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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SKYBRIDGE SPECTRUM FOUNDATION, a Delaware Nonprofit Corporation; WARREN C. HAVENS, an individual; TELESAURUS VPC, LLC, a Delaware Limited Liability Company; AMTS CONSORTIUM, LLC, a Delaware Limited Liability Company; INTELLIGENT TRANSPORTATION & MONITORING, LLC, a Delaware Limited Liability Company; and TELESAURUS HOLDINGS GB, LLC, a Delaware Limited Liability Company, Plaintiffs, v. MOBEX NETWORK SERVICES, LLC, a Delaware Limited Liability Company; MARITIME COMMUNICATIONS/LAND MOBILE, LLC, a Delaware Limited Liability Company, PAGING SYSTEMS, INC., a California Corporation; TOUCH TEL CORPORATION, a California Corporation, and DOES 1-100, Defendants.	Civil Action No. 2:11-cv-00993-KSH-CW

TRIAL MEMORANDUM OF DEFENDANT
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PRELIMINARY STATEMENT

Defendant Maritime Communications/Land Mobile, LLC ("MCLM") respectfully submits this trial brief in anticipation of the adjudication of the single remaining cause of action under the Sherman Antitrust Act §1 ("Section 1 Claim") alleged in the Second Amended Complaint ("Second Amended Complaint") filed by Plaintiffs Warren C. Havens ("Havens") and his controlled entities Skybridge Spectrum Foundation, Telesaurus VPC, LLC, AMTS Consortium LLC, Intelligent Transportation & Monitoring Wireless LLC and Telesaurus Holdings GB, LLC (collectively, "Plaintiffs"). This Court previously dismissed all of the other claims in the Second Amended Complaint.

Plaintiffs will not be able to meet their burden of proof at trial that MCLM violated the Sherman Antitrust Act in concert with PSI-TT (as defined herein). As an initial matter, there is simply no evidence that MCLM conspired with PSI-TT in any way – it is undisputed that there is no written agreement or other document between MCLM and PSI-TT. In fact, and as confirmed by all of the MCLM and PSI-TT witnesses during discovery, there have been scant few conversations ever between MCLM's and PSI-TT's witnesses – and absolutely no conversations, let alone alleged oral or written agreements, regarding alleged conspiratorial acts. The Plaintiff entities are direct competitors of MCLM and their Section 1 Claim is a last desperate attempt in their unabashed bicoastal litigation campaign against MCLM to interfere with MCLM's operations, its resolution of the FCC Action and its reorganization under the bankruptcy plan confirmed by the United States Bankruptcy Court for the Northern District of Mississippi in January 2013.

Rather than acknowledge these simple facts at summary judgment, Havens (and his entities) bombarded the Court with voluminous summary judgment papers and empty

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allegations that MCLM and PSI-TT were somehow "alter-egos" in a transparent attempt to distract this Court from the undisputed facts that MCLM and PSI-TT:

(1) did not conspire to do anything;

(2) have no common ownership, office space or any other indicia of joint operations and only knew of each other from being in the same industry; and

(3) did not together (or separately) engage in any anti-competitive acts.

Moreover, Plaintiffs have neither defined any relevant marketplace affected by the alleged anti-competitive acts (*e.g.*, nonconstruction of sites) nor identified how the supposed market was harmed by the alleged conspiratorial acts of MCLM and PSI-TT. And, ironically, Havens' own candid, sworn testimony confirmed that Plaintiffs, themselves, have not constructed or operated any locations under their own licenses (his main allegation of market harm against Defendants). Because there has been no conspiratorial conduct by MCLM and PSI-TT, there has been no antitrust effect or harm to any relevant market.

In essence, Plaintiffs (Havens, really) is annoyed that the AMTS market has operated exactly as it was supposed to – competitors obtained licenses through FCC procedure and each of them developed independent businesses, including stations and services that furthered those businesses – except Plaintiffs (as Havens' sworn testimony has confirmed), which have constructed no sites for their AMTS licenses (many of which have now been cancelled by the FCC) but have instead conducted a national litigation campaign against MCLM in the state of California, before the FCC, in the Bankruptcy Action and before this Court. For the reasons set forth below and as will be demonstrated at trial, MCLM respectfully submits that Plaintiffs' Section 1 Claim against MCLM in this action should end now as well.

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STATEMENT OF FACTS

Plaintiffs are a convoluted series of related companies (including one questionable non-profit company) controlled by Havens and are in the business of obtaining and transferring (among each) licenses issued by the Federal Communications Commission ("FCC"), including Automated Maritime Telecommunications Service ("AMTS") licenses. Plaintiffs' licenses cover the vast majority of the country and far outstrip the licenses of MCLM (and Paging Systems, Inc., hereinafter referred to with Touch Tel Corporation as "PSI-TT").

The formation of the various Defendants and their resulting businesses are unrelated and, in some markets, MCLM and PSI-TT were direct competitors with each other. MCLM was formed by Sandra DePriest in 2005 in Delaware; PSI was formed in 1981 by Susan Cooper in California and TT was formed in 1988 by Robert Cooper in California. Discovery has amply demonstrated that MCLM and PSI-TT are separate companies, formed at different times, by different individuals, that have different businesses, that hold different AMTS licenses and, according to the testimonial evidence (and as supported by the absences of any documentary evidence), that have rarely communicated with each other. Sandra DePriest, the owner of MCLM, has not spoken to the Coopers, owners of PSI-TT, since she formed MCLM in February 2005 and, similarly, Mr. Cooper, testified at his deposition that PSI-TT and MCLM "had no business dealings" but he and his wife may have, at most, "met the people [DePriests] a few times," though it is not clear in what timeframe. In short, there is absolutely no evidence that MCLM and PSI-TT ever acted in concert with each other at any time or otherwise agreed to do anything together.

In 2005, MCLM was formed to purchase certain AMTS licenses then held by Mobex Network Services, LLC ("Mobex Network"), which was owned by Mobex

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Communications, Inc. and Nextel Data Company. MCLM had completely distinct ownership from Mobex – there were no owners of Mobex that owned any interest in MCLM. Contrary to Plaintiffs' allegations that Mobex entities and MCLM are "alter egos" of one another, along with PSI-TT, Mobex Com. was owned by more than 100 shareholders, none of which was Sandra DePriest, or an entity in which she had ownership. Also, MCLM and Mobex entered into an arm's-length transaction to purchase (for several million dollars) certain AMTS licenses, which asset purchase agreement closed in December 2005 (the "MCLM-Mobex Asset Purchase") and required and received FCC approval over Plaintiff Havens' unsuccessful objections and motion for reconsideration to the FCC. After the MCLM-Mobex Asset Purchase closed, Mobex Network ceased doing business, underwent a brief winding-up period and was "cancelled" on December 22, 2006. Because Mobex Network ceased to exist after its FCC-approved sale of the AMTS licenses to MCLM, those entities obviously could not (and did not) conspire to do anything in violation of the Sherman Act.

The AMTS System And Licenses Issued To The Parties

AMTS systems were established in 1981 as a "specialized system of public coast stations providing integrated and interconnected voice and data communications, somewhat like a cellular system, for tugs, barges, and other commercial vessels on waterways." (*See AMTS Auction Scheduled for September 15, 2004*, 19 FCC Rcd 9518 (May 26, 2004)). Originally, the FCC issued "site-based" licenses, authorizing the construction of AMTS facilities ("stations") at particular sites, on a "first-come, first serve" basis. Plaintiffs allege that Defendants obtained a number of these site-based licenses but fail to mention that Plaintiffs also applied for site-based licenses, which applications were denied, and then were sanctioned by the FCC for frivolously and repeatedly appealing the FCC's denial decision.

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In 2002, the FCC announced that it would stop issuing site-based licenses and begin auctioning geographic licenses, authorizing the geographic licensees to construct and operate stations within a defined geographic area. *Second Mem. Op. and Order and Fifth Rep. and Order*, 17 FCC Rcd 6685 (April 8, 2002). Geographic license holders took the geographic licenses subject to the pre-existing site-based licensed stations within their areas; new facilities operated by the geographic licensee could not interfere with the site-based operations. As the FCC was transitioning to geographic license procedures, it issued a moratorium on the issuance of site-based licenses. *Fourth Rep. and Order and Third Further NPRM*, 15 FCC Rcd 22585 (November 16, 2000).

After the award of a license, a party has to construct actual facilities within a "construction period." 47 C.F.R. § 80.49(a)(3)). Under the regulations, failing to do this *can* (but not must) result in invalidation of the licenses. *See* 47 C.F.R. § 1.946. As stated above, MCLM acquired certain of its AMTS licenses at issue in this action in the Mobex-MCLM Asset Purchase in December 2005. Mobex Network obtained the licenses from its parent company Mobex Communications, Inc. ("Mobex Communications") after Mobex Communications had purchased the licenses from two sources: Waterway Communication Systems and two Regionet companies, Regionet Wireless License, LLC and Regionet Wireless Operations, LLC, which entities are not defendants in this action. Prior to MCLM's acquisition of its AMTS licenses, these other companies constructed many of the locations under each license (some sites were not yet due to be constructed). For any site that was not due to be constructed prior to Mobex's acquisition of the licenses, Mobex completed the construction. Each of these prior businesses, then Mobex, then MCLM, constructed or maintained locations within their licenses, which locations remained operational. Importantly, MCLM subsequently acquired certain Geographic

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AMTS Licenses at auction, which made certain of its overlapping AMTS site-based licenses redundant. MCLM entered into two stipulations with the FCC regarding which site-based AMTS licenses were redundant and, therefore, no longer needed by MCLM.

MCLM is unaware of the history of or operations under the PSI-TT AMTS licenses (though it could research the information in public FCC records). Ironically, as to Plaintiffs' licenses, Havens candidly admitted under oath that neither he nor his companies have ever constructed the majority of the relevant AMTS licenses that they currently hold (and owned for years), despite the fact that the initial construction periods for many passed years ago. Tellingly, the FCC cancelled 394 of Plaintiffs' licenses in the adjacent 220-222MHz band (and perhaps even more at this point), which was due to Plaintiffs' failure to construct anything after twelve years of ownership. Plaintiffs' massive warehousing demonstrates that they have neither been excluded from the market, nor are they interested in operating or providing actual service to third parties – instead, Plaintiffs are apparently interested in litigating and owning everything so that they can then resell licenses at monopolistic prices.

The Second Amended Complaint

The gravamen of Plaintiffs' Second Amended Complaint is that Defendants, including MCLM applied for, obtained and maintained FCC licenses, pursuant to a scheme to "hoard and warehouse" them in a manner that "blocked Plaintiffs . . . from obtaining from the FCC AMTS licenses they otherwise would have obtained, and suppressed competition in the relevant market." Specifically, Plaintiffs allege that Defendants have conspired in violation of the Sherman Antitrust Act in three ways, by: (1) conspiring to "warehouse" licenses by failing to construct and then failing to disclose to the FCC the alleged nonconstruction, including not reporting each other for nonconstruction at co-located sites; (2) coordinating the purchase of the

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A and B Block licenses and then co-locating stations; and (3) agreeing to withhold contour information for the incumbent licenses from Plaintiffs. During discovery, the following facts have been adduced that demonstrate that each of Plaintiffs' theories of conspiracy are factually without merit (not that Plaintiffs' proffered theories, even if proven, could sustain a violation of the Sherman Antitrust Act, especially given the overwhelming amount of AMTS spectrum owned and controlled by Plaintiffs, which they have largely failed to construct).

Alleged Warehousing/Nonconstruction/Failure To Report Codefendants

The evidence and testimony will amply demonstrate that the AMTS licenses MCLM purchased from Mobex in 2005 had been constructed and were interconnected or, for certain locations within a license, had been returned to the FCC either prior to MCLM's purchase of the licenses or by stipulation due to MCLM's acquisition of the overlapping, redundant Geographic AMTS licenses. For example, each license (or call sign) could have within it any number of locations (that could be designated and moved by the licensee), including more than one within the same city. These locations are mostly owned by independent third parties that construct a tower(s) and lease space on the tower(s) to any number of tenants (both within and without the AMTS spectrum). It is not unusual that employees of a wireless company, such as MCLM, would never set foot on a site. The tenants affix their equipment (through subcontractors) to a designated location (height and direction) on the tower. Additionally, a site may have other third parties that further distance the tenant from needing to visit the site, such as a property management company. In fact, for a tenant to visit a site, it would need to contact the landlord or management company to coordinate entry to the secure premises.

Often, a license holder would test multiple locations within an area and determine which was optimal, leaving the others dormant to avoid crossinterference within its area.

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Locations within a license could also be dormant if the license was fully loaded and the remaining locations could not be used without diminishing delivery of wireless services. In neither of these cases would the license be "unconstructed" (as Plaintiffs allege) – to the contrary, the license would be constructed and at maximum capacity while locations in it remained unused to promote optimal wireless service (a practice that is not prohibited by the FCC).

For example, call sign (or license) KAE889 had at least 49 sites, covering the west coast from approximately the northern border of Washington State to the southern border of California. Within major cities, there were occasionally multiple locations, such as in Portland, Oregon, where there were at least two locations in the years prior to MCLM's ownership. As testified to by Mr. Reardon, after testing for signal efficacy (which requires construction), a prior owner chose one of the Portland sites (site 13) to use and the other (site 18) remained dormant to avoid crossinterference. Site 13, known as KGON at the end of SW Council Road, was constructed during Regionet's ownership and has approximately six towers on it with various unrelated tenants' equipment, including MCLM's equipment.

Equally unavailing are Plaintiffs' allegations that Defendants conspired to refuse to report each other for nonconstruction at their co-located sites (a dozen sites of hundreds nationwide). As discussed above, the MCLM sites were either constructed or designated as not constructed and returned to the FCC, so there was nothing for PSI-TT to report (if it even knew what MCLM was doing at that time). Further, because of the nature of sites (*i.e.*, dozens or hundreds of tenants with unlabeled equipment depending upon the site) and the relationship tenants have with their sites (*i.e.*, no personal visits, third parties used for construction/maintenance/management), it would be unlikely that MCLM would have even known if PSI-TT had equipment installed at a site (or were even co-located there) and vice-versa.

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By way of example of numerosity of tenants at a given site, Plaintiffs allege that MCLM should have reported PSI-TT for non-construction at the Puerto Rico site (among others) where Defendants happen to be co-located. The Puerto Rico site, also known as Fajardo or El Yunque, is located in a mountainous jungle in a national park comprising approximately 28,000 acres and, according to the FCC Universal Licensing System ("ULS"), there are 348 entities now or previously associated with El Yunque. It is illogical that MCLM would have known whether PSI-TT had equipment atop a mountain, in a jungle, at a secure site, in Puerto Rico.

Alleged A and B Block Splitting/Co-location

The allegations regarding block splitting would pre-date the formation of MCLM in 2005 and be outside the four-year statute of limitations. And, the only information garnered during discovery regarding the purchase of A and B block licenses made clear that over 25 years ago PSI-TT and certain entities from which Mobex purchased certain licenses (not any defendant to this litigation) – refused to split A and B block purchases and, instead, bid against each other (even involving their own respective lawyers in protest).

As to an alleged "conspiracy" between Defendants to co-locate sites, the facts are simple – co-location is encouraged by the FCC to limit the number of unsightly towers erected to provide coverage, thereby encouraging carriers to operate from as few sites as possible. MCLM and PSI-TT are co-located at fewer than a dozen sites with each other – notably along with dozens to hundreds of other service providers. As confirmed by Plaintiffs' expert Mr. Charles Walters at his deposition, and supported by FCC documents, co-location is far from the illegal conspiratorial act Plaintiffs allege:

> Q. And is there anything that's improper at least from the perspective of the FCC with competitors co-locating their equipment in these data hotels?

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A. No. And, in fact, some of it has been mandated by the FCC.

Walters also confirmed that it is commonplace for competitors to co-locate their equipment.

As evidenced by the data on the FCC's ULS, co-location is normal, not an exception (or illegal). For example, the Portland site (discussed above) has approximately six towers with numerous tenants on each tower and the FCC ULS website reports that the KGON Portland site has approximately 689 entities associated with it. Also discussed above, the El Yunque site has approximately 348 entities now or previously associated with it.

Alleged Withholding Of Contour Information

As a threshold matter, there is no evidence of any agreement, written or verbal, between PSI-TT and MCLM to withhold any information from Plaintiffs. To the contrary, both MCLM's witnesses and PSI-TT's witnesses have made abundantly clear that they have never spoken about AMTS licenses, let alone to "conspire" to withhold information from Plaintiffs.

MCLM has repeatedly stated to Plaintiffs that it will provide contour information to Plaintiffs (as a geographic license holder in some areas) when, and if, Plaintiffs become prepared to construct stations – which construction Plaintiffs have never begun in the decade-plus Plaintiffs have held their licenses. MCLM has had no participation (and there is no evidence to the contrary) in PSI-TT's decisions regarding disclosure of its contour information. The remaining generalized allegations, some from as early as 1993, are far outside the four-year statute of limitations under the Sherman Antitrust Act and could not possibly be asserted against MCLM, which was formed in February 2005. And the alleged withholding of contour information is something that Plaintiffs have raised with the FCC but the FCC has never found a violation by either MCLM or PSI-TT, let alone that they committed any concerted action in that regard.

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PROCEDURAL HISTORY

Plaintiffs filed their Complaint on June 20, 2008, under docket number 08-3094, followed by a First Amended Complaint. Plaintiffs had previously filed an action against both MCLM and PSI-TT in California state court (the "California Action"). The New Jersey action was stayed pending the resolution of the California Action. The California Action (which included state antitrust claims against MCLM and PSI-TT) was dismissed in its entirety and Plaintiffs' appeals of that decision, including a petition for certiorari to the United States Supreme Court, were all denied. Following the resolution of Plaintiffs' California Action in favor of Defendants, Plaintiffs filed a Second Amended Complaint under docket 11-993. MCLM and PSI-TT filed a motion to dismiss Plaintiffs' Second Amended Complaint and in a December 22, 2011 Opinion, this Court dismissed each claim in the Second Amended Complaint except the Section 1 Claim. In 2011, MCLM was forced to file Chapter 11 bankruptcy in the Northern District of Mississippi (the "Bankruptcy Action"), where, in January 2013, the Bankruptcy Court entered an Order confirming MCLM's plan of reorganization. Plaintiffs are the only objectors to that Order, in large part (if not entirely) based upon their hollow assertion that they are a contingent creditor of MCLM due to the Section 1 Claim allegations in this action.

ARGUMENT

I. PLAINTIFFS' SECTION 1 CLAIM MUST BE DISMISSED BECAUSE PLAINTIFFS CANNOT ESTABLISH ANY OF THE REQUISITE ELEMENTS UNDER THE SHERMAN ANTITRUST ACT

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." 15 U.S.C. § 1. In order to establish a violation of Section 1, Plaintiffs must set forth sufficient facts proving "(1) concerted action by the defendants; (2) that

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produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005), *cert. denied, motion granted by*, 547 U.S. 1092 (2006); *In re: Baby Food*, 166 F.3d 112, 118 (3d Cir. 1999). Although Plaintiffs allege that Defendants' actions are a *per se* violation and would presumably argue that Defendants' actions should be reviewed under a *per se* analysis, Plaintiffs are unable to point to any violations that are "in and of themselves considered unreasonable because [of] 'their pernicious effect on competition and lack of any redeeming virtue,'" such as price-fixing agreements. *In re: Baby Food*, 166 F.3d at 118 (quoting *U.S. v. Cargo Service Stations, Inc.*, 657 F.2d 676, 682 n.4 (5th Cir. 1981) and citing *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)). Thus, Plaintiffs allegations must be analyzed under the rule-of-reason analysis. As set forth herein, Plaintiffs cannot demonstrate through credible evidence **any** concerted action between MCLM and PSI-TT, let alone the other elements of their Section 1 Claim, such as anti-competitive effects or injury.

A. <u>MCLM Has Not Engaged In Concerted Action</u>

As long held by the Supreme Court and reiterated by the Third Circuit, "unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement **must exist** to trigger *Section 1* liability." *In re: Baby Food*, 166 F.3d at 117 (emphasis added; internal quotations removed); *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). The Supreme Court has made clear that a Section 1 claim is insufficient, and "stops short of the line between possibility and plausibility of 'entitle[ment] to relief,'" if it merely alleges parallel conduct and "a bare assertion of conspiracy" – " when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a

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context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. " *Twombly*, 550 U.S. at 556-57; *see also Gordon*, 423 F.3d at 207 (explaining that evidence of concerted action exists where "two or more distinct entities have agreed to take action against the plaintiff," and as a result "requires proof of a causal relationship between pressure from one conspirator and an anticompetitive decision of another conspirator"). In *Twombly*, the Court determined that a complaint alleging violations of Section 1 of the Sherman Act cannot survive a rule 12(b)(6) motion to dismiss "when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." 550 U.S. at 548.

The record has made abundantly clear that Plaintiffs have alleged mere general presumptions – not facts – that MCLM "contracted, combined or conspired" with PSI-TT. The sworn testimony of all of the witnesses in this action confirm that there is no evidence that MCLM and PSI-TT have ever jointly done anything and certainly nothing that would support Plaintiffs' Section 1 Claim. Additionally, the Second Amended Complaint is devoid of any allegation that MCLM and Mobex Network committed any concerted action other than the undisputed fact that MCLM and Mobex Network consummated the arm's-length MCLM-Mobex Asset Purchase. MCLM did not exist before the negotiations began and Mobex ceased to exist shortly after the transaction was closed in December 2005. Moreover, the transfer of the AMTS licenses were subject to FCC approval, which was granted over Plaintiff Havens' objection and motion for reconsideration. Given that Mobex Network no longer exists (and has not existed since 2006), any conspiracy theory advanced by Plaintiffs now that MCLM and Mobex somehow violated the Sherman Act should be rejected.

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Plaintiffs' "formulaic recitation" of the elements of a Section 1 claim, coupled with allegations that MCLM independently failed to pay State fees, taxes and other costs and made false representations to the FCC (all of which it denies), does not establish evidence of an agreement between MCLM and any Defendant, let alone an agreement which caused an anticompetitive effect in the relevant market. Further, any allegation that MCLM has violated FCC law is a nonstarter for two reasons: First, the FCC has not found that MCLM committed any violation of FCC regulation and, second, even if the FCC were to make that finding as to MCLM, it would not support Plaintiffs' theory that there has been a conspiracy between MCLM and any other Defendant. Thus, in the absence of any "circumstance pointing toward a meeting of the minds," Plaintiffs' account of "defendant's commercial efforts stays in neutral territory," and Plaintiffs' restraint of trade claim should be dismissed. *Twombly*, 550 U.S. at 557.

Likewise, Havens and Plaintiffs' expert James Chen will presumably both testify (as they did in their depositions) that there is not a single document or even testimony from a witness that supports Plaintiffs' wild theories regarding the alleged conspiracy.

Contrary to Plaintiffs' baseless allegations, the evidence in this case confirms that the record is <u>completely devoid</u> of any conspiracy: there have been no written agreements between MCLM and PSI-TT and, as all of the MCLM and PSI-TT witnesses confirmed, there have been no oral agreements between them. Even more telling, there has been consistent and direct testimony that PSI-TT's and MCLM's owners do not even have a personal relationship.

Further, Defendants supposed circumstantial evidence regarding alleged concerted action to co-locate and warehouse AMTS licenses is nonsense – co-location is commonplace, promoted by the FCC and even mandatory, at times, as confirmed by Plaintiffs' expert, and there is no evidence of a joint lease or even a jointly negotiated lease for both MCLM

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and PSI-TT. MCLM and PSI-TT had separate, independently negotiated leases with third-party tower owners on those few sites where they happened to be co-located. Likewise, there is no written evidence or testimony indicating any conversations between MCLM and PSI-TT regarding a conspiracy based on nondisclosure of contour information or warehousing of licenses. Accordingly, the record makes abundantly clear that Plaintiffs will not meet their burden of demonstrating the threshold requirement of concerned action under the Sherman Act for their Section 1 Claim.

B. MCLM Has Always Competed Fairly And There Is No Evidence Of Anti-Competitive Effects Within The Relevant Product And Geographic Markets

As to the second element for their Section 1 Claim, Plaintiffs have again failed to allege facts or adduce evidence that demonstrates that the alleged conspiracy between MCLM and PSI-TT "produced adverse anti-competitive effects within the relevant product and geographic markets." Plaintiffs merely state in their Second Amended Complaint that the alleged conspiracy (as opposed to independent acts of either MCLM or PSI) "produced anti-competitive effects." First, it is well settled that unrealized sales expectations of a single competitor with respect to a single product in the larger marketplace is not an anti-competitive effect and is not protected by the antitrust laws. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). As explained by the Supreme Court, antitrust laws "were enacted for 'the protection of competition, not competitors,'" and it is "inimical to the purposes of these laws to award damages for the type of injury claimed here" (*i.e.*, damages to a competitor resulting from fair competition). *Id.* (quoting *Brown Shoe Co.*, 370 U.S. 294, 320 (1962)). Also, the Supreme Court has made clear that the purpose of the Sherman Act "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). Plaintiffs have failed to

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allege facts (rather than assumptions) or identify in discovery how MCLM and PSI-TT have jointly created an anti-competitive effect; to the contrary, Plaintiffs allegations merely suggest that MCLM and PSI-TT compete against them, which the undisputed record confirms that they do *individually* and permissibly (to the extent MCLM or PSI-TT could compete "against" Plaintiffs unconstructed stations).

Second, Plaintiffs have failed to identify the "relevant product and geographic markets." According to the Third Circuit, "[t]here are two aspects to a relevant market. The first aspect is known as the relevant product market. The second aspect is known as the relevant geographic market." *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir.), *cert. denied*, 131 S. Ct. 658 (2010). Here, Plaintiffs have not identified either a product market or a geographic market.

The Supreme Court has stated that "the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co*, 370 U.S. at 325; *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 442 n.18 (3d Cir. 1997) (product market test defined by same two factors whether under Sherman Antitrust Act §1 or §2); *see also Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991). The Third Circuit has held that the "interchangeability of use" test examines whether "commodities are reasonably interchangeable by consumers for the same purposes." *Queen City Pizza,* 124 F.3d at 438. Moreover, under the Third Circuit's test, cross-elasticity of demand measures the responsiveness of the demand for one product to changes in the price of a different product. *Id.* at 430, n.6. In order for two products to exhibit cross-elasticity of demand, and thus be in the same relevant market, the price increase of one product must tend to create a greater demand for the other product, and vice

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versa. *See Tunis Bros.*, 952 F.2d at 722. Here, Plaintiffs have failed to identify in their Second Amended Complaint (or otherwise) any relevant product market let alone how the alleged concerted activity of MCLM and PSI-TT affect that product market.

Moreover, Plaintiffs have the burden of defining the relevant market. *Pastore v. Bell Tel. Co. of PA*, 24 F.3d 508, 512 (3d Cir. 1994); *Tunis Bros. Co., Inc.*, 952 F.2d at 726. The Third Circuit has made equally clear that "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand . . . the relevant market is legally insufficient." *Queen City Pizza*, 124 F.3d at 436-437 (setting forth a summary of case law regarding failure to identify the relevant market). Plaintiffs only allege a product market of "the relevant AMTS market" without further explanation. Plaintiffs supposed "legal" expert James Chen did not expand on this characterization of the product market or address whether it meets the legal standard; to the contrary, Mr. Chen rendered no conclusion in that regard. As a result, Plaintiffs' Section 1 Claim should be dismissed on that basis as well.

According to the Third Circuit, it is also Plaintiffs' burden to demonstrate a geographic market, defined as "the area where his customers would look to buy such a product" which "will differ depending upon the price, durability and size of the product; in practical terms, one would comparison shop in a larger geographic market for a tractor, as compared to a grocery item." *Tunis Bros.*, 952 F.2d at 726 (*see, e.g.*, market for tractors found to be "6.36 miles east, 7 miles west, 11.45 miles north and 10 miles south of the Tunis Brothers location"). Here, Plaintiffs have failed to meet the basic requirement of identifying a geographic market, only vaguely alleging harm "among the several states" or in "the relevant geographic market," whatever that may be. Plaintiffs' expert did no better, identifying the geographic market as

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"discrete geographic markets" or a "national market"; he never identified the geographic market but instead hypothesized that is was somewhere between the size of one of his clients' geographic licenses and the entire nation, or maybe both. Plaintiffs and their expert's inability to identify the geographic market requires that Plaintiffs' Section 1 Claim be dismissed.

C. MCLM Did Not Engage In Illegal Acts With (Or Even Without) PSI-TT

The concerted action Plaintiffs allege regarding warehousing of licenses has not been found by the FCC, is wholly unsupported and has been roundly refuted by documents produced in this litigation demonstrating that sites were constructed by each of the Defendants (or prior license holders) separately with respect to their separate AMTS licenses (not to mention that Plaintiffs have failed to demonstrate that purported concerted action regarding license warehousing – a practice they, themselves, have perfected since Plaintiffs have not constructed under their current AMTS licenses – is even "illegal").

MCLM's licenses were each constructed prior to its ownership, defeating Plaintiff's spurious warehousing allegations, and MCLM's corporate designee testified he knew locations continued to be operational through a variety of sources, including that lease payments were made, as well as conversations with his engineers regarding equipment or signal issues or hiring of sales personnel for an area. Moreover, documents (27,584 pages worth) demonstrating MCLM's sites were constructed were produced in this litigation. In short, Plaintiffs cannot provide evidence to this Court that MCLM with PSI-TT warehoused (and the FCC has not found that MCLM warehoused licenses).

Plaintiffs also assert (without legal support) that it was illegal for MCLM and PSI-TT to not report each other for nonconstruction. First, it would be unlikely that Defendants would have known if other Defendants had not constructed given the large number of tenants

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and their equipment at any given site. As the deposition testimony consistently demonstrated, even where MCLM and the other Defendants were co-located, an observer could not tell from looking at the location and its tower whether PSI-TT or MCLM had an antenna or transmitter installed, as there could be numerous antennae and transmitters for many tenants and for a variety of applications. Second, Defendants would not have had anything to report to the FCC because MCLM's sites were constructed.

Plaintiffs also claim that Defendants have engaged in the supposed illegal act of co-location. As discussed above, co-location is not illegal, quite the contrary – it is promoted by the FCC and is a common practice. Using the El Yunque and KGON Portland sites examples, an alleged conspiracy regarding co-location would involve over 348 other entities associated with the El Yunque site and the 689 entities associated with the KGON Portland site (not to mention every other tenant at every other site MCLM was associated with nationwide). Clearly, Section 1 of the Sherman Act does not and cannot possibly stand on Plaintiffs' allegation of co-location.

D. Since There Is No Evidence Of Concerted Or Illegal Action, Plaintiffs Are Unable To Prove Injury As A Result Of That Action

As stated above, Plaintiffs have failed to adduce evidence of concerted action. Even Plaintiffs' supposed "legal" expert testified repeatedly that he relied solely on his clients' allegations in support of his "expert" report, which report then unsurprisingly concluded that there was a "conspiracy." When the Court goes beyond Plaintiffs' allegations at trial, the Court will be left with no facts to support Plaintiffs' hollow claims of conspiracy and harm. What the Court will have, though, is a clear picture that Plaintiffs did not like fair competition and have done everything in their power to impede the orderly resolution of MCLM's bankruptcy plan. Plaintiffs own the majority of the licenses and want to own the rest; and Plaintiffs (with Havens at the forefront) will continue to cry injury against any party in the AMTS spectrum until the

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United States is blanketed with Havens'-owned AMTS licenses but no competition. As the Third Circuit stated in *Town Sound*, "[o]bviously, if the plaintiff cannot come up with evidence of injury to competition, not simply to the plaintiffs themselves, then summary judgment is appropriate." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 486 (3d Cir. 1992). Notwithstanding the fact that MCLM and PSI-TT did not engage in any concerted action that allegedly violates Section 1 of the Sherman Act, Plaintiffs have suffered no damages as a result of any alleged concerted action between MCLM and PSI-TT.

CONCLUSION

For the foregoing reasons, Defendant Maritime Communications/Land Mobile, LLC respectfully requests that this Court dismiss Plaintiffs' Second Amended Complaint with prejudice.

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Dated: May 5, 2014