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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF GUAM**

**CYFRED, LTD., for itself and on behalf of  
others similarly situated,**  
  
Plaintiffs,  
  
vs.  
  
**TICOR TITLE INSURANCE COMPANY  
and DOES One (1) through Three  
Hundred (300), inclusive,**  
  
Defendants.

Civil Case No. 09-00004

**ORDER RE: MOTION TO DISMISS**

Before the court is Defendant’s “Motion to Dismiss” (“the Motion” or “Motion”). *See* Docket No. 5; *see also* Docket No. 6 (memorandum in support). The issues were briefed and argued. Having considered all of the arguments in light of the facts and applicable law, the court hereby **GRANTS** the Motion as to the antitrust claim, **DENIES** it in all other respects, and **STAYS** the case, all for the reasons set forth below.

**I. FACTUAL BACKGROUND**<sup>1</sup>

From January 2000 through January 2004, Plaintiff CYFRED, LTD. (“Cyfred” or “Plaintiff”) bought several title insurance policies from Defendant TICOR TITLE INSURANCE COMPANY (“TICOR” or “Defendant”), in order to protect its security interests in various

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<sup>1</sup> This background is drawn from the complaint. At this stage, the court takes Plaintiff’s factual allegations as true. *Alperin v. Vatican Bank*, 410 F.3d 532, 541 (9th Cir. 2005).

1 properties. *See* Docket No. 1 (“Complaint”) at ¶¶16-26. Cyfred bought these policies through  
2 Title Guaranty of Guam (“TGOG”), TICOR’s agent on Guam. *Id.* at ¶27.

3 Cyfred alleges that TICOR did not obtain approval from the Guam Banking and  
4 Insurance Commissioner as to the insurance forms constituting the Cyfred policies, nor as to the  
5 premiums charged to Cyfred and collected by TICOR, nor as to the rate schedules, rate plans, and  
6 rate computation methods used in designing the Cyfred policies—all in contravention of Guam  
7 law requiring such approval. *See* Complaint at ¶¶10-30. Moreover, Cyfred alleges that TICOR  
8 knew that it was required by law to obtain approval on all those points, and that it actively  
9 concealed its failure to do so by filing false “Affidavits of Compliance” each year. *See id.* at  
10 ¶¶31-32.

11 After it bought the title insurance policies from TICOR, Cyfred became involved in the  
12 case of *Kini Sananap et al. v. Cyfred, Ltd. et al.*, Superior Court of Guam Case No. CV1448-02,  
13 which directly implicates the titles that Cyfred had insured via the policies it bought from  
14 TICOR. *See* Complaint at ¶¶35-39. On October 4, 2006, believing itself entitled to do so under  
15 the policies, Cyfred asked TICOR to defend and indemnify it in the *Sananap* action. *See id.* at  
16 ¶40. TICOR did not respond until May 2, 2007, when it agreed to undertake Cyfred’s defense.  
17 *See id.* at ¶¶41-42. However, on July 19, 2007, TICOR withdrew its defense. *See id.* at ¶¶43-45.

## 18 **II. PROCEDURAL BACKGROUND**

19 Cyfred filed its complaint on March 18, 2009. *See* Complaint at 1. The case is a class  
20 action, brought by Cyfred on behalf of itself and “all other similarly situated Guam consumers  
21 who purchased title insurance policies, or who expected and are entitled to coverage under title  
22 insurance policies, purchased from [TICOR], by and through [TGOG].” *See id.* at 1:20-25.

23 The complaint asserts the following fourteen causes of action:

- 24 1. Fraud, by the class;
- 25 2. Fraudulent Deceit, by the denied claims sub-class;
- 26 3. Conspiracy to Defraud, by the class;
- 27 4. Involuntary Trust from Fraud, by the class;

- 1                   5.     Unjust Enrichment, by the class;
- 2                   6.     Negligent Failure to Comply with the Insurance Law, by the class;
- 3                   7.     Negligent Misrepresentation, by the class;
- 4                   8.     Deceptive Trade Practices, by the deceptive acts sub-class;
- 5                   9.     Conspiracy to Commit Violations of the Deceptive Trade Practices-
- 6                         Consumer Protection Act, by the deceptive acts sub-class;
- 7                   10.    Antitrust, by the class;
- 8                   11.    Racketeering Influenced and Corrupt Organization, by the class;
- 9                   12.    Breach of Contract, by Plaintiff;
- 10                  13.    Breach of Implied Covenant of Good Faith and Fair Dealing, by Plaintiff;
- 11                         and
- 12                  14.    Breach of Implied Covenant of Good Faith and Fair Dealing, by the class.

13    See Complaint at ¶¶61-183.

14                   TICOR filed the Motion on April 27, 2009. See Docket No. 5. Plaintiff opposed the  
15    Motion on May 11, 2009. See Docket No. 16. TICOR replied on May 18, 2009. See Docket  
16    No. 18. Finally, the court heard oral argument on the Motion on October 5, 2009. See Docket  
17    No. 34.

18    **III.    JURISDICTION AND VENUE**

19                   The court has jurisdiction over all of Plaintiff’s causes of action. The Eleventh Cause of  
20    Action is within the court’s federal question jurisdiction. See 28 U.S.C. § 1331. All others are  
21    within the court’s diversity jurisdiction. See id. § 1332; see also Complaint at ¶¶1-2.

22                   Venue is proper in this judicial district, the District of Guam, because Defendant conducts  
23    business here and because all of the events or omissions giving rise to Plaintiff’s claims occurred  
24    here. See 28 U.S.C. § 1391; see also Complaint at ¶8.

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26    \\  
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1 **IV. APPLICABLE STANDARDS**

2 A motion to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure  
3 tests the legal sufficiency of the complaint. Such a motion “is viewed with disfavor and is rarely  
4 granted.” *Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (internal quotes  
5 omitted).

6 Under 12(b)(6) analysis, the complaint must be construed on the assumption that all of its  
7 allegations are true, even if doubtful in fact. *Bell Atlantic Corp. v. Twombly*, 550 US 544, 556  
8 (2007). Similarly, the court must accept all reasonable inferences to be drawn from the facts.  
9 *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). However, the court need not accept as true  
10 conclusory allegations, legal characterizations, unreasonable inferences or unwarranted  
11 deductions of fact. *See Beliveau v. Caras*, 873 F. Supp. 1391, 1395-96 (C.D. Cal. 1995);  
12 *Transphase Systems, Inc. v. Southern Calif. Edison Co.*, 839 F. Supp. 711, 718 (C.D. Cal. 1993).

13 Rule 8(a) requires only “a short and plain statement of the claim showing that the pleader  
14 is entitled to relief,” in order to ‘give the defendant fair notice of what the . . . claim is and the  
15 grounds upon which it rests.’” *Twombly*, 550 U.S. at 555 (quoting Fed. R. Civ. P. 8(a)(2)). The  
16 complaint need not contain detailed factual allegations, but it must provide more than “a  
17 formulaic recitation of the elements of a cause of action.” *Id.* Even under the liberal pleading  
18 standard of Rule 8(a)(2), then, a plaintiff must go beyond a mere recitation of the elements of the  
19 claim and “provide the grounds of [its] entitlement to relief.” *Id.*

20 In short, the complaint must allege “enough facts to state a claim that is plausible on its  
21 face.” *Id.* at 570. If “plaintiffs [do] not nudg[e] their claims across the line from conceivable to  
22 plausible, their complaint must be dismissed.” *Id.* Courts have enforced this standard with  
23 particular vigor in the antitrust context.<sup>2</sup>

24 \_\_\_\_\_  
25 <sup>2</sup> Probably so because *Twombly* was an antitrust case. There was some confusion about whether the standards  
26 announced in *Twombly* applied to all cases, or only to antitrust cases, or to some intermediate set. *See, e.g., Ross v. Bank*  
27 *of America, NA (USA)*, 524 F.3d 217, 225 (2d Cir. 2008); *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir.  
28 2008); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). *See also* Keith Bradley, *Pleading Standards Should*  
*Not Change After Bell Atlantic v. Twombly*, 102 Nw. U. L. REV. COLLOQUY 117 (2007). However, it is now clear that  
*Twombly* applies to all cases. *See Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S.Ct. 1937, 1949-53 (May 18, 2009).

1 Finally, “[f]ederal pleading standards govern in federal court, even as to state claims.” *In*  
2 *re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1025 (N.D. Cal. 2007)  
3 (citing *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 696 (9th Cir. 1999)).

4 **V. ANALYSIS**

5 Defendant’s motion to dismiss makes two basic arguments: (1) the entire complaint  
6 should be dismissed because Plaintiff has not exhausted its administrative remedies; (2) the  
7 antitrust claim (*i.e.*, the tenth cause of action) in Plaintiff’s complaint should be dismissed  
8 because the manner in which it is pled does not satisfy minimal pleading standards. The court  
9 takes each argument in turn.

10 **A. The Court Will Not Dismiss the Entire Complaint, But Will Instead Stay the**  
11 **Action Pending Exhaustion of Administrative Remedies**

12 Defendant first argues that the entire complaint should be dismissed because “[a] motion  
13 to dismiss for lack of jurisdiction must be granted when a plaintiff has failed to exhaust all  
14 required administrative remedies,” and Plaintiff in this case has not exhausted all such remedies.  
15 Docket No. 6 at 5 (citing, *inter alia*, *Granholm ex rel. Michigan Dept. of Nat’l Res. v. FERC*, 180  
16 F.3d 278 (D.C. Cir. 1999)). Defendant acknowledges that the court has “the discretion to stay  
17 rather than dismiss when a plaintiff has not exhausted administrative remedies,” and that the  
18 court did just that in two cases very closely related to this one. *Id.*; see *Cyfred, Ltd. v. Stewart*  
19 *Title Guaranty Company et al.*, D. Guam Civ. No. 07-00023, Docket No. 140; *Cyfred, Ltd. v.*  
20 *First American Title Insurance Company et al.*, D. Guam Civ. No. 07-00024, Docket No. 132.  
21 However, Defendant argues that dismissal is the appropriate remedy in this instance because  
22 “Cyfred chose to ignore the fact that the [Magistrate’s] Reports made it clear that administrative  
23 review was required prior to judicial action, [but] simply filed another largely identical lawsuit  
24 without initiating administrative action.” Docket No. 6 at 6.

25 While the court may grant a motion to dismiss for failure to exhaust administrative  
26 remedies—see, e.g., *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003)—and while  
27 Defendant is right to describe Plaintiff’s filing of this complaint without first seeking  
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1 administrative review as a kind of “intransigence,” Docket No. 6 at 6, the court will exercise the  
2 discretion that Defendant has recognized and stay the action pending Plaintiff’s exhaustion of  
3 administrative remedies. This is so for two reasons. First, as Defendant indicates, the court  
4 followed that course of action in the other two *Cyfred* cases. Except for the antitrust claim  
5 alleged in this case, the operative complaints in Civil Case Nos. 07-00023 and 07-00024 are  
6 essentially the same as that in this case. *Compare* Docket No. 1 with *Cyfred, Ltd. v. Stewart Title*  
7 *Guaranty Company et al.*, D. Guam Civ. No. 07-00024, Docket No. 1, and *Cyfred, Ltd. v. First*  
8 *American Title Insurance Company et al.*, D. Guam Civ. No. 07-00024, Docket No. 11.  
9 Likewise, each case faced a motion to dismiss presenting essentially the same arguments at issue  
10 here. *See Cyfred, Ltd. v. Stewart Title Guaranty Company et al.*, Case 1:07-cv-00023, Docket  
11 Nos. 4 & 5; *Cyfred, Ltd. v. First American Title Insurance Company et al.*, Case 1:07-cv-00024,  
12 Docket Nos. 21, 22, 24, & 25. Finally, there is substantial overlap in counsel across all three  
13 cases. Given those similarities, there is reason to treat this motion to dismiss just as the court  
14 treated the motions to dismiss in the other two cases. This is particularly so since part of the idea  
15 behind staying the other actions (as opposed to dismissing them) was to foreclose the statute-of-  
16 limitations concerns hinted at in the Magistrate’s Report. *See, e.g., Cyfred, Ltd. v. Stewart Title*  
17 *Guaranty Company et al.*, D. Guam Civ. No. 07-00023, Docket No. 134 at 9:19-23.

18         The second reason the court will stay the action pending Plaintiff’s exhaustion of  
19 administrative remedies instead of dismissing the complaint outright is that the only appropriate  
20 mode of dismissal at this point would be dismissal *without prejudice*. *See Wyatt*, 315 F.3d at  
21 1119-20. After such dismissal, Plaintiff would be free to re-file its action upon exhaustion of  
22 administrative review. Such a remedy would thus only burden Plaintiff without affording  
23 Defendant any permanent relief, and so is inefficient and unfair.

24         Plaintiff argues that it should not be required to exhaust administrative remedies for three  
25 reasons. First, it argues that Defendant has not asserted that it has complied with Guam’s  
26 insurance laws, which amounts to a concession that “it issued unapproved forms and charged  
27 unapproved rates between 1993 and the present time . . . .” Docket No 16 at 3:17-19. This  
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1 argument is frivolous. Defendant has not yet answered the complaint in this case, so naturally it  
2 has not contested the assertions therein.

3         Second, Plaintiff argues that it should not be required to exhaust administrative remedies  
4 because its deceptive trade practices claim does not require administrative review. *See* Docket  
5 No. 16 at 3:20-4:8. This argument is closely related to Plaintiff’s third argument, which is that it  
6 should not be required to exhaust administrative remedies because its claims for breach of  
7 contract and bad faith “are not susceptible to an administrative remedy.” *Id.* at 4:17. Both  
8 arguments fail. Both contemplate that the exhaustion requirement may be defeated by the  
9 presence of claims for which administrative review is not necessary or appropriate. However,  
10 “even where the administrative remedy may not provide the specific relief sought by a party or  
11 resolve all the issues, exhaustion is preferred [under Guam law] because agencies have the  
12 specialized personnel, experience and expertise to unearth relevant evidence and provide a record  
13 which a court may review.” *Carlson v. Perez*, 2007 Guam 6, ¶69 (*following Westlake Comm.*  
14 *Hosp. v. Superior Court*, 551 P.2d 410, 416 (Cal. 1976)); *see also Booth v. Churner*, 532 U.S.  
15 731, 734-35 (2001); *O’Guinn v. Lovelock Correctional Ctr.*, 502 F.3d 1056, 1061 (9th Cir.  
16 2007); *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (stating, albeit in context of statutory  
17 rather than prudential exhaustion, that “obligation to exhaust ‘available’ remedies persists as long  
18 as *some* remedy remains ‘available’”) (emphasis in original). Indeed, the court rejected  
19 Plaintiff’s second and third arguments for this very reason in Plaintiff’s related cases. *See, e.g.,*  
20 *Cyfred, Ltd. v. Stewart Title Guaranty Company et al.*, D. Guam Civ. No. 07-00023, Docket No.  
21 134 at 8:4-9:13. Therefore, as Plaintiff now surely knows, the question is not whether the  
22 relevant administrative process may address *each* claim a plaintiff can articulate, but rather  
23 whether it may yield *some* relief on the alleged facts. If so, then it is proper to require the  
24 plaintiff to pursue that process before taking its claims to court.

25         In sum, the court will exercise the discretion that Defendant has recognized and stay the  
26 action pending Plaintiff’s exhaustion of administrative remedies.

1           **B.     The Court Will Dismiss the Antitrust Claim**

2           Plaintiff's antitrust claim consists in the following two allegations:

3                     At all times herein relevant TICOR through TGOG and  
4                     Calvo's and Calvo's Enterprises and their respective direct or  
5                     indirect participation and or [*sic*] membership in the IAG or  
6                     through other entities entered into a [*sic*] contracts, combinations  
7                     or conspiracies in restraint of or to monopolize trade or commerce  
8                     in the insurance market for title insurance sold by TICOR in Guam.

9                     TICOR through it [*sic*] membership in ratings bureau's  
10                    [*sic*] and participation in other entities, groups or associations  
11                    entered into contracts, agreements, combinations or conspiracies  
12                    that controlled or attempted to control the price and title insurance  
13                    policy terms in restraint of trade of title insurance policies sold in  
14                    Guam by TICOR through TGOG.

15           Docket No. 1 ¶¶135-36. Plaintiff alleges that these actions amount to willful violations of  
16           Sections 69.15 and 69.20 of Title 9, Guam Code Annotated, thereby entitling it to a variety of  
17           damages.<sup>3</sup> *See id.* ¶¶ 137-38; Docket No. 16 at 5:7-9.

18           Defendant argues, generally, that the antitrust claim (*i.e.*, the tenth cause of action) in  
19           Plaintiff's complaint should be dismissed because the manner in which it is pled does not satisfy  
20           minimal pleading standards. *See generally* Docket No. 6 at 6-13.

21                   **1.     The Claim Fails Insofar As It Alleges A Violation of Section 69.15**

22           Defendant argues that the antitrust claim under Section 69.15 should be dismissed  
23           because it offers only "a series of legal conclusions, parroting back the provisions found in  
24           Guam's antitrust statute, which are strung together without any of the requisite factual allegations  
25           providing the who, what, how, where, and when of any purported agreement to fix title insurance  
26           rates and/or the terms of title insurance policies in Guam." Docket No. 6 at 10 (citation omitted).

27           Section 69.15 renders unlawful, *inter alia*, "[a] contract, combination, or conspiracy  
28           between two (2) or more persons in restraint of, or to monopolize, trade or commerce in a

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3           Defendant argues that the court should not consider Plaintiff's claim under Section 69.20 because the  
complaint does not refer to that statute. *See* Docket No. 18 at 9. "However, a complaint should not be dismissed if it  
states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory." *Haddock v.*  
*Board of Dental Examiners of California*, 777 F.2d 462, 464 (9th Cir. 1985). As such, the court will consider whether  
the complaint states a claim under Section 69.20, even though Plaintiff does not cite that statute therein.

1 relevant market.” 9 G.C.A. § 69.15. The statute is modeled on Section 1 of the Sherman Act.  
2 *Compare id. with* 15 U.S.C. § 1; *see also* Docket No. 16 at 5:7-8 (Defendant’s acknowledgment  
3 that Section 69.15 is modeled on Section 1 of the Sherman Antitrust Act).<sup>4</sup>

4 A claim alleging a conspiracy or other agreement in restraint of trade should be dismissed  
5 when it merely alleges an agreement to fix prices or restrain trade, without identification or  
6 discussion of the co-conspirators, the nature of the conspiracy, or the type of agreement. *See*  
7 *Rick-Mik Enterps., Inc. v. Equilon Enterps., LLC*, 532 F.3d 963, 976 (9th Cir. 2008).<sup>5</sup> In *Rick-*  
8 *Mik*, the district court dismissed a Sherman Act Section 1 claim alleging that

9 Equilon “conspired with numerous banks, banking associations  
10 and financial institutions throughout the United States to fix, peg  
11 and stabilize the price of credit and debit card processing fees,  
12 commonly referred to as the ‘Merchant Discount Fee,’ charged to  
13 Plaintiffs and the members of the Class Plaintiffs represent.” It  
14 continues: “EQUILON receives compensation in the form of a  
15 ‘kick back’ from numerous banks, banking associations and  
16 financial institutions throughout the United States from the  
17 Merchant Discount Fee as consideration for its unlawful agreement  
18 to fix prices of credit and debit card processing fees and tying  
19 arrangement, which is not reimbursed to EQUILON’s franchisees.”

20 *Id.* at 966, 975-76. The Ninth Circuit affirmed. *Id.* at 966-67. The Ninth Circuit began by  
21 noting that, after *Twombly*, “[a] plaintiff’s obligation to provide the grounds of his entitlement to  
22 relief requires more than labels and conclusions, and a formulaic recitation of the elements of a  
23 cause of action will not do.’ A Sherman Act Section 1 claim ‘requires a complaint with enough  
24 factual matter (taken as true) to suggest that an agreement was made.’” *Id.* at 970 (brackets and  
25 internal citations omitted). The court then “readily conclude[d]” that the complaint did not  
26 adequately allege a Section 1 claim because “[a]ll that is alleged is there was an agreement on

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27 <sup>4</sup> Section 1 of the Sherman Act provides in pertinent part: “Every contract, combination in the form of trust or  
28 otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared  
to be illegal.” 15 U.S.C. § 1.

<sup>5</sup> There do not appear to be any cases construing Sections 69.15 and 69.20 of Title 9, Guam Code Annotated.  
However, analysis of state antitrust statutes tracks the analysis of federal antitrust statutes where the former are modeled  
on the latter. *See, e.g., County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001);  
*McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 n.4 (9th Cir. 1988). Since the Guam antitrust statutes at issue are, as  
stated above, modeled on the Sherman Act, the court looks to cases construing the Sherman Act for guidance in how to  
apply the Guam statutes.

1 price. The co-conspirator banks or financial institutions are not mentioned. The nature of the  
2 conspiracy or agreement is not alleged. The type of agreements are not alleged.” *Id.* at 975-76.

3 Plaintiff’s antitrust claim is dismissed insofar as it alleges a violation of Section 69.15. It  
4 does not specify whom Defendant entered into an agreement with, and it discusses neither the  
5 nature or type of the purported agreement. As such, it is just as factually deficient as the  
6 complaint in *Rick-Mik*, which the Ninth Circuit “readily conclude[d]” did not adequately allege a  
7 Section 1 claim. *Rick-Mik*, 532 F.3d at 975. Like that complaint, and like the complaint in  
8 *Twombly*, Cyfred’s complaint offers only “labels and conclusions, and a formulaic recitation of  
9 the elements of a cause of action,” which “will not do.” *Id.* at 970 (*quoting Twombly*, 550 U.S. at  
10 555). Factually deficient in this way, it fails to state a restraint-of-trade claim.

11 Plaintiff makes no good argument in support of its Section 69.15 claim. In its opposition  
12 to Defendant’s motion, Plaintiff offers new facts in an apparent attempt to cure the factual  
13 deficiency of its antitrust claim. *See* Docket No. 16 at 7:6-8:10. However, “[i]n determining the  
14 propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff’s  
15 moving papers, such as a memorandum in opposition to a defendant’s motion to dismiss.”  
16 *Schneider v. Cal. Dep’t. of Corr.*, 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998) (emphasis in  
17 original). Thus, the court will not consider any of these new allegations.

18 In sum, Plaintiff’s antitrust claim (*i.e.*, the tenth cause of action) must be dismissed  
19 insofar as it alleges a violation of Section 69.15 of Title 9, Guam Code Annotated.

20 **2. The Claim Fails Insofar As It Alleges A Violation of Section 69.20**

21 Defendant argues that the monopolization claim under Section 69.20, if the court even  
22 considers it,<sup>6</sup> should be dismissed because “Cyfred has failed to allege . . . an indispensable  
23 element of a monopolization claim, namely ‘the willful acquisition or maintenance of that  
24 [monopoly] power as distinguished from growth or development as a consequence of a superior  
25 product, business acumen, or historic accident.’” Docket No. 18 at 9 (*quoting United States v.*

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27 <sup>6</sup> *See* n. 3, *supra*.

1 *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

2 Section 69.20 renders unlawful “[t]he establishment, maintenance or use of a monopoly,  
3 or an attempt or conspiracy to establish a monopoly, of trade or commerce in a relevant market  
4 by any person, for the purpose of excluding competition or controlling, fixing, or maintaining  
5 prices.” 9 G.C.A. § 69.20. It is modeled on Section 2 of the Sherman Act. *Compare id. with* 15  
6 U.S.C. § 2; *see also* Docket No. 16 at 5:8-9 (Defendant’s acknowledgment that Section 69.20 is  
7 modeled on Section 2 of the Sherman Antitrust Act).<sup>7</sup>

8 Plaintiff’s antitrust claim is dismissed insofar as it alleges a violation of Section 69.20.  
9 As Defendant has indicated, “an indispensable element of a monopolization claim [is] ‘the  
10 willful acquisition or maintenance of [monopoly] power as distinguished from growth or  
11 development as a consequence of a superior product, business acumen, or historic accident.’”  
12 Docket No. 18 at 9. Cyfred’s complaint does not even offer a conclusory allegation of such  
13 “willful acquisition or maintenance,” let alone *facts* making such action plausible. *Cf. Twombly*,  
14 550 U.S. at 570. Thus lacking an essential element, it fails to state a monopolization claim.

15 Plaintiff makes no good argument in support of its Section 69.20 claim. As stated above,  
16 in its opposition to Defendant’s motion, Plaintiff offers new facts in an apparent attempt to cure  
17 the factual deficiency of its antitrust claim. *See pp. 17-18, supra*. Again, though, those facts are  
18 not to be considered. *See Schneider*, 151 F.3d at 1197 n. 1.

19 In sum, Plaintiff’s antitrust claim (*i.e.*, the tenth cause of action) must be dismissed  
20 insofar as it alleges a violation of Section 69.20 of Title 9, Guam Code Annotated. As such,  
21 Plaintiff’s antitrust claim should be dismissed altogether.<sup>8</sup>

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24 <sup>7</sup> Section 2 of the Sherman Act provides in pertinent part: “Every person who shall monopolize, or attempt to  
25 monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce  
26 among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .” 15 U.S.C. § 2.

27 <sup>8</sup> Plaintiff requests leave to amend in the event that the court dismisses the antitrust claim. *See* Docket No. 16  
28 at 8:15-16. Defendant has not yet filed a responsive pleading, so Plaintiff has an absolute right to amend its complaint  
once. *See* Fed. R. Civ. P. 15(a). That right ends only upon the filing of a responsive pleading or the entry of a final  
judgment. *See Rick-Mik*, 532 F.3d at 977. However, the court directs Plaintiff not to file its amended complaint until  
such time as the stay is lifted.

1 **VI. CONCLUSION**

2 For the foregoing reasons, Defendant's motion is **GRANTED** as to the antitrust claim,  
3 but **DENIED** in all other respects. The action is then **STAYED**, with Plaintiff ordered to  
4 exhaust its administrative remedies.

5 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood  
Chief Judge  
Dated: Dec 02, 2009

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