Case No. 18-30707

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CALDWELL WHOLESALE CO., L.L.C.,

Plaintiff - Appellant

v.

R J REYNOLDS TOBACCO COMPANY,

Defendant - Appellee

On Appeal from the United States District Court for the
Western District of Louisiana
(Case No. 5:17-CV-200-SMH-MLH)

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CERTIFICATE OF INTERESTED PERSONS

(No. 18-30707, Caldwell Wholesale Co., L.L.C. v. R.J. Reynolds Tobacco Company)

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

R.J. Reynolds Tobacco Company
Appellee

Reynolds American Inc.
Parent Company of R.J. Reynolds Tobacco Company

British American Tobacco, p.l.c.
Indirect Parent Company of Reynolds American Inc. (publicly traded)

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Dated: October 4, 2018

/s/ *Shay Dvoretzky*
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STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that the straightforward issues in this appeal do not warrant oral argument. Of course, Appellee would be pleased to address the Court's questions if the Court concludes that oral argument would be helpful.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Contrary to Appellant's jurisdictional statement, Caldwell Br. 1, the district court did not have diversity jurisdiction. Appellant's complaint fails to allege complete diversity among the parties or that the amount in controversy exceeds $75,000. *See* Part I, *infra*.

ISSUES PRESENTED FOR REVIEW

1. Whether the complaint adequately invoked diversity jurisdiction.
2. Whether the district court properly dismissed Caldwell's unfair trade practices claim, given that (a) Caldwell filed its complaint over twelve years after Reynolds chose not to maintain a business relationship with Caldwell, and (b) Louisiana law allows Reynolds to make that choice.
3. Whether the district court properly dismissed Caldwell's claim for tortious interference with business relations, given that (a) Caldwell waited over twelve years to file its complaint, and (b) Caldwell has not alleged that Reynolds tried to prevent third parties from dealing with Caldwell.
4. Whether the district court properly dismissed Caldwell's complaint with prejudice because amendment would be futile.

INTRODUCTION

Appellant Caldwell Wholesale Co., L.L.C. ("Caldwell") asserts that appellee R.J. Reynolds Tobacco Company ("Reynolds") injured Caldwell by terminating its business relationship with Caldwell in 2004 and refusing to reestablish it later. Caldwell's complaint should be dismissed.

As an initial matter, this Court directed the parties to brief whether complete diversity exists between the parties. Briefing Notice, *Caldwell Wholesale Company, L.L.C. v. R.J. Reynolds Tobacco Company*, No. 18-30707, at 3 (June 28, 2018) ("Briefing Notice"). Caldwell's complaint fails to properly invoke federal jurisdiction because it does not make the necessary allegations about Caldwell's citizenship or the amount in controversy. But Caldwell has now moved to amend its complaint to address these jurisdictional defects, and this Court is free to grant that motion in the first instance, without remanding to the district court. *Nadler v. Am. Motors Sales Corp.* 764 F.2d 409, 412 (5th Cir. 1985); 28 U.S.C. § 1653. In the interests of conserving judicial resources and resolving this dispute promptly, Reynolds does not oppose Caldwell's motion.

On the merits, as the district court correctly held, Caldwell has not adequately pleaded either of its claims. Its first claim alleges a violation of the Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPA"), La. Stat. § 51:1405(A). This claim is time-barred because the relevant limitations period expired over eleven years before Caldwell filed its complaint. It is also substantively deficient. Caldwell's sole allegation is that Reynolds has declined to maintain a business relationship with Caldwell, but Louisiana law gives Reynolds that absolute right. Finally, Caldwell's claim fails for yet another reason: Only direct consumers and

business competitors can bring a private cause of action under LUTPA. Caldwell is neither a consumer nor a competitor of Reynolds.

Caldwell's second claim alleges that Reynolds tortiously interfered with Caldwell's business relationships. This claim rests on the same conduct as the LUTPA claim, and has likewise been time-barred for over a decade. It also fails on the merits because, once again, Caldwell alleges only that Reynolds refused to do business with Caldwell—a decision Reynolds had an unfettered right to make.

For these reasons, Caldwell's complaint is legally deficient.

STATEMENT OF THE CASE

A. Reynolds Distributes Its Products Through Wholesalers

Reynolds conducts business mainly in the highly competitive cigarette market. Reynolds supplies cigarettes and other tobacco products to retailers through wholesale distributors. Some distributors purchase directly from Reynolds; others, known as indirect wholesalers, purchase from other wholesalers. *E.g.*, ROA.23, 25. Retailers, in turn, purchase Reynolds' products from either direct or indirect wholesalers and then sell them to consumers.

Reynolds contracts with certain retailers, and contracting retailers have an incentive to purchase Reynolds' products from direct distributors. Doing so entitles those retailers to receive discounting, or "buydown" payments, from Reynolds based on the quantity they purchase. ROA.24. Those retailers then pass the benefit of

these buydown payments on to consumers in the form of lower prices. The same is true for retailers who purchase from certain indirect wholesalers, who have entered a so-called "sub-jobber" agreement with Reynolds. ROA.25. Those retailers are also eligible to receive buydown payments from Reynolds. But retailers that purchase Reynolds products from all other indirect wholesalers—that is, all indirect wholesalers that have not entered a sub-jobber agreement with Reynolds—are not eligible for buydown payments. ROA.25.

B. Reynolds Terminated Its Direct-Distribution Relationship With Caldwell

Caldwell was a direct distributor of Reynolds products for 45 years. ROA.23. In December 2004, Reynolds terminated its direct-distribution agreement with Caldwell. ROA.23-24. Caldwell, for its part, wanted to continue distributing Reynolds products, so it began "purchas[ing] RJR products from an intermediary." ROA.23-24. But because Caldwell was no longer a direct distributor, retailers purchasing Reynolds' products from Caldwell could not get buydown payments from Reynolds. ROA.24. As a result, some retailers that previously purchased Reynolds products from Caldwell began buying them from other sources. ROA.27.

Caldwell asked Reynolds for a sub-jobber agreement so that retailers who buy from Caldwell could again receive buydown payments. ROA.25. Reynolds declined because it determined in its business judgment that the "distribution of R.J.

Reynolds tobacco products would not be improved by" a sub-jobber agreement with Caldwell. ROA.26.

C. Caldwell Sued Reynolds Twelve Years Later

Caldwell sued Reynolds on January 31, 2017. ROA.6. It asserted two claims, both of which were based on Reynolds' termination of the direct-distribution agreement in 2004, and its later refusal to enter into a sub-jobber agreement with Caldwell that would allow retailers purchasing from Caldwell to receive buydown payments. ROA.23-29.

Caldwell's first claim alleged tortious interference with business. ROA.28. Caldwell asserted that Reynolds' "refusal to buydown products sold by Caldwell" "serve[d] no legitimate business interest," was intended to "harm Caldwell," and "deter[red] . . . customers . . . from doing business with Caldwell." ROA.27-28. In Caldwell's view, Reynolds' conduct therefore "constitute[d] malicious and wanton interference with Caldwell's business." ROA.28.

Caldwell's second claim alleged that Reynolds committed unfair trade practices under LUTPA. ROA.28-29. Caldwell asserted that Reynolds' "decision to restrict the distribution of its own products" reflected "a specific effort to harm Caldwell" and represented "a pattern of unethical, oppressive, and substantially injurious business practices." ROA.29.

D. The Magistrate Judge Ordered Caldwell to Amend Its Jurisdictional Allegations

Shortly after Caldwell filed its initial complaint, ROA.6, the magistrate judge issued a memorandum order noting that Caldwell had failed to adequately plead its own citizenship for purposes of diversity jurisdiction. ROA.19-21. The complaint alleged that Caldwell was a "Louisiana limited liability company domiciled in [Louisiana]." ROA.6. As the order observed, however, the citizenship of an LLC depends on "the citizenship of all of its members," not its "state of organization or principal place of business." ROA.19. Caldwell's complaint therefore had to "identify [Caldwell's] members" and "allege their citizenship with specificity." ROA.20. It failed to do so. ROA.20. The magistrate judge directed Caldwell to file an amended complaint addressing this jurisdictional defect (as well as another jurisdictional defect not relevant here). ROA.21.

Caldwell filed its First Amended and Restated Complaint on February 21, 2017. ROA.22. As to Caldwell's citizenship, the amended complaint alleged that Caldwell's sole member is an LLP; that the LLP's members consisted of individuals, a trust, and a second LLC; and that the trustee and beneficiaries of that trust and the sole member of that second LLC were also individuals. ROA.22. The amended complaint also alleged that all of these individuals were *residents* of Louisiana, but said nothing about their domicile. ROA.22.

The next day, the magistrate judge issued a second *sua sponte* order. ROA.34. The order pointed out that "domicile rather than mere residency . . . decides [an individual's] citizenship for diversity purposes." ROA.34. But the magistrate did not require Caldwell to amend its complaint again. Instead, he decided that "[t]he court will *deem* the allegations of Louisiana residency to be allegations that those individuals are citizens/domiciliaries of Louisiana unless Caldwell states otherwise in the jurisdiction portion of the case management report." ROA.35 (emphasis added). The magistrate added that "[i]nstructions for the [case management] report will issue after the defendant has filed an answer." ROA.35.

E. The District Court Dismissed Caldwell's Claims as Time-Barred

Reynolds moved to dismiss the amended complaint. Reynolds argued that both counts were time-barred. ROA.69-74, 78-79. Reynolds also argued that both failed on the merits, because Reynolds did not engage in any unlawful conduct and had the right under Louisiana law to choose not to transact business with Caldwell. ROA.74-77, 79-81. Finally, Reynolds argued that Caldwell lacked standing to bring the LUTPA claim. ROA.77.

The district court agreed that Caldwell's claims were time-barred. ROA.127-43. It noted that Caldwell's complaint "lack[ed] continuous factual allegations of LUTPA violations" and that Caldwell had "fail[ed] to cite any case law that supports its assertion that its LUTPA claim is not [time-barred]." ROA.141. The district

court applied the same analysis to the tortious interference claim. ROA.141. The district court therefore granted Reynolds' motion to dismiss. ROA.144. Caldwell's appeal followed. ROA.145.

This Court "direct[ed] the parties to brief . . . whether complete diversity exists amongst the parties to this appeal." Briefing Notice at 3. Caldwell's opening brief did not analyze this question. Instead, it summarily asserted that the "District Court had original jurisdiction over this case under 28 U.S.C. § 1332 based on the diversity of citizenship" between Caldwell and Reynolds. Caldwell Br. 1. Several weeks later, Caldwell moved in this Court to amend its complaint, proposing to add "allegations that (1) all of the individuals whose citizenship is relevant for purposes of determining Caldwell's citizenship are citizens of Louisiana, and (2) the amount in controversy exceeds $75,000." Motion for Leave to Amend the Complaint, *Caldwell Wholesale Company, L.L.C. v. R.J. Reynolds Tobacco Company*, No. 18-30707, at 1-2 (Oct. 3, 2018) ("Motion to Amend"). Reynolds does not oppose this motion.

SUMMARY OF THE ARGUMENT

I. As Caldwell's complaint currently stands, Caldwell has not properly invoked diversity jurisdiction. First, Caldwell has not alleged a factual basis for asserting complete diversity among the parties. Complete diversity ultimately depends on the *citizenship* of several individuals. But for each of those individuals,

Caldwell has alleged only their *residency*, not their citizenship. Second, Caldwell has not alleged that the amount in controversy exceeds the jurisdictional amount. But Caldwell has moved to amend its complaint to cure these deficiencies. This Court can grant that motion in the first instance, and Reynolds does not oppose it. 28 U.S.C. § 1653.

II. The district court correctly dismissed Caldwell's LUTPA claim as untimely, and it fails on the merits and for lack of standing anyway.

A. The LUTPA claim is time-barred. The one-year limitations period expired over eleven years before the complaint was filed. And while Caldwell invokes the continuing-tort doctrine, binding precedent from the Louisiana Supreme Court makes clear that Caldwell has failed to allege a continuing tort.

The cause of Caldwell's alleged losses is Reynolds' 2004 decision to terminate its business relationship with Caldwell. And Reynolds' ongoing refusal to reinstate that relationship cannot establish a continuing tort. If it could, then the continuing-tort doctrine would apply to virtually any breach-of-contract or tort case, because the plaintiff can always assert that the defendant's continuing failure to remedy the effects of its original violation is itself a continuing violation. That is not the law.

B. The LUTPA claim also fails on the merits. LUTPA is a narrow penal statute that prohibits only particularly egregious actions, such as an abuse of a

relationship of trust. Caldwell alleges no egregious actions on Reynolds' part. Indeed, its only allegation is that Reynolds has declined to deal with Caldwell, as Reynolds is legally entitled to do. This falls far short of the standard for a LUTPA claim.

C. Finally, this Court has interpreted LUTPA to mean that only direct consumers or business competitors have standing to assert a private cause of action under LUTPA. Caldwell does not purport to be either a consumer or a competitor of Reynolds, so its claim fails for this reason too.

III. The district court correctly dismissed Caldwell's tortious interference claim.

A. Caldwell's tortious interference claim is based on the same conduct as its LUTPA claim, and is also subject to a one-year limitations period. So, like the LUTPA claim, this claim is over a decade late.

B. Also like the LUTPA claim, the tortious interference claim is substantively deficient. A tortious interference claim requires Caldwell to show that Reynolds affirmatively sought to prevent *third parties* from dealing with Caldwell. But Caldwell fails to allege that Reynolds even had any discussions with third parties, let alone that it sought to prevent those third parties from dealing with Caldwell. Indeed, Caldwell's *only* allegation is that Reynolds terminated its business relationship with Caldwell, which it later declined to reinstate. That

decision cannot constitute tortious interference under Louisiana law, even if it affected the incentives of third-party retailers to deal with Caldwell.

IV. The district court correctly dismissed Caldwell's complaint with prejudice. It is not an abuse of discretion to deny leave to amend where amendment would be futile. Caldwell has given no indication that it could amend its complaint in a way that would address the many fatal defects discussed above.

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must state a valid claim for relief." *Collins v. Mnuchin*, 896 F.3d 640, 652 (5th Cir. 2018). This Court reviews a grant of a motion to dismiss de novo. *Loupe v. O'Bannon*, 824 F.3d 534, 536 (5th Cir. 2016).

ARGUMENT

I. CALDWELL HAS NOT PROPERLY INVOKED DIVERSITY JURISDICTION, BUT GRANTING CALDWELL'S MOTION TO AMEND ITS COMPLAINT WOULD CURE THE JURISDICTIONAL DEFECT

This Court directed the parties to address "whether complete diversity exists amongst the parties to this appeal." Briefing Notice at 3. Caldwell's opening brief does not analyze that question. It summarily asserts that the "District Court had original jurisdiction over this case under 28 U.S.C. § 1332 based on the diversity of citizenship" between Caldwell and Reynolds. Caldwell Br. 1. But the operative complaint fails to properly invoke federal diversity jurisdiction because it does not

allege either complete diversity of citizenship, or that the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332. Caldwell has now moved to amend its complaint, however, and this Court can grant Caldwell's unopposed motion in the first instance.

A. The Complaint Fails To Allege Complete Diversity of Citizenship

1. Section 1332 requires "complete diversity"—that is, "all persons on one side of the controversy [must] be citizens of different states than all persons on the other side." *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079 (5th Cir. 2008) (internal quotation marks omitted). Reynolds is a citizen of North Carolina, ROA.22-23, so complete diversity would be established if Caldwell is a citizen of a state (or states) other than North Carolina.

Determining Caldwell's citizenship requires understanding its structure and the diversity rules that govern it. Caldwell is a limited liability company. ROA.22. "For diversity jurisdiction purposes, the citizenship of a limited liability company is determined by the citizenship of all of its members." Briefing Notice at 3 (citing *Harvey*, 542 F.3d at 1079-80). So complete diversity could exist only if none of Caldwell's members are citizens of North Carolina.

Caldwell, in turn, has only one member: a limited partnership, Caldwell Management, LLP. ROA.22. "[T]he citizenship of a limited partnership is based upon the citizenship of each of its partners." *Harvey*, 542 F.3d at 1079. Thus,

Caldwell's citizenship ultimately depends on the citizenship of each of the partners of Caldwell Management, LLP.

Caldwell Management, LLP has four partners. ROA.22. The complaint alleges that two of those partners, Kendra Caldwell Wagnon and Michael F. Wagnon, are "resident[s] of Caddo Parish," Louisiana. ROA.22. The third is another LLC, "whose sole member is Kenneth G. Caldwell," also a "resident of Caddo Parish." ROA.22.

The fourth and final member of Caldwell Management, LLP is an "irrevocable inter vivos trust," "whose beneficiaries are the grandchildren of Kenneth G. Caldwell, all of whom are residents of Caddo Parish, and whose Trustee is Kendra Caldwell Wagnon," also a resident of Caddo Parish. ROA.22. The citizenship of a trust is based on the citizenship of all of its members. *Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1015 (2016). The members of a trust include the trustee, and generally also the beneficiaries. *See, e.g.*, *id.* at 1016-17. As a result, the citizenship of this trust also turns on the citizenship of one or more individuals who are alleged to reside in Caddo Parish.

2. Caldwell's citizenship, therefore, ultimately depends on the citizenship of several individuals: Kendra Caldwell Wagnon, Michael F. Wagnon, Kenneth G. Caldwell, and likely the grandchildren of Kenneth G. Caldwell. But the complaint contains no allegations about the *citizenship* of those individuals; instead, it alleges

only that they are *residents* of Louisiana. These allegations are insufficient because "section 1332(a)(1) demands diverse citizenship, not diverse residency." *Nadler v. Am. Motors Sales Corp.* 764 F.2d 409, 412 (5th Cir. 1985). And "an allegation of residency does not satisfy the requirement of an allegation of citizenship." *Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984); *see also Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 310 n.2 (5th Cir. 2002); *Neeley v. Bankers Tr. Co. of Texas*, 757 F.2d 621, 634 n.18 (5th Cir. 1985).

3. The magistrate judge purported to overcome this problem by "deem[ing] the allegations of Louisiana residency to be allegations that those individuals are citizens/domiciliaries of Louisiana unless Caldwell states otherwise in the jurisdiction portion of the case management report," which would have to be submitted "after the defendant has filed an answer." ROA.35. This was not an adequate solution for the jurisdictional defect.

The magistrate judge identified no support for establishing jurisdiction by "deeming" the complaint to make additional allegations. Indeed, when this Court has allowed a party to address a jurisdictional defect, it has done so by permitting that party to *amend* its complaint under 28 U.S.C. § 1653. *See, e.g.*, *Nadler*, 764 F.2d at 413.

Moreover, even the magistrate judge appeared to recognize that Caldwell's complaint could not be rewritten without Caldwell's input. That is why he held that

the complaint would be deemed to include the appropriate allegations *only if* Caldwell failed to object in the case management report. ROA.35. The parties have not filed that report, because the case was dismissed before Reynolds answered the complaint. Before Caldwell's recent motion for leave to amend, then, there was no way to know whether Caldwell even accepted the magistrate judge's reframing of its jurisdictional allegations.

4. In sum, Caldwell's complaint "failed properly to invoke the jurisdiction of the federal courts." *Nadler*, 764 F.2d at 413. Caldwell has now moved to amend its complaint to cure this jurisdictional defect, Motion to Amend at 1-2, and this Court is free to consider that motion in the first instance. *Nadler*, 764 F.2d at 413; 28 U.S.C. § 1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."). In the interests of judicial economy, and achieving a prompt resolution of this dispute, Reynolds does not oppose the motion.

B. The Complaint Fails to Allege That the Amount in Controversy Exceeds $75,000

Caldwell's complaint also fails to properly invoke diversity jurisdiction for another reason. Section 1332 requires that "the matter in controversy" must be greater than $75,000. Caldwell's complaint makes no allegations about the amount in dispute.

This Court has explained that, "when a complaint does not allege a specific amount of damages, the party invoking federal jurisdiction"—here, Caldwell—

"must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount." *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998). To determine whether a party has done so, a court should first ask whether the amount in controversy is "facially apparent" from the complaint. *Id.* Here, as noted above, the complaint is silent about the amount in dispute. Caldwell must therefore present "summary judgment-type" evidence to establish the amount in controversy. *Id.* But Caldwell has not tried to do so.

This failure to plead is another jurisdictional defect. *See Strain*, 742 F.2d at 889-90. But, again, Caldwell has moved to amend its complaint under 28 U.S.C. § 1653, Motion to Amend at 2; this Court may consider that motion in the first instance, *Nadler*, 764 F.2d at 413; and Reynolds does not oppose Caldwell's motion.

II. THE DISTRICT COURT CORRECTLY DISMISSED CALDWELL'S LUTPA CLAIM

A. Caldwell's LUTPA Claim Is Time-Barred

Caldwell's LUTPA claim is subject to a one-year limitations period. That period began to run in 2004, when Reynolds terminated its business relationship and agreement with Caldwell. Caldwell's LUTPA claim—first filed over twelve years later—is over eleven years late. And the continuing-tort doctrine does not rescue the claim, because Caldwell has failed to allege continuous unlawful conduct. The claim is therefore time-barred.

1. The Limitations Period Ended Over Eleven Years Before Caldwell Sued

A one-year limitations period applies to private actions brought under LUTPA. La. Stat. § 51:1409(E); *Miller v. ConAgra, Inc.*, 991 So. 2d 445, 449 & n.7 (La. 2008); Caldwell Br. 24. The one-year period runs "from the time of the transaction or act which gave rise to [the] right of action." La. Stat. § 51:1409(E).

The Louisiana Supreme Court applied this rule in *Miller*. The plaintiff had an agreement with ConAgra to raise chickens on his farm. *Miller*, 991 So. 2d at 447. He alleged that ConAgra improperly coerced him into terminating that agreement, which eventually bankrupted him. *Id.* at 448. The court held that the act that triggered the limitations period was the termination of the contract. *Id.* at 456. "All performances under the contract ceased on that date," and this "trigger[ed] Miller's damages." *Id.* Miller failed to bring his LUTPA claim within a year of the termination of the contract, and his claim was therefore rejected as untimely. *Id.* at 455-57.

Here, the relevant act occurred in December 2004, when Reynolds "terminated Caldwell's status as a direct purchaser." ROA.23. Just as in *Miller*, this was the event that triggered Caldwell's damages. *See* ROA.28 (alleging that, when Reynolds "took Caldwell off direct," Caldwell "lost sales and business opportunities"). The one-year limitations period thus ended in December 2005—more than eleven years before Caldwell filed the complaint. *See* ROA.26, 28.

2. The Continuing Tort Doctrine Does Not Apply

Caldwell invokes the "continuing tort" doctrine to overcome the limitations bar. Caldwell Br. 10-11. But the amended complaint does not allege a continuing tort.

a. Under the continuing-tort doctrine, "when the tortious conduct *and* resulting damages continue," the applicable limitations period "does not begin until the *conduct* causing the damage is abated." *Ned v. Union Pac. Corp.*, 176 So. 3d 1095, 1100 (La. 3d Cir. 2015) (citation omitted; emphasis added). "[C]ontinuing damages" or "even progressively worsening damages" do not by themselves create a continuing tort. *In re Med. Review Panel for Claim of Moses*, 788 So. 2d 1173, 1183 (La. 2001). To the contrary, "both the injury *and* the wrongful conduct that caused it must be continuous." *Young v. U.S.*, 727 F.3d 444, 448 (5th Cir. 2013). That is, a continuing tort must also be "occasioned by *unlawful acts*, not the continuation of the ill effects of an original, wrongful act." *Crump v. Sabine River Auth.*, 737 So. 2d 720, 728 (La. 1999). And the wrongful conduct must consist of "overt, persistent, and ongoing acts." *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246, 279 (La. 2011) (citation omitted).

Again, *Miller* shows the application of these principles. The plaintiff argued that ConAgra had committed a continuing violation of LUTPA because, after coercing him into terminating the contract, ConAgra had "maintain[ed] that Miller

stole chicken feed" and "threatened him with criminal prosecution." 991 So. 2d at 456. The court rejected this argument. It emphasized that a continuing wrong occurs only where "the operating cause of injury is a continuous one," *id.* (quotation omitted), and that continuing *harms* from the original wrongful act are not a continuing *violation*, *id.* Therefore, it did not matter that the termination of the agreement eventually brought about plaintiff's bankruptcy or that ConAgra reiterated its accusations of theft and threats to pursue criminal charges against Miller. "[T]he operating cause of injury was not continuous" because Miller's damages were caused by a single act: the termination of the contract. *Id.*

Miller, in turn, relied on *Crump*, another decision explaining and applying the continuing-tort doctrine. *Id.* In *Crump*, the construction of a canal caused a bayou to dry up, depriving the plaintiff of access to a river and a reservoir from her property. 737 So. 2d at 723. Over the course of twenty years, she met with representatives of the defendant river authority and tried to resolve the issue. *Id.* at 723-25. But those attempts failed, and the plaintiff never regained access to the waterways. *Id.* Over twenty years after the digging of the canal, she sued, relying on the continuing-tort doctrine. *Id.* at 723-25.

The Louisiana Supreme Court rejected the continuing-tort argument. It explained that the operating cause of the injury was the construction of the canal, which dried up the bayou. *Id.* at 727. "The continued presence of the canal and the

consequent continuous diversion of water . . . are simply the continuing ill effects arising from a single tortious act." *Id.* at 727-28. And the parties' later conduct, including the discussions about a possible remedy, did not change this analysis. "[T]he breach of the duty to right a wrong and make the plaintiff whole simply cannot be a continuing wrong which suspends the [limitations period], as that is the purpose of any lawsuit and the obligation of every tortfeasor." *Id.* at 729. As this Court has explained, *Crump* "rejected the contention that a continuing breach of duty could consist of a defendant's failure to remedy the harm caused by the initial tortious conduct." *Terrebonne Par. Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 885 (5th Cir. 2002).

b. *Miller* and *Crump* make clear that the continuing-tort doctrine does not delay the running of the limitations period here. Just as in *Miller*, the act that gave rise to the alleged LUTPA violation and started the limitations period was the termination of the business relationship and contract. This action caused all of Caldwell's alleged damages. And just as in *Crump,* any later losses suffered by Caldwell are simply the continuing effects of that original action, which do not extend the limitations period.

The specific factual allegations in Caldwell's complaint do not change this analysis. First, Caldwell alleges that "lost sales and business opportunities have continued to occur," ROA.28, and that the termination "caused, and continues to

cause, damage to Caldwell," ROA.28, 29. That is beside the point. In *Miller*, the court concluded that similar post-termination damages were the "continuation of the ill effects of an original . . . act," so they did not constitute a continuing tort. *Miller*, 991 So. 2d at 456. Likewise, in *Crump*, the damages caused by the "continuous diversion of water" arose from a "single tortious act" at a specific time, and thus did not turn the tort into a continuing one. *Crump*, 737 So. 2d at 728; *see Terrebonne*, 310 F.3d at 885.

Second, Caldwell doubles down on its reliance on lost sales and business opportunities, alleging that they "have reached a point . . . that has caused Caldwell to conclude it cannot indefinitely sustain its business." ROA.28. But "[w]hen a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort." *In re Med. Review*, 788 So. 2d at 1183.

Third, Caldwell alleges that it twice began unsuccessful discussions with Reynolds about reestablishing a business and contractual relationship. ROA.25-26. These allegations similarly fail to transform the 2004 contract termination into a continuous tort. As *Crump* made clear, later discussions in which the parties try to work out their differences do not affect the running of the one-year limitations period because they are not the source of the injury. *See Crump*, 737 So. 2d at 725, 727-

28. Indeed, Caldwell concedes that its "2011 and 2014 entreaties to have its buydown eligibility restored" evidence no continuous tort, as they "produced no change or new action by [Reynolds] whatsoever" and are not "the source of injury alleged in the Complaint." Caldwell Br. 16. In any event, Caldwell alleges that the last discussions concluded in October 2014—more than two years before Caldwell filed this case. ROA.26; *see* ROA.140-41 (district court noting this point). So even if these fruitless discussions had been the source of a separate injury, any LUTPA claim based on them would be time-barred.

3. Caldwell's Counterarguments Are Unavailing

a. Caldwell suggests that Reynolds' "buydown payment mechanism" *itself* is "vast, complex, and constant in its execution," and that its implementation is a form of continuing tort. Caldwell Br. 11-12. That is wrong.

To be sure, Reynolds uses the buydown system on an ongoing basis to discount to consumers through payments to contracting retailers. But the amended complaint does not allege that administering this system is unlawful. Caldwell's complaint is not that the existence of the buydown system (which, after all, results in discounts to consumers) is itself wrongful. To the contrary, Caldwell wants to be included in the system. But to show a continuing tort, Caldwell must allege ongoing *unlawful acts* (*i.e.*, tortious conduct).

Young v. U.S., 727 F.3d 444, 448 (5th Cir. 2013), a decision on which Caldwell relies, is fatal to Caldwell's argument. There, this Court explained the distinction between acts that are continuous and *unlawful*, and those that are simply continuous and therefore insufficient to show a continuing *tort*. *Id.* at 449. The plaintiffs were property owners whose property had been flooded due to construction of a highway many years earlier. *Id.* at 445-46. They alleged that the highway's poor design was attributable to a report by the federal government that was negligently prepared in the lead-up to the highway's construction. *Id.* at 445. They also alleged that the tort was continuous because the government continued to maintain the highway over the succeeding years. *Id.* at 446. This Court rejected the argument, explaining that "to the extent that federal maintenance of the . . . highway could be considered a 'continuing' series of acts, such maintenance [was] not 'wrongful'" and thus could not support a finding of continuing tort. *Id.* at 449.

b. Caldwell also appears to argue that Reynolds' *refusal* to enter into a new relationship with Caldwell is the continuing conduct that supports its claim of continuing tort. *E.g.*, Caldwell Br. 12-13, 14. But that approach would turn the continuing-tort doctrine on its head and gut LUTPA's one-year time bar. Under this theory, virtually every breach of contract or tort would be a continuing violation. Almost any contract-termination case, for example, could be repackaged as an ongoing, day-after-day decision by the defendant not to enter into a new agreement

with the plaintiff. Similarly, any tort case could be recast as a continuous refusal to ameliorate the damages that stem from the original wrongful act.

That is not Louisiana law. In *Miller*, for example, the termination of the contract between Miller and ConAgra could have been recast as a continuing refusal by ConAgra to purchase Miller's chickens. But the Louisiana Supreme Court rejected the argument that "the [limitations] period has not begun to run because ConAgra's unfair practices have persisted to this day." *Miller*, 991 So. 2d at 456. Similarly, in *Crump*, the plaintiff argued that the tort was a continuing one because of "the continued existence of the canal" and "the defendant's continued refusal to remove the canal." 737 So. 2d at 726. But the Louisiana Supreme Court explained that "[t]he continued presence of the canal and the consequent continuous diversion of water . . . [were] simply the continuing ill effects arising from a single tortious act," and did not transform the alleged violation into a continuous one. *Crump*, 737 So. 2d at 727-28.

The cases that Caldwell cites are not to the contrary. In *Tubos de Acero de Mexico, S.A. v. American International Investment Corporation, Inc.*, 292 F.3d 471 (5th Cir. 2002), the plaintiff alleged "numerous" illicit actions by the defendant *throughout the period in question*. These acts included illegal copying of proprietary components, renovation of leased equipment in violation of lease terms, and negotiations with third parties to purchase competing equipment in violation of lease

terms. *Id.* at 482. Likewise, in *Bihm v. Deca Systems, Inc.*, the cross-defendants stole trade secret information from the cross-plaintiffs and affirmatively used it continually to gain an unfair advantage over the defendant. 226 So. 3d 466 (La. 1st Cir. 2017). Both cases thus involved affirmative, *unlawful* conduct extending well beyond the first unlawful act and causing new injuries each time.

c. Finally, Caldwell devotes significant space to whether the LUTPA limitations period is "peremptive" or "prescriptive" under Louisiana law—in other words, whether it is a statute of repose or a statute of limitations. Caldwell Br. 24-27; *see Coleman v. OFS, Inc.*, 554 F. App'x 251, 253 (5th Cir. 2013); *Marchseani v. Pellerin-Milnor Corp.*, 269 F.3d 481, 484 (5th Cir. 2001). Caldwell appears to be concerned that, if the limitations period is peremptive, the continuing-tort doctrine might be inapplicable to LUTPA. *See* Caldwell Br. 26-27.

This Court need not reach these questions because, as shown above, the continuing-tort doctrine cannot help Caldwell *even assuming* it is generally available under LUTPA. Therefore, the LUTPA claim is time-barred regardless of whether the limitations period is peremptive or prescriptive. *See Miller*, 991 So. 2d at 456 ("Because we conclude that [defendant] has not committed a continuing violation of LUTPA, we find it unnecessary to address whether [the one-year LUTPA limitations period] is a prescriptive or peremptive statute.").

d. Caldwell's failure to plead a continuing tort also means that its alternative argument—that the district court, at a minimum, should not have "den[ied] Caldwell's claims for damages arising from RJR conduct that took place during the year before suit was filed," Caldwell Br. 28—fails as well. As explained above, the amended complaint pleads no affirmative injury-causing conduct by Reynolds during that period (or any period following 2004).

B. Caldwell Fails to Allege a LUTPA Violation

In addition to being time-barred, Caldwell's LUTPA claim is substantively deficient. LUTPA is a penal statute that courts construe narrowly to prohibit only a limited range of egregious misconduct. It does not circumscribe a company's right to decline to do business with another company. Caldwell alleges only that Reynolds discontinued its business relationship with Caldwell, and has refused to reinstate that relationship. These allegations do not make out a LUTPA violation.

1. LUTPA prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." La. Stat. § 51:1405(A). A business practice is unfair "if it offends established public policy and is unethical, oppressive, unscrupulous, or substantially injurious"; it is deceptive if "it amounts to fraud, deceit or misrepresentation." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par.*, 309 F.3d 836, 843 (5th Cir. 2002).

LUTPA is "a penal statute," and therefore "it must be strictly construed." *Family Res. Grp., Inc. v. Louisiana Parent Magazine*, 818 So. 2d 28, 33 (La. 2d Cir. 2001). "[T]he range of prohibited practices under LUTPA is extremely narrow." *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 35 So. 3d 1053, 1060 (La. 2010); *see also Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993); *Walker v. Hixson Autoplex of Monroe, L.L.C.*, 245 So. 3d 1088, 1095 (La. 2d Cir. 2017).

For example, LUTPA cases have often "involve[d] breaches of ethical standards arising from the employer-employee relationship." 989 F.2d at 1422. And while LUTPA is not confined to that context, such cases show "the kind of behavior the statute aims to punish"—namely, abuses of "a special relationship of trust" in which one party is "especially vulnerable to duplicity at the hands of [the other]." Thus, "LUTPA does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions." *Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1332 (5th Cir. 1994) (internal quotation marks omitted).

Two corollaries of these principles are especially relevant here. First, LUTPA does not prohibit mere breaches of contract. To the contrary, "[t]here is a great deal of daylight between a breach of contract claim and the egregious behavior the statute proscribes." *Turner*, 989 F.2d at 1422. Second, under Louisiana law, individuals

and companies retain "an absolute right to refuse to deal with another"—"regardless of . . . motive." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5th Cir. 1981); *see Sandolph v. P&L Hauling Contractors, Inc.*, 430 So. 2d 102, 103 (La. 5th Cir. 1983); *Muslow v. A.G. Edwards & Sons, Inc.*, 509 So. 2d 1012, 1020 (La 2d Cir. 1987). A mere refusal to deal with another, therefore, cannot constitute a LUTPA violation.

2. These principles show that Caldwell has failed to state a LUTPA claim. According to Caldwell, Reynolds' wrongdoing consists in its "ongoing refusal to issue buydowns" to retailers purchasing Reynolds' products from Caldwell. Caldwell Br. 13. Caldwell thus faults Reynolds for terminating its business relationship with Caldwell in 2004, ROA.24, and for declining to contract with Caldwell since that time, ROA.25-26.

This is a far cry from the egregious behavior prohibited by LUTPA. First, as noted above, a LUTPA violation requires misconduct that is substantially worse than a mere breach of contract. *Turner*, 989 F.2d at 1422. But Caldwell does not even allege a contractual breach. Nor does it suggest that Caldwell and Reynolds were in any kind of "special relationship of trust" that would leave Caldwell "especially vulnerable" or impose any particular "ethical standards" on Reynolds. *Id.* Instead, its allegations describe an ordinary exercise of "permissible business judgment," which is entirely consistent with LUTPA. *Omnitech*, 11 F.3d at 1332.

Moreover, Caldwell's objection to Reynolds' conduct is simply that Reynolds has opted out of its business relationship with Caldwell. But Reynolds has "an absolute right to refuse to deal" with Caldwell. *Dussouy,* 660 F.2d 594 at 601. LUTPA does not penalize the exercise of this right.

3. In the district court, Caldwell tried to support its LUTPA claim by arguing that Reynolds' conduct was motivated by a desire to "retaliat[e]" against Caldwell "for a long-since-concluded antitrust suit" that was "brought against RJR in 2003 by twenty wholesalers," including Caldwell. ROA.98; *see* ROA.23-24. These allegations do not change the legal analysis. As noted above, Reynolds' "absolute right to refuse to deal" with Caldwell applies "regardless of [Reynolds'] motive." *Dussouy,* 660 F.2d 594 at 601; *Sandolph*, 430 So. 2d at 103; *Muslow*, 509 So. 2d at 1020. In other words, Caldwell must allege *improper conduct* by Reynolds, and it has failed to do so.

Turner reflects this principle. There, one company accused another of seeking to "eliminate" and "destroy" it. *Turner*, 989 F.2d at 1423. But this Court explained that "an intent to eliminate the competition does not by itself violate LUTPA." *Id.* Instead, "the statute forbids businesses to destroy each other *through improper means*." *Id.* (emphasis added). And because there was no indication that "improper means were planned or used," the LUTPA claim failed. *Id.*

So too here. Caldwell's allegations about Reynolds' motives are beside the point: Caldwell is not Reynolds' competitor and, in any event, there is nothing improper about Reynolds' decision not to do business with Caldwell. *See also Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Par.*, 289 F. App'x 22, 31-32 (5th Cir. 2008) ("Knatt complains that the refusal to lease was part of an overall scheme intended to harm his and the Howell Place Project's business, but the *means* he complains of are not forbidden."); *Guillory v. Broussard*, 194 So. 3d 764, 778 (La. 3d Cir. 2016) (a finding that the defendant breached a contract "in order to coerce [plaintiff] to dismiss lawsuits pending against the defendants" "does not meet the criteria for . . . a . . . LUTPA violation").

C. Caldwell Lacks Standing to Assert the LUTPA Claim

Caldwell's LUTPA claim also fails because Caldwell lacks standing to assert it. This Court has held that "LUTPA's private right of action is limited to direct consumers or to business competitors." *Tubos de Acero*, 292 F.3d at 480. *See Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Par.*, 327 F. App'x 472, 480 (5th Cir. 2009) ("To have standing to bring a private action under LUTPA, the plaintiff must be a direct consumer or business competitor of the defendant."). Caldwell is neither.

Caldwell is not a consumer of Reynolds' products. To the contrary, it is "a full-service wholesale distributor." ROA.23. Nor is it a business competitor of Reynolds. As Caldwell alleges, for a period of 45 years, it *collaborated* with

Reynolds in distributing Reynolds' products. ROA.23. *See, e.g.*, *Nat'l Gypsum Co. v. Ace Wholesale, Inc.*, 738 So. 2d 128, 129-30 (La. 5th Cir. 1999) (affirming trial court ruling that former distributor was not a business competitor under LUTPA); *Dorsey v. N. Life Ins. Co.*, No. 04-CV-342, 2005 WL 2036738, at *12 (E.D. La. Aug. 15, 2005) (plaintiff insurance agents were not business competitors of defendant insurer, whose policies they sold). Even now, far from competing with Reynolds, Caldwell seeks to distribute Reynolds' products and to deepen its business relationship with Reynolds. *See* ROA.23-24, 25-28, 29.

In the district court, Caldwell did not contest that it lacked standing under *this Court's* precedent. ROA.101-03. Instead, it urged the district court to disregard that precedent because of *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, 35 So. 3d 1053 (La. 2010). ROA.101-03. In *Cheramie*, a plurality of the Louisiana Supreme Court stated—in dicta, *see* 35 So. 3d at 1065 (Guidry, J., concurring in result)—that the private right of action under LUTPA is not limited to consumers and business competitors. *Id.* at 1058.

The district court agreed with Caldwell and followed the plurality dicta in *Cheramie* instead of this Court's precedent. ROA.137-38. This was error. "Once a panel of this Court has settled on the state law to be applied in a diversity case, the precedent should be followed by other panels without regard to any alleged existing confusion in state law, absent a subsequent state court decision or statutory

amendment which makes this Court's decision clearly wrong." *Lee v. Frozen Food Exp., Inc.*, 592 F.2d 271, 272 (5th Cir. 1979). Accordingly, this Court's past "'*Erie* guesses'" are "settled law in this circuit" "absent a contrary [state] Supreme Court opinion or a legislative amendment." *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 425 (5th Cir. 2001). *Cheramie* meets neither requirement. If anything, the Louisiana Supreme Court's inability to muster a majority to expand LUTPA standing beyond consumers and business competitors suggests that this Court has interpreted LUTPA correctly.

In short, *Tubos* remains binding precedent, and Caldwell therefore lacks standing to bring its LUTPA claim.

III. THE DISTRICT COURT CORRECTLY DISMISSED CALDWELL'S TORTIOUS INTERFERENCE CLAIM

A. The Tortious Interference Claim Is Time-Barred

A one-year limitations period applies to Caldwell's claim for tortious interference. La. Civ. Code art. 3492; *K.P.'s Auto Sales Inc. v. Gen. Motors Corp.*, No. 07-30906, 2008 WL 4580087, at *3 (5th Cir. Oct. 15, 2008) (applying the limitations period found in La. Civ. Code art. 3492 to tortious interference claim); *Simmons v. Templeton*, 723 So. 2d 1009, 1012 (La. 4th Cir. 1998). The limitations period "run[s] from the day injury or damage is sustained." La. Civ. Code art. 3492.

Caldwell's tortious interference claim is premised on the same conduct as its LUTPA claim. ROA.28-29. Indeed, Caldwell acknowledges that "there is no

distinction, for purposes of the continuing tort doctrine, between Caldwell's LUTPA and tortious interference with business claims." Caldwell Br. 26. Caldwell's tortious interference claim, like its LUTPA claim, is therefore untimely for the reasons stated in part II.A.

To be sure, the two limitations provisions are phrased slightly differently. The LUTPA limitations period runs "from the time of the transaction or act which gave rise to [the] right of action," La. Stat. § 51:1409(E), while the Article 3492 period runs "from the day injury or damage is sustained," La. Civ. Code art. 3492. To the extent this linguistic distinction makes a practical difference, that difference is not relevant here because Caldwell alleges that it began to incur injuries as soon as Reynolds terminated the agreement in December 2004. ROA.28.

B. Caldwell Fails to Allege a Tortious Interference Claim

In any event, Caldwell has not adequately pleaded tortious interference because it has failed to allege that Reynolds interfered with a business relationship between Caldwell and any third party. Instead, it alleges only that Reynolds *itself* has declined to do business with Caldwell. That does not come close to making out a tortious interference claim.

1. Although Louisiana courts have recognized a cause of action for tortious interference with a business relationship, they "do not look on this particular cause of action with favor." *St. Landry Homestead Fed. Sav. Bank v. Vidrine*, 118

So. 3d 470, 490 (La. 3d Cir. 2013); *see also Hardy v. Easterling*, 113 So. 3d 1178, 1186-87 (La. 2d Cir. 2013). In fact, as one commentator has noted, Louisiana courts have treated tortious interference with so much skepticism that "there appear to be no recorded cases in which anyone actually has been held liable for the tort." George Denegre, Jr. et al., *Tortious Interference and Unfair Trade Claims: Louisiana's Elusive Remedies for Business Interference*, 45 Loy. L. Rev. 395, 401 (1999). Many courts have quoted and endorsed this observation. *See, e.g.*, *JCD Mktg. Co. v. Bass Hotels & Resorts, Inc.*, 812 So. 2d 834, 841 (La. 4th Cir. 2002); *K&F Rest. Holdings, Ltd. v. Rouse*, No. 16-CV-293, 2018 WL 3553422, at *15 (M.D. La. July 24, 2018).

A claim of tortious interference is limited in two important ways. First, this claim requires plaintiffs to prove that the "defendant[] improperly influenced others not to deal with the plaintiff." *Jeff Mercer, LLC v. State*, 222 So. 3d 1017, 1024 (La. 2d Cir. 2017). It is not enough to show that a defendant's actions "adversely affect[ed]" the plaintiff's business; instead, "there must be a showing that defendants *actually prevented the plaintiff from dealing with a third party*." *Id.* at 1025 (emphasis added); *see also Bogues v. La. Energy Consultants, Inc.*, 71 So. 3d 1128, 1135 (La. 2d Cir. 2011) (same); *St. Landry*, 118 So. 3d at 490 (quoting *Bogues*). And courts have taken a narrow view of what it means to prevent a plaintiff from dealing with a third party. In particular, a plaintiff must establish, at a minimum, that the defendant and the third party specifically discussed the plaintiff. *Bogues*, 71

So. 3d at 1135 (rejecting tortious interference claim where the plaintiff had made "no factual allegations describing any conversation between [any alleged tortfeasor] and any particular entity with whom [plaintiff] was attempting to confect a business relationship"); *Junior Money Bags, Ltd. v. Segal*, 970 F.2d 1, 10-11 (5th Cir. 1992) (affirming a district court decision which had rejected a tortious interference claim "because [the plaintiff] did not show any communications between [the defendants] and [the third party]").

Second, as noted above, Louisiana law recognizes "an absolute right to refuse to deal with another"—"regardless of motive." *Dussouy*, 660 F.2d at 601. Courts have repeatedly explained that a mere refusal to do business with another individual or company cannot constitute tortious interference with a business relationship. *See id.*; *McCoin v. McGehee*, 498 So. 2d 272, 274 (La. 1st Cir. 1986); *Ustica Enters., Inc. v. Costello*, 434 So. 2d 137, 139-40 (La. 5th Cir 1983).

2. *Ustica* illustrates these principles. The plaintiff (The Music Box) provided ticketing services for a third party (Ole Man Rivers); in exchange, Ole Man Rivers advertised The Music Box as its ticket outlet. *Id.* at 138. Ole Man Rivers tried to place an advertisement with defendant WRNO (a radio station). WRNO, however, prohibited Ole Man Rivers from mentioning The Music Box on its radio waves (while allowing it to mention other ticket outlets). *Id.* at 138-39. As a result, Ole Man Rivers terminated its relationship with The Music Box. *Id.* at 139.

The Music Box claimed that, by preventing The Music Box from being mentioned on the station, WRNO had tortiously interfered with its business relationship with Ole Man Rivers. The court rejected the claim. It noted that The Music Box alleged only that WRNO "would not let Ole Man Rivers use The Music Box's name in its radio advertising." *Id.* at 140. This did not amount to "attempt[ing] to prevent Ole Man Rivers from doing business with The Music Box." *Id.* WRNO had not, for example, "threatened to discontinue advertising" for Ole Man Rivers if it "advertised The Music Box on other radio stations or through other forms of advertising." *Id.* Instead, WRNO "was simply determining who it chose to have advertised on its station as it is entitled to do." *Id.* To be sure, WRNO's conduct "may have affected the business relationship between Ole Man River and the Music Box," but that is not enough to "state a cause of action for tortious interference with business." *Id.*

3. These principles show that Caldwell has not stated a tortious interference claim. First, Caldwell has not alleged *any* discussions between Reynolds and any Caldwell customer, let alone discussions in which Reynolds sought to prevent a Caldwell customer from doing business with Caldwell. Indeed, the only conduct Caldwell alleges is that Reynolds terminated its business relationship with Caldwell in 2004, and has declined to reinstate it. These

allegations cannot support a tortious interference claim, because, under Louisiana law, Reynolds has an absolute right to refuse to deal with Caldwell.

In the district court, Caldwell sought to rehabilitate this claim by arguing that its lack of a relationship with Reynolds resulted in lost sales and customers. ROA.104. But any decision not to do business with another company may cause that company to lose sales and customers. This is why an adverse impact on the plaintiff's business cannot, by itself, constitute tortious interference. *See, e.g.*, *Jeff Mercer, LLC*, 222 So. 3d at 1025.

Indeed, this case is just like *Ustica*. There, as here, the defendant treated the plaintiff unfavorably, and, by doing so, indirectly affected the plaintiff's business relationships with third parties. But there, as here, the defendant was "entitled" to make the decision that it did. *Ustica*, 434 So. 2d at 140.

Moreover, like the defendant in *Ustica*, Reynolds has not "attempted to prevent" Caldwell's customers from doing business with Caldwell. *Id.* It has not, for example, threatened to deny all buydowns—even for purchases made from non-Caldwell wholesalers—to retailers that maintain a relationship with Caldwell. *See id.* Instead, it has merely chosen not to enter into its own business relationship with Caldwell. Under Louisiana law, that decision cannot constitute tortious interference, even if it "affect[s] the business relationship" between Caldwell and its customers. *Id.*

IV. THE DISTRICT COURT APPROPRIATELY DISMISSED CALDWELL'S COMPLAINT WITH PREJUDICE

Caldwell's final argument is that the district court erred by denying Caldwell leave to amend. Caldwell Br. 29-30. But the district court's decision to dismiss the complaint with prejudice was correct, and certainly was not an abuse of discretion. *See Porter v. Beaumont Enter. & Journal*, 743 F.2d 269, 271 (5th Cir. 1984) (district court's decision to dismiss with prejudice is reviewed for abuse of discretion).

Leave to amend need not be granted where amendment would be futile. *See, e.g.*, *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 620 F.3d 465, 468 (5th Cir. 2010) ("The trial court acts within its discretion in denying leave to amend where the proposed amendment would be futile because it could not survive a motion to dismiss."); *Briggs v. Mississippi,* 331 F.3d 499, 508 (5th Cir. 2003). That is the case here.

Caldwell hints that it might be able to offer a more "detailed articulation" of issues including "the buydown reimbursement mechanism, the effects of RJR's conduct on Caldwell's existing and potential customer base, [or] Caldwell's prospective viability." Caldwell Br. 29. But Caldwell does not even attempt to explain how a more detailed treatment of these subjects could overcome the defects of its complaint.

As shown above, both of Caldwell's claims are time-barred and substantively deficient. The problem with the complaint, in other words, is that its allegations are

legally inadequate, not that they are insufficiently detailed. Granting leave to amend would therefore be futile, and the district court's decision to dismiss the complaint with prejudice was proper.

CONCLUSION

If this Court grants Caldwell's motion to amend (which Reynolds does not oppose), this Court should affirm the district court's order dismissing the complaint with prejudice. Alternatively, this Court should remand to the district court with instructions to dismiss the amended complaint for lack of jurisdiction (or at least to address the jurisdictional issue).

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I caused a true and correct copy of the foregoing Brief to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated: October 5, 2018

/s/ Shay Dvoretzky
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I hereby certify that: (1) this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,839 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f); and (2) this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Circuit Rule 32.1, and the type-style requirements of Fed. R. App. P. 32(a)(6), because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point Times New Roman font.

Dated: October 4, 2018

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