UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

GAMES PEOPLE PLAY, INC.,	§	
	§	
Plaintiff,	§	
	§	
versus	§	CIVIL ACTION NO. 1:14-CV-321
	§	
NIKE, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before the court are Defendant Nike, Inc.'s ("Nike") Motion to Dismiss (#19) and Motion to Dismiss Second Amended Complaint (#33), wherein Nike seeks dismissal of all claims asserted by Plaintiff Games People Play, Inc.'s ("GPP") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Having considered the motions, the submissions of the parties, the pleadings, and the applicable law, the court is of the opinion that Nike's motions should be granted in part and denied in part.

I. Background

GPP alleges that Nike's business practices violated federal and state antitrust laws. In 1984, spouses Jeff Williams ("Jeff") and Marilyn Williams ("Marilyn") bought GPP, a Beaumont-based business that was then comprised of a driving range, a batting cage, and golf retail sales. Since then, GPP has expanded its operations to become a formidable player in the golf retail industry. In 2000, for example, GPP was selected as one of the "Top 100 Golf Shops in America" by *Golf World* magazine. GPP has invested hundreds of thousands of dollars in its e-commerce division in an effort to maintain a global reach.

GPP's relationship with Nike dates back to 1986, the year Nike began selling golf apparel and equipment. According to GPP, while having experienced its "ups and downs," the relationship reached a "boiling point" in 2010 over a dispute concerning a particular Nike product line—the Victory Red irons ("VR irons"). The VR irons, which were reportedly designed and used by Tiger Woods, one of Nike's sponsored athletes, were initially very popular and came in both "full cavity" and "split cavity" designs.

On May 17, 2010, Jeff and Marilyn's son, Austin Williams ("Austin"), who serves as GPP's vice-president in charge of purchases, reportedly received an e-mail from Kevin Goode ("Goode") of Nitro Golf, an equipment reseller, offering to sell Nike's VR irons to GPP at prices lower than what Nike had been offering to GPP. According to GPP, the full e-mail thread revealed that a competitor, Hap Personet ("Personet"), bought the VR irons from Nike for $400.00, a price that GPP describes as "substantially less" than the $552.00 it had been paying Nike for the same product. In response to this price disparity, GPP claims that it asked Nike to sell it the irons at the same price that Nike was offering to Personet. Nike allegedly replied that "as of right now, [Nike does] not have any program [it] can offer on any of the VR Irons." GPP then purchased the VR irons from Personet for an undisclosed price.

This interaction evidently affected GPP's relationship with Nike. Before the incident, Nike had reportedly provided GPP rebates totaling more than $50,000.00 and had offered GPP an average discount of approximately 17.5% on various products. Thereafter, Nike's regional sales manager, Carey Guglielmo ("Guglielmo"), allegedly stopped making site visits to GPP, refused to answer GPP's business questions, and reduced promotional offers that were purportedly made

to GPP.[1] In addition to the VR irons incident, GPP contends that Nike violated the Robinson-Patman Act ("RPA") on four separate occasions.

First, GPP asserts that in March 2011, it learned that Nike was selling two types of "Red Swoosh Balls" to retailers for $15.50 and $16.50 per dozen, respectively. GPP called its field representative, Jeff Morici ("Morici"), in an effort to purchase the balls. Morici allegedly responded that Nike did not want to make the Red Swoosh Balls available to retailers that maintained an Internet presence. When GPP reportedly replied that it was willing to sell the balls exclusively in its Beaumont store, and not via the Internet, Nike "continued to refuse to sell [GPP] the balls." On March 4, 2011, however, Nike apparently changed its policy, permitting select retailers—but not GPP—to sell Red Swoosh Balls on the Internet.

Second, GPP alleges that on May 3, 2011, it learned that Nike's regional manager had been allocated 5,000 packages of Vapor One balls that were to be sold at a price of $10.00 per dozen. According to GPP, its request to purchase 500 dozen went unfulfilled. Third, GPP claims that in February and March 2012, Nike "again" offered competing retailers exclusive deals, promotions, and advertisements that were apparently not offered to GPP. Finally, GPP avers that in August 2012, in the lead up to the Ryder Cup Tournament, GPP approached Nike about the possibility of selling its Ryder Cup line of shoes. GPP asserts that Nike advised that the shoes were to be offered only at the clubhouse hosting the tournament—the Medinah Country Club. Despite this assurance, GPP alleges that the Ryder Cup shoes were actually being sold by other online retailers.

[1] Though GPP mentions "promotional opportunities," it fails to specify any lost promotional opportunities.

Accordingly, on May 16, 2014, GPP filed suit in the 58th Judicial District Court of Jefferson County, Texas, alleging various violations of federal and state law. A month later, on June 16, 2014, Nike removed the case to federal court. On July 2, 2014, GPP filed its First Amended Complaint, asserting six separate causes of action. In response, on August 25, 2014, Nike filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On October 14, 2014, GPP filed its Second Amended Complaint, voluntarily dismissing three of its previous claims and asserting violations of the following: Sections 2(a), (d), and (e) of the RPA, 15 U.S.C. §§ 13(a), 13(d), and 13(e), respectively; Oregon's Anti-Price Discrimination Law, OR. REV. STAT. ANN. § 664.010-646.180 (2011); and intentional interference with economic relations.[2] On October 24, 2014, Nike filed the instant motion to dismiss GPP's Second Amended Complaint (#33).

II. Analysis

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests only the formal sufficiency of the statement of a claim for relief and is "appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). It is not a procedure for resolving contests about the facts or the merits of a case. *See* 5B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE

[2] Pursuant to Federal Rule of Civil Procedure 15(a), an amended complaint is permitted even if it was filed subsequent to the filing of Defendant's motions to dismiss. *See* 6 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1476 (3d ed. 1998). Defendant, however, is "not required to file a new motion to dismiss simply because an amended pleading was introduced while [Nike's] motion was pending. If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading." *Id.* Accordingly, the court will consider Nike's motions in light of GPP's Second Amended Complaint.

§ 1356 (3d ed. 1998). In ruling on such a motion, the court must accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiff, and draw all reasonable inferences in favor of the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013); *In re S. Scrap Material Co., LLC*, 541 F.3d 584, 587 (5th Cir. 2008), *cert. denied*, 556 U.S. 1152 (2009); *Ramming*, 281 F.3d at 161. Nevertheless, "the plaintiff's complaint [must] be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged." *Ramming*, 281 F.3d at 161 (citing *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989)). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *accord Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007), *cert. denied*, 552 U.S. 1182 (2008).

Furthermore, "a complaint that shows relief to be barred by an affirmative defense, such as the statute of limitations, may be dismissed for failure to state a cause of action." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *accord Jones v. Bock*, 549 U.S. 199, 215 (2007); *La Porte Constr. Co. v. Bayshore Nat'l Bank of La Porte*, 805 F.2d 1254, 1255 (5th Cir. 1986). Thus, "a complaint may be subject to dismissal if its allegations affirmatively demonstrate that the plaintiff's claims are barred by the statute of limitations and fail to raise some basis for tolling." *Frame v. City of Arlington*, 657 F.3d 215, 241 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1561 (2012); *see Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 141 (5th Cir. 2007); *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002), *cert. denied*, 537 U.S. 1200 (2003);

Davis v. Dallas Cnty., 541 F. Supp. 2d 844, 856 (N.D. Tex. 2008) (plaintiff's noncompliance with the applicable statute of limitations "may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like."). The limitations defense, however, must be clear on the face of the complaint. *See Carbe v. Lappin*, 492 F.3d 325, 328 n.9 (5th Cir. 2007); *China Nat'l Bldg. Material Inv. Co., Ltd. v. BNK Int'l, LLC*, No. A-14-CA-701-SS, 2015 WL 363275, at *4 (W.D. Tex. Jan. 27, 2015) ("'While the court can consider a statute of limitations argument on a Rule 12(b)(6) motion to dismiss, such a motion cannot be granted unless the limitations defense is clear on the face of the complaint.'") (quoting *Seghers v. El Bizri*, 513 F. Supp. 2d 694, 707 (N.D. Tex. 2007)). "Where the issue of limitations requires a determination of when a claim begins to accrue, the complaint should be dismissed only if the evidence is so clear that there is no genuine factual issue and the determination can be made as a matter of law." *Askanase v. Fatjo*, 828 F. Supp. 465, 469 (S.D. Tex. 1993) (citing *Sisselton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 591 (9th Cir.), *cert. denied*, 498 U.S. 824 (1990)). "'Although defendants bear the burden of pleading and proving affirmative defenses, where facts alleged in plaintiff's pleadings make clear that a claim is barred, dismissal under Rule 12(b)(6) may be granted.'" *Williams v. De-Valdenbro*, No. 4:13-CV-960, 2014 WL 4640745, at *2 (S.D. Tex. Sept. 10, 2014) (quoting *In re Dynegy, Inc. Secs. Litig.*, 339 F. Supp. 2d 804, 819 (S.D. Tex. 2004)); *see also Jones*, 549 U.S. at 215; *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003), *cert. denied*, 540 U.S. 1161 (2004).

"'A motion to dismiss under rule 12(b)(6) "is viewed with disfavor and is rarely granted."'" *Gregson v. Zurich Am. Ins. Co.*, 322 F.3d 883, 885 (5th Cir. 2003) (quoting *Collins*,

224 F.3d at 498 (quoting *Kaiser Aluminum & Chem. Sales, Inc.*, 677 F.2d at 1050)); *accord Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009). "'The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief.'" *Collins*, 224 F.3d at 498 (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 601 (1969)); *accord EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 467 (5th Cir. 2006). "In other words, a motion to dismiss an action for failure to state a claim 'admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts.'" *Ramming*, 281 F.3d at 161-62 (quoting *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992)).

A Rule 12(b)(6) motion to dismiss must be read in conjunction with Rule 8(a) of the Federal Rules of Civil Procedure. *Twombly*, 550 U.S. at 555. Accordingly, a district court should not dismiss a complaint for failure to state a claim unless a plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *accord Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556); *Harold H. Huggins Realty, Inc.*, 634 F.3d at 796. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders

'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. In other words, to state a cognizable cause of action, the complaint must allege sufficient facts to "nudge" the claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

A. Robinson-Patman Act

"The United States Congress passed the [RPA] in 1936, amending § 2 of the Clayton Antitrust Act." *Major Mart, Inc. v. Mitchell Distrib. Co., Inc.*, No. 3:13-CV-942-HTW-LRA, 2014 WL 4723599, at *18 (S.D. Miss. Aug. 14, 2014). The purpose of the RPA is to "'curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.'" *Fed. Trade Comm'n v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) (quoting *Fed. Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166, 167 (1960)). It was not Congress's intent, however, "'either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor.'" *Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 489 (5th Cir. 2006) (quoting *Standard Oil Co. v. Fed. Trade Comm'n*, 340 U.S. 231, 249 (1951)).

Price discrimination claims generally fall into three categories: primary-line, secondary-line, and tertiary-line. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006). "Primary-line cases entail conduct—most conspicuously, predatory pricing—that injures competition at the level of the discriminating seller and its direct competitors." *Id.* In primary-line cases, "the gravamen is that the aggressor sold goods for too little money, hoping to cripple or discipline rivals so that it might sell its wares for a monopoly price later, recouping the losses

and adding a hefty profit, to the detriment of consumers." *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1399 (7th Cir. 1989). Secondary-line cases involve price discrimination that injures competition among the seller's "favored" and "disfavored" purchasers. *Volvo Trucks*, 546 U.S. at 176 (citations omitted). The hallmark of a secondary-line price discrimination injury "is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." *Id.* at 177. Finally, "[t]ertiary-line cases involve injury to competition at the level of the purchaser's customers." *Id.* at 176.

The parties agree that this is a secondary-line case. In order to state a claim for a secondary-line injury under the RPA, a plaintiff must plead facts sufficient to show four elements: (1) the relevant sales were made in interstate commerce; (2) the products were of like grade and quality; (3) the seller discriminated in price between the plaintiff and another purchaser of the same products; and (4) the effect of that price discrimination was to injure, destroy, or prevent competition to the advantage of a favored purchaser. *Volvo Trucks*, 546 U.S. at 176. Both the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court have mandated that the RPA "be construed consistently with broader policies of the antitrust laws." *Water Craft*, 457 F.3d at 492 (citing *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 73 (1953)). Nike argues that GPP's RPA claims fail for four reasons: (1) GPP lacks antitrust standing; (2) GPP's claims are time-barred; (3) GPP's section 2(a) claim does not allege contemporaneous sales and injury to competition; and (4) GPP's section 2(d) and 2(e) claims are unavailing because a "refusal to sell" is not actionable as a matter of law.

1. Antitrust Standing

An antitrust injury is a predicate to establishing antitrust standing. *Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co.*, No. 10-00124, 2010 WL 3488244, at *11 (E.D. La. Aug. 26, 2010) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is necessary . . . to establish standing under [the antitrust laws]")). Standing to pursue an antitrust suit requires a plaintiff to plead: (1) injury-in-fact, that is, an injury proximately caused by the defendant's conduct; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are not better situated to bring suit. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997). Here, Nike argues that GPP lacks standing because GPP failed to allege an antitrust injury.

Nike's argument is unpersuasive. The Fifth Circuit has repeatedly distinguished between antitrust injury and injury to competition. *See, e.g.*, *Doctor's Hosp.*, 123 F.3d at 305; *Walker v. U-Haul Co.*, 747 F.2d 1011, 1016 (5th Cir. 1984); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 986 n.6 (5th Cir. 1983). Antitrust injury exists when (1) the injury was of the type antitrust laws were intended to prevent, and (2) the injury "flows" or was caused by the defendant's unlawful conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977). Injury to competition, on the other hand, while often a necessary component to substantive liability, need not be pleaded for a plaintiff's antitrust claims to survive a motion to dismiss. *Doctor's Hosp.*, 123 F.3d at 305.

In this case, GPP avers that it suffered financial loss as a result of Nike selling VR irons to at least one other retailer at a price lower than that charged to its competitors. This is a valid allegation of price discrimination—a type of injury that the antitrust laws were intended to prevent.

Vaughn, 2010 WL 3488244, at *13; *see also Marjam Supply Co. v. Firestone Bldg. Prods. Co., LLC*, No. 11-CV-7119, 2014 WL 5798383, at *3 (D.N.J. Nov. 7, 2014) ("The pleadings need only create a reasonable inference of an antitrust injury.") (citing *Precision Printing Co. v. Unisource Worldwide, Inc.*, 993 F. Supp. 338, 354 (W.D. Pa. 1998)); *Synthes, Inc. v. Emerge Med., Inc.*, No. Civ. A. 11-1566, 2012 WL 4473228, at *13 (E.D. Pa. Sept. 28, 2012) ("'A claim under Section 2(a) of the [RPA] requires the plaintiff to plead 'price discrimination,' which is 'nothing more than a difference in price charged to different purchasers or customers of the discriminating seller for products of like grade or quality.'") (quoting *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1271 (3d Cir. 1995)). Further, because GPP has pleaded that its purported injuries flow from Nike's conduct, the second prong of the antitrust injury analysis is also satisfied. Accordingly, GPP has adequately established antitrust standing.

2. Statute of Limitations

RPA claims must be brought within four years of the injury that gives rise to the cause of action. 15 U.S.C. § 15b; *see Kaiser Aluminum & Chem., Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050-51 (5th Cir. 1982); *El Aguila Food Prods., Inc. v. Gruma Corp.*, 301 F. Supp. 2d 612, 618 (S.D. Tex. 2003). Here, GPP filed its Original Petition on May 16, 2014, inside the limitations period, and its Second Amended Complaint on October 14, 2014, outside the limitations period. According to Nike, the claims in GPP's Second Amended Complaint do not "relate back" to the Original Petition because it is "impossible to ascertain from the original complaint what 'conduct, transaction, or occurrence' is being set out." Nike argues that, as a result, GPP's RPA claims were not brought within the applicable limitations period.

"Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended pleading 'relates back' to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 541 (2010); *see Hennelly v. Greenwood Cent. Sch. Dist.*, No. 02-CV-6398P, 2004 WL 1570277, at *3 (W.D.N.Y. June 29, 2004); *In re Enron Corp. Secs., Derivative & ERISA Litig.*, 310 F. Supp. 2d 819, 849-50 (S.D. Tex. 2004). Rule 15(c)(1) states that an amended pleading relates back to the date of the original pleading if one of the following requirements is satisfied:

> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

See Sanders-Burns v. City of Plano, 594 F.3d 366, 372-73 (5th Cir. 2010); *Jacobsen v. Osborne*, 133 F.3d 315, 319 (5th Cir. 1998); *FDIC v. Conner*, 20 F.3d 1376, 1385 (5th Cir. 1994); *In re Enron Corp. Secs., Derivative & "ERISA" Litig.*, 310 F. Supp. 2d at 849-50.

In this case, GPP's claims against Nike in its Second Amended Complaint arose out of the "'conduct, transaction, or occurrence'" set forth in GPP's Original Petition. *Mayle v. Felix*, 545 U.S. 644, 649 (2005); *see Jacobsen*, 133 F.3d at 320. In its Original Petition, for example, GPP

alleged that Nike sold "the same products to the Plaintiff and other buyers at different prices in reasonably contemporaneous sales transactions in interstate commerce," and thus engaged in price discrimination prohibited under Section 2(a) of the RPA. Further, GPP alleged that Nike "provid[ed] promotional allowances and services to other Nike retailers and competitors of GPP, while failing to provide these services and promotions, proportionally to GPP, and [thus] engaged in discrimination in the provision of promotional allowances and services in violation" of Sections 2(d) and 2(e) of the RPA. Because the claims set forth in GPP's Second Amended Complaint are based upon the same nucleus of operative facts and contain similar allegations of antitrust discrimination, GPP's claims relate back to the filing date of the Original Petition, dated May 16, 2014. Consequently, Nike's argument that the claims are time-barred is without merit.

3. Section 2(a) Claim

To state a claim under section 2(a) of the RPA, 15 U.S.C. § 13(a), a plaintiff must allege facts to demonstrate that the defendant made at least two contemporary sales of the same commodity at different prices to different purchasers. *Vaughn*, at *10 (citing *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1120 (5th Cir. 1982)). Additionally, a plaintiff must also allege that the effect of any price discrimination was to damage competition. *Id.* Nike argues that GPP failed to state a claim because it did not allege contemporaneous sales or injury to competition.

In response to Nike's contemporaneous sales argument, GPP directs the court to paragraph 15 of its Second Amended Complaint, wherein GPP states that "[t]hose sales of the VR Irons by Nike to Personet and GPP were contemporaneous, both occurring during May 2010." As GPP correctly notes, the "contemporaneous sale" requirement does not require that two sales be made

on the "same day," but rather only requires that "the sales must be close enough in time that the difference in price can be considered discriminatory." *Staton Holdings, Inc. v. Russell Athletics, Inc.*, No. 3:09-CV-0419-D, 2009 WL 4016117, at *6 (N.D. Tex. Nov. 20, 2009). Nike did not reply to this argument. In any event, GPP's characterization of the claims as "contemporaneous, both occurring during May 2010," creates a reasonable inference that the sales satisfy the statute's requirement.

Regarding Nike's injury to competition argument, GPP contends that it may show a competitive injury in either of two ways. The first is through a direct showing of the "'diversion of sales or profits from [a] disfavored purchaser to a favored purchaser.'" *J.D. Fields & Co. v. Nucor-Yamato Steel*, 976 F. Supp. 2d 1051, 1060 (E.D. Ark. 2013) (quoting *Volvo Trucks*, 546 U.S. at 177). Alternatively, the Supreme Court has recognized the *Morton Salt* inferential method of establishing competitive injury, which holds that "'a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.'" *Id.* (quoting *Volvo Trucks*, 546 U.S. at 177); *FTC v. Morton Salt Co.*, 334 U.S. 37, 49-51 (1948). According to Nike, GPP has "all but abandoned the 'direct allegations' method," and rests its case on the "inference of competitive injury" method. Nike argues that GPP's alleged competitive injury is neither significant nor substantial and thus fails to create an inference of competitive injury.

GPP responds that its Second Amended Complaint sufficiently alleges competitive injury under both the "direct" and "inferential" methods of analysis. To demonstrate that it sufficiently alleged a competitive injury directly, GPP points to its Second Amended Complaint, wherein GPP states that: "[a]s a result of Nike's discriminatory practices in violation of the Robinson-Patman

Act, GPP has suffered damages in the form of lost profits. . . ." (¶ 29); "[a]s a result of Nike's ongoing unlawful practices, GPP has lost a significant number of customers to competitors receiving favorable pricing and promotions from Nike." (¶ 30); and Nike's actions have "caused more than a 75 percent decline in the sale of Nike goods by GPP in the last four years and the loss of millions of dollars in revenue." (¶ 27).

Alternatively, GPP argues that it sufficiently alleges competitive injury under the *Morton Salt* method of inference. In its Second Amended Complaint, GPP claims that "Nike sold Personet the identical VR Irons for $400, which was substantially less than $552, what GPP had been paying Nike." Therefore, GPP asserts that this price differential creates an inference of competitive injury. In response, Nike attached an invoice dated May 12, 2010, to its reply brief that appears to show that GPP purchased three VR cavity irons for $1,656.00.[3] Accordingly, Nike argues that GPP's single transaction, in a single month, for a relatively small amount of money, fails to allege an RPA claim as a matter of law because it does not establish a *significant* price differential over a *substantial* period of time.

While Nike's argument may be meritorious at a later point in this litigation, it is premature at this stage. The court will need to consider records reflecting the precise dates and volume of purchases and sales to determine whether the alleged price disparity constitutes a competitive

[3] Generally, the court may not look beyond the four corners of the plaintiff's pleadings. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 261 (5th Cir. 1999); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). The court, may, however, consider "documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 820 (5th Cir. 2012); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). Because the invoice is not referenced in GPP's Second Amended Complaint and was not attached to Nike's motion to dismiss, the court will not consider it at this stage in the proceedings. Indeed, to hold otherwise would be to treat the instant motions to dismiss as motions for summary judgment under Rule 56(c). *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004).

injury as a matter of law. As a result, accepting GPP's allegations as true and viewing them in a light most favorable to GPP, and mindful of the Fifth Circuit's directive that a motion to dismiss under Rule 12(b)(6) is "viewed with disfavor and is rarely granted," the court finds that GPP has sufficiently pleaded a competitive injury. *Gregson*, 322 F.3d at 885. To the extent that GPP's allegations are not as specific as they perhaps could be, the court is of the opinion that summary judgment is the appropriate avenue for disposing of a potentially frivolous claim.

4. Sections 2(d) and 2(e) Claims

GPP next alleges that Nike's conduct regarding "the Red Swoosh balls, the Vapor One Ball, and the Ryder Cup shoes" violated sections 2(d) and 2(e) of the RPA. According to GPP, each of these three incidents "involve Nike not just in impermissible refusals to sell, but in promotional allowances and services unlawfully provided to other competing resellers . . . ." In response, Nike contends that GPP fails to state a claim under sections 2(d) and 2(e) of the RPA because GPP's allegations involve only a "refusal to sell" and are thus not actionable as a matter of law. GPP did not respond to this argument.

Section 13(d) of Title 15 of the United States Code prohibits a seller from paying or providing allowances to the customer for services or facilities provided by the customer if those same payments and allowances are not available to all customers:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all customers competing in the distribution of such products or commodities.

15 U.S.C. § 13(d); *see also Major Mart*, 2014 WL 4723599, at *19.

Similarly, 15 U.S.C. § 13(e) prohibits a seller from providing services, facilities, or other allowances to one purchaser if those same services, facilities, or other allowances are not made available to all purchasers:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e); *see also Major Mart*, 2014 WL 4723599, at *19.

Court have traditionally defined "services or facilities" as "those relating to promotional favors," such as advertising and merchandising. *Major Mart*, 2014 WL 4723599, at *19 (citing *L & L Oil Co.*, 674 F.2d at 1119). The Federal Trade Commission has identified the following as examples of promotional services and facilities covered by sections 13(d) and 13(e): cooperative advertising; handbills; demonstrators and demonstrations; catalogues; cabinets; displays; prices or merchandise for conducting promotional contests; and special packaging sizes. 16 C.F.R. § 240.7; *Major Mart*, 2014 WL 4723599, at *19.

Importantly, "it is well settled law that refusing to deal is not an independent violation of the [RPA]." *Feesers, Inc. v. Michael Foods, Inc.*, No. 1:CV-04-0576, 2009 WL 1475270, at *7 (M.D. Pa. May 26, 2009). *See L & L*, 674 F.2d at 1120-21 ("The [RPA] 'is not all-encompassing . . . it does not, for example, reach what arguably is the most extreme discrimination of all: namely, a total refusal to even deal with a particular individual or class of customers.'") (quoting *Cecil Corley Motor Co., Inc. v. Gen. Motors Corp.*, 380 F. Supp. 819, 850 (M.D. Tenn. 1974)); *Purdy Mobile Homes, Inc.*, 594 F.2d 1313, 1318 (9th Cir. 1979) ("It has long been recognized that [the RPA] does not require a seller to sell to, or maintain a customer relationship with, any

buyer or prospective buyer."); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867, 871 (2d Cir. 1962) ("When Congress enacted the Clayton Act, it rejected a provision which would have prohibited arbitrary refusals to sell because it was being projected into a field of legislation untried, complicated and dangerous."); *Vaughn*, 2010 WL 3488244, at *10 ("[Refusal to sell allegations], while potentially viable under other provisions of the federal antitrust laws, do not give rise to an actionable claim under the [RPA]."); *Bennett v. Cardinal Health Marmac Distribs., Inc.*, No. 02-CV-3095, 2003 WL 21738604, at *6 (E.D. N.Y. July 14, 2003) ("However, the [RPA] 'does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers to whom, for whatever reason, it does not wish to sell.'") (quoting *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980)).

Here, GPP's section 2(d) and 2(e) claims fail because they are premised on Nike's refusal to deal. While GPP describes the incidents involving the Red Swoosh Balls, the Vapor One balls, and the Ryder Cup shoes as "promotional opportunities" in its reply brief, the language used in GPP's Second Amended Complaint belies that label. In paragraph 24 of the Second Amended Complaint, for example, GPP states that Nike "refused to sell" it the Red Swoosh Balls. In paragraph 25, GPP states that it "sent a request to [Nike's regional sales manager] asking for 500 dozen" of the Vapor One balls at a price of $10.00 per dozen. Finally, in paragraph 26, GPP alleges that it "inquired about selling Ryder Cup Shoes but was told by Nike that they were being offered exclusively to Medinah Country Club, the host for the 2012 Ryder Cup." Accordingly, GPP's Second Amended Complaint illustrates that these three incidents are, at their core, refusals

to sell. Because a "refusal to deal" is not actionable as a matter of law, GPP fails to state a claim under sections 2(d) and 2(e) of the RPA.[4]

B. Oregon Anti-Price Discrimination Law ("APDL")

GPP next asserts a claim under Oregon's APDL, which was modeled after the RPA. *Redmond Ready-Mix, Inc. v. Coats*, 582 P.2d 1340, 1346 (Or. 1978). Both parties agree that federal interpretations of the RPA are persuasive authorities for construing the state statute. *McKenzie-Willamette Hosp. v. PeaceHealth*, No. Civ. 02-6032-HA, 2004 WL 3168282, at *7 (D. Or. Oct. 13, 2004) (citing *Yamaha Store Bend, Inc. v. Yamaha Motor Corp.*, 798 P.2d 656, 659 (1990)). Nike argues that GPP fails to state a claim for the same reasons it failed to state a claim under section 2(a) of the RPA: (1) GPP lacks antitrust standing; (2) GPP's claims are barred by the applicable statute of limitations; (3) GPP fails to allege that Nike made two separate and contemporaneous sales to competing buyers at discriminatory prices; and (4) GPP fails to allege injury to competition;

Nike's arguments are unavailing for the reasons previously articulated. In short, because GPP alleges that its injury was of the type that antitrust laws were intended to prevent, and because its injury "flows" from the defendant's unlawful conduct, GPP has established antitrust standing. Nike's limitations argument fails because the causes of action laid out in GPP's Second

[4] GPP also vaguely alleges that "in February 2012, GPP learned that Nike was again offering retailers exclusive deals and promotions not being offered to GPP," and that "in March 2012, Nike ignored more requests from GPP to run advertisements and promotions similar to those of Nike retailers." Plaintiff's use of the words "again" and "more requests" in paragraph 26 of its Second Amended Complaint suggest that these incidents are similar to the events in the immediately preceding paragraphs involving Red Swoosh Balls and the Vapor One Balls. Indeed, in its response, GPP focuses exclusively on the Red Swoosh Balls, the Vapor One Balls, and the Ryder Cup shoes, and completely neglects to articulate how any incidents in February 2012 or March 2012 support its claims under sections 2(d) and 2(e) of the RPA. Accordingly, these claims likewise fail because they are mere refusals to deal.

Amended Complaint are based upon the same nucleus of operative facts and contain similar allegations of antitrust discrimination as those contained in GPP's Original Petition. As a result, GPP's claims relate back to the filing date of the Original Petition, dated May 16, 2014, and are not time-barred. Finally, GPP avers both (1) two separate and contemporaneous sales to competing buyers at discriminatory prices, and (2) injury to competition.

C. Intentional Interference with Economic Relations ("IIER")

GPP alleges that Nike intentionally interfered with its economic relations, including its relations with customers who have bought from GPP "since the late 1980's." According to GPP, Nike "decided to punish GPP simply for doing what other retailers had done and selling Nike products at discounted prices and making sales on the Internet. Nike's objections, such as they were, were lodged solely in order to make an example of GPP and demonstrate Nike's power in the market and ability to whip recalcitrant retailers back into line." Nike argues that GPP fails to state a claim because, under Oregon law, the legitimate enforcement of a contractual right cannot support a claim for IIER.

To state a claim for IIER, a party must establish: (1) the existence of a valid business relationship or expectancy; (2) intentional interference with that relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and the damage to economic relations; and (6) damages. *Emmert v. No Problem Harry, Inc.*, 222 Or. App. 151, 159 (2008) (citing *Uptown Heights Assocs. v. Seafirst Corp.*, 320 Or. 638, 651 (1995)). At issue here is the fourth element—interference through improper means or for an improper purpose.

When a plaintiff's claim is based on improper purpose, that purpose must be to inflict injury on the plaintiff. *Eusterman v. Nw. Permanente, P.C.*, 204 Or. App. 244, 236 (2006). Improper means, by contrast, may be wrongful by "'reason of statutory law or common law, and include violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation, and disparaging falsehood.'" *MLM Prop., LLC v. Country Cas. Ins. Co.*, No. 06-3048-CL, 2010 WL 678149, at *4 (D. Or. Feb. 25, 2010) (quoting *Douglas Med. Ctr., LLC v. Mercy Med. Ctr.*, 203 Or. App. 619, 634 (2006)). Enforcement of a contractual right, however, "is not an improper purpose, as a matter of law." *Walchli v. Cmty. Bank*, No. 09-359-AC, 2010 WL 2164874, at *10 (D. Or. Mar. 16, 2010); *Uptown Heights Assocs. Ltd. P'ship v. Seafirst Corp.*, 320 Or. 638, 651 (1995) ("When a party invokes an express contractual remedy in circumstances specified in the written contract—conduct that reflects, by definition, the reasonable expectations of the parties—that party cannot be liable for intentional interference with economic relations based solely on that party's reason for invoking the express contractual remedy.").

Nike argues that its actions against GPP complied fully with the terms of the contract that bound the two parties. While "it would be anomalous to hold that a party to a contract nonetheless must defend a tort claim when a complaint shows that the party did precisely what the party was entitled to do under the contract," it would be equally anomalous, at this point in the proceedings, to make any determination about whether Nike's actions complied with the express remedies denoted in the contract. *Uptown*, 320 Or. at 652. Indeed, the court has not been provided a copy of the contract and, thus, is in no position to determine whether Nike's actions could have, or could not have, constituted an "improper means" or an "improper purpose." Accepting GPP's factual allegations as true, and viewing them in a light most favorable to the plaintiff, the court

finds that GPP sufficiently pleaded an IIER claim. The determination about whether Nike's actions amounted to an "improper means" or an "improper purpose" is better left for summary judgment.

III. Conclusion

Based on the foregoing analysis, Nike's motions to dismiss are granted in part and denied in part. The court finds that GPP's section 2(d) and 2(e) RPA claims fail to state a claim and are therefore dismissed with prejudice. The court is of the opinion, however, that GPP's section 2(a) of the RPA claim, Oregon ADPL claim, and IIER claim survive and remain pending in this action.

SIGNED at Beaumont, Texas, this 12th day of February, 2015.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE