users of unauthorized thermal cycler aware of personal contract. . . . If there is no detailed control method, I am sure that no end users would stop purchasing unauthorized thermal cyclers nor ask you to conclude the personal contract."

substantial competitive detriment at the hands of unlicensed manufacturers, such as MJ Research, who sell unlicensed thermal cyclers at prices well below those of Stratagene and place the responsibility for obtaining any necessary PCR license upon the purchaser. We have seen from your protracted refusal to proceed against companies such as MJ Research that Perkin-Elmer has chosen to acquiesce in this form of thermal cycler marketing . . . .").

Some suppliers deemed the licensing fees to be "unusually high," and stated that "[p]ayments as high as these do not seem justified as long as unlicensed competitors are free to operate unpunished and unhampered." Letter from Ernst Tennstedt, Eppendorf, to Hanna Fischer, Feb. 18, 1999 [Doc. # 1140, Ex. 37]. Other suppliers asked Applera to renegotiate the SAP fees because the unexpected existence of non-authorized thermal cycler manufacturers was creating price competition. For example, in a letter to Applera, supplier Sanyo stated:

> [W]e have seen more Non-Authorized units at by far cheaper prices from such competitors as MJ Research of the US and Techne of the UK . . . . We assume the price competition from Non-Authorized thermal cyclers is also felt by Perkin-Elmer, thus we need to increase the Authorized groups to fight with the Non-Authorized groups. One of the ways is that Sanyo is to look for the OEM customers for the product. By so doing, we can increase the group of the authorized cyclers to compete with MJ Research and Techne. We would like the current agreement to be modified to include the OEM brands. . . .The current license fee has put more cost pressure on Sanyo's market price than we had calculated at the time of the agreement because of the above Non-Authorized cyclers. We would like you to understand this

> and cooperate in making the substantial reduction of the license fee for the current product.

Letter from Yuichi Tamacki, Sanyo, to Hanna Fischer, Applied Biosystems, Feb. 26, 1996 [Doc. # 788, Ex. 7].

Between April 25, 1994 and June 15, 2003, sixteen thermal cycler suppliers in the market joined the SAP.[7] The SAP does not set the price at which the suppliers may sell their thermal cyclers. Instead, it imposes an "authorization" fee of

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[7]See Thermal Cycler Supplier Agreement between Applera and Takara, April 25, 1994 [Doc. # 923, Ex. 64] at PE 022732; Thermal Cycler Supplier Authorization Agreement between Applera and Stratagene, Jan. 1, 1995 [Doc. # 923, Ex. 63] at 022309; Thermal Cycler Supplier Agreement between Applera and Sanyo Electric Co., Ltd., June 1, 1995 [Doc. # 923, Ex. 60] at PE 021637; Thermal Cycler Supplier Agreement between Applera and Life Sciences International Plc (Hybaid), Dec. 27, 1996 [Doc. # 923, Ex. 55] at PE 19160; Thermal Cycler Authorization Agreement between Applera and Cold Spring Harbor Laboratory, Feb. 26, 1997 [Doc. # 923, Ex. 52] at PE 017539; Thermal Cycler Supplier Agreement between Applera and Eppendorf-Netheler-Hinz GmbH, June 1, 1997 [Doc. # 923, Ex. 53] at PE 017945; Thermal Cycler Supplier Authorization Agreement between Applera and Appligene Oncor, signed Feb. 26 and Mar. 8, 1998 [Doc. # 923, Ex. 49] at PE 016597; Thermal Cycler Supplier Agreement between Applera and Bio-Rad Laboratories, Inc., Apr. 1, 1998 [Doc. # 923, Ex. 50] at PE 017024; Thermal Cycler Supplier Authorization Agreement between Applera and Kaybee Engineering Ltd., Oct. 8, 1999 [Doc. # 923, Ex. 56] at PE 082979; Thermal Cycler Supplier Agreement between Applera and MWG Biotech AG, Aug. 1, 1999 [Doc. # 923, Ex. 58] at PE 083095; Thermal Cycler Agreement between Applera and Scinics Corp., Nov. 1, 1999 [Doc. # 923, Ex. 61] at PE 086316; Thermal Cycler Supplier Agreement between Applera and Cephoid, Apr. 15, 2000 [Doc. # 923, Ex. 51] at PE 105093; Thermal Cycler Supplier Authorization Agreement between Applera and GeneSystems, Sept. 1, 2002 [Doc. # 923, Ex. 54] at PE 108246; Thermal Cycler Supplier Agreement between Applera and Microcosm, Inc., October 16, 2002 [Doc. # 923, Ex. 57] at PE108222; Thermal Cycler Supplier Agreement between Applera and Smiths Detection, June 15, 2003 [Doc. # 923, Ex. 62] at PE 109222.

approximately $300-400 for each thermal cycler sold,[8] which allows the suppliers to promote their thermal cyclers for PCR use without risking inducing infringement, and permits them to pass along to their end users a license for the performance of PCR. As an April 1999 study commissioned by Applera reveals, competing suppliers participating in the SAP imposed a wide range of prices for thermal cyclers. See Thermal Cycler Competitive Review, April 1999 [Doc. # 1168, Ex. 4] at PE 088481-088488 (prices for PE Applied Biosystems' [Applera's] thermal cyclers ranging from $3,595 - $10,500; prices for Hybaid's thermal cyclers ranging from $1,995 - $7,995; prices for Stratagene thermal cyclers ranging from $4,495 - $11,375; prices for Eppendorf thermal cyclers ranging from $3,850 - $7,795).

The license fee was calculated on a per-thermal cycler basis, and while the SAP itself does not require that suppliers pass along the authorization and attendant license fee to all end users,[9] differential pricing of thermal cyclers based on whether

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[8]Suppliers were offered the process patent authorization both separately and in a package with instrument patent licenses. Applera's initial offer for the process rights was a $30,000 upfront issuance fee plus a fee of $400 per instrument, plus an additional $25/96 wells for instruments with greater than 96 wells. Some of the SAP agreements included a lower per-cycler fee.

[9]See, e.g., Letter from Jospeh H. Smith, Vice President, Intellectual property, PE Applied Biosystems, to Michael J. Finney [Doc. # 1168, Ex. 15] at PE 011719 ("We do not seek to influence whether you charge an authorization fee, to whom you charge an authorization fee, or how much you charge for an

the end-user intended to perform PCR was viewed by MJ as economically unfeasible.[10] The SAP licensing program otherwise imposed no controls on the supplier's sales of thermal cyclers. Nonetheless, because of the cost of the licensing fee, the minimum price at which participating suppliers could profitably sell their thermal cyclers increased, and the ability of suppliers to discount by giving away a cycler for free decreased. Further, the SAP agreements included "most favored" clauses which allowed suppliers to substitute a lower royalty rate if a more favorable agreement was later reached between Applera and another supplier.

II. Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of fact is "material" if it "might affect the

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authorization fee. You could, for example, charge $500 to those who need it and $5 to those customers who might need it only for resale of their instrument. Or you could charge any other amount. That is strictly up to you. Our only concern is that you, and in turn, your customers, properly respect PE's intellectual property.").

[10]Professor Almarin Phillips, MJ's antitrust expert, concluded that "[a]n individual supplier of thermal cyclers, paying PE a uniform fee under the SAP on all of the thermal cyclers it sells, would also find it impossible profitably to price differentially, charging customers who require authorization to perform PCR in PE's field a higher price than it charges those who do not need that authorization." Affirmation of Almarin Phillips [Doc. # 914] at ¶ 4; <u>see</u> <u>also</u> <u>id</u>. at ¶¶ 3-9.

outcome of the suit under the governing law," and is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On cross-motions for summary judgment "neither side is barred from asserting that there are issues of fact, sufficient to prevent the entry of judgment, as a matter of law, against it. When faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other." Heublein, Inc. v. United States, 966 F.2d 1455, 1461 (2d Cir. 1993) (citing Schwabenbauer v. Board of Educ. of Olean, 667 F.2d 305, 313 (2d Cir. 1981)). "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Schwabenbauer, 667 F.2d at 314.

III. Discussion

Before reaching the merits of the price-fixing conspiracy claim, it is necessary to address Applera's argument that MJ does not have standing, because as competitors of the alleged price-fixing conspirators, it cannot demonstrate antitrust injury. MJ argues that it suffered injury because as a non-member of the SAP, its thermal cyclers remained "unauthorized," which allowed Applera to tarnish its reputation and place its machines, even if cheaper, at a competitive disadvantage. Further, MJ argues that it faces threatened injury from Applera's coercive attempts to force it to join the SAP, which would eliminate MJ's ability to independently determine prices and output.

A. Standing

In order to establish standing to sue under the antitrust laws, a private plaintiff must prove, inter alia, "antitrust injury," that is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). "At its most fundamental level, the antitrust injury requirement precludes recovery for losses resulting from competition, even though such competition was actually caused by conduct violating the antitrust laws." II Areeda & Hovenkamp, Antitrust Law ¶ 337a (2d ed. 2000). Thus, while losses resulting from decreased competition may constitute antitrust injury, losses from increased competition do not suffice. See Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 115 (1986) (denying standing to a competitor claiming that the prospective merger of two rivals violated the antitrust laws, because the threatened lost profits would result from increased competition); see also Brunswick, 429 U.S. at 488 (denying standing where the loss of profits to competitors resulting from the entry of a large company into the market "preserved competition.").

Applera argues that MJ cannot establish antitrust injury, because even if, as alleged, a horizontal price fixing conspiracy is found, the anticompetitive harm would be increased prices to customers buying thermal cyclers. See, e.g. State Oil Co. v. Khan, 522 U.S. 3, 11 (1997). MJ, as a rival thermal cycler supplier, would benefit if its competitors conspired to raise prices. As the Supreme Court noted in Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), while a conspiracy "to charge higher than competitive prices would indeed violate the Sherman Act," such a conspiracy would not injure competitors, who "stand to gain from any conspiracy to raise the market price." Id. at 582 (citations omitted); see also Atlantic Richfield, 495 U.S. at 337 ("Even if the maximum-price agreement ultimately had acquired all of the attributes of a minimum-price-fixing scheme, respondent still would not have suffered antitrust injury because higher ARCO prices would have worked to USA's advantage. A competitor 'may not complain of conspiracies that . . . set minimum prices at any level.'") (quotation omitted) (emphasis in original); II P. Areeda & H. Hovenkamp, Antitrust Law ¶ 348b ("When a horizontal merger, price fixing, market division, or similar collaboration among competitors substantially reduces competition, consumers suffer, while rivals benefit.").

As MJ correctly notes, however, factors other than increased prices might amount to antitrust injury, including the loss of independence in decision-making and threats of reduced profits arising from decreased competition. See Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 258 (2d Cir. 1989). Thus, as the Second Circuit has held, a competitor may have standing to sue on the basis of an unlawful price fixing agreement that restrains "its freedom to compete, even though, in the long run, it may enjoy the benefits of the cartel." Id. at 258 ("[I]t is hard to imagine an injury to competition more clearly of the type the antitrust laws were designed to prevent . . .than the elimination of a major competitor's power to determine its prices and output."). Although Goldfields' holding specifically applied only to targets of hostile takeovers, MJ's position here is sufficiently analogous, in that MJ's participation in the SAP, a program to which it has vigorously objected and has thus far refused to join, would not be voluntary. Applera has realized its threat to bring this lawsuit if MJ did not join the SAP, and Applera's infringement suit against MJ has resulted in a jury's finding that MJ induced infringement of Applera's process patents. Given the jury's validity and infringement finding, MJ's remaining lawful course if it did not join the SAP would be to refrain from promoting its thermal cyclers for PCR, which could well be illusory in light of the importance of PCR to the thermal cycler market.[11]

Even under the Second Circuit's more generous standing standard, however, MJ has not proffered evidence which could establish actual injury resulting from Applera's alleged conduct. MJ has refused to join the SAP and has thus remained free to make

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[11]While the parties dispute each others' statistics on the use of thermal cyclers to perform PCR in Applera's fields, it remains undisputed that a large majority of thermal cyclers are used for PCR. See, e.g. Letter from Joseph Smith, PE to Michael Finney, MJ, Jan. 30, 1998 [Doc. # 1168, Ex. 15] at PE 011718 (stating that "worldwide, at least 93% of thermal cyclers need authorization"). MJ states that this percentage is misleading, because it was calculated on the usage pattern of PE/Applera's thermal cyclers, which were all "authorized," so end users had no incentive to segregate out some thermal cyclers for non-PCR use. See Deposition of Murray S. Anderson, Jun. 20, 2000 [Doc. # 922, Ex. 45] at 186. See also Trial Transcript of Dr. Gerald Ford [Doc. #1108] at 2198-2199 (testifying that study showed that 95.75% of all MJ Research thermal cyclers in the United States have been used to perform PCR in a Perkin-Elmer [Applera] field).

MJ's evidence suggests a higher percentage of thermal cyclers are used for non-PCR purposes than Applera calculates. See, e.g. Videotaped Deposition of Michael Finney, Oct. 7, 1998 [Doc. # 559, Ex. 2] at 176 ("I would guess of the thermal cyclers that we are currently selling at this point, perhaps 20 percent are never used to perform PCR"); Declaration of Michelle Lizotte-Waniewski, Feb. 13, 2004, ¶¶ 7, 9 (stating that Human Genome Project was completed using cycle sequencing, not PCR, and estimating that PCR has accounted for 40-50% of all reactions on thermal cyclers over the last ten years); Affidavit of Richard K. Wilson, Mar. 5, 2001, ¶¶ 15-17 (stating that 90% of thermal cyclers in his genome sequencing lab are devoted to the performance of cycle sequencing). Applera argues, however, that MJ's evidence from sequencing labs, where cycle sequencing is concentrated, does not dispute that most thermal cyclers are used at least once for PCR. See Plaintiff's Submission in Response to Defendant's Supplemental Brief in Opposition to Plaintiff's Motions in Limine [Doc. # 937] at 6 n. 10.

its own business decisions and set prices for its thermal cyclers lower than that of its competitors. The competition in the marketplace, therefore, has not decreased in a way that caused MJ cognizable harm. MJ's claim that Applera's public disparagement of its thermal cyclers caused MJ to lose customers cannot provide a basis for standing on its wholly separate price-fixing claim, which is based on the terms and conditions of the SAP.

MJ alleges that it suffers "threatened injury." While actual injury is necessary to establish a claim for antitrust damages under section 4 of the Clayton Act,[12] threatened injury may be sufficient for injunctive relief under Section 16 of the Clayton Act. See Clayton Act § 16, 15 U.S.C. § 26 ("Any person . . .shall be entitled to sue and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . ."); see also Cargill, 479 U.S. at 110-111. According to MJ, the SAP threatens to eliminate its ability to independently determine prices and output, because, if required to join, it would be forced to pass along license fees for the "authorization" of its thermal cyclers, regardless of whether its customers needed or wanted this authorization. If correct in its

[12]Section 4 of the Clayton Act provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

assertion, MJ’s threatened injury would confer standing. See Gold Fields, 871 F.2d at 258. Whether MJ is correct in its claim that the SAP restricts its ability to determine its own prices and output is a matter of dispute, however, and ultimately this claim is inseparable from MJ’s claim on the merits. Accordingly, the Court will proceed to address the substance of MJ’s price-fixing claim, and in so doing will reach the standing question.

B. Price-Fixing Conspiracy

To establish a price-fixing conspiracy, there must be "evidence that tends to exclude the possibility that the [suppliers] were acting independently. . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (quotation omitted). Because "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," Matsushita, 475 U.S. at 588, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Id. at 764. Thus, to establish a price fixing agreement, two essential elements must be proven: the existence of a horizontal agreement, and the presence of an unlawful objective.

MJ argues that the SAP constituted a horizontal agreement among competitors in a classic hub-and-spoke form with Applera "in the center as a ringmaster." Toys "R" Us, Inc. v. Fed. Trade Comm., 221 F.3d 928, 934 (7th Cir. 2000); see also Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939)("[A]n unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."); United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948). Moreover, according to MJ, the unlawful purpose of this conspiracy was pursued through three avenues: (1) the multiple licensing of virtually all competing suppliers in the thermal cycler market "tampered" with competitors' price structures; (2) the SAP agreements contained "most favored" licensee clauses in which Applera agreed to give suppliers the right to substitute a lower royalty rate if another supplier later reaches a more favorable agreement with Applera; and (3) the SAP discouraged competing suppliers from discounting the price of their thermal cyclers.

In a series of decisions issued in the mid-twentieth century, the Supreme Court established the parameters within which a patent holder may license competing manufacturers in the market, and the circumstances under which such licensing constitutes horizontal price fixing. In United States v. General Electric, 272 U.S. 476 (1926), the Supreme Court found no unlawful price fixing conspiracy when General Electric, the owner of patents covering tungsten incandescent lamps, licensed its competitor, the Westinghouse Company, on the "condition that its sales should be at prices fixed by [GE] and subject to change according to its discretion." The Supreme Court explained:

> One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself.' He does not thereby sell outright to the licensee the articles the latter may make and sell or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell. . . . The owner of an article patented or otherwise is not violating the common law or the Anti-Trust Act by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.

Although seemingly broadly approving of agreements to fix even the end price of goods made with patented technology, General Electric has been construed much more narrowly. When the Supreme Court next considered the intersection of patent and antitrust price-fixing laws in United States v. United States Gypsum Co., 333 U.S. 364 (1948), clear limits were placed on the ability of a patent holder to control the prices of competitors. U.S. Gypsum, the dominant concern in the gypsum industry,[13] was the owner of several patents covering the manufacture of gypsum board, and developed a licensing program in which virtually all of its competitors in the gypsum industry participated. All of the licenses contained a provision allowing U.S. Gypsum to "fix the minimum price at which the licensee sold gypsum products embodying the patents." Id. at 368-69. The licensing program was further designed to stabilize prices by eliminating production of an unpatented form of the gypsum board (open-edge board), which was cheaper to produce;[14] eliminating the participation of "jobbers"[15] in the market to prevent competition

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[13]Gypsum is a mineral used in construction material. "Gypsum board is made by taking the crushed and calcined mineral, adding water, and spreading the gypsum slurry between two paper liners. When the gypsum hardens, the mineral adheres to the paper and the resulting product is used in construction." U.S. Gypsum, 333 U.S. at 368.

[14]The Court found that "[t]he provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid." U.S. Gypsum, 333 U.S. at 397.

[15]The licensing agreements defined "jobbers" as "those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building

by uncontrolled resale prices;[16] and prohibiting the reduction of price on unpatented products such as plaster.[17] The licensing agreement was implemented through a series of price bulletins issued by U.S. Gypsum, and enforced by U.S. Gypsum’s Board Survey. The Supreme Court concluded:

> These licenses and bulletins show plainly a conspiracy to violate the Sherman Act. Price fixing of this type offends. It is well settled that price fixing, without authorizing statutes is illegal, per se. Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act’s protection of the public from evil consequences.

Id. at 400.

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material and who do not sell at retail." U.S. Gypsum, 333 U.S. at 385.

[16]The Court concluded, "[s]ince the defendants entered into a common scheme to stabilize the industry, and since the elimination of jobbers was undertaken by United States Gypsum in furtherance of that purpose, a finding of specific intent as to each licensee is not necessary. Nor do we agree that the elimination of jobbers falls within the protection of the patent grant when the purpose, as here, is to prevent competition by uncontrolled resale prices. The inference we draw from the uncontradicted evidence is that the defendants acted in concert to eliminate an important class of jobbers." U.S. Gypsum, 333 U.S. at 397-98.

[17]US Gypsum issued a bulletin provision prohibiting the reduction of price on unpatented products, which the Supreme Court viewed as an attempt "to stabilize plaster prices (an unpatented product), and the fact that plaster prices were stabilized only when plaster was sold in conjunction with board appears to us to be immaterial." U.S. Gypsum, 333 U.S. at 399.

The Supreme Court distinguished General Electric, stating, "[t]hat case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized." Id. at 400. These traditional per se violations of the Sherman Act — reduction of output, stabilization of end prices of both patented and unpatented products in the industry — formed the core of the Court's holding. In dicta, however, the Supreme Court also noted that a Sherman Act violation would exist under the so-called "rule of reason," even in the absence of the specific abuses identified. As the Justices explained, "it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices. . . . The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly." Id. at 401.

Thus, U.S. Gypsum settled one question left open by General Electric — whether the Patent Act protects price-fixing activity involving all competitors in an entire industry. As U.S. Gypsum made clear, while setting the prices of a single licensee, as in General Electric, would be permissible, where price-fixing is the product of concerted action amongst competitors, it is not permitted. See also United States v. Masonite Corp., 316 U.S. 265, 279, 281 ("[W]hen it is clear . . . [that] the purpose is to fix prices at which the competitors may market the product, the device is without more an enlargement of the limited patent privilege and a violation of the Sherman Act."). But U.S. Gypsum also generated another question: what licensing activity constitutes price-fixing? The dicta in U.S. Gypsum seemed to imply that any program under which a patent holder licensed multiple competitors in the industry would run afoul of the antitrust laws.

The Supreme Court clarified its decision in United States v. United States Gypsum Co., 340 U.S. 76 (1951) ("U.S. Gypsum II"), where it concluded that not every licensing scheme undertaken in concert by a patent holder and its competitors would violate the antitrust laws. See id. at 84 ("There was no holding in our first opinion in Gypsum that mere multiple licensing violated the Sherman Act."). Instead, in U.S. Gypsum II the Court emphasized that an unlawful price-fixing conspiracy is created only when the licensing scheme (1) involved "all former competitors in an entire industry" acting in concert; and (2) "restrain[ed] commerce in an entire industry under patent licenses"; in order to (3) "organize the industry and stabilize prices." Id. at 84 (quoting U.S. Gypsum, 333 U.S. at 401).

Subsequent Supreme Court precedent makes clear that unlawful price fixing is likely to be found where the licensing program serves to set the prices of the end products sold in the market when those end products are not themselves within the patent grant. In United States v. Univis Lens Co., Inc., 316 U.S. 241 (1942), for example, the Supreme Court invalidated a licensing program that sought to control the price at which the finished eyeglass lens was sold, because "merely because the licensee takes the final step in the manufacture of the patented product, by doing work on the blank which he has purchased from the patentee's licensee, it does not follow that the patentee can control the price at which the finished lens is sold." Id. at 249. Similarly, in United States v. New Wrinkle, 342 U.S. 371 (1952), the Supreme Court found an unlawful price-fixing conspiracy where the patent holder developed a licensing program requiring, among other things, "that a licensee observe in all sales of products covered by the licensed patents a schedule of minimum prices, discounts and selling terms established by the licensor New Wrinkle." Id. at 375. The Supreme Court explained that such a licensing program would organize the industry and stabilize prices, exceeding the scope of the patent right.[18]

The preceding authority in no way suggests, however, that the mere imposition of a licensing fee covering only the patented technology is unlawful. Because patent owners hold a lawful monopoly over the patented technology, the starting presumption must be that the licensing of that patent right is an activity that aids rather than impedes competition. See XII H. Hovenkamp, Antitrust Law ¶ 2041 (1999) at 218 ("Licensing multiple licensees would ordinarily be thought procompetitive."). It is only when the patent holder exceeds the scope of that lawful patent monopoly, by conspiring with licensees to impose price restrictions on unpatented items that are not themselves subject to the patent grant, that the multiple licensing program may be deemed anticompetitive. In each case discussed above in which the Supreme Court has found unlawful price fixing by a patent

[18] See also Cummer-Graham Co. v. Straight Side Basket Corp., 142 F.2d 646 (5th Cir. 1944) (finding unlawful price-fixing conspiracy where the owner of a patent covering an attachment for a basket-making machine not only licensed the use of these attachments by charging a royalty of 2 ½ % of the gross sales of baskets produced and sold, or five cents per dozen baskets, at the licensor's option, but also gave the patent holder the right to fix the selling price of the baskets themselves, as well as the terms and conditions of sale. Id. at 646. The Fifth Circuit found that the patent covering the use of the attachment on the basket-making machine did not provide the patent holder with the right to "fix, to the detriment of competition in commerce, the price of the articles made by using the machine. . . . Licensors of patented machines have no right to interfere with free competition in the sale of the unpatented products." Id. at 647.

holder, the licensing program imposed uniform rules on the final sale of the item using the patented technology, including giving the patent holder the right to set those final prices, or actively sought to reduce competition in the market by imposing restraints on non-patented goods.

In pursuing its price-fixing claim, MJ loses sight of the allowances due to Applera by virtue of its patent ownership. Where intellectual property rights are not at issue, it is settled that "any combination that tampers with price structures is engaged in unlawful activity." Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 346 (1982). But a patent gives its owner certain freedom to engage in otherwise price-fixing behavior, and MJ has identified no authority supporting its view that licensing fees of the sort at issue here, about which there is no factual dispute, constitute a naked price restraint. MJ acknowledges that Applera's Supplier Authorization Program did not control the ultimate price at which suppliers sold their thermal cycler machines,[19] but argues that the license fees translate into "an extraordinary price increase to the end user." Memorandum of MJ Research, Inc. in Opposition to Applera' Cross Motion and Reply

[19]See Amended Report of Dr. Almarin Phillips, Oct. 17, 2000 [Doc. # 1168, Ex. 3] at 38 ("Under [Applera's] Supplier Authorization Program, the authorized thermal cycler manufacturers are still free to set their own prices for thermal cyclers. However, the payment of fees and royalties to [Applera] increases the minimum prices at which other authorized suppliers can profitably sell.").

Memorandum in Further Support of Summary Judgment Determining that Plaintiffs Have Engaged in Price Fixing [Doc. # 1193] at 10. Applera owns the right to perform PCR on a thermal cycler, and the price increase imposed by the SAP is no more than what Applera charges as the value of that intellectual property right.

"Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23 (1979). In fact, in fashioning appropriate remedies after finding unlawful price fixing, courts have routinely required, and the Supreme Court has specifically approved, the multiple licensing of patents on a royalty basis to competitors in an industry. In U.S. Gypsum II, for example, the Supreme Court, reviewing the district court's remedial decree, stated, "[w]e think that the United States Gypsum Company should be required to license all its patents in the gypsum products field to all applicants on equal terms . . . The court should provide for its determination of a reasonable royalty either in each instance of failure to agree or by an approved form or by any other plan in its discretion." U.S. Gypsum II, 340 U.S. at 94. See also United States v. National Lead Co., 332 U.S. 319, 336 (approving district court's decree ordering defendants "to grant to any applicant therefor, including any defendant or co-conspirator, a nonexclusive license under any or all of the patents as herein defined at a uniform, reasonable royalty."). Accordingly, MJ's price fixing claim fails to the extent MJ challenges the SAP merely because it aimed to license all competing suppliers in the thermal cycler industry.[20]

MJ also argues more narrowly that the licensing scheme charged for more than Applera's process patent rights, because the SAP increased the price of all thermal cyclers, even those used exclusively for purposes other than the patented PCR process. Although it is undisputed that the SAP itself did not require suppliers to pass on the "authorization" and resulting licensing fee to customers who did not use the cyclers to perform PCR, defendants' expert, Almarin Phillips, states that differential pricing would be "impossible" because it would not be as profitable to suppliers as the uniform sale of "authorized" thermal cyclers. Lowering the cost of unauthorized thermal cyclers would require raising the price of authorized thermal cyclers to remain profitable. Phillips assumes that increasing the cost of authorized thermal cyclers would "cause the buyers

[20]Further, because Applera was entitled to seek to license its competitors in the thermal cycler market, MJ's evidence that some suppliers exited the market rather than joining the SAP or maintaining their business in a manner that did not induce infringement of Applera's patents fails to demonstrate impropriety. Appligene, for example, was accused by Applera of infringement and, upon exiting the thermal cycler market, entered into a monetary settlement agreement for claims of past infringement. See Settlement Agreement [Doc. # 1140, Ex. 47].

requiring authorization to switch most of their purchases to other sellers, causing a reduction in profits in this segment of the market." Affirmation of Almarin Phillips, Feb. 13, 2004 [Doc. # 914] at ¶ 5. Phillips also states that differential pricing creates a moral hazard problem.

As a competitor, however, MJ is not harmed by an increase in prices to thermal cycler customers who would, in MJ's scenario, purchase unneeded patent rights. See Atlantic Richfield Co., 495 U.S. at 337. As discussed above, the antitrust injury that would give MJ standing to sue is the loss of independence in determining its own prices and output. Nothing in the SAP requires MJ to pass along the licensing cost to end users who do not use their thermal cyclers for PCR. MJ would therefore be faced with the same market forces as the other suppliers, and it is this competition, not Applera's dictate or horizontal agreement, that would determine whether lower-priced "unauthorized" thermal cyclers could be sold. For example, if demand for lower-priced thermal cyclers that did not convey the right to perform PCR was high enough, then a supplier that offered such a discount theoretically could adequately offset the loss of PCR performing customers. Unlike U.S. Gypsum and other cases finding improper price-fixing, here there was no aim to reduce or eliminate the output of an unpatented product.[21]

MJ also challenges the SAP on the grounds that the agreements contain "most favored licensee" clauses which give suppliers the right to substitute a lower royalty rate if a more favorable agreement is later reached between Applera and another supplier.[22] See, e.g. Thermal Cycler Supplier Agreement between Applera and Bio-Rad Laboratories, Inc., Apr. 1, 1998 [Doc. # 788,

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[21]Moreover, MJ has presented no evidence that SAP had as its objective the increase in cost of thermal cyclers for end users who did not want or need a PCR process license. The SAP itself imposed no restrictions on how suppliers could allocate the licensing fees, and the evidence in the record shows that Applera believed MJ or other suppliers retained the freedom to differentially price their thermal cyclers. See, e.g. Letter from Joseph H. Smith, Vice President, Intellectual property, PE Applied Biosystems, to Michael J. Finney [Doc. # 1168, Ex. 15] at PE 011719 ("We do not seek to influence whether you charge an authorization fee, to whom you charge an authorization fee, or how much you charge for an authorization fee. You could, for example, charge $500 to those who need it and $5 to those customers who might need it only for resale of their instrument. Or you could charge any other amount. That is strictly up to you. Our only concern is that you, and in turn, your customers, properly respect PE's intellectual property.").

[22]MJ states in a footnote in its Memorandum of Opposition to Plaintiffs' Cross Motion and Reply Memorandum in Further Support of Summary Judgment determining that Plaintiffs Have Engaged in Price Fixing [Doc. # 1193] at 11 n. 19, that its argument regarding the "most favored" clauses in the SAP was meant only to demonstrate the existence of a horizontal understanding among the suppliers, not to challenge the "most favored" clause as itself per se illegal. As MJ had earlier argued that the most favored licensee clauses in the SAP agreement constituted an unlawful agreement to "fix the SAP at an anti-competitive rate", see Motion in Opposition to Plaintiffs' Motion in Limine to Preclude and Objection to Defendant's Evidence on Horizontal Price Fixing at 8, in the interest of completeness the Court will address the argument on its merits.

Ex. 17] at PE 017039.[23] Relatedly, MJ points out that Applera informed thermal cycler suppliers that its deals with other suppliers "limited [its] flexibility" in considering more favorable licensing terms. See, e.g. Affidavit of Simon J. Constantine, Jan. 15 2001 [Doc. # 427, Ex. B] (June 5, 1996 file note of a telephone conversation between H. Fischer and Simon Constantine of Hybaid). "Most favored" clauses, however, are not illegal price-fixing, particularly where, as here, the clause allowed the suppliers to obtain lower royalty rates if Applera changed its terms through subsequent negotiations. See Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.2d 1406, 1415 (7th Cir. 1995) ("'Most favored nations' clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. The [defendant] did this to minimize the cost of these services to it, and that is the sort of conduct that the antitrust laws seek to encourage. It is not price fixing."); see also III Areeda & Hovenkamp, Antitrust Law ¶ 768a7 (approving of

[23]The Most Favored Licensee clause read as follows: "11.1 If after signature of this Agreement, Perkin-Elmer grants to any unrelated third party, other than Roche a license of substantially the same scope as granted to Thermal Cycler Supplier herein but under more favorable royalty rates . . .Thermal Cycler Supplier shall have the right and option to substitute such more favorable royalty rates for the royalty rates contained herein . . .conditioned on Thermal Cycler Supplier's acceptance of all the same conditions, favorable or unfavorable . . . ."

MFN clause in context of Blue-Cross case).

Finally, MJ argues that by joining the SAP, the suppliers agreed to stop discounting. MJ notes that at Phase I of the trial, Applera acknowledged that once suppliers had "to pay a royalty, [suppliers would] stop giving away the machine for free." Testimony of Dr. Frishberg, Mar. 24, 2004, Trial Tr. Vol. X [Doc. # 1108] at 2141. Such an admission is no more than a recognition that the license itself carries a cost, not evidence of price-fixing. In addition, MJ notes that Hybaid wrote to Applera expressing concern that "we have seen P-E [Applera] discounting by up to 50% in the market." See Letter from Simon Constantine, Hybaid, to Michael Hunkapiller, Aug. 21, 1997 [Doc. # 1140, Ex. 50]. Further, MJ has submitted internal Applera e-mail communications expressing concern that Roche was discounting the price of its thermal cyclers in the research market, expressing its belief that while "Roche can sell these instruments for whatever they choose to the Diagnostic market . . . they should not be selling into the research market," and stating its intention to "send a fairly stern notice to Roche that this is not appropriate."[24] See E-mail Message from Michael

[24]In 1991, Roche and Applera entered into a Distribution Agreement, in which Roche granted Applera exclusive rights to exploit the PCR Process Patents in such fields as research and development, and Roche retained exclusive rights to exploit the PCR Process Patents in such fields as diagnostics. See Distribution Agreement [Doc. # 402, Ex. 8].

Hunkapiller to Hanna Fischer, attaching e-mail messages by Murray Anderson and Deryi Mu, Mar. 26, 2001 [Doc. # 1189, Ex. 4]. Applera's (and Roche's) discounting demonstrates the absence of an agreement to maintain high prices, however. Moreover, a supplier's complaints about such conduct cannot as a matter of law give rise to a finding of improper price fixing. See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) ("[S]omething more than evidence of complaints is needed [to prove a price-fixing conspiracy]. . . There must be evidence that tends to exclude the possibility that the [suppliers] were acting independently.").

MJ's price-fixing claim ultimately rests on its evidence that Applera instituted the SAP with anticompetitive intent.[25] To be cognizable, however, MJ's price-fixing claim must be based on more than evidence of improper motive. Where, as here, there is no basis for finding that the SAP carried out any unlawful objective, MJ's price-fixing claim must fail.

III. Conclusion

[25]Applera's Marketing Plan for FY '95 states its intention to license competing manufacturers of thermal cyclers, and states, "If accepted by our competitors this will result in a stabilization in the cycler market, will probably discourage any other suppliers from entering the market and will probably increase base prices for competitive instruments. This will result in an even stronger price/product perception of PE by the customer base and our market share/unit numbers will increase." FY'95 Marketing Plan [Doc. # 1140, Ex 2] at PE 205390.

For the foregoing reasons, Motion of MJ Research, Inc. for Summary Judgment Determining that Plaintiffs Have Engaged in Price Fixing [Doc. # 1141] is DENIED; and Plaintiffs' Cross Motion for Partial Summary Judgment Determining that MJ Lacks Standing to Assert Horizontal Price Fixing and that Applera's Supplier Licenses Are Not a Price Fixing Arrangement and Opposition to Defendants' Motion for Summary Judgment Determining that Plaintiffs Have Engaged in Price Fixing [Doc. # 1163] is GRANTED. In light of this decision, Plaintiffs' Motion in Limine to Preclude and Objection to Defendant's Price Fixing and Tying Claims for Lack of Antitrust Standing [Doc. # 773 (1)] is DENIED and Plaintiffs' Motion in Limine to Preclude and Objection to Defendants' Evidence on Horizontal Price Fixing [Doc. # 773 (3)] is GRANTED.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 16th day of December 2004.