IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

DIVERSE POWER, INC., Plaintiff, v. CITY OF LAGRANGE, GEORGIA, Defendant.	CIVIL ACTION FILE NUMBER 3:17-cv-3-TCB

O R D E R

This case comes before the Court on Defendant City of LaGrange, Georgia's motion [17] to dismiss antitrust claims filed against them by Plaintiff Diverse Power, Inc. ("DPI").

I. Background

Accepting the well-pleaded facts in the complaint as true, the City owns and operates a water supply system that provides water utility service to residential, commercial, and industrial customers within and beyond the City's corporate limits. The City is the main provider of water utility service in the unincorporated areas of Troup County. The

county does not provide water utility service. The towns of Hogansville and West Point provide water utility service within and near their city limits, but for much of unincorporated Troup County, LaGrange is the only provider of water utility service. This monopoly on water utility service is accomplished by explicit agreement with some towns, such as West Point, where the town and the City have divided up service areas.

The City also sells natural gas to residential, commercial, and industrial customers within and beyond the City's corporate limits. The City also provides electric service, primarily within the city limits. DPI's electric service competes with the City's natural gas utility service in unincorporated Troup County. The City competes with DPI in the retail energy market in some areas of the city and in Troup County outside the city limits. The City is the sole supplier of natural gas in much of unincorporated Troup County.

DPI alleges the City's local ordinance, LAGRANGE, GA. CODE § 20-15-6 (2004), creates an unlawful tying arrangement that violates the Sherman Antitrust Act, 15 U.S.C. § 1, the Clayton Act, 15 U.S.C. §§ 14, 26, and Georgia antitrust laws, and that the City tortiously interfered

with its business relations by enacting the ordinance and contracting with towns in Troup County. The ordinance states:

> For all new construction outside the corporate limits of the city, and upon natural gas service to such structure being available, said availability being within the sole discretion of the city, water service as set forth in this chapter shall be available only to those customers who install at least one (1) natural gas furnace, one (1) natural gas water heater, and at least one (1) additional natural gas outlet sufficient for potential future use for a clothes dryer, range, grill, pool heater or outdoor lighting fixture.

LAGRANGE, GA. CODE § 20-15-6 (2004).

The City enforces this ordinance by sending form letters to customers planning a building or development in the area that notifies them that a failure to choose natural gas appliances will result in water utility service not being provided to the building or development. The letter, headed "IMPORTANT NOTICE CONCERNING WATER SERVICE OUTSIDE THE CITY LIMITS" states:

> This letter is to inform you of a utility policy that applies to all new water connections outside the city limits of LaGrange. In areas where natural gas service is available, new homes or businesses must install gas appliances in order to receive water service from the City. Specifically, at least one gas furnace, one gas water heater, and one gas outlet for a future appliance such as a dryer or stove must be

> installed. Builders that do not comply with this policy will be denied permanent water service.

[14] ¶ 11.

DPI alleges the purpose and effect of the ordinance is to coerce new subdivisions and homes into buying natural gas from the City, thereby reducing the demand for electrical services from DPI. As an example, DPI points to the Cameron Pointe subdivision. The section of the subdivision on the south side of Cameron Mill Road was built prior to the ordinance's adoption and was designed and built to use electricity for all appliances. The houses on the north side of the road were built after the ordinance's adoption and, in order to obtain water utility services for the homes, the developer installed the natural gas appliances required by the ordinance. The developer told DPI that it would have built these homes to use electrical appliances as well had it not been for the City's ordinance.

In 2008, LaGrange utility director Patrick Bowie stated in an email discussing several different subdivisions in the county that depending on the location of the subdivision "[the City] decided to use water as a leverage to require gas," or, if the subdivision was within the

city limits, stated the City "[cannot] use water as leverage to require gas." [14-2]. For subdivisions within the city limits, the City offers rebates and incentives to encourage the installation of natural gas appliances.

The City also entered into an agreement with West Point to allow West Point to provide water and sewage utility services to an area of Troup County on the condition that the new construction receive natural gas service from the City. The City entered another agreement with West Point that gave the necessary right of way access to the City in exchange for West Point receiving three percent of the sales of natural gas to consumers in West Point.

On March 3, 2017, DPI filed this lawsuit alleging the following causes of action: (1) violation of the Sherman Act and the Clayton Act; (2) Georgia tortious interference with business relations; and (3) Georgia antitrust claims under article III, section 6, paragraph 5 of the Georgia Constitution and O.C.G.A. § 13-8-2. On April 3, Defendants filed their motion [17] to dismiss on multiple grounds.

II. Legal Standard on a Motion to Dismiss

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.* at 570). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555–56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Thus, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

III. Analysis

The City moves for dismissal primarily on the basis that because it is acting within the bounds of its legislative authorization from the State of Georgia, the City is entitled to state action immunity. The City also challenges the sufficiency of DPI's pleadings, arguing that DPI has not sufficiently identified the product market and has not alleged facts sufficient to support the City's alleged power in that market. The City further argues it is entitled to immunity on the state-law antitrust claim, and that DPI failed to allege wrongful conduct in its tortious interference claim and relies upon purely speculative damages.

A. The City Is Not Entitled to State-Action Immunity

The United States Supreme Court has long recognized that federal antitrust liability cannot attach to states acting as sovereigns. *See Parker v. Brown*, 317 U.S. 341, 351–53 (1943). "Although 'cities are not themselves sovereign,' states may sanction cities' anticompetitive conduct, enshrouding the cities within the protective cloak of *Parker* immunity." *McCallum v. City of Athens*, 976 F.2d 649, 652 (11th Cir.

1992) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978)).

A local government entity is entitled to *Parker* immunity when it acts pursuant to a "'clearly articulated and affirmatively expressed' state policy to displace competition." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 (2013) (quoting *Cmty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 52 (1982)). It is not necessary that the state legislature "expressly state in a statute or its legislative history that [it] intends for the delegated action to have anticompetitive effects." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985). Rather, it is sufficient that the "anticompetitive effect" of the conduct be the "'foreseeable result' of what the State authorized." *Phoebe Putney*, 568 U.S. at 227 (quoting *Town of Hallie*, 471 U.S. at 42).

DPI does not challenge the City's authority to provide gas or water service, but alleges instead that the ordinance creates an unlawful tying arrangement because the City conditions the sale of its water utility services on the buyer purchasing natural gas, a different product in a different market. Thus, the question at this stage is whether, as a

matter of law, the conditioning of water utility service on natural gas installation is a foreseeable result of the anticompetitive conduct authorized by the State of Georgia.

In Georgia, "any county, municipality, or any combination thereof" may provide water utility services. GA. CONST. art. 9, § 2, para. 3(a)(7) authorizing municipalities to develop, store, treat, purify, and distribute water); O.C.G.A. § 36-34-5(a)(3)(B) (authorizing operation and maintenance of water or sewage systems for "[p]ersons to whom the system is made available at the property owned by such persons").

In *Zepp v. Mayor & Council of City of Athens*, 339 S.E.2d 576 (Ga. 1986), the Georgia Supreme Court reaffirmed that a municipality's authority to provide water utility services beyond its territorial limits is discretionary: "A municipal corporation may not compel any person outside its territorial limits to accept water service which it undertakes to furnish, nor may the municipal authorities be compelled to render such service." *Id.* at 449–50. Thus, LaGrange is empowered to refuse to provide water utility services beyond its territorial limits.

The Eleventh Circuit has concluded that "Georgia has 'clearly articulated and affirmatively expressed' a state policy to displace competition in the provision of water treatment services." *McCallum*, 976 F.2d at 653. In *McCallum*, the court observed that Georgia positioned two important provisions—O.C.G.A. §§ 36-65-1 & -2—at the end of the Code section authorizing municipal waterworks. Section 36-65-1 states that "in the exercise of powers specifically granted to them by law, local governing authorities of cities and counties are acting pursuant to state policy." Section 36-65-2 states "[t]his chapter is intended to articulate clearly and express affirmatively the policy of the State of Georgia that in the exercise of such powers, such local governing authorities shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia."

The City argues that because the ordinance relates to the water utility service, it therefore must be blanketed in the immunity of state action. However, the Court sees no limiting principle to this assertion. If true, the City would have immunity to take anticompetitive actions

affecting any industry so long as the demand were made as a condition of refusing water service.

The City argues that under *McCallum* and the authorizing statutes discussed above, it has immunity in determinations of "whether and how to offer *such* services in those areas." [17] at 14 (emphasis added). The Court agrees, but finds the frequent use of the word "such" in the authorizing statutes indicates a limiting principle in the grant of immunity.

The powers referred to are the powers granted in § 36-65-1, or, "powers specifically granted to [the City] by law . . . ." The authorization cited by the City as specifically granted by law are those found in O.C.G.A. § 36-34-5(a)(3)(B), which is the authority to operate water or sewage systems. In this case, the "exercise of such powers" referred to in O.C.G.A. § 36-65-2 refers to the powers authorized in O.C.G.A. § 36-34-5(a)(3)(B), which is the authority to operate water or sewage systems. While the City would have *Parker* immunity for anticompetitive measures in the operation of its water or sewage systems, the immunity granted by O.C.G.A. § 36-34-5(a)(3) is only

immunity "[t]o operate and maintain *such* systems . . . ." (emphasis added). This, too, is a reference to the water and sewage systems that are the subject of that statute. *McCallum* does not dictate otherwise, as the anticompetitive activity in that case involved only the issue of price discrimination *within* the water utility market. *McCallum*, 976 F.2d at 651.

The City's reliance upon *Town of Hallie* is similarly misplaced. In *Hallie*, the action complained of was the City of Eau Claire's establishing a monopoly on sewage treatment services by tying "such services" to the provision of sewage collection and sewage transportation services. *Town of Hallie*, 471 U.S. at 37. Citing a similar statutory authorization scheme as Georgia's, the Supreme Court found that that sort of activity was precisely the type of regulatory action contemplated by the legislature. Importantly, sewage treatment, sewage collection, and sewage transportation services all fell within the ambit of sewage services, the subject of the authorizing statutes. Here, the anticompetitive conduct is alleged coercion in the natural gas market. Such activity is not, as a matter of law, the sort of activity

contemplated by the legislature in authorizing the operation of water and sewage systems.

The Court agrees with the City's argument that O.C.G.A. § 36-34-5 is not the type of general legislative authority that was at issue in *Phoebe Putney*. However, this argument proves too much. Because O.C.G.A. § 36-34-5 is not a grant of general authority (as in *Phoebe Putney*), it is a grant of specific authority, i.e., the operation of water and sewage systems.

The Court finds persuasive the reasoning in *Kay Electric Cooperative v. City of Newkirk*, 647 F.3d 1039 (10th Cir. 2011). There, the City of Newkirk, Oklahoma, was in competition with an electric cooperative to provide electric service to a new prison within a newly annexed area of the city. To secure the electric business, the city refused to provide sewage service unless the prison purchased electric service from the city. The prison acceded and the cooperative sued, alleging that the city's actions constituted a tying arrangement in violation of the antitrust laws. The Tenth Circuit found that the relevant Oklahoma statute simply authorized the provision of sewage and electric services

but contained no indication that the legislature had intended to authorize and immunize this type of anticompetitive activity.

Because there is no indication that the legislature intended O.C.G.A. § 36-34-5 to grant authority beyond the operation of water and sewage systems, but instead indicated an intent to grant authority limited to the operation and maintenance "such systems," the City is not shielded from federal antitrust liability under the state-action doctrine.

B. DPI's Unlawful Tying Claim

To plead an unlawful tying arrangement, a plaintiff must allege facts demonstrating:

> 1) that there are two separate products, a "tying" product and a "tied" product; 2) that those products are in fact "tied" together—that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Tic-X-Press, Inc. v. Omni Promotions Co. of Ga., 815 F.2d 1407, 1414 (11th Cir. 1987) (quoting *Amey Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir. 1985)).

The City argues that DPI fails to establish the plausibility of the third element of its federal tying claim—that LaGrange "possesses sufficient economic power in the tying product market to coerce [the] buyer['s] acceptance of the tied product." *Id.* The City argues that the submarket of water utility services is poorly pleaded and should include all water sources. As a result, the amended complaint fails to allege facts sufficient to establish the City's economic power in the product market.

To state a claim for unlawful tying, "Section One plaintiffs must define both (1) a geographic market and (2) a product market." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1336 (11th Cir. 2010). The relevant product market is "composed of products that have reasonable interchangeability." *Id* at 1337 (quoting *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1552 (11th Cir. 1996)).

In examining an alleged product market, courts consider "the uses to which the product is put by consumers in general." *Id.* (quoting *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1221 (11th Cir. 2002)); *see also United States v. E.I. du Pont de Nemours & Co.*, 351

U.S. 377, 404 (1956). A relevant product market includes all alternative products a consumer might reasonably substitute for one another, for the same purpose. *See, e.g.*, *E.I. du Pont de Nemours & Co.*, 351 U.S. at 394–96 (1956); *Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc.*, 101 F. Supp. 3d 1319, 1337 (N.D. Ga. 2015).

In determining whether a relevant product market exists as a distinct subset of a larger product market, "[a] court should pay particular attention to evidence of the cross-elasticity of demand and reasonable substitutability of the products, because '[i]f consumers view the products as substitutes, the products are part of the same market.'" *Jacobs*, 626 F.3d at 1337–38 (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995)) (second alteration in original) (footnote omitted). Moreover, at the pleading stage, the plaintiff is obligated "to indicate that [it] could provide evidence plausibly suggesting the definition of the alleged submarket." *Id.* at 1338.

At this stage in the case, accepting the facts in the amended complaint as true, the Court finds that DPI has sufficiently indicated

that it can provide evidence that plausibly suggests the definition of the alleged submarket of water utility services. DPI alleges that,

> [w]here water utility services are available, other means of obtaining water, whether by well, spring, [or] purchase of bottled water . . . are not reasonably interchangeable products since each involves builder or consumer investments and efforts that go far beyond simply turning on one's water tap or connecting to available water utility service.

[14] ¶ 35. This allegation sufficiently indicates that evidence can be provided regarding the up-front investment required of other water sources and whether the proffered alternatives are reasonable alternatives to the City's water utility service. It is plausible that the initial investment cost to consumers or developers of installing a well renders it an unreasonable substitute for the City's water utility service.[1] As such, it is sufficient to state a claim of unlawful tying, and more "detailed factual allegations" are not required to survive the

[1] It is also plausible, and has been adequately alleged, that if the product market were defined to include all methods of obtaining water, the City would still have a dominant market share sufficient to satisfy the coercive power prong of an unlawful tying claim. [14] ¶ 40. At this stage, however, the Court need not determine which is the relevant product market, only that DPI has adequately alleged its definition.

motion to dismiss. *Chaparro*, 693 F.3d at 1337 (quoting *Iqbal*, 556 U.S. at 678).

The City briefly argues in a footnote that because of the alleged narrowing of the product market, DPI fails to sufficiently allege facts regarding the City's purported market power in the water utility market. However, DPI alleges that the City is the "sole supplier of water utility service in the great majority of those areas of unincorporated Troup County in which such services are available[,] mak[ing] its economic power in the relevant tying product market manifest." [14] ¶ 18. As the Court has determined that the product market has been sufficiently alleged, so too has DPI sufficiently alleged the City's market power.

C. DPI's Georgia Antitrust Claim

The City argues the Georgia antitrust claim fails because DPI has not alleged facts sufficient to establish its standing to pursue a claim under article III, section 6, paragraph 5 of the Georgia Constitution and O.C.G.A. § 13-8-2, which "mean precisely the same thing" and

invalidate certain contracts in restraint of trade. *Griffin v. Vandegriff*, 53 S.E.2d 345, 348 (Ga. 1949).

To have standing to challenge the enforceability of an allegedly anticompetitive contract, the plaintiff either must be a party to the agreement or otherwise allege that the contracting parties conspired to injure the plaintiff. *See Palmer v. Atl. Ice & Coal Co.*, 173 S.E. 424, 428–30 (Ga. 1934) (no standing where plaintiff was not a party to challenged contract and did not allege facts showing a conspiracy to injure plaintiff); *Brown v. Jacobs Pharmacy Co.*, 41 S.E. 553, 556–57 (Ga. 1902) (allowing plaintiff to challenge a contract where the parties conspired to injure plaintiff). The City argues that DPI has failed to allege a conspiracy and therefore lacks standing to challenge the contract between the City and West Point.

In Georgia, "[a] conspiracy is a combination of two or more persons to accomplish an unlawful end or to accomplish a lawful end by unlawful means." *U.S. Anchor Mfg. v. Rule Indus.*, 443 S.E.2d 833, 835 (Ga. 1994) (quoting *First Fed. Sav. Bank v. Hart*, 363 S.E.2d 832, 833 (Ga. Ct. App. 1987)). "[C]onspiracy may be pleaded in general terms . . .

[even though] the jurisdiction of the court to render judgment against one or more of the defendants depends upon allegations and proof of the conspiracy." *Cook v. Robinson*, 116 S.E.2d 742, 745 (Ga. 1960). In the antitrust context, "where a petition merely alleges an oppressive course of conduct characterized by sharp business practices without setting forth all the necessary elements of a distinct tort committed during the course of the conduct resulting in damage," the complaint is subject to dismissal. *McCrary v. AA Music Serv., Inc.*, 153 S.E.2d 643, 646 (Ga. Ct. App. 1967).

"The essential element [of a conspiracy] is the common design[.]" *Cook*, 116 S.E.2d at 745. This may be shown if "two or more persons in any manner either positively or tacitly come to a mutual understanding that they will accomplish the unlawful design." *Traub v. Washington*, 591 S.E.2d 382, 387 (Ga. Ct. App. 2003) (quoting *Davidson v. Collier*, 122 S.E.2d 465, 467 (Ga. Ct. App. 1961)). "Because civil conspiracy is by its very nature a secret endeavor, concert of action, amounting to a conspiracy, is best suited for jury resolution." *Id.* (quoting *Ass'n Servs., Inc. v. Smith*, 549 S.E.2d 454, 461–62 (Ga. Ct. App. 2001).

In light of this standard, DPI sufficiently alleges a claim of conspiracy, and thus overcomes the City's argument on standing. The City and West Point came to a mutual understanding that allowed West Point to provide water in certain areas of Troup County only if the construction received natural gas service from the City. In exchange, the City agreed to pay West Point three percent of receipts for sales of natural gas in the city limits of West Point. West Point was financially incentivized by this allegedly illegal agreement to exclude competing electric service in order to receive natural gas revenue from the City. As the City is not entitled to state-action immunity for the allegedly illegal tying actions, discussed *supra*, this agreement is sufficient to allege a common unlawful design and to state a claim for conspiracy.

D. DPI's Tortious Interference Claim

The City argues that DPI fails to state a claim for tortious interference with business relations under Georgia law. To the extent the City moves to dismiss because there has been no allegation of wrongful conduct based on its arguments above, that argument is addressed *supra*. The City also argues that the amended complaint does

not identify a predatory tactic or sufficient financial injury to state a claim.

> The elements of tortious interference with . . . business relations . . . are: (1) improper action or wrongful conduct by [the City] without privilege; (2) [the City] acted purposely and with malice with the intent to injure; (3) [the City] induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with [DPI]; and (4) [the City's] tortious conduct proximately caused damage to [DPI].

Ne. Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc., 676 S.E.2d 428, 433 (Ga. Ct. App. 2009). Georgia courts have defined improper action or wrongful conduct as "conduct wrongful in itself . . . that generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." *Sommers Co. v. Moore*, 621 S.E.2d 789, 791 (Ga. Ct. App. 2005) (quoting *Disaster Servs. v. ERC P'ship*, 492 S.E.2d 526, 528–29 (Ga. Ct. App. 1997)).

This general list is not exhaustive in describing wrongful conduct, but merely exemplifies improper action in the usual course. *See, e.g.*, *Cobb Theatres III, LLC*, 101 F. Supp. 3d at 1331 (tortious

interference claim based on the establishment of "clearances" that gave movie theater exclusive right to show films on a particular day); *TracFone Wireless, Inc. v. Zip Wireless Prods., Inc.*, 716 F. Supp. 2d 1275, 1287–8 8 (N.D. Ga. 2010) (tortious interference claim based on solicitation of runners to purchase phones for purpose of reflashing/unlocking and then reselling them in violation of contract). Actions that are in fact illegal, as the tying scheme here is alleged to be, are sufficiently improper to state a claim for tortious interference of business relations.

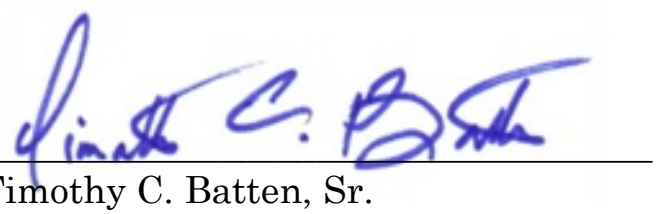
Finally, the City argues that DPI's damages are too speculative in that DPI identifies only a single customer who allegedly would have purchased additional electric service from DPI but for the ordinance. According to the City, it is speculative to infer from the allegation that because one customer would have purchased electrical services from DPI, others would as well. However, this argument brushes over the fact that DPI alleged one specific customer—Cameron Pointe—was coerced by an illegal ordinance into refusing future business with DPI. In its amended complaint, DPI alleges that the "developer informed

[DPI] that it would have built these homes to use electricity for these appliances were it not for the City's ordinance and policy." [14] ¶ 14. Whether further damages are speculative is a fact issue that may be resolved another time. For present purposes, these damages alone are sufficient to state a claim.

IV. Conclusion

For the foregoing reasons, the City's motion [17] to dismiss is denied.

IT IS SO ORDERED this 21st day of February, 2018.



Timothy C. Batten, Sr.
United States District Judge